

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

12/27/18 AM 9:27 LUBA

3 COLUMBIA RIVERKEEPER,  
4 *Petitioner,*

5  
6 and

7  
8 1000 FRIENDS OF OREGON,  
9 *Intervenor-Petitioner,*

10  
11 vs.

12 COLUMBIA COUNTY,  
13 *Respondent,*

14  
15 and

16 PORT OF ST. HELENS,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2018-020

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from Columbia County.

25  
26 Scott N. Hilgenberg and Maura Fahey, Portland, filed a petition for  
27 review, and Maura Fahey argued on behalf of petitioner. With them on the brief  
28 was Crag Law Center.

29  
30 Meriel L. Darzen, Bend, filed a petition for review and argued on behalf  
31 of intervenor-petitioner. With her on the brief was 1000 Friends of Oregon.

32  
33 No appearance by Columbia County.

1           Spencer Q. Parsons, Portland, filed the response brief and argued on  
2   behalf of intervenor-respondent. With him on the brief were Christopher D.  
3   Crean and Beery, Elsner & Hammond, LLP.

4  
5           BASSHAM, Board Member; RYAN, Board Chair, participated in the  
6   decision.

7  
8           ZAMUDIO, Board Member, concurred in the decision.

9  
10                   REMANDED                   12/27/2018

11  
12           You are entitled to judicial review of this Order. Judicial review is  
13   governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a decision approving comprehensive plan amendments, zone changes, and an exception to Statewide Planning Goal 3 (Agricultural Land) to expand an existing rural industrial site onto adjacent farmland.

**REPLY BRIEF**

Petitioner Columbia Riverkeeper (Riverkeeper) and intervenor-petitioner 1000 Friends of Oregon (1000 Friends) move to file a joint reply brief to respond to new matters raised in intervenor-respondent Port of St. Helens' (the Port's) response brief. There is no opposition to the motion and it is allowed.

**FACTS**

The county's decision is on remand from LUBA. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171, *aff'd* 267 Or App 637, 342 P3d 181 (2014) (*Riverkeeper I*). The proposed exception area is an 837-acre area (consisting of 17 parcels) that is planned and zoned for exclusive farm use (EFU) (PA-80), and which consists predominantly of Class III high-value farm soils. The proposed exception area is adjacent to the existing Port Westward site, which is a 905-acre rural industrial exception area with 4,000 feet of frontage along the Columbia River, served by a 1,250-foot dock and rail connections. The Port Westward site is one of five deepwater ports in the state of Oregon, *i.e.*, capable of handling ocean-going vessels, and one of three deepwater ports located along the Columbia River. The Port Westward river

1 frontage is self-scouring, a condition that eliminates the need for dredging to  
2 accommodate docking of deep-draft vessels.

3 Port Westward is a former military site, and in the 1970s the county  
4 adopted built and irrevocably committed exceptions to Goal 3 in order to plan  
5 and zone the site for rural industrial uses. Port Westward is zoned Rural  
6 Industrial Planned Development (RIPD), which allows a broad and open-ended  
7 range of uses, not limited to industrial uses that depend on access to a port.

8 The Port leases 862 acres of Port Westward to Pacific Gas and Electric  
9 (PGE) under two 99-year leases. PGE has constructed and operates three  
10 electrical generating plants on a portion of its leasehold. The leasehold site also  
11 includes a 1.3-million barrel tank farm, a biomass refinery facility, and an  
12 electrical substation. A significant portion of the leasehold site is occupied by  
13 roads, rail lines, transmission lines and other infrastructure. Approximately half  
14 of the Port Westward site, and almost all of the remaining undeveloped area,  
15 consists of wetlands.

16 In 2013, the Port applied for a reasons exception and comprehensive plan  
17 and zoning amendments to rezone the proposed 837-acre exception area to  
18 RIPD, as an expansion of the Port Westward site. The Port did not propose any  
19 specific industrial uses for the exception area, but sought amendments that  
20 would allow any of the broad array of uses authorized in the RIPD zone. In  
21 2014, the county approved the reasons exceptions under three separate

1 “reasons” set out in OAR 660-004-0022(3)(a), (b) and (c).<sup>1</sup> On appeal, LUBA  
2 remanded the 2014 reasons exception on a number of grounds, including failure  
3 to adequately justify the broad range of uses allowed under the RIPD under one  
4 or more of the three reasons set forth at OAR 660-004-0022(3)(a), (b) and (c).

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<sup>1</sup> OAR 660-004-0022(3) provides:

“Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts may include, but are not limited to, the following:

- “(a) The use is significantly dependent upon a unique resource located on agricultural or forest land. Examples of such resources and resource sites include geothermal wells, mineral or aggregate deposits, water reservoirs, natural features, or river or ocean ports;
- “(b) The use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas; or
- “(c) The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county's gain from the industrial use, and the specific transportation and resource advantages that support the decision.”

1        On remand, the Port modified the application to seek a reasons exception  
2        only under OAR 660-004-0022(3)(a), for uses that are “significantly dependent  
3        upon a unique resource located on agricultural or forest land,” which includes  
4        as a listed example “river or ocean ports.” *See* n 1. The modified application  
5        also narrowed the range of industrial uses allowed in the exception area to five  
6        categories of uses allowed in the RIPD zone that are intended to be significantly  
7        dependent on the deepwater port: (1) Forestry and Wood Products processing,  
8        production, storage and transportation; (2) Dry Bulk Commodities transfer,  
9        storage, production and processing; (3) Liquid Bulk Commodities processing,  
10       storage, and transportation; (4) Natural Gas and derivative products, processing,  
11       storage, and transportation; and (5) Breakbulk storage, transportation, and  
12       processing.<sup>2</sup> The county board of commissioners conducted hearings on the  
13       modified application and, on February 18, 2018, issued a decision approving  
14       the application. This appeal followed.

15       **FIRST AND NINTH ASSIGNMENTS OF ERROR (RIVERKEEPER)**

16       **FIFTH ASSIGNMENT OF ERROR (1000 FRIENDS)**

17       In these assignments of error, petitioner Riverkeeper and intervenor-  
18       petitioner 1000 Friends (together, petitioners) argue that the county failed to  
19       justify why Goal 3 should not apply to the exception area, specifically by

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<sup>2</sup> We understand “breakbulk” to refer to cargo that is loaded off and on ships as individual items (*e.g.*, barrels or automobiles) rather than in large intermodal containers, or as bulk commodities such as oil or grain. Record 3092.

1 failing to justify “the amount of land for the use being planned” as required by  
2 OAR 660-004-0020(2)(a).<sup>3</sup> According to Riverkeeper, the Port failed to identify  
3 how many acres it needs to accommodate the proposed five categories of uses,  
4 and to justify why 837 acres are necessary to accommodate those uses.

5 Relatedly, 1000 Friends argues that because no particular use or uses are  
6 proposed, the county does not know how much land will be needed. 1000  
7 Friends argues that there is no evidence that a single industrial use would  
8 require 837 acres of land, and that the county is instead justifying the amount of  
9 land based on the assumption that a number of different industrial uses, likely  
10 occupying anywhere from 50 to 100 acres, will be sited in the exception area.  
11 However, petitioners argue, that approach is inconsistent with Statewide  
12 Planning Goal 2 (Land Use Planning), ORS 197.732(1)(b)(A) and OAR 660-  
13 004-0005(1)(a), which all define an “exception” in part as a comprehensive

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<sup>3</sup> OAR 660-004-0020(2) provides, in relevant part:

“The four standards in Goal 2 Part II(c) required to be addressed when taking an exception to a goal are described in subsections (a) through (d) of this section, including general requirements applicable to each of the factors:

“(a) ‘Reasons justify why the state policy embodied in the applicable goals should not apply.’ The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations, including the amount of land for the use being planned and why the use requires a location on resource land[.]”

1 plan amendment that is “applicable to specific properties or situations and does  
2 not establish a planning or zoning policy of general applicability.”

3 The Port responds that the county justified the size of the exception area  
4 based on the Mackenzie Report, at Record 3079-3133. The Mackenzie Report  
5 discussed acreage requirements in several different ways. First, it concluded  
6 that three of the five use categories (Forestry/Wood products, Dry Bulk, and  
7 Breakbulk) require large yard or deck storage areas, and the two others (Liquid  
8 Bulk and Natural Gas) require large buffer areas. Record 3100. Section IV of  
9 the Mackenzie Report surveys a representative sample of uses within the five  
10 use categories that are located at other ports and terminals along the river,  
11 noting the amount of acreage each use occupies. Record 3104-07. The acreage  
12 associated with the sample uses range from 25 acres for an ethanol plant to 262  
13 acres for a multi-function marine transport terminal, with an average acreage of  
14 around 77 acres. The Mackenzie Report concludes that all five use categories  
15 require relatively large, flat, contiguous development sites.<sup>4</sup> Further, the

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<sup>4</sup> The Mackenzie Report states:

“For uses defined in this report, a large share of physical space is required for the storage and movement of commodities in a rural industrial setting. Bulk commodities including aggregates, steel, logs, wood chips, liquid bulks, and automobiles, for example, all require extensive space for circulation, storage and laydown yards. In the case of uses involving the presence of hazardous materials or other externalities, required buffering increases users’ overall site needs. Another contributing factor to large site needs is land



1 Mackenzie Report concludes that all five use categories require access to a  
2 deepwater port. Record 3099. However, petitioners are correct that the  
3 Mackenzie Report does not attempt to estimate the minimum or typical acreage  
4 requirements of any use category or uses within each category. The Mackenzie  
5 Report does not, for example, estimate the minimum or typical acreage  
6 requirements for a sawmill or a natural gas terminal.

7 Instead, the Mackenzie Report estimates acreage needs, for individual  
8 uses and in the aggregate, in a more general way. The main evidence on this  
9 point is an inventory of recent site inquiries to locate industrial uses at Port  
10 Westward, an inventory maintained by the Port and Business Oregon. The  
11 Mackenzie Report notes:

12 “As illustrated in Figure 12 and Figure 13, since 2007 there have  
13 been over 40 active prospects seeking land at Port Westward  
14 totaling over 2,800 acres of rural industrial land. These prospects  
15 have been heavily concentrated in energy production (solar,  
16 biomass, other); chemical/liquid bulk (ethanol, fertilizer, methanol,  
17 crude oil, other) processing and transport; and dry bulk products  
18 (iron, coal, grain) transport. While sitings have been prohibited by  
19 regulatory (e.g., PA-80 zoning) and physical constraints (e.g.,  
20 wetlands and existing leaseholds), this velocity is reflective of the  
21 site’s economic potential.

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banking. Because the proposed uses’ storage needs for products and cargo is quite high, uncertainty about future space needs leads firms to locate on sites with the flexibility and scale to accommodate future growth. The PGE leasehold at Port Westward is a classic example of this kind of land banking, and is clearly explained by PGE in its 2016 letter in Appendix 2.” Record 3110.

1           “\* \* \* \* \*

2           “Within these sectors, the site need profile is consistent with what  
3           we observed across existing firms in peer locations, previously  
4           reviewed in Section IV. Site needs ranged from 10 to over 300  
5           acres in size. The most common request was for sites between 50  
6           and 100 acres, as illustrated in Figure 13. Over just a 10-year  
7           period, an interval that included the worst economic downturn in a  
8           generation, there were 11 potential deals at Port Westward of 100  
9           acres or larger.

10          “\* \* \* \* \*

11          “Collectively, this prospect list represents over 2,800 acres of  
12          potential demand over a 10-year period. This amounts to more  
13          than three times the size of the zone change area. Because the data  
14          to calculate this rate was observed over a period that included a  
15          severe recession and tepid recovery, we can assume that this rate of  
16          business activity represents a conservative assessment of future  
17          velocity, all else being equal. At this rate of demand velocity,  
18          capturing 15% of similar inquiries would fully absorb the  
19          [proposed exception area of 857 acres] over a 20-year period.  
20          Given observed market interest and recent activity in similarly  
21          configured areas, we would consider this to be a completely  
22          feasible scenario. \* \* \*” Record 3115-17.

23          Appendix 3 of the Mackenzie Report includes a list of the 40 prospects and the  
24          requested acreage, along with proposed investment amounts and number of  
25          jobs, where known.<sup>5</sup>

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<sup>5</sup> We note that some of the prospects listed in Appendix 3 are for uses that, under the county’s decision, cannot be sited in the proposed exception area. Examples include two proposals for 150-acre and 200-acre coal terminals. The challenged decision prohibits siting a coal terminal in the exception area. Record 183. Others include uses that, by their nature, do not appear to fall within any of the five use categories (e.g., a proposal to site a solar farm) and/or

1 In sum, the Mackenzie Report provides evidence that (1) the five use  
2 categories all require large areas for storage or buffering, (2) both similar uses  
3 on other sites, and acreage requests of recent prospects, show that the proposed  
4 uses commonly require 50 to 100 acres, and (3) the aggregate total acreage of  
5 recent prospects to site industrial uses at Port Westward significantly exceeds  
6 the size of the proposed 857-acre exception area. Based on this evidence, the  
7 county found that the “the amount of land for the use being planned” is justified  
8 for purposes of OAR 660-004-0020(2)(a). Record 45.

9 1000 Friends is correct that the typical reasons exception involves only a  
10 single proposed use, the size of which is generally known, and in such cases it  
11 is relatively easy to determine “the amount of land for the use being planned”  
12 for purposes of OAR 660-004-0020(2)(a). However, as we held in *Columbia*  
13 *Riverkeeper I*, a county may take a reasons exception to allow more than one  
14 use, or even a range of uses, the exact nature and size of which may not be  
15 known. 70 Or LUBA at 181. In our view, that is even more likely when the

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do not appear to require access to the unique resource. The total number of acres listed in Appendix 3 (2,789 acres) thus appears to significantly overstate the total number of acres associated with recent prospects that could have been sited in the exception area. If coal terminals and other uses that cannot be lawfully sited in the exception area are excluded from the acreage total, the total falls to less than 2,000 acres, which is roughly two times the size of the 857-acre exception area, not three times the size, as the Mackenzie Report states. However, petitioners do not make any arguments on this point, or dispute the accuracy of the total acreage estimates in the Mackenzie Report, so we consider it no further.

1 reasons exception is intended to exploit a “unique resource” under OAR 660-  
2 004-0022(3)(a). In such circumstances, the amendment is not necessarily  
3 driven by a particular land use proposal, but rather by the existence of a unique  
4 resource that can be exploited to support what can be an array of rural industrial  
5 economic activity, which may have varying land size needs. Some of the  
6 unique resources listed in OAR 660-004-0022(3)(a), by their nature, can be  
7 exploited only by a limited set of industrial uses (*e.g.*, mining operations for  
8 mineral or aggregate resources), and the amount of land needed for such uses is  
9 intrinsically limited by the size of the resource. Other listed unique resources  
10 can, by their nature, support a variety of rural industrial uses. For example, one  
11 of the unique resources listed in OAR 660-004-0022(3)(a) is “geothermal  
12 wells,” which provide a source of energy that could potentially power a range  
13 of rural industrial uses, with varying land needs. We see no reason why the  
14 county cannot justify an amount of land for a range of industrial uses dependent  
15 on that energy resource, based on evidence regarding the dependence of those  
16 industrial uses on that energy resource, likely or typical land needs of the  
17 identified range of uses and the economic demand for such uses, without  
18 knowing the precise industrial uses to be located or the exact amount of land  
19 each industrial use would need.

20 Similarly, with respect to the unique resource of deep water “river or  
21 ocean ports,” such resources can support a potentially wide range of rural  
22 industrial uses that are dependent on shipping goods by water to intrastate,

1 national and international markets. We see nothing in OAR 660-004-0020 or -  
2 0022 that would preclude a county from justifying an amount of land for a  
3 range of deepwater port-dependent rural industrial uses based on the best  
4 available evidence regarding the types and land needs of likely industrial uses,  
5 without knowing exactly which industrial uses will locate in the exception area  
6 or exactly how much acreage each use will require. We disagree with  
7 petitioners that such an approach establishes a “planning or zoning policy of  
8 general applicability,” and thus does not qualify as an “exception” as defined at  
9 ORS 197.732(1)(b)(A) and OAR 660-004-0005(1)(a). The challenged decision  
10 is limited to a single site in a remote rural area, is based on a single unique  
11 resource, and limits its authorization to five categories of rural industrial uses  
12 that are significantly dependent on that resource. Such an exception decision  
13 does not represent a “planning or zoning policy of general applicability.”

14 Further, petitioners have not established that the county’s justification for  
15 the size of the 837-acre exception area is not supported by substantial evidence  
16 or adequate findings. A reasonable person could rely on the Mackenzie Report  
17 to conclude that there is significant economic demand to site a range of rural  
18 industrial uses at Port Westward that are dependent on deepwater shipping, that  
19 aggregate land demand is well in excess of 837 acres, and that individual  
20 industrial uses will require large, flat contiguous sites of varying acreage, with  
21 the most common need for sites from 50 to 100 acres in size. Petitioners have  
22 not established that in the context of a justifying an exception based upon the

1 unique resource of a deepwater port that OAR 660-004-0020(2)(a) requires the  
2 county to limit the analysis to a single proposed use, or to determine exactly  
3 which industrial uses will locate at the site or exactly how many acres each  
4 industrial use will require.

5 Riverkeeper's first and ninth assignments of error and 1000 Friends' fifth  
6 assignment of error are denied.

7 **SECOND ASSIGNMENT OF ERROR (Riverkeeper)**

8 **SECOND ASSIGNMENT OF ERROR (1000 Friends)**

9 Goal 2 defines an "exception" in part as a comprehensive plan  
10 amendment to allow a use that "[d]oes not comply with some or all goal  
11 requirements applicable to the subject property or situations[.]" Goal 3 does not  
12 generally allow industrial uses on agricultural land. However, Riverkeeper  
13 argues that the county erred in authorizing some rural industrial uses that are in  
14 fact allowed on agricultural lands under Goal 3 and ORS chapter 215, which  
15 govern lands zoned for EFU. Relatedly, 1000 Friends argues that the county  
16 erred in approving an overly broad range of industrial uses.<sup>6</sup>

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<sup>6</sup> The Port argues, initially, that these issues were not raised with sufficient specificity during the proceedings below, and are thus waived under ORS 197.763(1) (an issue that is the basis for an appeal to LUBA must be raised during local proceedings, with sufficient specificity sufficient to afford the decision maker and the parties an adequate opportunity to respond); ORS 197.835(3). However, we agree with petitioners that the issues raised under the petitioners' second assignments of error were raised with sufficient specificity below.

1       As noted, the county's decision authorizes five categories of rural  
2 industrial uses, based on five distinct types of commodities: (1) Forestry and  
3 Wood Products processing, production, storage and transportation; (2) Dry Bulk  
4 Commodities transfer, storage, production and processing; (3) Liquid Bulk  
5 Commodities processing, storage, and transportation; (4) Natural Gas and  
6 derivative products, processing, storage, and transportation; and (5) Breakbulk  
7 storage, transportation, and processing. Petitioners argue that these five use  
8 categories in fact represent 18 categories of industrial uses. This calculation is  
9 achieved by breaking each of the five use categories into components. For  
10 example, in petitioners' view, Category 1 actually consists of four separate  
11 industrial use categories: (a) forestry and wood products *processing*, (b) forestry  
12 and wood products *production*, (c) forestry and wood products *storage*, and (d)  
13 forestry and wood products *transportation*. From that premise, Riverkeeper  
14 argues that the county erred in authorizing the use category of forestry and  
15 wood processing, because Goal 3 and ORS 215 already allow, in limited  
16 circumstances, certain uses such as forest product processing on agricultural  
17 land. *See, e.g.*, ORS 215.283(2)(j) (allowing temporary or portable facilities for  
18 the primary processing of forest products grown on the subject property or  
19 contiguous land). Similarly, Riverkeeper argues that the county erred in  
20 authorizing the use category of forest products transportation, because ORS 215  
21 and OAR 660-0012-0065, an administrative rule that implements Goal 12

1 (Transportation), allow construction of certain transportation facilities on  
2 resource land without taking an exception to the resource goals.

3 Relatedly, 1000 Friends argues that the 18 use categories that petitioners  
4 have identified are expanded further by the broad nature of the five types of  
5 commodities at issue. For example, 1000 Friends argues that “forestry and  
6 wood products processing” could include anything from primary log milling to  
7 secondary or tertiary furniture making, and that “liquid bulk transportation”  
8 could encompass transshipments of any liquid in bulk, including milk,  
9 petroleum products, or liquid fertilizer. We understand 1000 Friends to contend  
10 that each type of wood product or bulk liquid involves a distinct type of  
11 industrial use, and that the broad array of industrial uses potentially allowed  
12 demonstrates that the county has strayed too far from the permissible scope of  
13 an exception, and has impermissibly adopted a “zoning policy of general  
14 applicability,” contrary to the definition of “exception” in Goal 2, ORS  
15 197.732(1)(b)(A) and OAR 660-004-0005(1)(a).

16 The Port responds, and we agree, that petitioners have not demonstrated  
17 reversible error in the manner that the county categorized the authorized uses.  
18 Any conceivable industrial use that is dependent on a deepwater port will  
19 involve the storage and transportation of goods, and those functions are not  
20 properly viewed as separate use categories. Processing and production of goods  
21 could constitute distinct operations in separate facilities, or they could be  
22 vertically integrated operations within a single facility. But regardless of how



1 finely the land use categories are sliced, petitioners have not established that the  
2 county approved any category of land use within the exception area that is  
3 allowed without an exception on agricultural land. The ORS 215.283 uses that  
4 Riverkeeper cites to, such as temporary or portable forest products processing  
5 facilities allowed in limited circumstances on EFU-zoned lands, are clearly not  
6 the same as the permanent forest products processing and production facilities  
7 authorized in the county's decision. Further, while ORS chapter 215 and OAR  
8 660-012-0065 allow a limited set of transportation facilities on resource or rural  
9 lands without taking an exception, the "transportation" function at issue here is  
10 transshipping goods and commodities on and off ships, via a deepwater port and  
11 dock facility. Nothing cited to us in ORS chapter 215 or OAR 660-012-0065  
12 authorizes on resource lands such transportation uses or facilities without taking  
13 an exception to the resource goals.

14 1000 Friends is correct that by authorizing five categories of uses  
15 distinguished by a general type of good or commodity (dry bulk, liquid bulk,  
16 breakbulk, etc.), the county has lumped together within each general category a  
17 diverse range of specific goods and commodities. However, we disagree with  
18 1000 Friends that as a consequence the county has approved an exception that  
19 establishes a "zoning policy of general applicability," contrary to the Goal 2,  
20 ORS 197.732(1)(b)(A) and OAR 660-004-0005(1)(a) definition of "exception."  
21 1000 Friends argues that in *Hood River Valley Residents v. Hood River County*,  
22 75 Or LUBA 452 (2017), LUBA commented that allowing all uses in an

1 industrial zone within an exception area “comes close” to establishing a zoning  
2 policy of general applicability. *Id.* at 461. According to 1000 Friends, in the  
3 present case the county’s five broad categories allow so many different and  
4 distinct sub-categories of uses that, in effect, the county has authorized in the  
5 exception area almost all uses allowed in the RIPD zone.

6       However, *Hood River Valley Residents* does not support 1000 Friends’  
7 argument. In *Hood River Valley Residents*, the county interpreted language in  
8 its comprehensive plan adopting an irrevocably committed exception for land  
9 formerly occupied by a sawmill. 75 OR LUBA at 458. The county had zoned  
10 the property for industrial use, under an industrial zone that also, by reference,  
11 allowed all uses authorized under the county’s commercial zone. *Id.* at 455. The  
12 specific issue was whether it is consistent with the exception language to  
13 approve a commercial use—a hotel—on the site, without taking a new  
14 exception. *Id.* at 455-456. LUBA rejected the county’s interpretation and held  
15 that the committed exception did not extend to authorize all uses allowed in the  
16 industrial and commercial zones, such as the proposed hotel, in part because  
17 such a broad interpretation would “come close” to establishing a zoning policy  
18 of general applicability. *Id.* at 461.

19       In the present case, the five categories of uses authorized by the county’s  
20 decision are only a subset of the universe of industrial uses allowed in the  
21 county’s RIPD zone. Not only are the uses allowed limited by the five  
22 specified commodity types but, as discussed below, each use is also limited by

1 the requirement that the use be significantly dependent upon the deepwater port.  
2 In any case, even if the county had authorized *all* of the industrial uses allowed  
3 in the RIPD zone, which would put the present circumstances closer to those at  
4 issue in *Hood River Valley Residents*, we did not state that interpreting a  
5 comprehensive plan exception area designation to allow all uses in an industrial  
6 zone (plus all uses allowed in a commercial zone) *establishes* a zoning policy of  
7 general applicability, only that it “comes close” to establishing such a general  
8 zoning policy. The present much more limited range of uses allowed by the  
9 challenged decision is even further from establishing a zoning policy of general  
10 applicability.

11 The second assignment of error (Riverkeepers) and the second  
12 assignment of error (1000 Friends) are denied.

13 **THIRD ASSIGNMENT OF ERROR (Riverkeeper)**

14 **FIRST AND THIRD ASSIGNMENTS OF ERROR (1000 Friends)**

15 As noted, OAR 660-004-0022(3)(a) provides that an appropriate reason  
16 for taking an exception to site industrial development on resource land includes  
17 circumstances where “[t]he use is significantly dependent upon a unique  
18 resource located on agricultural or forest land,” with the listed example of “river  
19 or ocean ports.” *See* n 1. Under these assignments of error, petitioners argue  
20 that the county misconstrued OAR 660-004-0022(3)(a) and approved a decision  
21 that is prohibited by law because, among other reasons, (1) the proposed uses  
22 are not all significantly dependent upon the unique resource, a deepwater port,

1 (2) the unique resource at issue is not “located on agricultural or forest land,”  
2 and (3) the exception area does not in fact have guaranteed access to the  
3 deepwater port.

4 **A. Significantly Dependent on a Unique Resource**

5 Petitioners contend that the county failed to adopt findings that each of  
6 the authorized industrial uses are significantly dependent upon the deepwater  
7 port. As noted, petitioners argue that the county actually authorized at least 18  
8 distinct uses, rather than the five use categories discussed in the findings.  
9 Petitioners’ count of 18 uses is derived by breaking up the listed components of  
10 the five identified uses into separate uses, *e.g.*, forestry and wood products  
11 *processing*, forestry and wood products *production*, forestry and wood products  
12 *storage*, etc. Petitioners do not appear to dispute that storage and  
13 loading/offloading of goods and commodities onto ships are uses that are  
14 significantly dependent upon the deepwater port. However, petitioners contend  
15 that other components, processing and production, could be accomplished  
16 elsewhere and need not be located in proximity to the deepwater port.  
17 According to petitioners, with respect to these components the county cites only  
18 considerations such as “operational advantages” and minimization of costs to  
19 explain why these separate components are significantly dependent on the port.  
20 Record 3098. Petitioners argue that such considerations are insufficient.

21 The county rejected petitioners’ argument that “operational  
22 subcomponents” of the five identified uses “each comprise separate uses[.]”

1 Record 19. The county and the Mackenzie Report on which the county relied  
2 focus on whether each of the five identified uses, and not their individual  
3 components, are dependent on deepwater access. The county concluded, based  
4 on the Mackenzie Report, that the five identified uses are “highly dependent  
5 upon immediate proximity to a deepwater port[,]” quoting a statement in the  
6 Mackenzie Report that the five uses are “low-margin industrial operations  
7 which rely upon deepwater access to maintain an economically viable business  
8 in current market conditions.” Record 163. The findings continue:

9 “Table 2 of the Mackenzie Report [at Record 3099] illustrates that  
10 each of the Port’s five proposed uses are dependent upon  
11 deepwater access. As the Mackenzie Report explains:

12 “Uses with foreign trade markets and marine-served  
13 domestic markets for products that are shipped by marine  
14 vessel are, by definition, reliant on deepwater port facilities.  
15 Table 2 demonstrates that each of the five proposed uses for  
16 [the Port Westward expansion] involve foreign  
17 import/export operations and are thus dependent upon a  
18 deepwater port. The proposed uses will achieve a  
19 significant operational advantage due to deepwater port  
20 access with nearby storage yards. As the proposed uses are  
21 low-margin businesses, port proximity is necessary to  
22 minimize operational costs for both import/export and  
23 domestic shipping operations. An external benefit of these  
24 firms’ locations near port facilities is that locating their  
25 yards close to the port minimizes impacts on offsite  
26 transportation infrastructure.” *Id.*

27 The Port argues, and we agree, that petitioners have not demonstrated  
28 that the county erred in concluding that the five identified uses are  
29 “significantly dependent” on the deepwater port, notwithstanding that some

1 components of the uses could theoretically be separated from the others and  
2 located elsewhere. As the Mackenzie Report notes, import/export uses of this  
3 kind are low-margin operations, and proximity to a deepwater port represents a  
4 significant operational and cost advantage. That advantage clearly extends to  
5 the import/export operation as a whole. Stated differently, an otherwise  
6 integrated import/export operation that is allowed to locate only storage yards  
7 and loading/unloading facilities at the port, but is forced to locate processing  
8 and other components of the operation elsewhere, could be at a significant  
9 economic disadvantage, a disadvantage that may preclude siting any facilities  
10 entirely at Port Westward. We conclude that the county did not err in  
11 evaluating the five identified uses as a whole, including components such as  
12 processing or production of goods and commodities transshipped via the port,  
13 to determine whether the use as a whole is significantly dependent on the  
14 deepwater port.

15 The county's findings acknowledge concerns that it is possible that a  
16 conditional use permit application for a specific use could be submitted that, in  
17 fact, does not involve the import or export of goods and commodities via the  
18 deepwater port and thus would not be "significantly dependent" on the port.  
19 OAR 660-004-0022(3)(a). The county rejected that concern, finding that  
20 because the challenged exception authorizes only uses that are significantly  
21 dependent on the port, and all proposed uses must be consistent with the  
22 exception, that "any potential tenant seeking to locate in the new expansion area

1 would be limited not only to the five authorized uses, but to the five authorized  
2 uses in a form that would be significantly dependent on the deepwater port at  
3 Port Westward.” Record 19. However, to address the opponents’ concerns, the  
4 county imposed Condition 5, quoted below, explaining:

5 “[T]he Board acknowledges that the opponents’ concern is a  
6 reasonable one and notes that Condition 5 has accordingly been  
7 imposed for additional clarity. The condition requires that the five  
8 uses authorized be significantly dependent on and have  
9 demonstrated access to the deepwater port at Port Westward. With  
10 that condition in place, the Board finds that the only rural industrial  
11 uses the approval authorizes in the new expansion area are those  
12 that will be significantly dependent on actual deepwater port usage  
13 at Port Westward.” *Id.*

14 Condition 5 states:

15 “The types of industrial uses for the subject Plan Amendment shall  
16 be limited to only those uses that are substantially dependent on a  
17 deepwater port and have demonstrated access rights to the dock,  
18 and those uses with employment densities, public facilities and  
19 activities justified in the exception, specifically:[Listing the five  
20 authorized types of land uses].” Record 15.

21 1000 Friends argues, however, that Condition 5 is insufficient to ensure  
22 that only uses that are significantly dependent on the port facilities will be  
23 approved. 1000 Friends argue that Condition 5 simply requires an applicant to  
24 show that the proposed use is one of the five authorized uses, not that the  
25 proposed use is also dependent on the port. The Port responds that the county  
26 found that, even without Condition 5, all potential industrial tenants will have to  
27 demonstrate that the proposed use is consistent with the reasons exception,

1 which explicitly authorizes only uses that are significantly dependent on the  
2 deepwater port. According to the Port, Condition 5 was imposed only to  
3 provide additional assurance to opponents that only uses that are significantly  
4 dependent on the port will be approved. The Port argues that Condition 5, read  
5 in context with the county's findings and the exception that it is attached to, is  
6 clearly intended to require that applicants demonstrate that the proposed use is  
7 not only one of the five authorized uses, but also a use that is significantly  
8 dependent on the port facilities.

9 We agree with the Port. All industrial uses in the RIPD zone are  
10 essentially conditional uses, and are allowed only if the county reviews an  
11 application for the proposed use and determines that the use conforms to the  
12 "exceptions to the rural resource land goals[.]" Columbia County Zoning  
13 Ordinance (CCZO) 683.1.A. Even if the county had not imposed Condition 5,  
14 it appears that any applicant for a proposed industrial use within the exception  
15 area would be required to show that the use is consistent with the adopted  
16 exception statement, which is part of the county comprehensive plan, and which  
17 explicitly allows only uses that are significantly dependent on the port facility.  
18 In this context, it is reasonably clear that Condition 5 is a "belt and suspenders"  
19 condition intended as additional assurance that applicants will have to  
20 demonstrate that proposed uses will be significantly dependent on the port.

21 Nonetheless, 1000 Friends argues that requiring an applicant to  
22 demonstrate that the proposed use is "significantly dependent" on the port



1 facility as required by Condition 5 represents an impermissible deferral of  
2 findings of compliance with OAR 660-004-0022(3)(a). *See Riverkeeper I*, 70  
3 Or LUBA at 205 (where the county does not find that authorized uses will be  
4 compatible with adjacent land uses, as required by OAR 660-004-0020(2)(d),  
5 but instead relies on a demonstration of compatibility as part of permit  
6 approval, the county impermissibly defers findings of compliance with OAR  
7 660-004-0020(2)(d)). However, we disagree that Condition 5 represents a  
8 deferral of findings of compliance with OAR 660-004-0022(3)(a). The county  
9 adopted several pages of findings intended to establish that uses authorized  
10 under the exception are limited to those that are significantly dependent on the  
11 port facility. Record 18-21. The county imposed Condition 5 only because  
12 opponents, including petitioners, expressed concerns that there were inadequate  
13 safeguards to prevent approval of industrial uses that are not in fact  
14 significantly dependent on the port facility. That the county agreed to impose  
15 additional safeguards does not mean that the county deferred findings of  
16 compliance with OAR 660-004-0022(3)(a) to the permit stage.

17 **B. Located on Agricultural or Forest Land**

18 As noted, OAR 660-004-0022(3)(a) provides that an appropriate reason  
19 to take an exception to the resource goals includes uses that are significantly  
20 dependent upon a unique resource “located on agricultural or forest land.” The  
21 unique resource identified by the county is the deepwater port, which includes  
22 the submerged land under the jurisdictional waters of the state, plus the dock

1 facilities and related upland facilities. However, petitioners argue that the  
2 upland components of the port facilities are located in the existing exception  
3 area at Port Westward that is zoned RIPD, and therefore are not “located on  
4 agricultural or forest land.” Therefore, petitioners argue the port facilities do  
5 not qualify as a “unique resource.”

6 The county rejected that argument:

7 “As an initial matter, the [Columbia County] Comprehensive Plan  
8 designates the RIPD zone as a resource zone, as embedded in its  
9 name, ‘Resource Industrial Planned Development.’ The zone is  
10 intended to be on resource lands and to coexist with farm and  
11 forest uses. For that reason, CCZO Section 682 establishes as the  
12 only outright permitted uses in the RIPD zone ‘[f]arm use[s] as  
13 defined [by] Subsection 2 of ORS 215.213 except marijuana  
14 growing and producing’ and the ‘[m]anagement, production and  
15 harvesting of forest products, including wood processing and  
16 related operations.’ The Board concludes that such ‘farm uses’  
17 and ‘management, production and harvesting of forest products’  
18 are agricultural and forest uses and that the original exception area  
19 qualifies as agricultural or forest land.” Record 22.

20 In addition, the county noted that the exception document for the Port  
21 Westward exception site found that 300 acres of the site had been filled with  
22 dredged materials and “is no longer considered resource land.” *Id.* The county  
23 inferred from this statement that the original exception document continued to  
24 view the unfilled remainder of the site as “resource land.” *Id.*

25 On appeal, petitioners argue that, as a matter of state law, land that is  
26 subject to an exception to Goal 3 is no longer “agricultural [] land” for any  
27 purpose, including OAR 660-004-0022(3)(a). Petitioners cite to OAR 660-033-

1 0020(1)(c), part of the administrative rule implementing Goal 3, which for  
2 purposes of that division defines the term “Agricultural [Land” to exclude “land  
3 within acknowledged exception areas for Goal 3 or 4.” Because the Port  
4 Westward site has been acknowledged to be committed to industrial uses,  
5 petitioners argue that the dock and related upland facilities are not located on  
6 “agricultural land” for purposes of OAR 660-004-0022(3)(a), even if the RIPD  
7 zone is labeled as a “resource” zone and continues to allow farm uses as a  
8 permitted use. The county’s findings acknowledge that argument, but respond  
9 that even if petitioners are correct on that point the Port Westward exception  
10 was applicable only to Goal 3, not to Statewide Planning Goal 4 (Forest Lands),  
11 and there is no equivalent rule applicable to forest lands stating that forest lands  
12 excludes lands subject to an exception. Record 22-23.

13 It is clear that “Agricultural Land” for purposes of Goal 3 and its  
14 implementing administrative rule does not include land areas subject to  
15 exceptions to Goal 3. *See* Goal 3 (definition of “Agricultural Land”).<sup>7</sup>

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<sup>7</sup> “Agricultural Land—in western Oregon is land of predominantly Class I, II, III and IV soils and in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be

1 However, it does not necessarily follow that “agricultural [] land” as that term is  
2 used in OAR 660-004-0022 or other parts of the Goal 2 exception rule is  
3 subject to the same restriction. A goal exception under OAR chapter 660,  
4 division 004 can be, indeed in many cases will be, only a partial exception to a  
5 goal, to allow a specific use or type of use that is contrary to the goal. OAR  
6 660-004-0018(1) provides:

7 “\* \* \* Exceptions to one goal or a portion of one goal do not  
8 relieve a jurisdiction from remaining goal requirements and do not  
9 authorize uses, densities, public facilities and services, or activities  
10 other than those recognized or justified by the applicable  
11 exception. Physically developed or irrevocably committed  
12 exceptions under OAR 660-004-0025 and 660-004-0028 and 660-  
13 014-0030 are intended to recognize and allow continuation of  
14 existing types of development in the exception area. Adoption of  
15 plan and zoning provisions that would allow changes in existing  
16 types of uses, densities, or services requires the application of the  
17 standards outlined in this rule.”

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undertaken on adjacent or nearby lands, shall be included as  
agricultural land in any event.

“More detailed soil data to define agricultural land may be utilized  
by local governments if such data permits achievement of this  
goal.

“Agricultural land does not include land within acknowledged  
urban growth boundaries or land within acknowledged exceptions  
to Goals 3 or 4.

“Farm Use—is as set forth in ORS 215.203.

“High-Value Farmlands—are areas of agricultural land defined by  
statute and Commission rule.”

1 OAR 660-004-0018(2)(a) provides that for physically developed and  
2 irrevocably committed exception areas all plan and zoning designations must  
3 limit uses to those that are same as the existing uses on the site. OAR 660-004-  
4 0018(3) provides that uses that do not qualify under OAR 660-004-0018(2),  
5 e.g., different types of uses than those that justified the exception, can be  
6 approved only under the provisions for a reasons exception. *See Ooten v.*  
7 *Clackamas County*, 70 Or LUBA 338, 346 (2014), *aff'd* 270 Or App 214, 346  
8 P3d 1305 (2015) (discussing the requirements of OAR 660-004-0018).

9 The Port Westward exception area is a physically developed and  
10 irrevocably committed exception area, based on the existence of industrial  
11 development that predated the Statewide Planning Goals. Under OAR 660-  
12 004-0018(1), the Port Westward exception is intended to allow continuation of  
13 those preexisting types of industrial development, but plan and zoning  
14 amendments that would allow changes in existing types of uses potentially  
15 require that the changes be justified as a new “reasons” exception to the  
16 applicable goals. For example, if the Port wanted to change the use of Port  
17 Westward from industrial to commercial or residential use, that change in use  
18 would almost certainly require that the county adopt a new reasons exception to  
19 Goal 3 (and perhaps also Goal 4), because the original built and committed  
20 exception did not take an exception to any goal for commercial or residential  
21 uses.

1 In other words, the fact that Port Westward is an area subject to an  
2 exception to Goal 3 does not mean that Goal 3 no longer applies at all to the  
3 site, at least for purposes of OAR chapter 660, division 004. At least for the  
4 limited purpose of evaluating the need for and compliance with exception  
5 standards to allow new or changed uses contrary to the resource goals, land  
6 within an exception area potentially remains “agricultural land” subject to Goal  
7 3.<sup>8</sup> In addition, the original Port Westward exception did not take an exception  
8 to Goal 4 and the Port Westward site potentially remains “forest land” for that  
9 reason alone. For these reasons, the county did not err in concluding that the  
10 “unique resource” at issue, the deepwater river port whose upland portions are  
11 located within the existing Port Westward exception area, is still “located on  
12 agricultural or forest land” for purposes of OAR 660-004-0022(3)(a).

### 13 **C. Access to the Unique Resource**

14 The county found that the proposed expansion of the Port Westward  
15 exception area has access to the deepwater port and dock facilities at Port

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<sup>8</sup> Petitioners cite to *1000 Friends of Oregon v. Jackson County* (Jackson County), 76 Or App 270 (2017), *rev'd and rem'd* 292 Or App 173, 423 P3d 793 (2018), *appeal pending* (S066118), to support their argument that land within an exception area is not “agricultural land” for purposes of OAR 660-004-0022(3)(a). However, as the Port notes, *Jackson County* did not involve OAR 660-004-0022(3)(a), and did not concern land within an exception area. Further, the particular holding that petitioners rely upon was reversed by the Court of Appeals. 292 Or App at 184.

1 Westward. Record 27. Petitioners argue that this finding is not supported by  
2 substantial evidence.

3 According to petitioners, the Port's lease with PGE grants PGE a non-  
4 exclusive easement to use the Port's dock facilities, and further provides that  
5 access to the docks by other users across PGE's leasehold is subject to PGE's  
6 consent. The lease provides that PGE's consent "shall not be unreasonably  
7 withheld," and can only be "reasonably conditioned." Record 27. Petitioners  
8 argue that there is no evidence in the record that PGE is likely to consent to  
9 allow new tenants within the expanded exception area to fully access the dock  
10 facilities.

11 The Port responds, and we agree, that the county's finding that tenants  
12 within the proposed exception area will have access to the docks is supported  
13 by substantial evidence. In addition to the lease itself, which requires PGE to  
14 consent to reasonable access, the findings note that the record includes  
15 communications with PGE evincing PGE's commitment to continue providing  
16 reasonable access to other users. A reasonable person could conclude based on  
17 the lease terms and representations in the record that tenants in the expanded  
18 exception area will have reasonable access to the dock facilities. *Dodd v. Hood*  
19 *River County*, 317 Or 172, 179, 855 P2d 608 (1993) (substantial evidence is  
20 evidence a reasonable person would rely on in making a decision).

21 Riverkeeper's third assignment of error, and 1000 Friends' first and third  
22 assignments of error, are denied.

1 **FOURTH ASSIGNMENT OF ERROR (Riverkeeper)**

2 **FOURTH ASSIGNMENT OF ERROR (1000 Friends)**

3       ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding  
4 that the proposed uses are “compatible with other adjacent uses or will be so  
5 rendered through measures designed to reduce adverse impacts.”<sup>9</sup> In  
6 *Riverkeeper I*, we held that the county failed to establish compliance with OAR  
7 660-004-0020(2)(d), in part because the proposed exception at issue in that  
8 appeal authorized an open-ended universe of industrial uses in the exception  
9 area, and the county made no attempt to describe the proposed uses or identify  
10 their adverse impacts, and thus could not meaningfully address whether the  
11 proposed uses are compatible with adjacent uses or will be rendered compatible  
12 through identified measures. Instead, as noted, above, the county essentially  
13 punted that evaluation to the permit approval stage.

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<sup>9</sup> OAR 660-004-0020(2)(d) provides:

“The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.” The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”



1           On remand, as noted, the county narrowed the range of authorized uses to  
2 five categories of uses, discussed above, and adopted findings that attempt to  
3 identify likely adverse impacts of the five categories of uses, and explain how  
4 the proposed uses will be rendered compatible with adjacent uses through  
5 identified measures. On appeal, petitioners argue that the county again failed to  
6 meaningfully address the compatibility standard, and again impermissibly  
7 deferred a determination of compliance with the compatibility standard to the  
8 development approval stage.

9           The county's findings, at Record 28-30 and 177-80, take the position that  
10 potential adverse impacts of the five proposed categories of industrial uses will  
11 be similar to the impacts of the existing industrial uses located at Port  
12 Westward, and that substantial evidence in the record establishes that the  
13 existing industrial uses are and have been compatible with adjacent agricultural  
14 uses. The findings address specific arguments made regarding specific  
15 potential adverse impacts, particularly regarding impacts on water quality from  
16 industrial pollution or hazardous waste. The findings discuss a number of  
17 conditions imposed to prevent or address the identified impacts, including  
18 Condition 1 (requiring site design and conditional use approval), Conditions 2  
19 and 3 (requiring traffic studies and compliance with a traffic cap), and  
20 Condition 4 (requiring a range of measures, including buffers, dust-control,  
21 stormwater facilities, water quality monitoring, and an "agricultural impact  
22 assessment" with a mitigation plan for any negative impacts identified). In

1 addition, the county imposed Conditions 7 and 8, which require the Port to  
2 develop a plan and ongoing program to establish baseline measurements for a  
3 range of industrial contaminants and manage future industrial wastewater  
4 discharges to prevent pollution, and further to require the Port to prepare a plan  
5 to deal with a hazardous material spill.

6 Riverkeeper argues that the record does not support the county's  
7 fundamental premise that potential adverse impacts of the five proposed  
8 categories of industrial uses would be similar to the impacts of the existing  
9 industrial uses located at Port Westward. On this point, the findings state only  
10 that there is "no evidence in the record of any meaningful distinction between  
11 the anticipated impacts of the approved uses and those existing industrial uses  
12 at Port Westward[.]" Record 29. However, Riverkeeper argues that this finding  
13 effectively shifts the burden to opponents, and that if the Port wants to rely  
14 upon the supposed similarity between the impacts of the proposed uses and the  
15 existing industrial uses, it is incumbent on the Port to present evidence on that  
16 point. Riverkeeper argues that the few existing industrial uses at Port Westward  
17 (three electrical generating plants, tank farm, a biomass refinery facility, and an  
18 electrical substation) differ significantly from the proposed five categories of  
19 uses, and there is simply no evidence in the record indicating that the impacts of  
20 the existing uses would be similar to likely impacts of the proposed uses.

21 In addition, Riverkeeper argues that the county's findings fail to address  
22 detailed testimony by an expert hydrologist regarding probable adverse impacts

1 on water quality from industrially polluted water, given the area's high water  
2 table and mixing of ground and surface water during winter months. Finally,  
3 Riverkeeper argues that the county failed to address whether the proposed uses  
4 are compatible with existing PGE operations, noting PGE testimony that it  
5 retains the right under its lease to withhold consent to any improvements within  
6 its leasehold that would have a material adverse impact on PGE's operations.

7 1000 Friends similarly argues that the county failed to provide any  
8 analysis of the likely potential adverse impacts of the five authorized use  
9 categories, and further that those use categories are still too broad and open-  
10 ended to allow meaningful analysis of impacts even if the county had separately  
11 evaluated the impacts of the five use categories, instead of lumping them  
12 together. With respect to impacts on adjacent agricultural practices, 1000  
13 Friends argues that the decision provides no analysis or findings, but relies  
14 almost entirely on Condition 4, which requires development applicants to  
15 provide an agricultural impacts analysis. Finally, 1000 Friends contends that  
16 the findings fail to identify non-agricultural resource uses on adjacent lands,  
17 specifically fishing and aquatic-related natural resource uses that may be  
18 impacted by spills of contaminants and other industrial pollution.

19 In response, the Port does not cite to any evidence supporting the  
20 county's finding that the likely adverse impacts of the proposed uses are similar  
21 to the impacts of the existing industrial uses at Port Westward. The findings  
22 simply state that there is no evidence that the impacts would be different.

1 However, the *absence* of evidence that the impacts would be different is not a  
2 basis to conclude that the impacts would be similar. The unsupported  
3 presumption that the impacts would be similar is the foundation for much of the  
4 county's subsequent analysis. Because that presumption is not supported by  
5 substantial evidence, we agree with petitioners that remand is necessary to  
6 adopt more adequate findings regarding compatibility, supported by substantial  
7 evidence.

8 We also agree with petitioners that adequate findings regarding  
9 compatibility would start by identifying the likely adverse impacts of typical  
10 uses authorized under the five approved use categories, evaluating each use  
11 category separately, and if necessary specific types of uses within each use  
12 category. As petitioners argue, the potential adverse impacts of different types  
13 of liquid bulk terminals, *e.g.*, an oil terminal versus a fertilizer export operation,  
14 could be different enough to require a separate analysis. The findings should  
15 also address the characteristics of uses on adjoining areas, and assess  
16 vulnerability to potential externalities from industrial uses in the exception area,  
17 such as impacts on water quality. Informed by those analyses, the county can  
18 then reach sustainable conclusions regarding whether the proposed uses are  
19 compatible with adjoining uses, or can be rendered compatible via identified  
20 measures. We generally agree with petitioners that because the county failed to  
21 conduct the required analyses, its determinations regarding compatibility with  
22 adjoining agricultural practices are conclusory, and the resulting over-reliance

1 on conditions such as Condition 4, which require applicants to submit an  
2 agricultural impacts analysis, thus represents an impermissible deferral of  
3 demonstrating compliance with OAR 660-004-0020(2)(d).

4 Riverkeeper's and 1000 Friends' fourth assignments of error are  
5 sustained.

6 **FIFTH ASSIGNMENT OF ERROR (Riverkeeper)**

7 OAR 660-004-0020(2)(b) requires a showing that "areas that do not  
8 require a new exception cannot reasonably accommodate the use," considering  
9 relevant factors including economic costs.<sup>10</sup> In *Riverkeeper I*, LUBA rejected

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<sup>10</sup> OAR 660-004-0020(2)(b) provides:

"Areas that do not require a new exception cannot reasonably accommodate the use." The exception must meet the following requirements:

"(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use that do not require a new exception. The area for which the exception is taken shall be identified;

"(B) To show why the particular site is justified, it is necessary to discuss why other areas that do not require a new exception cannot reasonably accommodate the proposed use. Economic factors may be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under this test the following questions shall be addressed:

"(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an

1 the county's alternative sites analysis for multiple reasons, noting that it was  
2 "highly problematic" to attempt to reject all alternative sites to justify an  
3 exception for a broad and open-ended set of industrial uses, based on three  
4 separate but overlapping justifications. 70 Or LUBA at 199. On remand, the

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exception, including increasing the density of uses on nonresource land? If not, why not?

"(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses not allowed by the applicable Goal, including resource land in existing unincorporated communities, or by increasing the density of uses on committed lands? If not, why not?

"(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

"(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?

"(C) The 'alternative areas' standard in paragraph B may be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception unless another party to the local proceeding describes specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described, with facts to support the assertion that the sites are more reasonable, by another party during the local exceptions proceeding."

1 Port limited the range of industrial uses to five categories, and focused on a  
2 single justification: uses that are significantly dependent upon a unique  
3 resource, the deepwater port. To demonstrate that no alternative sites can  
4 reasonably accommodate the proposed uses, the Port submitted an alternative  
5 sites analysis that focused on industrial lands near deepwater port facilities  
6 along the river, concluding that no alternative sites could reasonably  
7 accommodate the proposed uses. The county considered and rejected  
8 alternative sites suggested by opponents on various grounds, including lack of  
9 access to a deepwater port, lack of sufficient available acreage, and location  
10 elsewhere than on the Columbia River corridor. The county ultimately relied  
11 upon the Port's analysis to find compliance with OAR 660-004-0020(2)(b).

12 On appeal, Riverkeeper argues that the Port's alternative sites analysis  
13 suffers from many of the same flaws identified in *Riverkeeper I*. Riverkeeper  
14 first argues that the county erred in rejecting alternative sites with no access to a  
15 deepwater port. The Port responds, and we agree, that because the exception is  
16 justified based solely on the "unique resource" of a deepwater port—in this  
17 case, a self-scouring deepwater port that requires no dredging in order to  
18 accommodate ocean-going cargo vessels—the county properly limited its  
19 analysis to alternative sites with access to a deepwater port. We agree with the  
20 Port that the county is not required to evaluate non-deepwater ports, or the  
21 possibility of dredging non-deepwater ports to accommodate ocean-going  
22 vessels.

1       As we understand it, there are three existing deepwater ports along the  
2 Columbia River: Port of Astoria, Port of Portland and the existing Port  
3 Westward exception area. The county rejected all three sites as alternatives, for  
4 reasons we discuss below. The county also considered and rejected the two  
5 deepwater ports located along the Oregon coast (Coos Bay and Newport), and a  
6 coastal port that currently lacks any maritime access (Tillamook). All three  
7 coastal ports were rejected in part because they cannot serve commerce needs  
8 along the Columbia River corridor, which the analysis notes is a region that  
9 represents 60 percent of Oregon's manufacturing, warehousing and  
10 transportation-based economy, with a concentration of river, rail and highway  
11 transportation networks. Riverkeeper argues, however, that the county erred in  
12 rejecting the coastal alternative sites for that reason. According to Riverkeeper,  
13 while "comparative advantage due to its location" is a basis for a reasons  
14 exception under OAR 660-004-0022(3)(c) (*see* n 1), such locational  
15 considerations are not a factor under OAR 660-004-0022(3)(a), which is only  
16 concerned with proximity to and the characteristics of a unique resource, not  
17 comparative advantages due to location. Thus, Riverkeeper argues, it is error  
18 under OAR 660-004-0022(3)(a) to reject an alternative site simply because it  
19 does not serve the same economic region as the preferred site.

20       The Port responds that OAR 660-004-0020(2)(b) allows consideration of  
21 "economic factors" along with other relevant factors, and argues that it is not  
22 error to reject alternative sites that cannot serve the Columbia River corridor



1 and its economic region. We agree with the Port. Part of what makes the Port  
2 Westward site a unique resource is its status as one of three deepwater ports  
3 along a primary maritime artery, connecting national and international markets  
4 with the Portland Metropolitan area, the state's largest economic area. The three  
5 coastal ports are located hundreds of miles away from that economic area and  
6 serve very different and more isolated regional markets. We conclude that in  
7 conducting an alternative sites analysis for industrial uses justified based on  
8 proximity to the "unique resource" of a river or ocean port under OAR 660-  
9 004-0022(3)(a), the county is not required to evaluate other port sites in the  
10 state (or elsewhere) that serve entirely different economic markets.

11 With those preliminaries, we turn to Riverkeeper's challenges to the  
12 findings rejecting the three alternative sites located on the Columbia River:  
13 Port of Astoria, Port of Portland and the existing Port Westward exception area.

#### 14 **A. Port of Astoria**

15 The county found that the only vacant industrial land at the Port of  
16 Astoria is at Tongue Point, which has north and south sub-areas. The county  
17 found that North Tongue Point has no vacant parcels larger than 15 acres,  
18 insufficient to accommodate even one of the large-scale industrial uses  
19 authorized at the preferred site. South Tongue Point has four vacant parcels  
20 totaling 137 acres, but the county found that three parcels are subject to a recent  
21 purchase and sale agreement with a community college, and the other, owned  
22 by the U.S. Army Corps of Engineers, is in the process of being repurposed for

1 an army training facility. The county found that these parcels are not available,  
2 and thus cannot reasonably accommodate any of the proposed uses.

3 Riverkeepers argue that the county erred in finding that the four South  
4 Tongue Point parcels are not available, citing to *Riverkeeper I*, where we held  
5 that the county erred in rejecting any alternative site simply because it was not  
6 owned or controlled by the Port. 70 Or LUBA at 195. We held that the mere  
7 fact that an alternative site is owned or currently leased by a third party is an  
8 insufficient basis to conclude, without more, that the site is unavailable.  
9 However, we agree with the Port that evidence that three of the parcels are  
10 subject to a recent purchase and sale agreement, and the other is a federally  
11 owned property that is subject to other development plans, is a sufficient basis  
12 to conclude that these parcels are not available for purchase or lease.

13 Riverkeeper also argues, with respect to the Port of Astoria and the Port  
14 Westward alternative sites, that the county erred in rejecting alternatives as too  
15 small, based on inability to provide at least 837 acres for industrial  
16 development. Riverkeeper contends that the county is required to evaluate  
17 individual industrial uses, not the aggregate sum that can be accommodated on  
18 the proposed 857-acre exception area. Further, Riverkeeper repeats its  
19 arguments that the county must identify the minimum acreage necessary for  
20 each individual industrial use, and can reject only those alternative sites that fall  
21 below the identified minimum acreage.

1           However, as far as we can tell the county did not reject alternative sites  
2 because they were less than 857 acres in size and thus too small to  
3 accommodate all of the proposed uses in the aggregate. The county rejected the  
4 15-acre North Tongue Point site as being too small, because it cannot  
5 accommodate even one of the authorized large-scale uses, which the county  
6 found all require large storage areas or large buffer areas, and which the county  
7 found commonly require 50 to 100 acres. The county did not reject any or all  
8 of the four South Tongue Point parcels, totaling 157 acres, for being too small;  
9 indeed, the county presumed that those parcels, if available, could  
10 accommodate at least some of the proposed uses. Record 41 (“there is no  
11 available acreage at the Port of Astoria for siting any of the Port’s approved  
12 uses”). In sum, Riverkeeper has not demonstrated that the county erred in  
13 rejecting the Port of Astoria as an alternative site under OAR 660-004-  
14 0020(2)(b).

15           **B. Port of Portland**

16           The alternative sites analysis found that the main Port of Portland  
17 facilities are built out and have no remaining available land for the proposed  
18 uses. The analysis also rejected West Hayden Island, a large undeveloped site  
19 (which in 2013 the Port of Portland attempted, but failed, to have annexed into  
20 the city and zoned for a proposed new marine terminal) with no port facilities or  
21 deepwater access. The county concluded that no Port of Portland facilities can  
22 reasonably accommodate the proposed uses. Riverkeeper directs only

1 scattershot challenges to the county's findings. For example, Riverkeeper  
2 argues that the county erred in citing the lack of "political will" to annex and  
3 develop West Hayden Island as one reason why that site cannot accommodate  
4 the proposed use. However, the county rejected that site for a number of other  
5 reasons, among them the current lack of deepwater access, which are largely  
6 unchallenged. As explained above, because the proposed exception is based on  
7 the unique resource of an existing deepwater port, the county is not required to  
8 evaluate alternative sites that are not deepwater ports or that require dredging to  
9 become a deepwater port. Riverkeeper has not demonstrated that the county  
10 erred in rejecting the Port of Portland site as an alternative site.

### 11 **C. Port Westward**

12 In *Riverkeeper I*, we remanded the county's decision regarding the  
13 existing Port Westward exception area as an alternative site, noting evidence  
14 that approximately 445 acres of the 862-acre PGE leasehold appeared to be  
15 vacant and potentially developable for at least some of the proposed uses, and  
16 that the record failed to establish that the Port is unable to acquire a sublease  
17 from PGE or otherwise obtain the right to develop those vacant areas.

18 Since our 2014 decision PGE has constructed a third power plant on its  
19 leasehold, and the last vacant area of Port Westward not within the PGE  
20 leasehold is no longer available. On remand, the Port submitted a letter from  
21 PGE stating that the Port should consider the undeveloped portion of its

1 leasehold unavailable for siting additional tenants.<sup>11</sup> In addition, the Port  
2 submitted additional evidence regarding the availability of vacant lands within  
3 the PGE leasehold, concluding that the undeveloped portion of PGE's leasehold  
4 is encumbered with a number of roadways, utilities, drainage facilities, levees,  
5 pipelines, conservation areas, wetland areas, and areas reserved for buffers or  
6 expansion of PGE facilities, in a manner that effectively precludes siting any  
7 large-scale industrial use. Nearly all of the remaining vacant land in the PGE  
8 leasehold, representing 439 acres and approximately half of PGE's leasehold,  
9 consists of wetlands. Record 3088-89. The evidence included estimates of the  
10 cost of wetland mitigation (creating new wetlands) in the area of \$77,000 to

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<sup>11</sup> The PGE letter states, in relevant part:

“Maintaining and protecting PGE's assets at Port Westward is imperative to the company's current and future operations. Protecting the long-term interests of the electric generation capabilities at the site requires PGE to maintain adequate land buffers around the facilities for security and reliability purposes, thus restricting third-party use on the 854-acre leasehold. In addition, it is important to our future operations there is adequate space in our leasehold for building future generating plants. This limits the physical space, location and other related dynamics that might otherwise make the area available to third-parties. Given the company's investment in Port Westward and the critical nature of the site to support reliable electric service, third-party compatibility is a high bar which some proposed industrial facilities in the past could not meet. Due to this high bar, PGE supports the Port's efforts to bring additional industrial land outside the buffer into Port Westward.” Record 3135.

1 \$82,000 per acre, above and beyond the cost of acquiring off-site mitigation  
2 areas, and testimony that filling and mitigating the hundreds of acres of  
3 wetlands on the site would require acquiring 658 acres of mitigation and cost in  
4 the order of \$50 million. Record 3089. Based on this evidence, the county  
5 found that development of any significant portion of the existing wetland areas  
6 is economically unfeasible, and that given the other constraints and  
7 encumbrances on the remainder of PGE's leasehold that there is no contiguous  
8 site available to develop even one of the authorized large-scale industrial uses,  
9 even if PGE were willing to sublease any portion of its leasehold.

10 Riverkeeper argues that the county places too much reliance on the PGE  
11 letter and PGE's current unwillingness to consider subleasing any part of its  
12 leasehold. Riverkeeper notes that we stated in *Riverkeeper I* that "absent  
13 evidence that PGE is categorically unwilling to sublease part or all of its  
14 leasehold to other industrial users" the fact that land otherwise available within  
15 the leasehold is not currently controlled by the Port is not a sufficient basis to  
16 conclude that the vacant PGE lands are not available. 70 Or LUBA at 195.  
17 According to Riverkeeper, the PGE letter falls short of demonstrating a  
18 "categorical unwillingness" to sublease land during the remainder of its 99-year  
19 lease, stating only that a "high bar" exists to PGE granting its consent to site  
20 third-party industrial uses within its leasehold. Petition for Review 38-39;  
21 Record 3136.

1       The Port argues, and we agree, that the PGE letter is a sufficient basis to  
2 conclude that the vacant PGE lands are not available because PGE is unwilling  
3 to sublease any portion of its leasehold. We disagree with Riverkeeper that that  
4 unwillingness must be stated in stronger or more categorical terms to support  
5 that conclusion. We also disagree with Riverkeeper's suggestion that the Port  
6 must consider terminating PGE's long-term leases (which would presumably  
7 entail paying PGE a significant amount of compensation) or otherwise offer  
8 extraordinary financial inducements to overcome PGE's expressed  
9 unwillingness to sublease the remaining vacant lands within its leasehold.

10       In addition, the county also found that, regardless of PGE's willingness  
11 to sublease portions of its leasehold, the vacant lands are so encumbered that no  
12 large-scale industrial use of the types proposed could be feasibly or  
13 economically developed. Riverkeeper disputes the findings regarding wetland  
14 areas, arguing that the evidence the Port submitted is insufficient to establish  
15 that it is economically unfeasible to convert wetlands to developable land,  
16 including mitigation costs. Riverkeeper argues that much of the existing  
17 development at Port Westward historically involved filling some wetlands, and  
18 any future expansion of PGE facilities will probably also involve filling some  
19 wetlands, which demonstrates that the existence of wetlands is not an  
20 insuperable bar to development. Riverkeeper argues that it must be possible to  
21 cobble enough land together, avoiding wetlands and existing encumbrances, to  
22 site at least one of the proposed large-scale industrial uses.

1 Riverkeeper is correct that the presence of wetlands at an alternative site,  
2 in itself, would not generally be sufficient to render land unavailable, for  
3 purposes of OAR 660-004-0020(2)(b). Generally, it is possible to obtain  
4 needed state and federal agency approvals to fill jurisdictional wetlands, usually  
5 subject to requirements to provide mitigation at a one to one and a half (1:1.5)  
6 acre ratio. But filling and mitigating wetlands is expensive, and economic costs  
7 are one of the factors the county can consider in determining whether an  
8 alternative site can reasonably accommodate a proposed use. OAR 660-004-  
9 0020(2)(b)(B). In the present case, the undisputed evidence is that the vacant  
10 land within the PGE leasehold consists largely of jurisdictional wetlands. Even  
11 if PGE's unwillingness to sublease property could be overcome, and a  
12 contiguous site for a single large-scale industrial use such as that authorized  
13 could be found given other encumbrances on the property, the undisputed  
14 evidence is that development of any large-scale site would likely require  
15 providing off-site mitigation, at a cost of \$77,000 to \$82,000 per acre. In other  
16 words, development of even a single large-scale industrial use on the order of  
17 50 acres could require several million dollars for wetland mitigation alone, not  
18 counting land acquisition costs.

19 We agree with the Port that the record supports the county's conclusion  
20 that the Port Westward site cannot reasonably accommodate any of the  
21 proposed uses, given PGE's expressed unwillingness to sublease any part of its  
22 leasehold, the pervasive extent of various encumbrances, the pervasive extent of



1 wetlands, and the consequent difficulty and high cost of developing any large-  
2 scale industrial site. Record 171. Riverkeeper has not demonstrated that the  
3 county erred in rejecting the Port Westward site under OAR 660-004-  
4 0020(2)(b).

5 Riverkeeper's fifth assignment of error is denied.

6 **SIXTH ASSIGNMENT OF ERROR (Riverkeeper)**

7 OAR 660-012-0060 is part of the Transportation Planning Rule (TPR),  
8 which implements Statewide Planning Goal 12 (Transportation). OAR 660-  
9 012-0060(5) provides that:

10 "The presence of a transportation facility or improvement shall not  
11 be a basis for an exception to allow residential, commercial,  
12 institutional or industrial development on rural lands under this  
13 division or OAR 660-004-0022 and 660-004-0028."

14 Riverkeeper contends that the Port Westward dock facility constitutes a  
15 "transportation facility" for purposes of OAR 660-012-0060(5), and therefore  
16 as a matter of law the presence of the dock facility cannot constitute a basis for  
17 a reasons exception for industrial development on rural land under OAR 660-  
18 004-0022.

19 The county rejected that argument, stating:

20 "[O]pponents re-raise the argument that OAR 660-012-0060(5)  
21 prohibits the Port from relying on the deepwater port and dock  
22 facilities at Port Westward as a basis for seeking a reasons  
23 exception under OAR 660-004-0022(3)(a). The Port essentially  
24 responded by stating that, while that may or may not have been  
25 true if the approval relied solely on the dock at Port Westward as  
26 the basis for the exception, it is in fact the *deepwater port* at Port

1 Westward, which simply happens to include the existing dock  
2 facilities.

3 “OAR 660-004-0022(3)(a) explicitly authorizes an exception to  
4 Goal 3 for ‘river or ocean ports,’ with or without existing dock  
5 facilities, and whether or not the port has deepwater access. The  
6 Board finds that these additional attributes present at Port  
7 Westward do not disqualify Port Westward as a ‘river or ocean  
8 port’ under OAR 660-004-0022(3)(a), and OAR 660-012-0060(5)  
9 does not disqualify it under OAR 660-004-0022(3)(a). The Board  
10 finds that it is unnecessary to determine whether river or ocean  
11 ports are or are not ‘transportation facilities’ under OAR 660-  
12 0012-0060(5) because, whether they are (and OAR 660-004-  
13 0022(3)(a) provides an exception) or they are not (and OAR 660-  
14 0012-0060(5) does not apply), OAR 660-004-0022(3)(a) explicitly  
15 authorizes ports such as Port Westward as a valid basis for a Goal  
16 3 exception.” Record 50 (emphasis in original).

17 Thus, the county reads OAR 660-012-0060(5) in context with OAR 660-004-  
18 0022(3)(a) to apply only when the exception is based solely on an existing  
19 transportation facility. The county concluded that, even if the existing dock  
20 facility is a “transportation facility” for purposes of OAR 660-012-0060(5), the  
21 exception is based not (or not solely) on the existing dock facility but rather on  
22 the natural upland and aquatic features of the port, with the combination of flat  
23 developable upland in proximity to deep water and self-scouring features,  
24 aspects of a deepwater river port that is the “unique resource” justifying an  
25 exception under OAR 660-004-0022(3)(a). We understand the county to  
26 conclude that an exception could be justified under OAR 660-004-0022(3)(a)  
27 based on that unique resource, even if there were no existing dock facilities, but

1 only a proposal to construct dock facilities to take advantage of deepwater  
2 access.

3 On appeal, Riverkeeper argues that a “river or ocean port[]” as that term  
4 is used in OAR 660-004-0022(3)(a) is also a “[t]ransportation facility” for  
5 purposes of OAR 660-012-0060(5), and that there is no meaningful distinction  
6 between the dock facility and the other features of the river port for purposes of  
7 OAR 660-012-0060(5). Riverkeeper notes that OAR 660-012-0005(30) defines  
8 “[t]ransportation facility” in relevant part as a “physical facility” that moves  
9 goods, including facilities identified in OAR 660-012-0020.<sup>12</sup> OAR 660-012-  
10 0020(2)(e) requires that a local government transportation system plan include  
11 “[a]n air, rail, water and pipeline transportation plan which identifies where  
12 public use airports, mainline and branchline railroads and railroad facilities,  
13 [and] *port facilities*” are located or planned. (Emphasis added.) We understand  
14 Riverkeeper to that argue even if the exception is based on the river \* \* \*  
15 port[]” as a whole (OAR 660-004-0022(3)(a)), and not on the existing dock  
16 facility, the river port is itself a type of “[t]ransportation facility” and hence  
17 subject to OAR 660-012-0060(5).

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<sup>12</sup> OAR 660-012-0005(30) provides the following definition for purposes of  
OAR 660-012:

“‘Transportation Facilities’ means any physical facility that moves  
or assist[s] in the movement of people or goods including facilities  
identified in OAR 660-012-0020 but excluding electricity, sewage  
and water systems.”

1 Riverkeeper is correct that a “port facility” that must be identified in a  
2 local government transportation system plan pursuant to OAR 660-012-  
3 0020(2)(e) is included by cross-reference within the definition of  
4 “[t]ransportation facility” at OAR 660-012-0005(30). The Port responds in part  
5 that the county’s air, rail, water and pipeline transportation plan included in its  
6 transportation system plan does not, in fact, identify Port Westward among the  
7 port facilities discussed in the plan. However, we disagree with the Port that  
8 the fact the county did not actually identify Port Westward as a port facility in  
9 its transportation plans means that, as a consequence, that the Port Westward  
10 port facilities is not a “port facility” for purposes of OAR 660-012-0020(2)(e)  
11 or, by cross-reference, at least potentially a “[t]ransportation facility” for  
12 purposes of OAR 660-012-0005(30).

13 Riverkeeper acknowledges that its argument casts OAR 660-004-  
14 0022(3)(a), which expressly allows a reasons exception for industrial uses based  
15 on the existence of a “river or ocean port,” into apparent conflict with OAR  
16 660-012-0060(5), which under Riverkeeper’s interpretation prohibits taking an  
17 exception based on the presence of a river or ocean port. However, Riverkeeper  
18 argues that any conflict must be resolved in favor of OAR 660-012-0060(5),  
19 which was adopted more recently. According to Riverkeeper, the Land  
20 Conservation and Development Commission (LCDC) clearly intended, by the  
21 express cross-reference to OAR 660-004-0022, that OAR 660-012-0060(5)  
22 would limit or prohibit some exceptions that could otherwise be approved under

1 OAR 660-004-0022. Riverkeeper argues that LCDC is presumably aware of its  
2 own administrative rules, was presumably aware that “river or ocean ports” are  
3 types of “[t]ransportation facilities,” and thus presumably intended to prohibit  
4 any exception on rural land that is based upon the existence of a river or ocean  
5 port.

6 However, it does not necessarily follow that OAR 660-012-0060(5), read  
7 in context, is properly interpreted to prohibit the establishment or expansion of  
8 an industrial area based on an existing river or ocean port authorized under  
9 OAR 660-004-0022(3)(a), as Riverkeeper argues. It is important to note that  
10 the list of appropriate reasons to approve industrial uses at OAR 660-004-  
11 0022(3) is non-exclusive, and that a county can, theoretically, come up with a  
12 new but still sufficient reason to authorize industrial use of resource land that is  
13 not one of the three listed reasons. *See* n 1 (appropriate reasons and facts may  
14 include, but are not limited to, the three listed reasons). Thus it is entirely  
15 possible to read OAR 660-004-0022(3)(a) and OAR 660-012-0060(5) in  
16 context together in a manner that offers no conflict. Read in this context, OAR  
17 660-012-0060(5) is intended to prohibit only an exception based on the  
18 existence of a transportation facility for reasons that are not otherwise  
19 specifically listed as an appropriate reason for an exception set out in OAR 660-  
20 004-0022.

21 This view is supported by two other rules viewed in context. The first is  
22 OAR 660-004-0022(3)(c), which provides that an appropriate reason to site

1 industrial uses on resource land includes comparative advantage due to location.  
2 OAR 660-004-0022(3)(c) expressly authorizes consideration of the “specific  
3 transportation” advantages that support the exception, which presumably would  
4 allow the county to consider advantages provided by proximity to an existing  
5 transportation facility. *See* n 1. Second, as already noted, a specific provision  
6 of the TPR, at OAR 660-012-0065(3)(m), authorizes replacement of existing  
7 docks without taking a goal exception, where the replacement does not  
8 significantly increase the dock capacity. The clear implication is that dock  
9 replacement that significantly increases dock capacity requires a goal exception.  
10 However, no such goal exception would be possible under Riverkeeper’s broad  
11 interpretation of OAR 660-012-0060(5).

12 Moreover, it is difficult to understand why LCDC would intend OAR  
13 660-012-0060(5) to effectively prohibit the expansion or improvement of an  
14 existing dock facility or port facility (or any similar transportation facility).  
15 OAR 660-012-0060(5) is part of an administrative rule that, broadly speaking,  
16 is intended to ensure that when local governments adopt comprehensive plan  
17 amendments that significantly impact transportation facilities, measures are put  
18 in place to protect the function and performance of transportation facilities.  
19 OAR 660-012-0060(1). One of the common measures to protect the function  
20 and performance of affected transportation facilities is to require improvements

1 to those transportation facilities.<sup>13</sup> OAR 660-012-0060(2). Read in this  
2 immediate context, OAR 660-012-0060(5) is probably intended to protect

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<sup>13</sup> OAR 660-012-0060 provides in relevant part:

“(1) If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. \* \* \*”

“\* \* \* \* \*

“(2) If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below[.] \* \* \*

“(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

“(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.

1 transportation facilities from an otherwise inappropriate exception based on  
2 nothing but the presence of a transportation facility. An easy-to-imagine  
3 example is an exception to allow commercial or industrial uses on rural or  
4 resource land that are rendered economically feasible due only to the presence  
5 of an adjoining public highway. Conversely, it makes no policy sense to  
6 interpret OAR 660-012-0060(5) to effectively prevent local governments from  
7 adopting an exception necessary to improve or expand existing docks, ports or  
8 similar transportation facilities, where that exception is otherwise authorized by  
9 a reason that LCDC has specifically deemed to be appropriate. We highly  
10 doubt that LCDC intended, in promulgating OAR 660-012-0060(5), to  
11 effectively preclude the expansion of port facilities or the industrial uses and  
12 areas that support port facilities. Accordingly, we conclude that OAR 660-012-  
13 0060(5), read in context, does not prohibit a reasons exception for an industrial  
14 use based on a river port that is a unique resource for purposes of OAR 660-  
15 004-0022(3)(a).

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“(c) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.

“(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. \* \* \*”



1 Riverkeeper's sixth assignment of error is denied.

2 **SEVENTH ASSIGNMENT OF ERROR (Riverkeeper)**

3 OAR 660-012-0070 sets out standards for reasons exceptions needed to  
4 approve "transportation facilities and improvements" on rural land that cannot  
5 be approved without an exception under OAR 660-012-0065. OAR 660-012-  
6 0070(2) provides:

7 "When an exception to Goals 3, 4, 11, or 14 is required to locate a  
8 transportation improvement on rural lands, the exception shall be  
9 taken pursuant to ORS 197.732(1)(c), Goal 2, and this division.  
10 The exceptions standards in OAR chapter 660, division 4 and OAR  
11 chapter 660, division 14 shall not apply. Exceptions adopted  
12 pursuant to this division shall be deemed to fulfill the requirements  
13 for goal exceptions required under ORS 197.732(1)(c) and Goal  
14 2."

15 Under the seventh assignment of error, Riverkeeper argues that the county erred  
16 in approving "transportation improvement[s]" on rural land without applying  
17 the standards for a reasons exception at OAR 660-012-0070. According to  
18 Riverkeeper, because each of the five authorized industrial uses involves the  
19 "transportation" of goods and commodities, *i.e.*, loading and offloading goods  
20 and commodities, the exception standards at OAR 660-012-0070 apply rather  
21 than the exception standards at OAR 660-004-0022.

22 The Port responds initially that no issue was raised below regarding OAR  
23 660-012-0070 and thus the issue raised under the seventh assignment of error is  
24 waived, under ORS 197.763(1). On the merits, the Port argues that the decision  
25 does not approve any transportation facility or improvement, but rather simply

1 approves five types of industrial uses which, like all industrial uses, necessarily  
2 involve some transportation of goods and commodities.

3 Riverkeeper responds that it is entitled to raise new issues on appeal  
4 because the county's notices did not describe the five authorized uses, and thus  
5 did not "reasonably describe" the proposed action. ORS 197.835(4)(b).<sup>14</sup>  
6 However, even if ORS 197.835(4)(b) would allow Riverkeeper to raise new  
7 issues on appeal regarding OAR 660-012-0070, we agree with the Port that the  
8 challenged decision does not approve any "transportation facilities or  
9 improvements" within the meaning of OAR 660-012-0070. As noted, OAR  
10 660-012-0005(30) defines "transportation facility" as a "physical facility that  
11 moves or assist[s] in the movement of people or goods[.]" The decision  
12 approves a reasons exception to authorize five categories of industrial uses, and  
13 those uses necessarily involve shipping of goods and commodities off and on  
14 the site, but the decision does not approve any physical facility to move or assist  
15 in the movement of those goods and commodities, such as a dock facility.  
16 Riverkeeper argues, nonetheless, that moving the goods or commodities  
17 between the industrial sites and the existing dock facilities will require some

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<sup>14</sup> ORS 197.835(4)(b) provides that a petitioner may raise new issues to LUBA where:

"The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

1 kind of internal road, pipeline, etc. However, we disagree that internal  
2 improvements needed to move goods or commodities from one location to  
3 another location within the Port Westward industrial site constitutes a  
4 “transportation facility or improvement” for purposes of OAR 660-012-0070.

5 Riverkeeper’ seventh assignment of error is denied.

6 **EIGHTH ASSIGNMENT OF ERROR (Riverkeeper)**

7 As noted, the existing Port Westward exception area is an irrevocably  
8 committed and physically developed exception site, zoned RIPD. OAR 660-  
9 004-0018(2) provides that “all plan and zone designations” must meet several  
10 requirements, including that the “rural uses, density, and public facilities”  
11 allowed under the plan and zoning designation “will not commit adjacent or  
12 nearby resource land to uses not allowed by the applicable goal as described in  
13 OAR 660-004-0028.” OAR 660-004-0028 sets out the standards for  
14 determining whether land is irrevocably committed to uses not allowed by the  
15 applicable goals, by uses or development on adjoining or surrounding uses.  
16 OAR 660-004-0018(1) provides that “[a]doption of plan and zoning provisions  
17 that would allow changes in existing types of uses, densities, or services  
18 requires the application of the standards outlined in this rule.”

19 Riverkeeper argues that the challenged decision approves industrial uses  
20 within the proposed exception area that will intensify use of the existing docks  
21 within the existing Port Westward exception area. Because the decision  
22 authorizes increased use of the dock facility within an existing exception area,

1 Riverkeeper contends that OAR 660-004-0018 requires the county to adopt a  
2 new reasons exception for the Port Westward exception area, to authorize the  
3 more intensive dock usage.

4 The county rejected that argument in its findings, noting that the uses  
5 allowed in the new exception area are much more restrictive than the uses  
6 allowed in the RIPD zone that applies to the Port Westward exception area, and  
7 thus the decision does not authorize any “changes in existing types of uses,  
8 densities, or services” within the Port Westward exception area. OAR 660-004-  
9 0018(1); Record 33. The findings also note that the exception statement for the  
10 Port Westward site contemplated heavy reliance on the dock to transport liquid  
11 and bulk commodities, similar to those approved in the new exception area, and  
12 concludes that the fact that uses within the new exception area will rely upon  
13 the dock facility does not result a change in or intensification of the dock usage  
14 that would require a new reasons exception. Record 33-34 (citing language in  
15 the Port Westward exception statement discussing proposals for a 200-acre oil  
16 refinery, 150-200 acre coal plant, and a 230-acre coal gasification plant).

17 The Port argues, and we agree, that Riverkeeper has not demonstrated  
18 that the county is required to adopt a reasons exception for the existing Port  
19 Westward exception area. The uses and facilities allowed in the RIPD zone on  
20 the existing Port Westward exception area do not “commit” adjacent resource  
21 land (*i.e.*, the proposed exception area) to uses not allowed by the resource  
22 goals, contrary to OAR 660-004-0018(2)(b). There is no dispute that the

1 existing dock facilities at Port Westward are underutilized, apparently because  
2 actual development at Port Westward (*e.g.*, the PGE power plants) does not use  
3 the docks, for the most part. The county found that the proposed increased use  
4 of the docks is within the level of intensity contemplated by the original  
5 exception and the RIPD zone. Riverkeeper might be correct that a new reasons  
6 exception would be required if intensified dock usage (from either exception  
7 area) required an expansion of the dock facilities.<sup>15</sup> However, the present  
8 decision does not authorize or require dock expansion, and no party argues that  
9 that the existing docks have insufficient capacity to handle cargo associated  
10 with the proposed uses. Accordingly, Riverkeeper's arguments under OAR 660-  
11 004-0018 do not provide a basis for reversal or remand.

12 Riverkeeper's eighth assignment of error is denied.

### 13 **CONCLUSION**

14 As explained under Riverkeeper's and 1000 Friends' fourth assignments  
15 of error, the decision must be remanded for the county to adopt more adequate

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<sup>15</sup> The existing dock facilities at Port Westward can handle two ocean-going vessels. We note that OAR 660-012-0065(3)(m) authorizes the replacement of docks without taking a new exception to the resource goals where the replacement does not significantly increase the capacity of the facility. That suggests, by negative implication, that expanding the existing docks to increase capacity would require a new exception to the resource goals. The present application does not include any proposal to expand the existing dock facility, although one portion of the proposed exception area (tax lot 500) fronts on the river next to the existing dock facility and the Port has deemed tax lot 500 as "critical for future dock expansion." Record 114.

1 findings, supported by substantial evidence, regarding compliance with the  
2 compatibility requirement of OAR 660-004-0020(2)(d). All other assignments  
3 of error are denied.

4 The county's decision is remanded.

5 Zamudio, Board Member, concurring.

6 In my view, this case presents a close call and I concur based on the facts  
7 that the exception is based on a single unique resource, the river port, the  
8 exception authorizes only those uses that are significantly dependent on the  
9 river port, and the exception area is uniquely situated by the river port. I write  
10 separately to emphasize that exceptions are and should remain "exceptional."  
11 *1000 Friends of Oregon v. LCDC*, 69 Or App 717, 731, 688 P2d 103 (1984).  
12 Goal 3 preservation of agricultural lands for existing and future needs is  
13 essential to statewide land use planning. ORS 215.243. A reasons exception is,  
14 by design, a narrow yet flexible passageway for avoiding compliance with Goal  
15 3.<sup>16</sup> See *Riverkeeper I*, 70 Or LUBA at 181–82 (explaining that a reasons  
16 exception is a more limited vehicle than physically developed and irrevocably  
17 committed exceptions). In this case, LUBA recognizes flexibility in justifying a

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<sup>16</sup> The parties in this appeal did not provide any legislative history regarding the legislature's intent in allowing a reasons exception, or LCDC's intent in adopting rules governing reasons exceptions. Perhaps such legislative history would illuminate the scope and function of reasons exceptions.

1 reasons exception but does not create a broader passage around Goal 3  
2 protections.

3 I agree with petitioners that the evidence in the record and the county's  
4 reasoning supporting the reasons exception are slim. With respect to the amount  
5 of land included in the 837-acre exception area, the county relied heavily on  
6 inquiries to the Port to conclude that port-dependent industrial uses require  
7 large acreage lots and that the total acreage to meet the demand for industrial  
8 uses at Port Westward significantly exceeds the proposed 837-acre exception  
9 area. The evidence is that the exception area will feasibly be fully utilized over  
10 a 20-year period based on market "demand velocity." Record 3117. It is not  
11 clear to me that a reasons exception was intended to be used as a mid-range  
12 planning tool to meet market demand. However, I ultimately agree with the  
13 majority that market demand may justify the amount of land included in the  
14 exception area.

15 LCDC has determined that general housing market demand is not a  
16 sufficient reason to justify a goal exception for rural residential development on  
17 resource lands. OAR 660-004-0022(2) ("For rural residential development the  
18 reasons cannot be based on market demand for housing except \* \* \* [where] the  
19 rural location of the proposed residential development is necessary to satisfy the  
20 market demand for housing generated by existing or planned rural industrial,  
21 commercial, or other economic activity in the area."); *see also Still v. Marion*  
22 *County*, 42 Or App 115, 122, 600 P2d 433 (1979), *rev den*, 288 Or 493 (1980)

1 (in the context of a needs exception, the court observed that “Goal # 3 was  
2 enacted to preserve agricultural land from encroachment by urban and suburban  
3 sprawl by subordinating the free play of the marketplace to broader public  
4 policy objectives”). LCDC has not imposed a similar limitation on reasons  
5 exceptions for rural industrial development on resource lands. OAR 660-004-  
6 0022(3). Thus, a local government is not prohibited from relying on market  
7 demand, as the county did here, to establish the amount of land planned for  
8 resource-dependent rural industrial development. In my opinion, the evidence  
9 and reasoning supporting the justification for the amount of land needed for the  
10 exception area is thin, but nonetheless qualifies as “substantial evidence in the  
11 record.”<sup>17</sup> See ORS 197.732(6)(a) (“Upon review of a decision approving or  
12 denying an exception: The Land Use Board of Appeals \* \* \* shall be bound by  
13 any finding of fact for which there is substantial evidence in the record of the  
14 local government proceedings resulting in approval or denial of the  
15 exception[.]”).

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<sup>17</sup> I am troubled by the county’s reasoning that the approved categories of industrial uses require large lots to allow “land banking” for future expansion. However, land banking for rural industrial uses may be analogous to acreage needs supporting 160-acre minimums for livestock rangeland or 2- to 5- acre lots for rural residential development in that the nature of the use supports a certain size lot regardless of whether the entire lot is physically occupied by the use at any given time.



1           In this case, the county was required to determine that the approved uses  
2 are “significantly dependent upon a unique resource” and could not defer that  
3 analysis to the permitting process. OAR 660-004-0022(3)(a); *Riverkeeper I*, 70  
4 Or LUBA at 206 (“[I]t is clearly impermissible to defer to a subsequent permit  
5 proceeding a determination that *a Goal 2 exception standard* is met[.]”  
6 (Emphasis in original.)). As I understand it, the county did not find that the five  
7 categories of approved uses are in-and-of-themselves significantly port-  
8 dependent. Instead, the county found that a subset of those uses *can be* port-  
9 dependent. Record 19. The county plans to assure significant port dependence  
10 through (1) adopting the exception as part of the county’s comprehensive plan,  
11 (2) imposing Condition 5 of the challenged decision, and (3) the conditional use  
12 permitting process. While it is a very close call, I agree with the majority that  
13 the county’s findings and reasoning justify the reasons exception and the county  
14 did not impermissibly defer that determination to a later permit proceeding.

15           Finally, I write separately to note the potential mischief that could arise  
16 from LUBA accepting the county’s conclusion that the area of existing  
17 exception land within PGE’s leasehold “cannot reasonably accommodate the  
18 proposed use[s].” OAR 660-004-0020(2)(b). My concern is that an applicant or  
19 local government could avoid meaningful consideration of alternative sites if  
20 allowed to exclude areas that are either contractually obligated or in different  
21 ownership, and thereby obtain approval for a preferred location for an  
22 exception. For example, a company could create different entities to hold

1 interests in property and then submit evidence that a less desirable potential  
2 alternative site is otherwise committed and cannot reasonably accommodate the  
3 proposed use. While I do not think that type of mischief is necessarily present in  
4 this case, it is a potential problem that merits scrutiny in reviewing such an  
5 alternative site analysis.