

## **STANDING**

Intervenor-Respondents Audubon Society of Portland (“Audubon Society”) and Willamette Riverkeeper (“Riverkeeper”) concur that Petitioners Gunderson, LLC; Schnitzer Steel Industries, Inc.; and Working Waterfront Coalition (collectively, “Petitioners”) have standing to appeal. Audubon Society and Riverkeeper appeared before Respondent the City of Portland (the “City”) orally and in writing, and timely filed their motion to intervene on June 1, 2010, within 21 days after Petitioners filed their notice of intent to appeal. *See* ORS 197.830(7)(a), 197.830 (7)(b)(B).

## **STATEMENT OF THE CASE**

### **A. Nature of the Decision**

On April 15, 2010, the City adopted Ordinance No. 183694 (the “River Plan”), updating and replacing the 1987 Willamette Greenway Plan as to the northern portion of the Willamette River, including Portland Harbor (the “North Reach”). R. at 7–13. The ordinance amends the City’s comprehensive plan and zoning code for the 12-mile long stretch of riverfront land beginning at the confluence of the Willamette and Columbia Rivers and ending at the Fremont and Broadway bridges. R. at 188, 25.

### **B. Summary of the Argument**

After reading the Petitioners’ briefs, the Land Use Board of Appeals (the “Board”) might think that the only Statewide Goals 9 and 12 were at issue when the City drafted and approved the River Plan. But any land use decision regarding a geographic area that includes the last 12 miles of the Willamette River also necessarily implicates Goals 5, 6 and 15. In creating the River Plan, the City had a duty to balance all of the applicable Statewide Planning Goals, giving each goal equal weight. The River Plan updates the Willamette Greenway Plan, which was developed

to meet Statewide Goal 15: “[t]o protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River . . . .” The text of this goal, in and of itself, indicates that the decision-maker must consider and accommodate the various enumerated qualities of the river. Additionally, ORS 197.340(1) directs that “local governments *shall give the goals equal weight* in any matter in which the goals are required to be applied.” ORS 197.340(1) (emphasis added). Thus, the City cannot give Goals 9 and 12 more weight than Goals 5 and 6 and cannot construe Goal 15 to only implicate economic interests. The City must give equal weight and consideration to each goal in making land-use decisions. The last twelve miles of the Willamette River is not only, or even primarily, a transit corridor for Petitioners’ businesses that can be viewed in isolation from its critical ecological functions. Although its banks are now heavily developed and its water quality degraded, this final stretch of the Willamette River also serves as a critical transit corridor for numerous species of birds and threatened salmon species. In order to reach their upstream spawning grounds adult salmon must swim through this stretch of the river and juvenile salmon must then make their way through these twelve miles in order to reach the Pacific Ocean. The City thus had to consider those and other natural resource values of the North Reach as well as the business interests of Petitioners.

Despite the Petitioners’ assertions, the River Plan does not focus exclusively or even primarily on environmental concerns. Rather, in crafting the North Reach River Plan, the City struck a reasonable and appropriate balance of all applicable Statewide Planning Goals. The River Plan is a multi-dimensional plan with entire sections devoted exclusively to promoting industrial development, as well as protecting the environment, providing waterfront access, aiding river communities, and working with competing stakeholders in the issue. The River Plan

does not impose environmental protections with disregard to Portland’s waterfront industry, as Petitioners argue. In fact, it directly addresses many concerns raised by industry regarding the prior Greenway Plan. The City reasonably considered and balanced competing industrial and environmental interests, and many of the resulting environmental regulations actually provide greater flexibility and a more streamlined process for Petitioners and other industrial entities. Despite Petitioner’s contentions, the River Plan makes multiple concessions to industry interests along the Willamette River—in some cases to the detriment of environmental interests, and in some cases to a mutually beneficial result. The River Plan also provides important environmental protections where they are needed for the welfare of the unique North Reach ecosystem.

Because the balance that the City struck is consistent with all of the applicable Statewide Goals, reasonable, and supported by substantial evidence, the Board should affirm the City’s adoption of the River Plan.

### **C. Statement of the Facts**

Pursuant to OAR 661-010-0035(3)(a), Audubon Society and Riverkeeper accept the Petitioners’ statements of the case, so far as it goes, but its almost exclusive focus on industrial concerns results in the omission of many relevant facts. According to the City, the River Plan is “a comprehensive, multi-objective plan for the land along the Willamette River that strives to *balance* jobs, natural resources, access to the river and livable communities.” R. at 20 (emphasis added). Oregon defines “comprehensive” to mean “all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan.” ORS 197.015(5). The River Plan has five major policy objectives: economic

prosperity, watershed health, creating public access to the river, revitalizing riverfront communities, and building partnerships. R. at 20–23.

The Willamette River is among Oregon’s signature natural resources, and in 1998 it was one of thirteen rivers across the United States designated by the U.S. Environmental Protection Agency as an American Heritage River. It drains 11,500 square miles, which encompasses much of western Oregon. R. at 2873.

The Willamette provides Oregon’s most populous region with many important natural services. Its floodplain provides flood storage during large storm events, and remnant wetlands and associated vegetation store water, filter pollutants, cycle nutrients, and help cool both the mainstem as well as the Willamette’s many tributaries. The river and its floodplain also are both important habitat and a connectivity corridor for a wide variety of terrestrial, avian, and aquatic species, including those considered to be “at risk” by government agencies or wildlife organizations. R. at 697.

The Willamette’s North Reach is a “primary component of the region’s ecological infrastructure which includes the Ridgefield Wildlife Refuge and Vancouver Lake Lowlands, Sandy River basin, Sauvie Island and the Tualatin Mountains.” R. at 51. The North Reach area contains what the River Plan terms “important natural resources,” including remnant bottomland hardwood forests, upland forests and oak escarpments, wetlands, streams, riparian corridors, and the Willamette River itself. R. at 701–02. These resources help control sediment and pollution, add shade and organic material to the river, and provide wildlife habitat and travel corridors. R. at 702. Historically, the North Reach was one of the most unconstrained portions of the lower river, and its many beaches, islands, and wetlands harbored large salmon runs. R. at 703.

Unfortunately, impacts resulted from human activities have substantially diminished the natural functioning of the Willamette River in general and the North Reach in particular. Dams and associated changes in river flow have affected water temperature, reduced ecological benefits provided by seasonal flooding, and blocked migrating fish. R. at 691. Other adverse changes to river habitat and the biological diversity it supports stem from channelization, bank hardening, invasive species introductions, timber harvest and agricultural activities, and urbanization. *Id.* As perhaps the most urbanized and industrialized stretch of the Willamette, the river and its associated resources in the North Reach have been particularly hard hit. Water quality in this area ranges from fair to poor; the river in this stretch does not meet water quality standards for bacteria, mercury, dioxin, and temperature. R. at 697. The Portland Harbor area is also a designated Superfund cleanup site; as a result of pollution associated with past industrial practices, the river bottom and banks are contaminated with heavy metals, polycyclic aromatic hydrocarbons, PCBs, chlorinated pesticides, and dioxin. R. at 698. Finally, once common shallow-water areas that provided excellent habitat for fish and wildlife now comprise less than 10% of the channel area in the North Reach; instead of beaches, sandy flats, riparian vegetation, and gently-sloping shores, this area is now characterized by steep banks, armored pilings, and riprap. R. at 703.

Human alteration and pollution of the Willamette River and its tributaries have decimated salmon and steelhead runs that depend on its habitat and use the mainstem as a migration corridor. Fish populations have declined to the extent that the National Marine Fisheries Service (“NMFS”) has listed several evolutionarily significant units (“ESUs”) of salmonids that spawn in the Willamette or lower Columbia and associated tributaries as threatened or endangered under the federal Endangered Species Act (“ESA”). R. at 673. Along with other areas, NMFS

designated the portion of the Willamette in the North Reach as “critical habitat” for listed ESUs. R. at 682. The ESA prohibits all “persons,” including municipalities, from taking actions that constitute “take” of listed salmonids, i.e. harming individual fish or their habitat in a manner that results in death or injury. R. at 673; *see* 16 U.S.C. §§ 1532(19), 1538; 50 C.F.R. § 17.3.

After the ESA listings of salmon and steelhead in the Willamette and lower Columbia, the City adopted measures to not only avoid “take” of listed fish but to set forth a “comprehensive, coordinated citywide response” to promote their recovery. *See* R. at 673-74 (discussing City Council Resolution No. 35715). The City has designated critical habitat for salmon and steelhead, which includes the Willamette River through the North Reach, as “Special Habitat Areas.” R. at 682. Through additional actions such as identifying and prioritizing City programs that can help conserve salmon and their habitat, providing technical support to City bureaus, developing a watershed plan to guide City actions, and providing oversight for actions involving federal funding and permitting, the City has placed a high priority on restoration of salmon and steelhead and their habitat. R. at 673–74. These actions also may help the City prevent ESA listings of additional at-risk species such as Pacific lamprey and coastal cutthroat trout. R. at 674.

Audubon Society and Riverkeeper participated for years in development of the North Reach River Plan. While these groups along with other conservation stakeholders and natural resource agencies sought stronger environmental protections than were eventually incorporated into the final Plan, Audubon and Riverkeeper ultimately decided to support the Plan as an acceptable compromise among many uses and constituencies. However, fearing that Petitioners seek a one-sided focus on industry to nearly the exclusion of other uses and qualities of the North Reach, Audubon and Riverkeeper intervened in these appeals.

## JURISDICTION

Audubon Society and Riverkeeper accept the Petitioners' statement of the Board's jurisdiction. In the decision on review, the City adopted Ordinance No.183694, the River Plan, a land use decision as defined in ORS 197.015(10)(a)(A) and subject to the Board's jurisdiction under ORS 197.825.

## STANDARD OF REVIEW

Petitioners have the burden of persuasion for their challenge to the River Plan/North Reach. ORS 197.350(1). The Board:

shall affirm the City's interpretation of its comprehensive plan and land use regulations, unless the Board determines that the local government's interpretation:

- (a) is inconsistent with the express language of the comprehensive plan or land use regulation;
- (b) is inconsistent with the purpose for the comprehensive plan or land use regulation;
- (c) is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- (d) is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.

ORS 197.829(1).

Where a city interprets its own goal or policy and that interpretation is not inconsistent with the language of the goal, the city is granted interpretative discretion. *Homebuilders Assoc. of Metropolitan Portland v. City of Portland*, 37 Or LUBA 707, 734 (2000); *see also Johnson v. Employment Dept.*, 187 Or.App. 441, 447–48, 67 P.3d 984, 987–88 (2003).

In terms of the factual basis for the City' decision, LUBA's review is limited to the record, ORS 197.835(2)(a), and Petitioners must show that the City "made a decision not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). "Substantial evidence' means record evidence "viewed as a whole [that] would permit a reasonable person to make [a particular] finding." *Younger v. City of Portland*, 305 Or. 346, 348, 752 P.2d 262, 270

(1988)( quoting ORS 183.482(8)(c)); *see also* OAR 661-010-0071. Substantial evidence in the record should not include “estimates” or “assumptions” regarding the “likely” impacts of this land use decision. *See e.g.* WWC Br. at 12–16.

## **ARGUMENT**

### **A. The City Has a Duty to Balance All Statewide Planning Goals When Making Land Use Decisions.**

While the River Plan does add four new chapters to the zoning code, R. at 188, Petitioners mischaracterize these amendments as exclusively new, more stringent environmental regulations with negative impacts on industry. In fact, when the River Plan is considered as a whole, it becomes clear that its provisions embody a careful balance between the North Reach’s myriad resources. The River Plan is a multi-dimensional plan with entire sections devoted exclusively to promoting industrial development. As part of its balancing process, the City weakened several of the Plan’s draft environmental sections to accommodate industry concerns.

Although Goals 9 and 12 were a key part of the City’s planning process, the City legally had to give equal weight to all other applicable Goals, including Goals 5, 6 and 15. The fact that an area is “industrial” and a focus for the City’s planning obligations under Goal 9 does not mean that such “industrial areas” are “off limits” to regulation by the City to achieve the City’s equally important obligations under Goals 5, 6, and 15. The City properly considered and applied all of the applicable Goals when devising the River Plan. Petitioners had numerous opportunities during the City’s lengthy public planning process to bring their concerns and priorities to the attention of the City and many of those concerns and priorities are clearly reflected in the final River Plan.

1. Oregon Law Requires the City to Give Equal Weight to Each Statewide Planning Goal.

Under ORS 197.340(1), the City was required to address each of the applicable Statewide Planning Goals and to give them “equal weight.” Pursuant to that statutory mandate, land designated primarily to achieve the purposes of one land use goal is not totally insulated from regulation in order to achieve other land use goals. See *Lane County v. LCDC*, 325 OR 569, 582; 942 P.2d 278, 285 (1997). Thus the City properly made policy judgments that balanced and, where necessary, prioritized values and objectives under all of the applicable Statewide Planning Goals. See *Port of St. Helens v. LCDC*, 165 Ore App. 487, 498; 996 P.2d 1014, 1019 (2000) (recognizing LCDC’s authority to conduct such balancing). Moreover, the City could not “allow a frontal violation of Goal 5 for the purpose of giving preference to Goal 9.” *Dept. of Land Conservation and Development v. Yamhill County*, 99 Ore App. 441, 447-48, 783 P.2d 16, 19 (1989)(applying ORS 197.340(1)).

Compliance with applicable Statewide Planning Goals, including Goal 5— which mandates conservation of open space and protection and natural and scenic resources—requires a decision-maker to analyze and consider economic and social factors in designing measures to protect the environment. In fact, the second step of the three-step Goal 5 process is to complete an economic, social, environmental and energy (ESEE) analysis. R. at 1166. As pointed out in the City’s documents, “[t]he ESEE analysis involves evaluating the tradeoffs associated with different levels of natural resource protection.” *Id.* This analysis requires identification of the consequences of allowing, limiting, or prohibiting conflicting uses in areas containing significant natural resources. *Id.* A conflicting use is a land use or activity that may negatively impact natural resources. *Id.* Thus, Goal 5 also mandates a balancing when promulgating a land use plan.

Additionally, Portland's Comprehensive Plan is the City's primary planning policy document, intended to guide development and redevelopment of the city. R. at 28. In this plan, the City states as one of its land resources policy objectives:

Conserve significant natural and scenic resource sites and values through a combination of programs which involve zoning and other land use controls, purchase, preservation, intergovernmental coordination, conservation, and mitigation. *Balance the conservation of significant natural resources with the need for other urban uses and activities* through evaluation of economic, social, environmental, and energy consequences of such actions.

Comprehensive Plan Goals and Policies, City of Portland Bureau of Planning, Policy 8.14 (emphasis added). Thus balancing potentially competing interests is an important element of both state and local land use planning requirements.

In the present case, the City fulfilled its duty to balance goals focusing on both environmental and economic well-being, and struck a balance between the two that includes significant new regulations and policies explicitly designed to support economic prosperity in the North Reach. In some cases, over the objections of conservation stakeholders, these new regulations compromised on environmental protections for the North Reach, benefitting Petitioners and other industrial and commercial entities. Thus, Petitioners' argument that the City failed to give proper consideration to industry-related Statewide Planning Goals is unfounded.

2. Petitioners Had Adequate Time and Opportunity to Ensure the Goals Were Equally Weighed by the City.

The River Plan was developed over the last ten years. The City's planning process was open to comments and advice from all stakeholders, including the Petitioners. In fulfilling its duty to balance Statewide Planning Goals, the City was able to adequately consider the interests of the Petitioners.

Development of the River Plan/ North Reach has been an incredibly long and inclusive process. Each stage involved stakeholder committees and extensive outreach; the Audubon Society participated in each of these stages. The River Renaissance process, from 2001 to 2004, created goals and aspirations for the river, which laid the foundation for the River Plan. R. at 29. The River Concept process, in 2006, synthesized planning documents and discussions. *Id.* The River Plan/North Reach process, from 2007 to 2010, included a citizen advisory committee and multiple task groups; three briefings, three public hearings and five work sessions before the City of Portland Planning Commission. R. at 35–36. There have been nearly 400 outreach meetings, R. at 136–48, and 4 stakeholder meetings led personally by Mayor Sam Adams to address industry concerns. R. at 147–48. City Council also held two public hearings and a town hall meeting. See R. at 1847–48, 2732–38.

According to the City, the purpose of the River Plan is to “help set the course for the next twenty years.” R. at 20. However, the planning process itself has been long and arduous, and it has now lasted almost half the time dedicated to actual implementation of the River Plan. The City’s efforts to amend the Greenway Plan began as early as 1998. R. at 7. Audubon Society has since served on numerous committees involving the North Reach planning, including the Integration Work Group that analyzed how to integrate natural resources, economic development, and recreational objectives. Riverkeeper has also, on several occasions, provided written comments to and testified before City Council on the relevant environmental issues throughout the River Plan planning.

Petitioners have not given substantial reason for wishing to extend the planning process further. Petitioners have had ten years to present evidence to City Council on behalf of industrial interests. After considering the competing interests of the multiple stakeholders, the City

fulfilled its duty to equally weigh the Statewide Planning Goals and struck a reasonable and appropriate balance in adopting the River Plan.

**B. The City Struck an Appropriate Balance of Goals When Devising the River Plan.**

Far from being overreaching environmental regulation, the River Plan in fact contains numerous changes and revisions that directly benefit Petitioners and all industrial areas within the North Reach. These changes give industry increased flexibility and actually increase development opportunities. Many of these changes were adopted despite the objections or concerns expressed by environmental groups and environmental regulatory agencies. Of course the City also added important and necessary protections for wildlife habitat and water quality in the North Reach, but it did so in the overall context of giving all of the applicable Statewide Goals equal weight.

1. The River Plan Includes Multiple Regulatory and Policy Changes That Are Directly Beneficial to Industry.

The North Reach River Plan is hardly the one-sided environmental plan described by the Petitioners in their appeals. In fact, the River Plan contains analysis, objectives, and policy and regulatory amendments specifically focused on promoting industrial objectives in the North Reach that are every bit as robust as the environmental elements of the River Plan. *See* R. at 39–49. In addition, new environmental regulations contained in the River Plan were specifically designed to address specific industry concerns with the previous Greenway Plan, including the need for greater flexibility on industrial properties, increased coordination between regulatory local, state and federal regulatory agencies, and an expanded list of exemptions and standards that allow property owners to avoid regulatory review under certain circumstances. *Id.*

The River Plan established three primary objectives to promote economic prosperity in the North Reach. The first objective is to “[c]ontinue to support river-dependent and river-

related uses and the industrial land supply in the working harbor as a long term public resource.” The second objective is to “[i]mprove regulations to increase predictability and flexibility for industrial redevelopment and expansion.” Finally, the third objective is to “[i]mplement the Working Harbor Reinvestment Strategy to fuel private reinvestment through coordinated public investments in harbor infrastructure and land development.” R. at 41.

To achieve these objectives, the City incorporates a long list of code changes and policy recommendations to directly benefit industrial property owners in the North Reach. For example, the River Plan’s elimination of the Greenway setback that required that all development within twenty-five feet of the top of the bank be either “river-related” or “river-dependent” provides greater flexibility in how industrial property owners are able to utilize their property and eliminates environmental protections from nearly five miles of previously regulated industrial shoreline. R. at 42. The City has also created a "streamlined" permitting process to ensure that local, state and federal regulatory processes minimize duplication, conflicting obligations, and permitting time. R. at 78. In addition, the River Plan amends the city code to limit conversion of industrial lands to other uses by prohibiting quasi-judicial Comprehensive Plan map amendments and by precluding land divisions that restrict access to the river. *id.* A final example is the City's commitment to implement the Working Harbor reinvestment strategy, a ten-year program of public investments to be made by the City and Port of Portland. R. at 44. This strategy is expected to result in investment of approximately \$586 million, of which \$441 million is expected to be invested within 10 years. R. at 45. This is roughly two times what the City anticipates will be invested in natural resource mitigation and restoration under the River Plan. R. at 61 (explaining that funding for natural resources will be between \$183 and \$247 million). These and many other industrial focused elements of the River Plan represent a firm

commitment by the City to protecting and improving the economic prosperity of the North Reach.

The Board should note that industry has done extremely well under the previous Greenway Plan. Between 2000 and 2008, at a time when the ecological health of the river continued to degrade, the net income of North Reach industries more than tripled from \$54,586,214 in 2000 to \$163,683,266 in 2008. R. at 2872–77. As explained below, through the River Plan the City has incorporated additional regulations, policies and subsidies to ensure that that prosperity will continue.

*i. Elimination of the Greenway Setbacks*

The River Plan eliminates the Greenway setback in the River Industrial Overlay Zone (“i-overlay”), which required that all development near the river be either “river-dependent” or “river-related.” R. at 21. This elimination allows industry to create development near or on the riverbank that would have previously been precluded under the old Greenway Plan. *Id.* This significant concession shows that the City fully considered and in fact gave great weight to industry-related goals and policies.

Under the old Greenway Plan, any development in the i-overlay that was not river-dependent or river-related was required to be set back from the riverbank by a distance ranging from 25 to 200 feet. R. at 213. This regulation applied on all industrial lands in the North Reach. The purpose of setback regulations was to facilitate “protection, maintenance, restoration, preservation and enhancement of the natural, scenic, historic and recreational qualities of the Willamette River in the North Reach by reserving space for the conservation and enhancement of natural vegetation and the opportunity for public access.” *Id.* In spite of this important purpose, the River Plan now removes the setbacks in the i-overlay for the sake of industry. Instead of the

uniformly applied setback requirement, the new River Plan only applies protections to sites where high- and medium-value natural resource values continue to occur. R. at 21, 213. The direct result of this decision is that nearly five miles of riverbank that were regulated and protected under the prior Greenway Plan are completely unprotected under the new River Plan, something which Audubon Society and Riverkeeper strongly opposed. R. at 2339.

The City clearly indicates in the commentary on section 33.475.210 of the Greenway Plan amendments implemented by the River Plan that the amendment eliminating setbacks was made to benefit industry. R. at 213. The Plan emphasizes that “[o]ne of the major goals of the [River Plan] is to revise existing regulations where reasonable so that property owners in the working harbor have the flexibility to expand and redevelop onsite.” *Id.* This amendment is a significant benefit to industry.

ii. *Exemptions from Review and Mitigation for Certain Development Activities*

In addition to significantly reducing the amount of river bank protected by environmental regulations, the River Plan also included a long list of exemptions for certain types of development activities within the remaining environmental overlay areas. Activities included under these exemptions do not have to either go through River Review and industrial developers are not required to mitigate for any environmental impacts that occur as a result of these activities. R. at 247. River Review is a process by which the City evaluates projects with environmental overlay areas to ensure that environmental impacts are avoided, minimized or mitigated. Activities included in the exemptions include dredging of navigation channels, placement of structures on paved areas and wharfs, placement of up to four piles or two dolphins per 100 feet of shoreline, installation of utility poles, and several other development activities. R. at 248–51. These exemptions were incorporated because they were deemed by the City to be

“important for continued operation of existing facilities.” R. at 247. While these activities are in theory supposed to have little or no impact on resources or alternatively are supposed to be adequately regulated by other agencies, it is important to note that Audubon Society and Riverkeeper expressed strong opposition to several exemptions on the basis that their impact would be significant and that they were not regulated by other agencies. R. at 2337. Several of these exemptions were added at the last minute just prior to the final River Plan Hearing.

Audubon wrote:

[I]ncremental expansion of the list of standards and exemptions is now being used by industry as a strategy to achieve their original objective of eliminating the city's oversight of projects that directly impact high value environmental zones. Standards and exemptions have traditionally been used to address actions in e-zones that are expected to have de minimus impacts or which were intended to actually enhance the e-zone. ....The changes proposed in the amendment go much further and will lead to a situation where e-zones can be significantly eroded over time through a series of actions conducted under the standards provisions without any city review. This defeats the whole purpose of the e-zone.

*Id.* The inclusion of an extensive list of exemptions from review or mitigation within environmental zones reflects that in fact the City may have, in some instances, gone too far in accommodating the needs of industry. Nonetheless, Audubon Society and Riverkeeper were willing to support adoption of the River Plan, recognizing that compromise and concessions are part of any complex plan.

*iii. Flexible Mitigation and Restoration Site Requirements*

Under the previous Greenway Plan, industrial property owners were required to compensate for impacts to natural resources on their own property. This resulted in situations that industrial property owners argued deprived them of use of a limited land base and which also resulted in sub-standard habitat restoration. R. at 42–43. The River Plan creates flexibility

for property owners to meet natural resource requirements offsite in order to address this concern. It accomplishes this objective via three mechanisms:

First, a property owner may mitigate offsite for natural resource impacts within environmental overlay zones on their property in situations where mitigating onsite is not practicable. R. at 407. Second, a property owner may conduct required vegetation enhancement activities either on or off site at their own discretion regardless of practicability. R. at 199. Third, the River Plan allows property owners to meet "balanced cut and fill" requirements to compensate for impacts to FEMA designated 100-year floodplains either onsite or offsite. R. at 43. In each of these cases, mitigation offsite may be achieved by paying a "fee-in-lieu" into the City's River Restoration Program (or to a mitigation bank once banks are established in the North Reach), which is responsible for acquiring sites in North Reach and carrying out resource restoration activities.

Both Audubon Society and Riverkeeper as well as the National Marine Fisheries Service (NMFS), which implements the Endangered Species Act for listed salmonid species found in the North Reach, expressed concerns that in fact mitigation and restoration fees may have been set too low to compensate for impacts to natural resources. R. at 4178; 4186–87. NMFS wrote:

It is of concern to us that the mitigation and restoration fees have been substantially modified since the end of the public process. It is important to note that many trade-offs were made during the development of this plan and that the changes being proposed have implications for the efficacy of the plan as a whole. While the North Reach Plan is laudable in its aspirations, the large gap in funding mechanisms for ecological restoration appears to have grown significantly larger as the North Reach Plan has been modified. As currently proposed, we are not convinced that the natural resource mitigation program in the Lower Willamette River will support the intended ecological improvements. Instead it may simply slow the rate of degradation. We encourage the City to revisit the funding mechanisms to ensure that the laudable aspirations contained in the North Reach Plan can be realized.

R. at 4186–87.

Despite these concerns, the Portland City Council adopted and in fact further reduced mitigation and restoration fees before final adoption. By providing property owners with significantly greater on-site/off-site flexibility to conduct mitigation, restoration and balanced cut and fill obligations than were provided under the more rigid Greenway Plan, the City has demonstrated its commitment to balancing the unique needs of the working harbor with environmental objectives.

*iv. Standards for Certain Types of Development Activities*

In addition to significantly reducing the amount of river bank protected by environmental regulations, the River Plan also included a long list of standards for certain types of development activities within the remaining environmental overlay zones. Activities included under these standards do not have to either go through River Review if developers agree to meet pre-determined mitigation requirements to compensate for impacts. R. at 251. Activities included under River Plan standards include placement of certain types of bulkheads, cargo conveyers, stormwater outfalls, rail right-of-ways, and utility lines. R. at 251–59. As in the case of the exemptions, Audubon Society and Riverkeeper unsuccessfully argued that the list of standards went too far in compromising the integrity of environmental overlay areas and that mitigation under the standards was insufficient to compensate for environmental impacts. R. at 2337. The inclusion of an extensive list of standards in the River Plan over conservation organization objections again demonstrates that the city did not disproportionately weight conservation concerns over economic development.

*v. No Preclusion from Development Where Activity Causes Unavoidable Environmental Harm*

E-overlay zones do not preclude development, even where there are no practicable alternatives to avoid adversely affecting natural resources. R. at 245. Industry arguments that

the river e-overlay precludes owners' property from being developable are false. Instead, the River Plan merely requires that property owners mitigate for impacts when impacts cannot be avoided. In the commentary on this River Plan amendment, the City stated that the zone "will function more like the environmental conservation zone than the environmental protection zone." R. at 425. Furthermore, the plan does not apply the e-overlay to portions of riverbank that are currently in river-dependent industrial use or that are hardened and without vegetation.

The River Plan also embodies the City's judgment that economic development and environmental protection can even work together. For example, one guidance encouraged developers to "transform redevelopment and infrastructure projects into opportunities to improve watershed conditions through creative building and site design and use of innovative materials and techniques. R. at 52. Another guidance authorizes natural resource improvements enabled by "active, economically viable industrial uses." *Id.* These elements of the River Plan indicate that the City attempted as much as possible to provide for ecological and economic concerns together, and it does not show any intent to regulate industrial use of North Reach to protect the environment in a manner that is prejudicial to industry interests.

The foregoing River Plan regulations benefitting industry, when compared with the regulations benefitting environmental concerns, make it clear that the City adequately balanced industrial, commercial, and economic interests with the concerns about preserving the unique and important North Reach natural resources.

2. The River Plan Gives Appropriate Weight to Environmental Goals in Light of the Ecological Importance of the Willamette River.

The River Plan was developed to address changed conditions, including both new natural resource protection issues and the changing needs of industry. In formulating the Plan, the City

reasonably balanced the ecological importance of the North Reach against the commercial and industrial interests of entities such as Petitioners.

In focusing exclusively on how they believe the River Plan adversely impacts industrial uses in the affected area, Petitioners lose sight of the unique—and most challenging—aspect of crafting a set of comprehensive zoning requirements for the North Reach, namely that this area is vital for both the economic and environmental well-being of the City of Portland. When faced with charting the future of an area containing both significant economic and ecological resources, state law does not allow a decision-maker to choose one set of uses over another. Instead, in this case the City had a legal obligation to craft a balance between promoting industrial and economic uses and protecting key natural resources. Despite the many arguments advanced by Petitioners, the bulk of their concerns boils down to a desire for the City’s balance between competing values in the North Reach to tilt more in favor of industry. However, Goals 9, 5, and 15 apply to the North Reach, and the City appropriately designed a regulatory scheme that reasonably takes into account these sometimes conflicting requirements in providing for industrial development and growth while protecting and providing for restoration of vitally important natural resource values. *See Dept. of Land Conservation and Development v. Yamhill County*, 99 Ore App. 441, 447-48, 783 P.2d 16, 19 (1989) (a decision-maker cannot “allow a frontal violation of Goal 5 for the purpose of giving preference to Goal 9.”).

The record in this case unquestionably contains substantial evidence to support the City’s judgment as to the appropriate balance between economic development and environmental protection, as embodied in the River Plan. As noted in the Statement of Material Facts above, the entire Willamette River, including its last twelve miles in the North Reach, is an essential aquatic ecosystem that cannot be divided up into river miles that are heavily protected and other miles

that are almost completely sacrificed to exclusive industrial use. As also reflected in the record and summarized above, water quality and habitat availability in the river has been severely degraded by years of development and other human activities without attention to their environmental consequences. Ongoing efforts to restore the Willamette's natural resources, including the City's specific goal of recovering salmon and steelhead listed pursuant to the ESA, will succeed only by efforts to protect and improve the environment along the Willamette's entire length. Salmon in particular can use the Willamette as a crucial migration corridor only if every mile is in fact inhabitable by these fish. Indeed, the North Reach is arguably the most important habitat of all for the Willamette's salmon runs – if these fish are unable to safely pass through this threshold stretch of their critical habitat as both juveniles and adults, the river's salmon will become extinct. However, Petitioners in their briefs completely fail to assess the effects on the Willamette's natural resources that would stem from their desired emphasis on industrial uses in the North Reach.

Finally, the City recognized that Portland's "economic and environmental futures are inextricably linked . . . ." R. at 16, 51. In light of this recognition, the City understood that it had responsibilities towards both industry and the river's many natural resources when crafting zoning regulations in the North Reach, and the River Plan accordingly struck an appropriate balance between those equally protected interests under the applicable Statewide planning goals.

In sum, the record in this case provides substantial evidence that the natural resources in the North Reach need protection, for the sake of ecological *and* economic concerns. Petitioners may wish that the City adopted a course of action between promoting industry and protecting the environment that is more favorable to their interests, but the record contains ample evidence that

the City's chosen course, as reflected in the River Plan, represents a reasonable balance among applicable state land use planning goals, and should thus be upheld by the Board.

3. The City's Decision is Reasonable Considering Potential Liability under Other Local and Federal Legal Obligations.

While the River Plan incorporates a significant number benefits for industry and gives equal weight to both industrial uses and natural resource protection, the City also had to be aware of other potential legal liabilities. In addition to the Statewide Planning Goals, the City must comply with all other local, state and federal regulations. R. at 27. In particular, the City must be sure that it does not violate the Clean Water Act or the Endangered Species Act. Failure to do so may leave it vulnerable to enforcement by federal regulators or third-party lawsuits by environmental advocates. The ESA's prohibition against "take" of protected species applies to municipalities. *See* 16 U.S.C. §1538(a)(1)(B) and (G) (prohibiting take); §1532(12) (defining "person" to include municipalities); 50 C.F.R. § 17.3 (defining "take" to include significant habitat modification). Federal court decisions interpreting the ESA's take prohibition have held that regulators are liable for take of listed species resulting from activities they permit, even if another entity carries out the activity that actually kills or injures protected species. *See Strahan v. Coxe*, 127 F. 3d 155, 163–64 (1<sup>st</sup> Cir. 1997) (state liable for take of protected whales due to licensing lobster fishers, who were likely to cause death or injury to whales while fishing in accord with their licenses); *Pacific Rivers Council v. Brown*, 2002 WL 32356431 (D. Ore. 2002) (environmental organization could state a "take" claim against the Oregon State Forester for enacting regulations authorizing logging activities that allegedly killed or injured protected salmon). Accordingly, in modifying and enacting zoning ordinances and natural resources protection standards within and adjacent to critical habitat for protected salmon and steelhead, the City had to be careful to avoid authorizing activities that could modify this habitat in a

manner that resulted in death or injury of listed salmonids. Failure to do so could subject the City to enforcement action by NMFS, or even a citizen suit under the ESA from an interested third party. Petitioners fail to assess in their briefs whether decisions in the River Plan more conducive to industrial interests would be consistent with the City's obligation under federal law to avoid take of salmon and steelhead.

Moreover, other City policies direct the City to advance protection of salmon and other natural resources. As noted above in the factual summary, the City has decided as a matter of policy to do more than simply avoid take of protected salmonids and actually formulate City policies in a manner that advances their recovery. Additionally, Metro's Urban Growth Management Functional Plan (UGMFP) provides tools for meeting the long-range growth management plan, and the River Plan must comply with the UGMFP regulations related to water quality (Title 3), fish and wildlife habitat conservation (Title 13), as well as industry and employment (Title 4). R. at 27–28. The City's adoption of the River Plan is also reasonable in light of these policy goals.

### **CONCLUSION**

The City of Portland has spent nearly a decade engaging with interested citizens and stakeholders, including Petitioners, in a variety of processes aimed at crafting a plan for the North Reach that balances many interests, including the need for promoting industrial uses while protecting a crucial stretch of the Willamette River. The record in this case is replete with information on the environmental and ecological importance of the North Reach, and the need to protect and restore its few remaining functional natural attributes. Applicable law mandates that the City balance all applicable land use goals in creating its zoning and resource protection standards. In this case, Petitioners' complaints mostly boil down to a desire that the City used its

discretion and expertise to strike a balance more favorable to industrial interests. However, the record provides substantial evidence that the City's decision to adopt the River Plan was reasonable.

For the foregoing reasons, the Audubon Society of Portland and Willamette Riverkeeper respectfully request that the Board affirm the City's decision in devising and adopting the River Plan/North Reach.

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Respectfully submitted,

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Daniel J. Rohlf, OSB No. 990069  
Pacific Environmental Advocacy Center  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219  
(503) 786-6707  
(503) 768-6642(fax)  
rohlf@lclark.edu