

June 2018

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### Recommended Citation

Edward J. Sullivan, *Protecting Oregon's Estuaries*, 23 Ocean & Coastal L.J. 373 (2018).

Available at: <https://digitalcommons.mainerlaw.maine.edu/oclj/vol23/iss2/5>

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## PROTECTING OREGON'S ESTUARIES

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### ABSTRACT

Estuaries are an invaluable part of a coastal ecosystem where plant and animal species indigenous to fresh and salt waters mix. Since 1971, the United States government has encouraged states to study and protect coastal resources. Oregon is one of those states and has almost 600 kilometers of coast, an area with only about 6% of the state's population. Oregon also has a statewide planning program, which establishes binding policies, called "goals," for local governments (cities and counties) to carry out. The constellation of available federal funds, a state and local desire to protect coastal resources, and a mechanism to do so resulted in a complex, though effective, program to assure that estuaries, shorelands, beaches and dunes and ocean resources were subject to state policy making, planning and regulation.

The paper reviews the history and content of Goal 16, Estuarine Resources. Indeed, given the general lack of resources available to local governments on the Oregon Coast and the general antipathy to regulation, it was remarkable that these smaller local governments agreed to undertake this complex project. The coastal goals, including Goal 16, were adopted in 1977, setting off a 10-year process of draft inventories, plans and regulations which culminated in 1986 when the last of the 29 cities and 7 counties were "acknowledged" as complying with all the goals.

Under a broad goal direction to protect estuarine resources and allow development only when appropriate, Oregon has classified 22 "major" estuaries, which were further classified to be "natural," "conservation" or "development" (each classification allowing a greater degree of human activity) and "minor" estuaries, which were generally to be left undisturbed. Each of the estuaries were further classified into "management units" to allow activities that did not exceed the capacity of its overall classification. Local governments then adopted plans and implementing regulations to assure that land uses were consistent with these classifications and the policies of the goal.

In addition to these policies, the goal contains a number of specific directions for land use, including avoidance of dredging, filling and fill material disposal in estuaries if other alternatives are available, requiring impact analyses in local plans and permitting, planning and permit coordination with applicable federal, state and local public agencies, avoidance of duplicate regulation and the like.

The Oregon story may be helpful to others facing similar planning and regulatory complexities.

## I. Introduction

Estuaries are an important part of the natural ecosystem. In addition to providing economic, cultural, and ecological benefits, estuaries provide for a natural water filtration system and habitat protection.<sup>1</sup> They provide habitat for fish and invertebrate species of biological and economic importance.<sup>2</sup> They provide habitat for the organisms that filter

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The author is indebted to many of those who participated in the formulation and application of the estuary policies of Oregon including former Commissioners of the Oregon Land Conservation and Development Commission (LCDC) Steve Schell and Anne Squier, present and former staff of the Oregon Department of Land Conservation and Development (DLCD) Bob Bailey, Bob Cortright, Matt Spangler, and Dick Benner (also a former DLCD Director and environmental advocate) former county planning directors Vic Affolter, Matt Spangler and Bill Grile, Cameron La Follette of the Oregon Coast Alliance, a coastal environmental advocacy organization and Bill Kabeiseman, my former colleague. Their insights and recollections were invaluable for this article.

<sup>1</sup> The benefits of estuaries have been long realized. The federal government in particular has explicitly recognized their value:

Habitats associated with estuaries, such as salt marshes and mangrove forests, act like enormous filters. As water flows through a salt marsh, marsh grasses and peat (a spongy matrix of live roots, decomposing organic material, and soil) filter pollutants such as herbicides, pesticides, and heavy metals out of the water, as well as excess sediments and nutrients (USEPA, 1993).

\* \* \*

Estuaries and their surrounding wetlands are also buffer zones. They stabilize shorelines and protect coastal areas, inland habitats and human communities from floods and storm surges from hurricanes. When flooding does occur, estuaries often act like huge sponges, soaking up the excess water. Estuarine habitats also protect streams, river channels and coastal shores from excessive erosion caused by wind, water and ice.

Unlike economic services, ecosystem services are difficult to put a value on, but we cannot do without them, and thus, they are essentially priceless.

NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, *Estuaries: Why are estuaries important?* Ecosystem Services, [https://oceanservice.noaa.gov/education/kits/estuaries/estuaries03\\_ecosystem.html](https://oceanservice.noaa.gov/education/kits/estuaries/estuaries03_ecosystem.html) [<https://perma.cc/T5QY-BFD7>]. See also Charles Simenstad, U.S. DEP'T OF THE INTERIOR, *The Ecology of Estuarine Channels of the Pacific Northwest Coast: A Community Profile* (1983).

<sup>2</sup> Brent B. Hughes et al., *Nursery Functions of U.S. West Coast Estuaries: The State of Knowledge for Juveniles of Focal Invertebrate and Fish Species* 2-3 (2014) [http://research.pbsci.ucsc.edu/eeb/bbhughes/wp-content/uploads/2014/12/Hughes\\_etal\\_2014\\_NurseryFunction\\_TNC.pdf](http://research.pbsci.ucsc.edu/eeb/bbhughes/wp-content/uploads/2014/12/Hughes_etal_2014_NurseryFunction_TNC.pdf) [<https://perma.cc/W48L-FS4E>].

sediment and pollutants from rivers and streams before they reach the ocean,<sup>3</sup> and their wetlands store floodwaters and maintain surface water flow during dry periods.<sup>4</sup>

Oregon, a state in the Pacific Northwest Region of the United States, has a unique combination of resources in an extensive coastal area<sup>5</sup> and significant estuarine resources;<sup>6</sup> however, the Oregon coastal area is not well populated and thus has less legislative representation compared to other centers of population in the state.<sup>7</sup>

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<sup>3</sup> Nat'l Geographic Soc'y, *Estuary* <https://www.nationalgeographic.org/encyclopedia/estuary/> [https://perma.cc/A7S4-35PX].

<sup>4</sup> U.S. ENVTL. PROT. AGENCY, *Why are Wetlands Important?* <https://www.epa.gov/wetlands/why-are-wetlands-important> [https://perma.cc/G4SV-R8C9].

<sup>5</sup> Officially, the Oregon coastline extends for 363 miles. *Oregon Coast Highway 101 Mile by Mile Travel Guide* <http://www.oregoncoasttravel.net> [https://perma.cc/UUG2-YBZ7]. However, driving along that coast from Astoria at the northernmost point to Brookings Harbor at the California border would take thirteen hours, as the coastal roads involve 475 miles of travel. *Driving the Entire Oregon Coast*, <https://theoregoncoast.info/Distance/North-to-South.html> [https://perma.cc/8HJ4-5392]. The “coastal zone” for the purposes of this article extends from the summit of the Coast Range Mountains to the outer edge of the United States territorial sea. *Oregon Coastal Management Program*, [http://www.oregon.gov/LCD/OCMP/pages/cstzone\\_intro.aspx](http://www.oregon.gov/LCD/OCMP/pages/cstzone_intro.aspx) [https://perma.cc/HA52-VSDM]. See also *Oregon Territorial Sea Plan* [http://www.oregon.gov/LCD/OCMP/docs/ocean/otsp\\_1-c.pdf](http://www.oregon.gov/LCD/OCMP/docs/ocean/otsp_1-c.pdf) [https://perma.cc/564B-4KJB].

<sup>6</sup> For planning law purposes, Oregon defines “estuary” as follows:

a body of water semi-enclosed by land, connected with the open ocean, and within which salt water is usually diluted by freshwater derived from land. The estuary includes estuarine water, tidelands, tidal marshes, and submerged lands. Estuaries extend upstream to the head of tidewater, except for the Columbia River estuary, which, by definition, is considered to extend to the western edge of Puget Island.

OR. ADMIN. R. 660-017-0005(6) (2018).

As noted below, Oregon has twenty-two major estuaries and multiple minor ones. See OR. ADMIN. R. 660-017-0015, -0020 (2018). The listing, mapping and classification of those estuaries at *Estuaries, Oregon Coastal Management Program* [http://www.oregon.gov/LCD/OCMP/pages/est\\_intro.aspx](http://www.oregon.gov/LCD/OCMP/pages/est_intro.aspx) [https://perma.cc/B7NX-PH74].

<sup>7</sup> As this author noted recently regarding the Oregon Coast:

The Oregon Coast extends for 363 miles (584 km.), from the Mouth of the Columbia River to the California state line, and includes twenty-nine cities and parts of seven counties. The upland portion of the Oregon Coastal Zone (generally the area between the peak of the Coast Range and the Pacific Ocean) has about 225,000 people (about 6.5% of the state’s population) on 7800 square miles (2,020,191 hectares) of land. Since 1971, this area, which contains places of ecological and

Moreover, the state's estuarine resources have become endangered through loss or neglect:

Between about 1870 and 1970, approximately 50,000 acres or 68% of the original tidal wetland area in Oregon estuaries was lost to diking, filling, and other human actions.”<sup>8</sup>

Federal interest in estuarine protection reached heightened levels with the passage in 1972 of the Coastal Zone Management Act (CZMA). This act began a program of funding and other support to coastal states, a certification of state coastal programs that met federal standards, and a requirement of consistency of many federal actions affecting a state's coastal zone be consistent with those state-certified programs.<sup>9</sup> These incentives induced states to take federal funds for coastal resource research and protection

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touristic importance, has been treated differently than the remainder of the state to protect its natural beauty . . . .

Edward J. Sullivan, *Shorelands Protection in Oregon*, 1-2 (Dec. 19, 2017) (unpublished manuscript) (on file with author) (hereinafter “Shorelands Protection”). Moreover, the Oregon Coastal Economy has shifted in recent years:

The coastal economy is not . . . heavily dependent on natural resource extraction, either directly or through processing of raw materials such as fish and timber. Instead . . . the economy is much more dependent on aesthetic beauty and intactness of the natural environment for nature-based tourism and high quality of life that draws retirees and entrepreneurs.

Paula Swedeen et al., *An Ecological Economics Approach to Understanding Oregon's Coastal Economy and Environment*, 2-3 <http://coastrange.org/CoastalEconomicsReport.pdf> [<https://perma.cc/U9JT-7LPR>]. For additional information on the Oregon Coast, see *Oregon Coastal Management Program* [http://www.oregon.gov/LCD/OCMP/pages/cstzone\\_intro.aspx](http://www.oregon.gov/LCD/OCMP/pages/cstzone_intro.aspx) [<https://perma.cc/V6L5-FVEF>].

<sup>8</sup> Or. Progress Bd., *State of the Environment Report 2000* <http://oregonstate.edu/dept/eoarc/sites/default/files/publication/490.pdf> [<https://perma.cc/A6XF-4TRW>].

<sup>9</sup> For a summary of the history of the federal program and the provisions of the CZMA, see *Coastal Zone Management Act*, OFFICE OF COASTAL MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN. <https://coast.noaa.gov/czm/act/> [<https://perma.cc/M2H5-N37H>]; OR. DEP'T OF LAND CONSERVATION & DEV., *Oregon Coastal Management Program* (1988) <https://www.gpo.gov/fdsys/pkg/CZIC-ht393-o7-o83-1987/html/CZIC-ht393-o7-o83-1987.htm> [<https://perma.cc/432K-GSBJ>]. Because the adopted Oregon Coastal Zone Plan becomes a part of the adopted national plan under the Coastal Zone Management Act, the state has leverage in affecting many federal decisions regarding coastal land use. For a discussion of an early consistency case in Oregon, see *Sunset Cove – “Federal Consistency” at Work*, 1000 FRIENDS OF OR. NEWSLETTER, December, 1978.

programs, as well as creating the unique situation of binding federal agencies to the requirements of state coastal management programs.

In 1971, while the issue of the federal role in coastal conservation and regulation was before Congress, the Oregon Legislature created the Oregon Coastal Conservation and Development Commission (OCC&DC), to inventory coastal resources, and prepare and plan for the conservation and development in coastal areas for the 1975 legislature.<sup>10</sup> Funds from the newly created National Oceanic and Atmospheric Administration facilitated these efforts. The work of the Commission was controversial because, in making its recommendations, it had to navigate between strongly held development and conservation interests as well as strong political views about state versus local control of coastal resources.<sup>11</sup>

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<sup>10</sup> The OCC&DC was established by 1971 Or. Laws Ch. 608, codified as OR. REV. STAT. §§ 191.110- .180 (1973). Section 3 of that legislation required the Commission to prepare a report for the Governor and Legislature by January 17, 1975 and a “proposed comprehensive plan for the preservation and development of the natural resources of the coastal zone.” When, as discussed herein, SB 100 provided statewide planning in 1973, the new Land Conservation and Development Commission (LCDC) was authorized to delegate functions to the OCC&DC. *Former* OR. REV. STAT. § 197.055 (1975). In 1975, the OCC&DC filed its *Final Report – March 1975* (see [http://www.oregon.gov/LCD/OCMP/docs/OCCDC\\_Intro,I,II,III-A,B,C.pdf](http://www.oregon.gov/LCD/OCMP/docs/OCCDC_Intro,I,II,III-A,B,C.pdf) [<https://perma.cc/VC4V-95RE>]) and a set of Regional Land Use Planning Goals and Guidelines for the Coastal Zone (April, 1975) (on file with the author) were the basis for what would become the Coastal Goals. Its planning functions were then taken over by LCDC. The statutes creating OCC&DC were then repealed. 1977 Or. Laws Ch. 664.

<sup>11</sup> Steve Schell, an initial LCDC commissioner, recalls the work of the OCC&DC:

Its work product was the result of compromises of significance. Wilbur TERNYIK, a Siuslaw Indian and Port of Siuslaw commissioner in Florence, was the chair of the OCC&DC. Jim Ross, from Coos County, was the OCC&DC’s executive director. There were six city representatives, six county representatives, six port commissioners, and six public members, one of whom was Jack Broome. The politicians formed the Oregon Coastal Zone Management Association, which still exists \* \* \*. In Florence at a hearing on the first round of proposed goals (which at that point did not include any specific coastal goals) LB Day was hung in effigy from a logging trailer perched on the bed of log truck, probably by the “vine maple savages” who were from Mapleton, dressed in animal skins with shillelaghs, and who signed in to testify.

See TERNYIK’s heritage was from the Clatsop, rather than the Siuslaw, tribe. *Wilbur E. TERNYIK Biography* <https://static1.squarespace.com/static/569c307ed8af100e850e7dc3/t/56b298ba27d4bd936c3a20ca/1454545083093/Wilbur+E.+Ternyik+Biography.pdf> [<https://perma.cc/HC2X-BHWR>].

However, other events overtook the work of OCC&DC. In 1973, the Oregon Legislature enacted SB 100, the state's enabling legislation for a comprehensive land use planning system. SB 100 provided for a state role in comprehensive planning and requiring that each local government (at that time cities and counties, the only general purpose local government entities) adopt binding comprehensive plans and land use regulations to meet standards ("goals") adopted by the newly-created state agency, the Land Conservation and Development Commission (LCDC).<sup>12</sup> These LCDC goals were similar to state agency rules and were themselves the subject of detailed administrative rules to carry out their broadly stated policies.

Ultimately, LCDC used the OCC & DC proposed stand-alone recommendations for coastal plans and land use regulations by folding them into generally applicable state expectations for land uses, though the OCC & DC recommendations applied only to one area of the state. In the end, out of the nineteen statewide planning goals adopted by LCDC, four of them were the "coastal goals."<sup>13</sup> The choice of using planning standards instead of individual impact reviews along the lines of federal environmental legislation, copied by many states, was a critical one. The planning approach selected required

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Personal Communication from Steve Schell (October 24, 2017).

For an understanding of the nature of this controversy, see Oregon Coastal Zone Management Association, *Interviews with Members of the Oregon Coastal Conservation and Development Commission 1971-75* at [http://www.oczma.org/pdfs/OCC\\_DC%20Final%20Report.4-04.pdf](http://www.oczma.org/pdfs/OCC_DC%20Final%20Report.4-04.pdf).

<sup>12</sup> The new legislation was enacted by 1974 Or. Laws Ch. 190. For a fuller description of the Oregon land use system, see generally Edward Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 John Marshall L. Rev. 357 (2012) (hereinafter *Quiet Revolution*).

<sup>13</sup> OR. ADMIN. R. 660-015-0010(1) and (2) (2017). According to participants, Ted LaRoe, on loan from the federal Office of Coastal Zone Management, did most of the writing of the coastal goals and "crafted and refined the broad recommendations developed in by OCCDC and initial drafts by DLCD into the framework and detail that still guides coastal planning today." **Personal communication from Bob Cortright (Oct. 21, 2017).**

public officials to identify areas that would be conserved (or protected) and to provide appropriate opportunities for development on a comprehensive, rather than reviews on a project-by-project basis. While planned development is not free from all examination, it does tend to proceed comparatively easily, while resources planned for conservation tend to remain untouched by development.

The coastal goals were similar in their objective of conserving coastal resources and provided for development consistent with that conservation objective.<sup>14</sup> These goals provided, *inter alia*:

- Goal 16: Estuarine Resources -- To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and To [sic] protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries.<sup>15</sup>
- Goal 17: Coastal Shorelands -- To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and to reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands.<sup>16</sup>
- Goal 18: Beaches and Dunes -- To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and

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<sup>14</sup> The language of the coastal goals tracks fairly well with the stated congressional purposes of the CZMA, found at 16 U.S.C. § 1452(1) (“to preserve, protect, develop, and where possible, to restore or enhance the resources of the nation’s coastal zone.”).

<sup>15</sup> OR. ADMIN. R. 660-015-0010(1) (2017). Goals 16 through 18 are somewhat unique in that they direct protection of existing resources, but also direct their restoration. *Denison v. Douglas County*, 789 P2d 1388, 1391 (Or. App. 1990).

<sup>16</sup> OR. ADMIN. R. 660-015-0010(2) (2017). Under the LCDC definitions, coastal shorelands include those areas immediately adjacent to the ocean, all estuaries and associated wetlands, and all coastal lakes. OR. ADMIN. R. 660-015-0000 (2017). That broader definition includes estuarine areas.



dune areas; and to reduce the hazard to human life and property from natural or man-induced actions associated with these areas.<sup>17</sup>

- Goal 19: Ocean Resources -- To conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits to future generations.<sup>18</sup>

These coastal goals, as amended, contain more specific requirements than most of the other statewide planning goals and would become the standards for planning and land use regulation within the coastal zone of the state. Three of them (16, 17, and 18) were together drafted and must be seen as a unified set of policies. While estuarine areas are unique, they may include beaches and dunes (covered by Goal 18) and usually include shorelands (covered by Goal 17). Thus, the overlapping requirements of these other related goals must be included in any planning or development analysis.

## II. Public Proprietary Interests and Regulation of Coastal Resources

As with all states, Congress admitted Oregon into the Union in 1859 on an “equal footing”<sup>19</sup> with the other states and provided, *inter alia*:

That the said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever

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<sup>17</sup> OR. ADMIN. R. 660-015-0010(3) (2017).

<sup>18</sup> OR. ADMIN. R. 660-015-0010(4) (2017). Goal 19 was never applied to local governments and was substantially revised in 2000.

<sup>19</sup> The “equal footing” language has been interpreted by the United States Supreme Court to provide for transfer of federal property interests in navigable waterways within states (because the original states had possessed such title), and to require application of state law following admission to the Union, as opposed to federal common law, in the adjudication of title to submerged and submersible lands. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977). The Oregon Supreme Court, on remand, then adjudicated the matter following Oregon property law. *State ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 582 P2d 1352, 1357 (Or. 1977). Even if title may not reside in a state under the “equal footing” doctrine (for example if the river or stream not be navigable), the state may still take action under its public trust responsibilities to assure protection of surface waters. *PPL Montana v. Montana*, 565 U.S. 576, 604 (2012).

free, as well as to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.<sup>20</sup>

Thus, Oregon had ownership interests in submerged and submersible lands of navigable waterways within the state (rivers, lakes, other navigable waterways and the territorial sea).<sup>21</sup>

In addition to this property interest in submerged and submersible lands in navigable rivers and coastal areas, Oregon has asserted the British common law doctrine of custom to claim dry sand areas along its coast.<sup>22</sup> The state's assertion has a unique

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<sup>20</sup> Oregon Admission Act, 11 Stat. 383, [https://www.oregonlegislature.gov/bills\\_laws/Pages/OreConstAdmission.aspx](https://www.oregonlegislature.gov/bills_laws/Pages/OreConstAdmission.aspx) [<https://perma.cc/H4M7-WPRZ>].

<sup>21</sup> The State, through its Division of State Lands, asserts ownership of, and manages, submerged and submersible lands within its boundaries:

The people of Oregon are the owners of the submerged and submersible land ("beds and banks") underlying all navigable and tidally influenced waterways. In most cases, this ownership extends to the line of ordinary high water or high tide, but ownership can become mixed, even along the same waterway.

The Department of State Lands is responsible for management of publicly owned submerged and submersible land. The public has rights to use the beds and banks of navigable waterways for any legal activity, such as boating, fishing and swimming, including pulling your canoe or kayak onto the bank.

Or. Div. of State Lands, Use of State-Owned Waterways <http://www.oregon.gov/dsl/WW/Pages/Waterways.aspx> [<https://perma.cc/4G9G-SBLL>] (last visited 05/11/2018).

According to a 2005 Oregon Attorney General Opinion cited by the Oregon State Land Board, which manages these state property interests:

if the waterway meets the above criteria, the public has the right to use the submerged and submersible land below the line of ordinary high water for water-dependent uses (such as swimming, boating and fishing), and "uses incidental to a water-dependent use such as camping when travelling a long distance and walking while fishing." In cases of emergency or if it is necessary to travel around a barrier, the public may temporarily go above the line of ordinary high water.

*Id.*

<sup>22</sup> *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969). The Oregon Division of State Lands has been given public trust responsibilities over non-federal public lands in the state. Its website explains:

At statehood, the federal government granted Oregon 3.4 million acres – about 6 percent – of the new state's land to finance public education. Though only about 1/5 of the original acreage

provenance,<sup>23</sup> beginning in 1913 when the Oregon Legislature declared these dry sands to be a public highway, and thus owned and regulated by the state.<sup>24</sup> In 1967, the Legislature bolstered its claim in the passage of the “Oregon Beach Bill”<sup>25</sup> which, *inter alia*, asserts state ownership of the “Ocean Shore.”<sup>26</sup>

- (1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore legally existing over the ocean shore of the state from the Columbia River on the north to the Oregon-California line on the south so that the public may have the free and uninterrupted use thereof.
- (2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use has been legally sufficient to create rights or easements in the

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remains, DSL continues to manage land and other resources dedicated to the Common School Fund for K-12 education. The Land Board is trustee of the fund.

About the Agency, <http://www.oregon.gov/dsl/About/Pages/AboutAgency.aspx>. [<https://perma.cc/5LE7-VJM8>] (last visited 05/11/2018). It was in this capacity that the state asserted ownership of the dry sand areas of the coast. However, that assertion of interest is not without controversy. *See Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) *cert. denied*, 510 US 1207 (1994). The extent to which the public trust doctrine may be affected by statutory law is complicated, with the Oregon Supreme Court interpreting flexibility in application of the doctrine through legislative action. *Morse v Div.of State Lands*, 590 P2d 709, 713 (Or. 1979).

<sup>23</sup> *See Shorelands Protection*, *supra* note 7. For a brief history of Oregon’s involvement with coastal resource protection and regulation, *see* JAMES F. ROSS, OREGON COASTAL MANAGEMENT PROGRAM 2-3 (1987) at <https://www.gpo.gov/fdsys/pkg/CZIC-ht393-o7-o83-1987/html/CZIC-ht393-o7-o83-1987.htm> [<https://perma.cc/KG92-DQET>].

<sup>24</sup> *General Laws of Oregon 1913*, ch. 47. In a 1947 revision to the law, the legislature declared ownership of the beaches to be “vested” in the state. 1947 Or. Laws Ch. 493.

<sup>25</sup> 1967 HB 1601.

<sup>26</sup> “Ocean shore” means the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, whichever is farther inland. “Ocean shore” does not include an estuary as defined in ORS 196.800. OR. REV. STAT. 390.605(2) (1999). While the state owns and manages estuaries, it also has a scheme to hold and manage these lands as other than a state recreation area.

public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.

(3) Accordingly, the Legislative Assembly hereby declares that all public rights or easements legally acquired in those lands described in subsection (2) of this section confirmed and declared vested exclusively in the State of Oregon and shall be held and administered as state recreation areas.

(4) The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore.<sup>27</sup>

The combination of those property interests provided by the federal government upon admission of Oregon to the Union in 1859, the interests acquired after that time under Oregon law, the successful assertion of ownership and regulatory powers over the dry sands areas of its beaches, and a long tradition of accepted planning and regulation of land use, have combined to give Oregon significant leverage in establishing and implementing binding policy in its estuaries.

### III. Oregon Estuarine Planning and Implementation Requirements

Goal 16, Estuarine Resources was summarized above;<sup>28</sup> however, that summary masks the detailed requirements of state policy. The goal sets out four steps to be taken

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<sup>27</sup> OR. REV. STAT. § 390.610 (1969).

<sup>28</sup> OR. ADMIN. R. 660-015-0010(1) (2017).

in planning for the future of this resource, *viz a viz*, inventory, classification, policy development and implementation.<sup>29</sup> Let us examine each.

- a. *Inventory Requirements*—The goal sets out an objective of a shared point of departure for assessment of estuarine resources:

Inventories shall be conducted to provide information necessary for designating estuary uses and policies. These inventories shall provide information on the nature, location, and extent of physical, biological, social, and economic resources in sufficient detail to establish a sound basis for estuarine management and to enable the identification of areas for preservation and areas of exceptional potential for development.<sup>30</sup>

The goal goes on to discuss public agency participation in the inventory process and the development of common standards:

State and federal agencies shall assist in the inventories of estuarine resources. The Department of Land Conservation and Development, with assistance from local government, state and federal agencies, shall establish common inventory standards and techniques, so that inventory data collected by different agencies or units of government, or data between estuaries, will be comparable.<sup>31</sup>

In response, the Department of Land Conservation and Development (DLCD) contracted with the Oregon Department of Fish and Wildlife (ODFW) to undertake the standards for evaluating data on the nature, location and extent of physical and biological resources.

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<sup>29</sup> OR. ADMIN. R. 660-015-0010(1) (2017).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* For an early example of the inventory of a significant estuary, see Columbia River Estuary Task Force, *Columbia River Estuary Inventory of Physical, Biological and Cultural Characteristics* (1978), <https://www.gpo.gov/fdsys/pkg/CZIC-gc860-c6-c6-1977/html/CZIC-gc860-c6-c6-1977.htm> [<https://perma.cc/2C4D-WGU7>].

A significant issue for estuarine planning, more often addressed generally in the Shorelands Goal (Goal 17) is the conflict between water-dependent and non water-dependent uses. Many estuarine landowners find it to their economic advantage to place certain non water-dependent uses e.g., hotels or residential development on or over estuaries. There is limited space for water-dependent uses and when they are displaced, there may be nowhere else for them.

However, no standards were provided for the social and economic resources, and so local government planners were “on their own” on these matters.<sup>32</sup> Because there were concrete, commonly accepted data on physical and biological characteristics of estuaries, this data is given more weight in subsequent actions affecting estuaries.<sup>33</sup>

- b. *Estuary Classification*—The determination of development limits is a critical step in estuarine planning. After inventories were completed, the goal sets a further step:

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<sup>32</sup> Oregon Department of Land Conservation and Development, *Assessment of Oregon’s Regulatory Framework for Managing Estuaries* (March, 2014), 11. In addition, the report notes:

In response to the “common inventory standard” directive of Goal 16, in 1978 DLCD contracted with the Oregon Department of Fish and Wildlife to conduct an estuary inventory project intended to assist local governments in completing the resource inventory requirements of Goal 16. The project was focused on assembling biological and physical data for Oregon’s major estuaries, and classifying and mapping estuarine habitats. This project produced an overall estuarine habitat classification system, a set of guidelines for conducting estuarine resource inventories, and a series of recommendations for research needs in Oregon estuaries. In addition, it produced a series of resource reports for individual estuaries which summarized existing resource inventory data, provided a habitat classification map for each estuary, and included general management recommendations for each identified estuarine subsystem. These reports became, and largely remain, the principal natural resource inventory source for local estuary management plans.

The report adds that the estuarine management program could be enhanced greatly if the data were digitalized. *Id.* at 21.

However, Matt Spangler, former Lincoln County Planning Director and presently a Senior Coastal Policy Analyst for DLCD says that the overall classification was based primarily on the level and types of existing alterations in each estuary rather than detailed resource inventory information.

Personal Communication with Matt Spangler (October 24, 2017).

Bob Cortright, a former DLCD staffer, agrees:

I think it is more accurate to say that classification reflected the extent of development in each estuary rather than detailed inventory information about each estuary. "Development estuaries" were those with jetties and established navigation channels. "Conservation estuaries" were those with some level of marine development, typically recreational marinas or aquaculture, and "natural estuaries" were those with little or no alteration for water-related development.

Personal Communication with Matt Spangler (October 21, 2017).

<sup>33</sup> *Id.* at 11.

To assure diversity among the estuaries of the State, by June 15, 1977, LCDC with the cooperation and participation of local governments, special districts, and state and federal agencies shall classify the Oregon estuaries to specify the most intensive level of development or alteration, which may be allowed to occur within each estuary. After completion for all estuaries of the inventories and initial planning efforts, including identification of needs and potential conflicts among needs and goals and upon request of any coastal jurisdiction, the Commission will review the overall Oregon Estuary Classification.<sup>34</sup>

This step has two parts, the classification of estuaries to determine the maximum levels of development for each of them and a review of the overall classification, both steps taken by LCDC. The classification process is set out in a binding administrative rule promulgated by LCDC adopted pursuant to Goal 16.<sup>35</sup> The classification system provided by the rule is broad in scope:

- (a) Specifies the most intensive level of development or alteration allowable within each estuary;
- (b) Directs the kinds of management units appropriate and allowable in each estuary;
- (c) Affects the extent of detail required and items inventoried for each estuary;
- (d) Affects the issuance of and conditions attached to permits by state and federal agencies;
- (e) Provides guidance for the dispersal of state and federal public works funds; and
- (f) Indirectly affects decisions concerning private investment in and around estuaries.<sup>36</sup>

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<sup>34</sup> OR. ADMIN. R. 660-015-000010(1) (2017).. The notion of state classification had been raised before adoption of the coastal goals in a report by the Oregon Student Public Interest Research Group and prepared by Richard P. Benner, *The Oregon Coast and the Oregon Coastal Conservation and Development Commission: Why Not Classify Estuaries?* (1973), [https://books.google.co.il/books/about/The\\_Oregon\\_Coast\\_and\\_the\\_Oregon\\_Coastal.html?id=nn8JRAAA\\_CAAJ&redir\\_esc=y](https://books.google.co.il/books/about/The_Oregon_Coast_and_the_Oregon_Coastal.html?id=nn8JRAAA_CAAJ&redir_esc=y) [<https://perma.cc/R7BP-HBGN>].

<sup>35</sup> OR. ADMIN. R. 660-017-0000 (2017).

<sup>36</sup> OR. ADMIN. R. 660-017-0000(2)(2017).

The rule contains two types of estuarine categories, based on whether the estuary is a major or minor water area and the intensity of development permitted<sup>37</sup> and prohibits development more intense than provided in the relevant classification.<sup>38</sup>

The major/minor classification appears to be based on the separation of twenty-two specific “major” estuarine areas of the state<sup>39</sup> from the remainder, designated as “minor.”<sup>40</sup> In turn, the major estuaries are further classified as to the level of development permitted within them:<sup>41</sup>

(1) Natural Estuaries<sup>42</sup> include Sand Lake, Salmon River, Elk River (Curry County), Sixes River, and Pistol River.

(2) Conservation Estuaries<sup>43</sup> include Necanicum River, Netarts Bay, Nestucca River, Siletz Bay, Alsea Bay, and Winchuck River.

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<sup>37</sup> OR. ADMIN. R. 660-017-0010 (2017).

<sup>38</sup> See OR. ADMIN. R. §660-017-0025 (2017) (provides in material part “No development or alteration shall be more intensive than that specified in the Estuarine resources goal as permissible uses for comparable management units”); OR. ADMIN. R. 660-017-0005(1) (2017) (defines alteration as “any man-caused change in the environment, including physical, topographic, hydraulic, biological, or other similar environmental changes, or changes which affect water quality”).

<sup>39</sup> See OR. ADMIN. R. 660-017-0015 (2017).

<sup>40</sup> See OR. ADMIN. R. 660-017-0020 (2017).

<sup>41</sup> OR. ADMIN. R. 660-017-0015 (2017) (The rule states that twenty-one of twenty-two major Oregon estuaries are classified; *contra* Personal Communication of Matt Spangler (Sep. 11, 2017) (however, the number adds up to twenty-two. “The difference is accounted to a delay in classifying the Nehalem Bay Estuary. When that estuary was classified, the drafters of the rule neglected to change the “twenty-one of twenty-two” language”).

<sup>42</sup> OR. ADMIN. R. 660-017-0010(1) (2017) (defining “Natural estuaries” as “Estuaries lacking maintained jetties or channels, and which are usually little developed for residential, commercial, or industrial uses. They may have altered shorelines, provided that these altered shorelines are not adjacent to an urban area. Shorelands around natural estuaries are generally used for agricultural, forest, recreation, and other rural uses”).

<sup>43</sup> OR. ADMIN. R. 660-017-0010(2) (2017) (defining “Conservation estuaries” as “Estuaries lacking maintained jetties or channels, but which are within or adjacent to urban areas which have altered shorelines adjacent to the estuary”).



(3) Shallow-draft Development Estuaries<sup>44</sup> include Tillamook Bay, Nehalem Bay, Depoe Bay, Siuslaw River, Umpqua River, Coquille River, Rogue River, and Chetco River.

(4) Deep-draft Development Estuaries<sup>45</sup> include Columbia River, Yaquina Bay, and Coos Bay.

As provided in the rule (but not the Goal),<sup>46</sup> there are the four possible classifications for major estuaries based on the maximum level of development activity permitted. These classifications are defined by rules – two of them, Natural and Conservation, emphasize little or no development at all,<sup>47</sup> while two others, Shallow Draft and Deep Draft, allow for increasing levels of development, including channel maintenance.<sup>48</sup> Minor estuaries are not classified by the rule, but are required to be

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<sup>44</sup> OR. ADMIN. R. 660-017-0010(3) (2017) (defining "Shallow-draft development estuaries" as "Estuaries with maintained jetties and a main channel (not entrance channel) maintained by dredging at 22 feet or less, except Nehalem Bay, which now has only authorized jetties and no authorized or maintained channel").

<sup>45</sup> OR. ADMIN. R. 660-017-0010(4) (2017) (defining "Deep-draft development estuaries" as "Estuaries with maintained jetties and a main channel maintained by dredging at deeper than 22 feet").

<sup>46</sup> See OR. REV. STAT. § 197.040(1)(c) (2017) (Under Oregon's land use system, administrative rules are more precise commands that are promulgated to implement the broader directions of the goals.

<sup>47</sup> See OR. ADMIN. R. 660-017-0010(1) (2) (defines "Natural estuaries" as "Estuaries lacking maintained jetties or channels, and which are usually little developed for residential, commercial, or industrial uses. They may have altered shorelines, provided that these altered shorelines are not adjacent to an urban area. Shorelands around natural estuaries are generally used for agricultural, forest, recreation, and other rural uses," and "Conservation estuaries" as "Estuaries lacking maintained jetties or channels, but which are within or adjacent to urban areas which have altered shorelines adjacent to the estuary").

<sup>48</sup> See OR. ADMIN. R. 6690-017-0010(3)(4) (2017) (In contrast to the relatively undisturbed nature of the natural and conservation estuaries, OR. ADM. R. §660-017-0010(3) and (4) define "Shallow-draft development estuaries" as "Estuaries with maintained jetties and a main channel (not entrance channel) maintained by dredging at 22 feet or less, except Nehalem Bay, which now has only authorized jetties and no authorized or maintained channel." And, "Deep-draft development estuaries" as "Estuaries with maintained jetties and a main channel maintained by dredging at deeper than 22 feet").

By contrast, the details of estuary planning - i.e. the designation of management units and preparation of detailed plans for each estuary - was a drawn out, often controversial, multi-year process, particularly for the development estuaries. The planning process for each of the larger development estuaries involved creation of a task force of local planners, city, county and port officials and state and federal resource agencies, to assess development needs and opportunities, and, reach agreement about management unit designations. In general, local interests wanted more areas made available for development, or with fewer restrictions, while resource agencies wanted areas designated as natural or conservation management units to protect resource values.

identified as either Natural or Conservation estuaries in the development of comprehensive plans by cities and counties.<sup>49</sup>

Once designated, the Goal 16 rule provides specific limitations on development activity within estuaries. As its designation infers, a “Natural” estuary is apparently intended to enhance natural uses with a minimum of development,<sup>50</sup> while a “Conservation estuary” allows certain development that does not require a major alteration of the estuary, including high-intensity recreational uses, some mineral extraction and dredging, and other development activities, but not including maintenance of jetties and channels.<sup>51</sup> On the other hand, the remaining development classifications

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Personal Communication with Bob Cortright (October 21, 2017).

<sup>49</sup> See OR. ADMIN. R. 660-017-0020 (2017)

<sup>50</sup> See OR. ADMIN. R. 660-017-0010(1) (2017) (The limited nature of the uses permitted by the Goal 16 rule bear out the narrow scope of “natural estuaries”); see OR. ADM. R. §660-017-0025(1)(a) (stating that “Natural estuaries shall be managed to preserve the natural resources and the dynamic natural processes. Those uses which would change, alter, or destroy the natural resources and natural processes are not permitted. Natural estuaries shall only be used for undeveloped, low intensity, water-dependent recreation; and navigation aids such as beacons and buoys; protection of habitat, nutrient, fish, wildlife, and aesthetic resources; passive restoration measures, and where consistent with the resource capabilities of the area and the purposes of maintaining natural estuaries, aquaculture; communication facilities; placement of low water bridges and active restoration measures. Existing man-made features may be retained, maintained, and protected where they occur in a natural estuary. Activities and uses, such as waste discharge and structural changes, are prohibited. Riprap is not an allowable use, except that it may be allowed to a very limited extent where necessary for erosion control to protect: (A) Uses existing as of October 7, 1977(B) Unique natural resource and historical and archeological values, or (C) Public facilities; and where consistent with the natural management unit description in Goal #16 (and as deemed appropriate by the permitting agency).”); OR. ADM. R. §660-017-0025(1)(b)(the rule further provides that natural estuaries may contain only natural management units).

<sup>51</sup> See Or. Admin. R. 660-017-0025(2) (2017) (Consistent with the description of “conservation estuaries” in OR. ADM. R. §660-017-0010(2) in note 43, *supra*, the rule allows a greater level of development activities than in natural estuaries stating that “Conservation estuaries shall be managed for long-term uses of renewable resources that do not require major alterations of the estuary. Permissible uses in conservation management units shall be those allowed in section (1) of this rule; active restoration measures; aquaculture; and communication facilities. Where consistent with resource capabilities of the management unit and the purposes of maintaining conservation management units, high-intensity water-dependent recreation; maintenance dredging of existing facilities; minor navigational improvements; mining and mineral extraction; water dependent uses requiring occupation of water surface area by means other than fill; bridge crossings; and riprap shall also be appropriate. Conservation estuaries may have shorelines within urban or developed areas. Dredged marinas and boat basins without jetties or channels are

allow increasingly intrusive human activity in estuaries. Both Shallow-Draft Development estuaries<sup>52</sup> and Deep-Draft Development estuaries<sup>53</sup> allow for various levels of commercial and industrial activities,<sup>54</sup> but provide for standards and limitations of those uses.<sup>55</sup>

In its “acknowledgment” of local comprehensive plans and land use regulations, i.e., certification that those locally adopted policies and implementing ordinances meet

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appropriate in conservation estuaries. Waste discharge meeting state and federal water quality standards would be acceptable. Maintained jetties and channels shall not be allowed. Conservation estuaries shall have both conservation and natural management units, as provided in the Estuarine Resource Goal”); *See* Personal Communication with Steve Schell (Oct. 24, 2017) (The place of jetties in estuary classifications remains controversial. Steve Schell, an original LCDC Commissioner, observes “I participated in the discussions on classification. I now think a crucial set of facts was ignored. The Corps of Engineers originally constructed and maintained the various jetties. This wasn’t always a happy event – as evidenced by the destruction of the Bayocean community and much of the Bayocean Spit itself by a breach caused by erosion resulting from the Corps building a single jetty, North Jetty, instead of two, one at each side of Tillamook Bay’s mouth. The single jetty destabilized wave patterns and led to massive erosion on Bayocean Spit to the south. When the Corps ran short of money or the public policy changed the Corps made decisions not to continue maintenance of the jetties. I don’t think the Corps decisions were integrated into the decisions as to conservation and natural estuaries”). Steve Schell (October 24, 2017).

<sup>52</sup> *See* Or. Admin. R. 660-017-0010(3) (2018) (These estuaries are described in note 44, *supra.*, and are characterized as areas of limited marine development with maintained jetties and a main channel).

<sup>53</sup> These estuaries have the most intensive level of development, which may include commercial port and water-related industrial uses. *See* note 45, *supra.*

<sup>54</sup> Some of those standards and limitations are set forth in the rule:

Both shallow and deep draft development estuaries shall be managed to provide for navigation and other identified needs for public, commercial, and industrial water-dependent uses consistent with overall Estuarine Resources Goal requirements. Where consistent with the development management unit requirements of the Estuarine Resources Goal, other appropriate uses include riprap and those uses listed as permissible uses in development management units in the Estuarine Resources Goal. Minor and major navigational improvements are allowed in both shallow-draft and deep-draft estuaries, consistent with the requirements of the Goal. However, in shallow-draft estuaries, extension or improvements in main channels shall not be designed to exceed 22 feet in depth. Information about the location, extent, and depth of channels and jetties including planned extensions, shall be developed during the local planning process and described in the comprehensive plan. *See* OR. Admin. R. 660-017-025(3)(a) (2018).

<sup>55</sup> As shown later, both the goal and acknowledged local plans and regulations supply additional limitations. In addition, OR. Admin. R. 660-017-025(3)(b) (2018) allows either of these estuaries to have a mixture of natural, conservation and development segments (or “management units”).

the statewide planning goals,<sup>56</sup> and its publication of major Oregon estuaries,<sup>57</sup> the State of Oregon has adopted specific binding policies for these land and water areas.

c. *Policy Development* – Once estuary classification has been accomplished on the basis of inventories, the local government must then adopt policies for conservation and development consistent with the goal and adopted estuary classifications within the various management units of the estuary.<sup>58</sup> While the goal requires that Natural and Conservation estuaries be uniformly treated as those classifications require, it is possible to have segments of the other two classified estuaries

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<sup>56</sup> OR. REV. STAT. 197.251 (2018) OR. Admin. R. 660-017-030 (2018) allows for additional classification changes, so long as diversity among estuaries is retained. Bob Bailey, a long-time plan reviewer for LCDC observes:

To me, the impressive thing is that, at the end of the day, every single estuary of the state's 22 estuaries is accounted for in local comp plans and ordinances that are in compliance with Goals 16 and 17.

Bob Bailey (September 17, 2017).

<sup>57</sup> See *Oregon Coastal Management Program*, Oregon.gov (Apr. 19, 2018), available at [http://www.oregon.gov/LCD/OCMP/pages/est\\_intro.aspx](http://www.oregon.gov/LCD/OCMP/pages/est_intro.aspx) [<https://perma.cc/6FSN-HWJK>].

<sup>58</sup> Matt Spangler, former Lincoln County Planning Director and presently Senior Coastal Policy Analyst for DLCD, sets out the paradigm for coastal planning:

There are really two distinct type of decisions in the estuary planning realm. Broadly speaking, those are planning decisions, or decisions that are made as a part of the formulation and adoption of the plan, and implementation decisions, perhaps better described as project review decisions. In general, planning decisions consist mostly of the basic spatial allocation decisions, meaning the identification of management unit boundaries and the assignment of designations to these units as either natural, conservation or development. These decisions are directed by the detailed framework of Goal 16 and typically have been made in a very public process with participation by various interests and agencies. The result is that the basic spatial foundation of Oregon's estuary plans are well vetted, framed by the structure of Goal 16 and informed by considerable expertise beyond the local staff level. One reason, in my opinion, that Oregon's estuary plans have been generally successful and quite durable over time is because of this focus on advance decision making. It should also be noted that the staff capacity of local governments during the initial phase of plan development was considerable, thanks to substantial financial assistance from the state. \*  
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Spangler further observes that these plans have in general changed very little since adoption, as funding (and thus staff expertise) has dwindled. Matt Spangler (August 18, 2017).

contain Natural or Conservation designations for individual subdivisions (or management units) of those estuaries.<sup>59</sup> The goal requires that management units be established with consideration of inventories, existing circumstances, conservation and certain costs and

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<sup>59</sup> See Note 55, *supra*. See also *Oregon Ocean – Coastal Management Plan Estuary Management Units for Columbia River Estuary Plan* (1987), available at <http://www.coastalatlantlas.net/metadata/EstuaryManagementUnitsforColumbiaRiverEstuaryPlan.htm> [<https://perma.cc/8E3Z-URQM>] (for an example of the classification of management units of a major estuary).

benefits<sup>60</sup> and provides “at a minimum” for the establishment of natural conservation, and development management units.<sup>61</sup>

The Goal is quite clear as to the direction of these policies that may be considered and adopted in local plans:

Comprehensive plans and activities for each estuary shall provide for appropriate uses (including preservation) with as much diversity as is consistent with the overall Oregon Estuary Classification, as well as with the biological economic, recreational, and aesthetic benefits of the estuary. Estuary plans and activities

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<sup>60</sup> The goal provides with respect to management units:

Diverse resources, values, and benefits shall be maintained by classifying the estuary into distinct water use management units. When classifying estuarine areas into management units, the following shall be considered in addition to the inventories:

1. Adjacent upland characteristics and existing land uses;
2. Compatibility with adjacent uses;
3. Energy costs and benefits; and
4. The extent to which the limited water surface area of the estuary shall be committed to different surface uses.

Within limits, therefore, there is some discretion in the designation of management units. As described in an evaluation of one of the more complicated estuary plans in the Coos Bay area by a reviewer (and former DLCDC staff member):

Zoning for the Coos Bay estuary is detailed and complex. Zoning regulations are given for each management unit designated in the Coos Bay Estuary Management Plan (CBEMP). Each zoning “district” is based on location, whether it is an Aquatic or Shoreland area, and its planned function, e.g. Water-Dependent Development, Conservation, Natural, etc. There are more than 120 such separate zoning “districts” for the areas of Coos Bay under county jurisdiction. For each zoning district, a table of “Uses and Activities” is given, which is further modified by General Conditions and Special Conditions and, for many districts, “Land Development Regulations” that are based on the characteristics and location of that district. As a result, land uses and development activities for each management unit/zoning district are regulated by a unique set of zoning and development requirements. All 122 zoning districts are listed below and include in the table in Section VI of this report. A few plan/zoning districts extend into estuarine or shoreland areas under the jurisdiction of the City of Coos Bay or the City of North Bend. Each of those cities applies its zoning or development ordinances based on the policies of the CBEMP.

Bailey adds that the review of this plan was more difficult, as it spanned multiple jurisdictions and, over time, has evolved into individual plans by Coos County and the participating cities, in lieu of being a single plan. Personal Communication with Bob Bailey (September 16, 2017).

<sup>61</sup> Goal 16 *supra*, note 29.

shall protect the estuarine ecosystem, including its natural biological productivity, habitat, diversity, unique features and water quality.

The general priorities (from highest to lowest) for management and use of estuarine resources as implemented through the management unit designation and permissible use requirements listed below shall be:

1. Uses which maintain the integrity of the estuarine ecosystem;
2. Water-dependent uses requiring estuarine location, as consistent with the overall Oregon Estuary Classification;
3. Water-related uses which do not degrade or reduce the natural estuarine resources and values;
4. Nondependent, nonrelated uses which do not alter, reduce or degrade estuarine resources and values.<sup>62</sup>

The values emphasized in the policy development phase include limiting uses within each classification, diversity of resources, a bias for preservation of natural resources but also a recognition that responsible development must occur in the coastal economy and the establishment of a system of estuarine land use priorities. Thus, it will be generally impossible to locate an urban-type use, even if related to marine activities, in a natural or conservation estuary unless the classification be changed or an exception<sup>63</sup> is

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<sup>62</sup> Goal 16, *supra* note 29. See also *Columbia River Estuary Management Task Force, Columbia River Estuary Regional Management Plan* (1979), available at <https://www.gpo.gov/fdsys/pkg/CZIC-hd1695-c73-c7-1979/html/CZIC-hd1695-c73-c7-1979.htm> [<https://perma.cc/HG7D-LRLR>] (for an example of an estuary plan for a significant area).

<sup>63</sup> An exception is an allowance of a use otherwise prohibited by the goals. By their very nature they contradict state land use policy and are (and should be) difficult to secure. In addition to recognizing pre-existing lawful uses, exceptions may allow needed “exceptional” uses, such as a processing plant in a rural estuarine area where there is no viable alternative for the use. OR. REV. STAT. §197.732; Statewide Planning Goal 2, Part II, OR. ADM. R. §660-0150000(2) and 660, Div. 06. While a number of exceptions were approved in local plans, most did not develop, as the exceptions process requires a discrete project that may not be varied without a new exception. Given changing market needs and investment requirements, this lack of follow-up is not surprising. Bill Grile, former Coos County Planning Director, recalls the difficulties involved with allowing development in a coastal program oriented towards conservation:

\* \* \* DLCD sat at the table with local governments during nearly 20+/- facilitated meetings without objecting to consensus decisions then ultimately approved 20+ Goal 2 exceptions to allow the consensus decisions to stand. Some of these were Goal 17 exceptions but the unmistakable

secured.<sup>64</sup> For the most part, these kinds of potential conflicts and applications are fairly rare. Also rare are discussions over existing plan policies and implementing ordinances, as they have been “acknowledged” as being in compliance with the goals.<sup>65</sup> However, if new plan or implementing regulations (including a zoning map change) is adopted, there is a process for challenging these “post-acknowledgment amendments” in which goal and implementing rule challenges may be raised.<sup>66</sup> Similarly, when a local government undertakes a periodic review of its plans and regulations, it will be LCDC that scrutinizes goal compliance of those revisions.<sup>67</sup> Aside from these situations, it is the local plan and implementing ordinances that control development, although those instruments must be interpreted consistent with the applicable goals.<sup>68</sup> Agencies and courts reviewing land use actions taken pursuant to such plans and regulations give no deference, as they normally would under Oregon law, to local interpretations inconsistent with the applicable goal.<sup>69</sup> Nevertheless, the choices made in framing plans and land use regulations in estuarine areas often present a range of permissible options that allow some discretion in the interplay between the resource and human activity.<sup>70</sup>

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conclusion was that DLCD itself didn’t really know how to make Goals 16 and 17 reasonably work in a “Development Estuary” without applying the flexibility allowed by Goal 2

Personal Communication with Bill Grile (October 16, 2017).

<sup>64</sup> *Supra* note 38.

<sup>65</sup> OR REV. STAT. 197.251 (2018).

<sup>66</sup> OR REV. STAT. 197.610-.625 (2018).

<sup>67</sup> OR REV. STAT. 197.626-.649 (2018).

<sup>68</sup> OR REV. STAT. 197.829(2) (2018).

<sup>69</sup> *Id.*

<sup>70</sup> Bob Bailey, a former LCDC plan reviewer, notes the relative paucity of revisions to local estuary plans and regulations over the last few decades:



That discretion is underscored by the goal's direction given to local governments regarding estuarine planning:

Based upon inventories, the limits imposed by the overall Oregon Estuary Classification, and needs identified in the planning process, comprehensive plans for coastal areas shall:

1. Identify each estuarine area:
2. Describe and maintain the diversity of important and unique environmental, economic and social features within the estuary;
3. Classify the estuary into management units; and
4. Establish policies and use priorities for each management unit using the standards and procedures set forth below.
5. Consider and describe in the plan the potential cumulative impacts of the alterations and development activities envisioned. Such a description may be general but shall be based on the best available information and projections.<sup>71</sup>

Although the estuary description has been accomplished in the classification process, there is much discretion in describing the features of the estuary and how they would be maintained, dealing with management unit policies and priorities and the consideration of cumulative impacts. Because so few people understand and can assess these values and balance them, most decisions on estuaries are neither well- understood or subject to challenge. A small priesthood of planning specialists does most coastal

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I would also say that there have been very few, if any, amendments to any of the estuary plans over the years. Coastwide, the implementing zoning ordinances for these plans have been amended only a bit more often (e.g. the NOAA berth on Yaquina Bay). As a result, Goals 16 and 17 combined were major factors, in my view, in halting the loss of estuarine habitats and preventing conversion of estuarine areas to non-estuarine uses.

Bailey, *supra* note 56.

<sup>71</sup> *Id.*

planning and interacts with port, state and federal coastal planning specialists. Rarely will the private sector engage such a specialist in the development of plans and regulations (as opposed to such assistance in a development permit proceeding). While the plans and regulations are not carbon copies of one another, the limitations placed on estuary activity by the goal provide for a smaller scope of action and there is a commonality of approach to coastal planning issues by cities and counties. Moreover, these local governments are largely dependent on state and federal funds for this planning and such funding is predicated on expectations of approaches and outcomes. Thus, it appears that, if the experts have arrived at a consensus on plan policies and land use regulations, that consensus is fairly likely to be enacted locally and acknowledged by LCDC.

d. *Implementation* – There are specific implementation directions in the goal to carry out estuarine plan policies, and thus to implement the goal.<sup>72</sup> Those requirements are too lengthy to include here, but can be summarized as follows:

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<sup>72</sup> *Id.* Matt Spangler, former Lincoln County Planning Director and presently Senior Coastal Policy Analyst for DLCD, points out the function of local plan implementation:

Implementation decisions, or the review of individual estuarine development proposals place a different, more technical burden on local governments. In practice, most of the technical analysis required for individual project permitting is provided by environmental consultants retained by applicants. Most local staff and decision makers are not technical experts in estuarine resources, and so rely to a considerable extent on the input of state and federal resource agencies in the review of this information in rendering decisions on individual project proposals.

Personal Communication with Matt Spangler (August 18, 2017). Spangler notes that significant projects will likely have state or federal agency review by competent staff.

Cameron La Follette of the Oregon Coast Alliance, an environmental advocacy organization cites one example of estuary policy implementation:

Perhaps the most dramatic is the Port of Newport's successful project to completely remove the 365-ft. long concrete barge Pasley from Yaquina Bay. The decommissioned barge was originally sunk in the Bay after World War II to form the basis for the Port's international terminal dock, along with the Hennebique, another WWI-era decommissioned concrete barge. Ultimately, the Hennebique was cleaned and stabilized, remaining as a foundation for the dock; but the Pasley,

1. Major estuarine impacts (such as dredging or filling must either be addressed in the plan or at the application stage;
2. Dredging and filling is disfavored, limited and seen as a last alternative.
3. Relevant state and federal agencies and local governments must cooperate to maintain water quality and prevent sedimentation in estuaries.
4. The state shall consider establishing minimum fresh-water flow rates for estuaries.
5. Dredge and fill activities in intertidal or tidal marsh areas must be mitigated and plans must designate and protect mitigation areas.
6. State, federal and local governments must develop programs for disposal and stockpiling of dredged materials, encouraging those activities in upland or ocean locations, and avoiding those activities in intertidal or tidal marsh estuarine areas, except when part of an approved fill project.
7. Local, state and federal agencies shall act to restrict the proliferation of docks and piers.

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which had leaked oil into the Bay in the 1990s and sat in an unstable berth, needed to be completely removed. It was a long, complex task requiring much innovation in marine debris removal techniques.

Personal Communication with Cameron La Folette (October 28, 2017).

8. State and federal agencies shall assist local governments in identifying restoration areas where human or natural activities have adversely affected the estuarine system.
9. State agencies with planning, permit or review authority must review their standards and procedures to assure compliance with this goal. Certain state agencies<sup>73</sup> are singled out as subject to this direction.

Finally, although not binding, the goal contains extensive “Guidelines” for best practices in implementing its provisions, including coordination of inventory and planning requirements of other goals, especially the four coastal goals,<sup>74</sup> detailed inventory

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<sup>73</sup> These agencies, and certain of their activities are listed in the Implementation section of the goal as follows:

Division of State Lands  
 Fill and Removal Law ORS 541.605-541.665  
 Mineral Resources ORS 273.551; ORS 273.775 - 273.780  
 Submersible and Submerged Lands ORS 274.005 - 274.940  
 Economic Development Department  
 Ports Planning ORS 777.835  
 Water Resources Department  
 Appropriation of Water ORS 37.010-537.990; ORS 543.010-543.620  
 Department of Geology and Mineral Industries  
 Mineral Extraction ORS 520.005- Oil and Gas Drilling ORS 520.095  
 Department of Forestry  
 Forest Practices Act ORS 527.610-527.730  
 Department of Energy  
 Regulation of Thermal Power and Nuclear Installation ORS 469.300- 469.570  
 Department of Environmental Quality  
 Water Quality ORS 468.700-468.775  
 Sewage Treatment and Disposal Systems ORS 454.010-454.755

Goal 16, *supra*, note 29. See also *Estuary Management in the Pacific Northwest*, 52-56 (OR. STATE UNIV. 2003)

<sup>74</sup> The guidelines provide:

Because of the strong relationship between estuaries and adjacent coastal shorelands, the inventories and planning requirements for these resources should be closely coordinated. These inventories and plans should also be fully coordinated with the requirements in other state planning goals, especially the Goals for Open Spaces, Scenic and Historic Areas and Natural

suggestions,<sup>75</sup> coordination on transportation matters,<sup>76</sup> and consideration of temporary alterations.<sup>77</sup> While not binding, the guidelines provide further understanding of state policy expectations for estuarine management.

#### IV. LCDC Oversight of Local Estuary Planning and Regulation

Although estuary planning and regulation is done at the city or county level in Oregon, the Land Conservation and Development Commission (LCDC) assures that state policy embodied in the goals, is carried out in local plans and regulations. For our purposes, this is accomplished through periodic review of existing acknowledged plans and regulations,<sup>78</sup> enforcement orders against recalcitrant localities,<sup>79</sup> and post-acknowledgment amendments and land use regulations.<sup>80</sup> However, the principal method of application of state policy has been through the “acknowledgment” process, whereby a

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Resources; Air, Water, and Land Resources Quality; Recreational Needs; Transportation; and Economy of the State.

Goal 16, *supra*, note 29.

<sup>75</sup> *Id.* (The Guidelines provide for specific physical, biological and social and economic characteristics that “should” be included in inventories.)

<sup>76</sup> *Id.* (The Guidelines suggest that state and federal agencies closely coordinate navigation and port needs with shoreland and upland transportation facilities, follow Goal 12, Transportation, and consider cumulative impacts of allowed uses.)

<sup>77</sup> These alterations are not to be permitted in areas designated for conservation or preservation, but to support uses otherwise permitted by the goals.

<sup>78</sup> OR. REV. STAT. §197.626-.649. However, this process has broken down of late, effectively leaving in place outdated inventories, analyses and plan policies. Sullivan, *Quiet Revolution*, note 12, *supra*. at 392-93.

<sup>79</sup> OR. REV. STAT. §197.319-.335 (2017).

<sup>80</sup> OR. REV. STAT. §197.610-.625 (2017).

local government submits its plan and land use regulations for LCDC certification of compliance with applicable goals.<sup>81</sup>

LCDC adopted the coastal goals in late 1976, effective one year later.<sup>82</sup> Under state law, cities and counties must submit their plans and land use regulations by the end of that one-year period,<sup>83</sup> but the last plans were acknowledged nine years after these goals were adopted.<sup>84</sup> In the course of the acknowledgment process, the mandates of the various goals were explored, defined and clarified. This was especially true of the Estuarine Goal. Through the acknowledgement process, LCDC encountered issues of goal interpretation and application in the context of individual local plans and regulations and struggled to come up with a coherent exposition and practical application of the elements of the goal.

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<sup>81</sup> OR. REV. STAT. §197.251 (2017). Acknowledgment was a long, contentious process, as noted by Bob Bailey, a long-time plan reviewer for LCDC:

I wasn't directly involved with the coastal jurisdiction acknowledgments during that era but can recall anecdotally that all were difficult and controversial and several were barn-burners with legacies we lived with for years. Estuaries were seen as raw development potential by many, especially by the Chamber of Commerce types, because that is how estuaries had always been seen. Suddenly there were statewide requirements that sharply curtailed or dashed those expectations. Coos Bay Estuary Plan, in particular, took a long time and a lot of political pain to finally approve. I think the Tillamook Bay estuary plan was just about as controversial. The Yaquina Bay Estuary Plan was about the only one of the "major" estuaries that was relatively smooth.... partly because they had a longer history of estuary planning, more realistic expectations, and a board of commissioners that was more friendly to the statewide program.

Person Communication with Bob Bailey (September 17, 2017).

<sup>82</sup> OR. Admin. R. 660-015-0010(1) (1977).

<sup>83</sup> OR. REV. STAT. §197.250 (2017).

<sup>84</sup> DEPT OF LAND CONSERVATION AND DEV., ACKNOWLEDGEMENT SCOREBOARD (Jan. 14, 1993).

At the outset, a number of very basic issues in the understanding of the goal will be covered only in summary form, as these issues are generally common to all the goals.

These issues include:

1. The requirement to adopt consistent and adequate local plan policies, supported by an adequate factual base and coordinated with the plans of public and private persons, to meet goal requirements;
2. The requirement to adopt adequate regulatory standards to meet local plan policies (and thus the goals themselves);
3. The requirement that zoning or other regulatory maps are consistent with the factual base that support the plan policies (such as in the establishment of use boundaries);
4. The establishment of adequate standards and procedures for public participation in, and potential appeal of, discretionary decisions on permits;
5. Provision for an “exceptions process,” so that lawfully existing use commitments will be accommodated and that there is a process to accommodate public needs for uses that do not comply with the goals.<sup>85</sup>

In addition, there are basic requirements of the Estuarine Goal that are not elaborated upon here further, because they are so basic, namely:

1. The requirements of the state’s estuary classification system, by which estuaries are classified as natural, conservation or development;<sup>86</sup>

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<sup>85</sup> *Supra*, note 63.

<sup>86</sup> OR. ADMIN. R. 660.017. (2017).

2. The further classification of estuaries into management units;<sup>87</sup>
3. The requirement that plans contain a purpose statement for estuary uses in general and for each estuary classification.<sup>88</sup>

Our examination of LCDC's role in carrying out state policy involves a selective inquiry as to the actions of the Commission in dealing with the elements of Goal 16 when plans and implementing regulations were submitted by cities and counties seeking acknowledgement that those plans and regulations complied with the goals.<sup>89</sup> As noted above, the goal contains five elements, some more exacting and controversial than others.

- A. General Requirements – These general requirements are integral to the state's estuary policies and not overly controversial. The overall purpose of the goal is to protect estuarine resources, allowing development only when that development is either not harmful or any harm is mitigated. The process provided for in this section requires classification of the estuary by LCDC rule to establish the most intensive use allowed in each classification,<sup>90</sup> then the inventories of estuarine resources within each classification (recalling that estuaries may have several management units), so that comprehensive planning may occur. One issue of particular importance is the extent of state control over estuaries, with the decision

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<sup>87</sup> OR. ADMIN. R. 660.016 (2017).

<sup>88</sup> *Id.*

<sup>89</sup> Although fairly complete, not every acknowledgment action is set forth below, but an effort has been made to include significant LCDC actions in interpreting and applying Goal 16.

<sup>90</sup> OR. ADM. R. §660-017-0000(1)-(2),0025.



that that “mean higher high watermark” provides the shoreward limit of the state’s reach.”<sup>91</sup>

B. Inventory Requirements -- Perhaps because of the estuary classification rule<sup>92</sup> and the limited number of experts in the area, the conflict over requirements for estuary inventories is limited. Moreover, LCDC had let it be known that it expected uniformity in reviewing local plans during acknowledgment. In an early case involving the southernmost Oregon Coastal County, the Commission found the goal not met, adding:

The Curry County plan does not contain complete estuary elements for the Rogue and Chetco estuaries. In addition, the plan classifies the Elk, Sixes and Pistol estuaries in conflict with the Estuary Classification rule adopted by LCDC. The plan’s factual base fails to comply with the inventory requirements of Goal 16 by not providing a sufficient basis to support designations of management units and classification of minor estuaries. \* \* \*<sup>93</sup>

LCDC has required the connection between the factual base for estuary planning in the inventories and management unit classification and use decisions.<sup>94</sup> If there are differing or unclear resource inventory designations, the local government must resolve those conflicts so as to

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<sup>91</sup> Appendix D of the Oregon Territorial Sea Plan, provides an illustration of this term, which means the mean higher level at which the sea meets to coast. *See Acknowledgement of Compliance Coos County, Land Cons. & Dev. Comm’n* May 11, 1984, at 77-8, November 14, 1983, at 75-6, and September 15, 1983, at 173) and *Acknowledgement of Compliance Curry County, Land Cons. & Dev. Comm’n* October 3, 1984, at and October 29, 1982, at 85).

<sup>92</sup> OR. ADMIN. R. 660.017 (2017).

<sup>93</sup> *Acknowledgement of Compliance Curry County, Land Cons. & Dev. Comm’n*, April 24, 1980 at 85.

<sup>94</sup> *See, e.g.,* City of Coos Bay Staff Report, July 2, 1984, p. 4; Coos County Staff Report, April 1, 1983, pp. 10-12 and June 24, 1983, pp. 16, 64; Coos County Staff Report, September 15, 1983, pp 170 (City of Bandon, reviewed with Coos County must coordinate its inventories, plan policies and implementing regulations for the Coquille River Estuary for goal compliance); Lincoln County Staff Report December 1, 1982, pp. 5, 16-19, 109-110 and 177.

provide clear direction as to use decisions.<sup>95</sup>

- C. Comprehensive Plan Requirements – As with most of Oregon’s planning requirements, conformity to the comprehensive plan is not new, so the requirements of consistency with the estuary and management unit classifications, so as to limit uses, and plan policies are accepted in the Oregon planning culture. One issue that did arise more frequently is the (generally unfamiliar) requirement of anticipating cumulative environmental impacts of potential uses.<sup>96</sup> In an early case, LCDC established the necessary baselines for compliance:

There is an absence in the county and city plan inventories of a description and consideration of the cumulative effect of all uses, activities and alterations allowed in the Rogue and Chetco River development management units. In addition, there is no indication in the Plan that development management unit designations were based upon a consideration of cumulative effects or use of upland sites as required by the Goal. In this context, consideration most at a minimum must include a discussion on how the impacts will be dealt with in relation to other Goals. The reason for this requirement is to ensure that development decisions in the plan are made in a context of the overall estuarine ecosystem, and the housing and public facilities goals can be more effectively applied.<sup>97</sup>

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<sup>95</sup> An interesting controversy arose in Coos County over the use of a more generalized “specialized considerations” map and the more detailed baseline information contained in the inventory maps. LCDC directed that the County use the inventory maps to make use decisions. Acknowledgment of Compliance: Coos County, Land Conservation and Dev. Comm’n, 1, 4 (LCDC, Sept. 27, 1984); Acknowledgment of Compliance: Coos County, Land Conservation and Dev. Comm’n, 1, 4 (LCDC, Nov. 28, 1984)

<sup>96</sup> In evaluating the Coos Bay Estuary plan, LCDC found inadequate and overly general consideration of cumulative impacts and directed the County *inter alia* to:

Amend the plan’s cumulative effects statement to address how the various water-dependent needs listed in the Goal’s development management unit section will be met. This analysis must, at a minimum, identify any potential conflict that may arise regarding these uses.

Acknowledgment of Compliance: Coos County, Land Conservation and Dev. Comm’n, 1, 197 (LCDC, Apr. 1, 1983);. *See also* Acknowledgment of Compliance: City of Brookings, Land Conservation and Dev. Comm’n, 1, 7 (LCDC, Sept. 20, 1984); Acknowledgment of Compliance: City of Gold Beach, Land Conservation and Dev. Comm’n, 1, 4 (LCDC, Sept. 20, 1984).

<sup>97</sup> Acknowledgment of Compliance: Curry County, Land Conservation and Dev. Comm’n, 1, 91 (LCDC, Oct. 29, 1982).

D. Management Units – This section of the goal sets out multiple considerations for classifying management units, a task carried out in the LCDC administrative rule,<sup>98</sup> and the requirements in administering each of those classifications. The overarching requirement of this section is that each management unit has both a purpose and resource capabilities requirements that must be dealt with in the plan or implementing regulations to protect the estuary.<sup>99</sup> The problem arises when quantitative standards are not used to measure capabilities and impacts and there is suspicion that uses harmful to the estuary would be allowed without consideration of the resource capabilities of the individual management unit. LCDC has responded with limitations on use of non-quantifiable standards:

If qualitative performance standards are used to implement Goal 16 and 17 requirements, a specific review process must be adopted as an implementing measure for applying these standards to individual development proposals. This process must be able to identify to an applicant which standards and policies are applicable and how they will be applied to the particular development proposal. In such a process, for example, the following components would at a minimum be appropriate:

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<sup>98</sup> OR. ADMIN. R. 660-017-0000-0030 (2017).

<sup>99</sup> Acknowledgment of Compliance: Coos County, Land Conservation and Dev. Comm'n, 1, 13 (LCDC, Sept. 27, 1984). This approach was taken with respect to a number of specific uses in the estuary. LCDC had signaled its intent to approve that approach in an acknowledgement of compliance to Coos County on May 11, 1984, when it said:

There is ample precedent for allowing resource capability findings to be part of the permit process (see the Commission's compliance reviews for Lane County and Douglas County, where all questions of resource capability are deferred to the permit process).

Acknowledgment of Compliance: Coos County, Land Conservation and Dev. Comm'n, 1, 63 (LCDC, May 11, 1984).

- a. Identify any quantitative, or otherwise specific, standards that have been generated by previous development proposals of similar circumstances;
- b. Indicate necessary state and/or federal permit actions that would substitute for meeting a standard or policy;
- c. Identify the types of information the applicant must provide, and how the jurisdiction will use that information to measure the project against the qualitative performance standard. This should include the point during the process at which specific and where possible quantitative performance or design/construction/siting standards will be generated vis-à-vis the project; and
- d. Indicate how interested third parties and those with relevant technical expertise will provide input in the process.<sup>100</sup>

Where specific uses may harm the estuary but could be allowed with individualized conditions, the resource capabilities process and the purposes of the individual management units provide a helpful measuring device. The most common “problem uses” include aquaculture, mineral and aggregate extraction, navigation devices, high intensity water-

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<sup>100</sup> Acknowledgment of Compliance: City of Brookings, Land Conservation and Dev. Comm’n, 1, 11 (Sept. 20, 1984). LCDC noted with approval that the City had provided a public hearings process to deal with contested facts and legal interpretations. *See* Acknowledgment of Compliance: Gold Beach, Land Conservation and Dev. Comm’n, 1, 9-11 (Sept. 20, 1984) ; Acknowledgment of Compliance: Lincoln County, Land Conservation and Dev. Comm’n, 1, 101-03 (December 1, 1982). In applying these requirements to new dredging, LCDC expanded on the rationale for that requirement:

The effect of the “resource capability and purpose” test is intended to be a significant reduction in the amount and location of dredging for a use in a conservation management unit than for the same use in a development management unit. For example, dredging of an intertidal mudflat or marsh area (e.g. “tract of significant habitat smaller or of less biological signifi[cance] than those managed for natural preservation”) in quantities necessary for a recreational marina and boat basin would probably not meet this test. In this example, replacing such an amount of intertidal habitat for subtidal habitat would not be consistent with the resource capability of the intertidal area or with the purpose of that management unit. On the other hand, the amount of dredging of the same intertidal area for a boat ramp would meet the test.

Acknowledgment of Compliance: Lincoln County, Land Conservation and Dev. Comm’n, 1, 105 (LCDC, Aug. 6, 1981).

dependent uses, dikes and log storage facilities.

E. Implementation Requirements – There are nine such requirements, but they are not of equal significance and will be touched upon as necessary to illustrate their application.

1. *Impact Assessments of Potential Estuary Alterations* – This requirement provides for a “clear presentation” of impacts of certain actions that could affect the physical processes or biological resources of the estuary. However, where qualitative standards are used, the applicant and the local government must respond with sufficient findings to show compliance with applicable standards.<sup>101</sup> This impact assessment issue was considered, in conjunction with the resource capability requirements of the Goal by an LCDC subcommittee. Considering the use of non-quantifiable standards in both cases, the subcommittee concluding that individuated decisions were often required, the myriad of circumstances and factors involved and the level of technical expertise necessary and concluding that there was the need for data and analysis as may be available.<sup>102</sup>

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<sup>101</sup> See Acknowledgment of Compliance: Lincoln County, Land Conservation and Dev. Comm’n, 1, 105 (LCDC, Aug. 6, 1981)..

<sup>102</sup> Memorandum from Coos Bay Estuary Subcommittee to Land Conservation and Dev. Comm’n at 9-11 (Sept. 22, 1983)(on file with author). LCDC has adhered to some version these requirements throughout its review of local plans. Acknowledgment of Compliance: Gold Beach, Land Conservation and Dev. Comm’n, 1, 6 (LCDC. Sept. 20, 1984); Acknowledgment of Compliance: Douglas County, Land Conservation and Dev. Comm’n, 1, 15-16, 22 (LCDC. Feb. 29, 1984); Acknowledgment of Compliance: Lincoln County, Land Conservation and Dev. Comm’n, 1, 109 (LCDC. Dec. 1, 1982); and

2. *Dredging and Filling* – Generally, this requirement limits the availability of dredging and filling without a goal exception, which requires both a need for the same to be shown, upland alternatives considered and the mitigation of adverse impacts.
3. *Water Quality and Sedimentation* – These issues are to be resolved under four specifically recognized state agencies in order to avoid new or duplicative programs.<sup>103</sup>

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Acknowledgment of Compliance: Lincoln County, Land Conservation and Dev. Comm’n, 1, 186 (LCDC, August 6, 1981). These reviews generally did not involve specific uses, but the future review of uses.

<sup>103</sup> Acknowledgment of Compliance: Curry County, Land Conservation and Development Comm’n, 101-102, 108 (LCDC, Oct. 29, 1982); *see also* Acknowledgment of Compliance: Tillamook County, Land Conservation and Development Comm’n, 186-187 (LCDC, Nov. 11, 1982); Acknowledgment of Compliance: Clatsop County, Land Conservation and Development Comm’n, 25-26 (LCDC, May 17, 1984); Acknowledgment of Compliance Clatsop County, Land Conservation and Development Comm’n, 83, 120 (LCDC, June 4, 1981); Acknowledgment of Compliance: Coos Bay, Land Conservation and Development Comm’n, 12-13 (LCDC: July 12, 1984); Acknowledgment of Compliance: Coos Bay, Land Conservation and Development Comm’n, 194-195, 198 (LCDC, Apr. 1, 1983); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, 23-24 (LCDC, Sept. 27, 1984); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, 104-105, 176-177 (LCDC, Sept. 15, 1983); Acknowledgment of Compliance Curry County, Land and Conservation Comm’n, 84 (LCDC, Apr. 23, 1980); Acknowledgment of Compliance: Douglas County, Land Conservation and Development Comm’n, 5-6 (LCDC, Apr. 29, 1982); Acknowledgment of Compliance: Lincoln County, Land Conservation and Development Comm’n, 107, 117, 118, 124 (LCDC, Dec. 1, 1982); Acknowledgment of Compliance: Lincoln County, Land Conservation and Development Comm’n, 188, 190 (LCDC, Aug. 6, 1981).

Cameron La Follette of the Oregon Coast Alliance, an advocacy group, cites sedimentation as an intractable problem in Oregon’s estuaries, providing a number of examples. She attributes sedimentation to excessive logging, clear-cutting, construction of roads and dikes, and agricultural runoff in watersheds of rivers and creeks feeding the estuaries, all of which “shallows” them and results in a constant shifting of existing and creation of new sandbars, causing navigational hazards and impediments to migrating salmon. La Follette adds that sedimentation is so severe that estuaries are unable to purge themselves during storms or high water events and terms the control of the cumulative impacts of sedimentation to be “daunting,” concluding:

How best to address cumulative impacts, design solutions if there effective ones, and implement them across an array of agencies with jurisdiction and community stakeholders, remains a daunting problem. It is unclear if the estuarine planning process under Goal 16 provides a sufficiently robust framework for this task. In addition, funding for large-scale restoration of the estuaries is a significant barrier.

4. *Fresh-Water Flow Rates and Standards* -- Such standards are only to be “considered” by the Oregon Water Policy Review Board. While there is a modicum of water policy coordination among state agencies,<sup>104</sup> this implementing requirement has played no significant role in state land use policy.
5. *Dredging and Filling in Intertidal or Tidal Marshes* – This requirement necessitates mitigation to ensure the integrity of the estuarine ecosystem and generally requires protection of mitigation sites. Late in the acknowledgment process, LCDC found the following Coos County plan policy met this requirement:

Intertidal Dredged Material Disposal

Local governments shall prohibit dredged material disposal in intertidal or tidal marsh areas except where such disposal is part of an approved fill project. Further, local governments shall encourage disposal of dredged materials in the ocean where a positive benefit-cost ratio is

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La Follette provides a number of examples, including: Komar, Paul. *Sediment Accumulation in Tillamook Bay, Oregon: Natural Processes versus Human Impacts*, [http://www.jstor.org/stable/10.1086/421074?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/10.1086/421074?seq=1#page_scan_tab_contents) [https://perma.cc/6X2C-J7VX]; Michael Styllas, *Sediment accumulation and human impacts in Tillamook Bay, Oregon*, <https://ir.library.oregonstate.edu/xmlui/handle/1957/22911?show=full> [https://perma.cc/L3AW-J7UE] *Port of Nehalem is considering funding of a USGS Nehalem Bay sedimentation study*; <https://www.northcoastcitizen.com/2017/06/port-nehalem-considering-funding-usgs-nehalem-bay-sedimentation-study/> [https://perma.cc/DJG3-2UVE]; *Lower Rogue Sediment Study* <https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/108684> [https://perma.cc/S9UM-6S6M]

Personal Communication with Cameron La Follette (October 28, 2017).

<sup>104</sup> Oregon Water Resource Department, *Land Use Procedures Guide 3* (1990) [http://www.oregon.gov/LCD/docs/sac/owrd\\_sac.pdf](http://www.oregon.gov/LCD/docs/sac/owrd_sac.pdf) [https://perma.cc/J6PX-4CXC].

established.

This strategy shall be implemented through operation of the waterway permit process as a response to a request for comment from the Division of State Lands.

This strategy recognizes that upland disposal and ocean disposal are alternatives to intertidal disposal.<sup>105</sup>

Whether done grudgingly or not, this policy was formulated to respond to this Implementing Measure as a result of LCDC insistence to attain acknowledgment.

6. *Dredged Material Disposal* – This provision requires dredged material stockpiling and disposal programs, including specific sites and procedures, a preference for upland or ocean disposal and avoidance of intertidal or tidal marsh disposal. Some early discussions regarding these

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<sup>105</sup> Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, 20 (LCDC, Sept. 27, 1984) (This report dealt with the Coquille River Estuarine Management Plan, applicable to the County and the City of Bandon); *see also* Acknowledgment of Compliance: City of Brookings, Land Conservation and Development Comm’n, 10, 11, 14 (LCDC, Sept. 20, 1984); Acknowledgment of Compliance: Clatsop County, Land Conservation and Development Comm’n, 16-19 (LCDC, May 17, 1984); Acknowledgment of Compliance: Clatsop County, Land Conservation and Development Comm’n, 77-83, 104, 120-123 (LCDC, June 4, 1981); Acknowledgment of Compliance: City of Coos Bay, Land Conservation and Development Comm’n, 16 (LCDC, July 2, 1984); Acknowledgment of Compliance: Coos Bay Estuary, Land Conservation and Development Comm’n, 183-187, 191-98, 250, 254-55 (LCDC, Apr. 1, 1983); Acknowledgment of Compliance: Lincoln County Land Conservation and Development Comm’n, 113, 140, 147 (LCDC, Aug. 6, 1981); Acknowledgment of Compliance: Curry County, Land Conservation and Development Comm’n, 104, 146 (LCDC, Oct. 29, 1982); 19 (LCDC, Aug. 30, 1984); Acknowledgment of Compliance: Coos County and Bandon, Land Conservation and Development Comm’n, 178 (LCDC, Sept. 15, 1983).

Bob Cortright, former DLCD staffer, calls Oregon’s work on requiring compensatory mitigation for estuarine fills ground breaking “in establishing a now well-accepted practice of requiring compensatory mitigation for estuarine fills.” That is so, because “Goal 16 and estuary plans establish a basic policy requiring 1:1 replacement of like habitat lost when fills are allowed.”

Personal Communication with Bob Cortright (October 21, 2017).



requirements involving Tillamook<sup>106</sup> and Coos<sup>107</sup> Counties resulted in clear direction on programs and areas to be preferred or avoided.<sup>108</sup>

7. *Single Purpose Docks and Piers* – This implementation requirement seeks to consolidate these facilities and thus to take up less space by encouraging smaller and multi-use alternatives. This requirement is easily satisfied by the use of a plan policy along the lines as this one adopted by Clatsop County:

Proliferation of individual, single-purpose docks, piers, and mooring facilities is discouraged in favor

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<sup>106</sup> Acknowledgment of Compliance Tillamook County, Land Conservation and Development Comm'n, 167-72, 182-199 (LCDC, Nov. 17, 1982).

<sup>107</sup> Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm'n, 94-96, 104, 109 (LCDC, Oct. 29, 1982).

<sup>108</sup> Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm'n, 11-12, 93-5, 107, 109 (LCDC, Aug. 30, 1984) (Coos County, which had much trouble with acknowledgment under the Coastal Goals, finally achieved recognition for Goal 16 compliance in 1984). *See also* Acknowledgment of Compliance: Tillamook County, Land Conservation and Development Comm'n, 99, 108, 120-23, 140-42, 147, 153 158, 160, 162, 164 (LCDC, Dec. 13, 1984); Acknowledgment of Compliance: Lincoln County, Land Conservation and Development Comm'n, 5, 111, 186, 189 (LCDC, Aug. 6, 1981); Acknowledgment of Compliance: Lincoln County, Land Conservation and Development Commission, 109-110, 124-25, 120-130 (LCDC, Dec. 1, 1982); Acknowledgment of Compliance: Lincoln City, Land Conservation and Development Comm'n, 21-22 (LCDC, July 5, 1984); Acknowledgment of Compliance: Lincoln city, Land Conservation and Development Commiss'n, 12-13 and 25 (LCDC, June 28, 1983); Acknowledgment of Compliance: Douglas County,, Land Conservation and Development Comm'n, 5, 133-36 (LCDC, Apr. 29, 1982); Acknowledgment of Compliance: Douglas County, Land Conservation and Development Comm'n, 13-16 (LCDC, Feb. 29, 1984); Acknowledgment of Compliance: Curry County, Land Conservation and Development Comm'n, 77-79 (LCDC, Apr. 23, 1980); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm'n, 20 (LCDC, Sept. 27, 1984); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm'n, 68 (May 11, 1984); Acknowledgment of Compliance: Coos Bay, Land Conservation and Development Comm'n, 11, 13 (LCDC, July 2, 1984); Acknowledgment of Compliance: Clatsop County, Land Conservation and Development Comm'n, 74-75, 82, 119-20 (LCDC, June 4, 1981) (regarding the cities of Seaside and Gearhart) Acknowledgment of Compliance: Clatsop County, Land Conservation and Development Comm'n, 13-14, 24 (LCDC, May 17, 1984); *City of Brookings* 7-8 (LCDC, Sept. 20, 1984). (The provisions of this Implementation requirement overlap with some of the Goal 17 requirements, as noted in the various staff reports).

of common or cooperative moorage facilities. Individual, single-purpose docks and piers will be approved only after alternative moorage options such as nearby marinas, community docks or mooring buoys are investigated and considered. Any dock or pier approved shall be the minimum size necessary to fulfill the purpose.<sup>109</sup>

8. *Restoration Sites* – This requirement relates to identification of degraded sites for restoration, which is not the same as mitigation of future activity. In focusing on this requirement, LCDC said that this requirement refers to proposed active restoration projects that are responding to a historical loss of estuarine resources; otherwise, the activity must be treated like any other dredge or fill project.<sup>110</sup> This explanation built upon two previous extended discussion of this implementation requirement.<sup>111</sup> In a review of the 1982 submissions by Douglas County and the City of Reedsport, LCDC stressed that the otherwise disfavored use of dredging and filling was allowable for restoration

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<sup>109</sup> Acknowledgment of Compliance: Clatsop County, Land Conservation and Development Comm’n, 20-21 (LCDC, May 17, 1984). *See also* Acknowledgment of Compliance: City of Gold Beach, Land Conservation and Development Comm’n, 9 (LCDC, Sept. 20, 1984); Acknowledgment of Compliance: Douglas County, Land Conservation and Development Commission, 23 (Feb. 29, 1984); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, (Bandon) 103-04 (LCDC, Sept. 15, 1983); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, 8-9 (LCDC, Sept. 27, 1984).

<sup>110</sup>Coos Bay Estuary Subcommittee, *Memorandum to Land Conservation and Development Commission* 10 (Sept. 22, 1983) (this memo dealt with County complaints and requests for clarification on LCDC’s actions on the Coastal Goals).

<sup>111</sup> Acknowledgment of Compliance: Clatsop County, Land Conservation and Development Comm’n, 78-79 (LCDC, May 17, 1984) (However, LCDC did not find a necessary conflict between mitigation and restoration).

projects justified in the plan.<sup>112</sup> In a review of the Tillamook County Plan later that same year, LCDC required that “restoration” be defined and the historical cause and existence of the proposed restoration be set out.<sup>113</sup> Nevertheless, the identification and justification of restoration sites remained a sticking point for many coastal jurisdictions.<sup>114</sup>

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<sup>112</sup> Acknowledgment of Compliance: Douglas County and City of Reedsport, Land Conservation and Development Comm’n, 138-40 (LCDC, Apr. 29, 1982).

<sup>113</sup> Acknowledgment of Compliance: Tillamook County, Land Conservation and Development Comm’n, 176-85 (LCDC, Nov. 17, 1982) (The County responded to these directions to the satisfaction of LCDC); Acknowledgment of Compliance: Tillamook County, Land Conservation and Development Comm’n, 111-12 (LCDC, Dec. 13, 1984). See also Acknowledgment of Compliance: Coos County and Bandon, Land Conservation and Development Comm’n, 10-03, 109, 110 (LCDC, Sept. 15, 1983).

<sup>114</sup> Acknowledgment of Compliance: Lincoln County, Land Conservation and Development Commission, 115-16, 127-29 (LCDC, Dec. 1, 1982); Acknowledgment of Compliance: Lincoln County, Land Conservation and Development Commission 114-16, 161, 187, 192, 195 (LCDC, Aug. 6, 1981); Acknowledgment of Compliance: Lincoln City, Land Conservation and Development Commission, 11-12 (LCDC, June 28, 1983); Acknowledgment of Compliance: Gold Beach, Land Conservation and Development Comm’n, 8, 12-15 (LCDC, Sept. 18, 1984); Acknowledgment of Compliance: Curry County, Land Conservation and Development Comm’n, 11, 14 (Aug. 30, 1984); Acknowledgment of Compliance: Curry County, Land Conservation and Development Comm’n, 4-5, 99-100, 104, 110 (LCDC, Oct. 29, 1982); Acknowledgment of Compliance: Curry County, Land Conservation and Development Comm’n, 84 (LCDC, Apr. 23, 1980); Acknowledgment of Compliance: Brookings, Land Conservation and Development Comm’n, 9 (LCDC, Sept. 20, 1984); Acknowledgment of Compliance: Clatsop, Land Conservation and Development Comm’n, 16-17, 19, 39, 49, 82 (LCDC, May 17, 1984); Acknowledgment of Compliance: Coos Bay Estuary, Land Conservation and Development Comm’n, 192-193, 198 (LCDC, Apr. 1, 1983); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, 52-53 (LCDC, June 13, 1985); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, 14, 22-23, 25, 26 (LCDC, Sept. 27, 1984); Acknowledgment of Compliance: Coos County, Land Conservation and Development Comm’n, 9, 72-73 (LCDC, May 11, 1984).

Cameron La Follette of the Oregon Coast Alliance, provides an example in the so-called Jerry’s Flat Millsite adjacent to the Rogue River just east of Gold Beach, The former site of a lumber mill used from 1955-1989, it continues to be of concern to the Department of Environmental Quality (DEQ) for various contaminants emanating from underground storage tanks, log ponds and settling ponds. In 2017 DEQ certified that though remediation is complete, shallow groundwater may not be used, nor any residential, recreational or agricultural food crop use unless DEQ approves it. La Follette asserts that no real remediation has taken place, despite being adjacent to the Rogue River and its salmon runs: the site remains contaminated and available for only very limited uses.

Personal Communication with Cameron La Follette (October 28, 2017), referring to the DEQ

9. *State Agency Review of Procedures and Standards* – This requirement directs state agencies with planning, permit or review functions to review their procedures and standards to assure realization of estuarine goal objectives. Because state agencies are not subject to the acknowledgment process, this requirement is not dealt with further herein.

V. Estuary Planning and Regulation in Practice

With notable exceptions involving energy facilities, litigation over the Estuarine Resources Goal has been limited following initial acknowledgment of local plans and regulations.<sup>115</sup> More interestingly, there have only been only two appeals (both based not on the underlying policies of the goal, but approval of a deviation from those policies for a single site, and both ultimately unsuccessful) based on that goal of the acknowledgment of a local planning effort.<sup>116</sup> The remaining cases deal with local application of the

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documentation of this site at  
<http://www.deq.state.or.us/Webdocs/Forms/Output/FPController.aspx?SourceId=781&SourceIdType=11>  
[<https://perma.cc/XS2K-XTGU>].

<sup>115</sup> See, Personal Communication, *supra* note 70; see also, Personal Communication, *supra* note 56. Bob Bailey, a long-time LCDC plan reviewer agrees that many citizens do not understand the workings of the coastal goals, but that there are watchdogs to assure that coastal resource values are observed:

\* \* \* On the coast, estuarine land use decisions have always been closely watched by local individuals and organizations precisely because they do understand estuarine resources, what is at stake and what a potential decision would mean. Oregon Shores and 1000 Friends, among others, have assisted many of these local opponents over the years in challenging estuarine development proposals, especially if they rise to the threshold of a plan amendment.

Personal Communication from Bob Bailey (September 18, 2017).

<sup>116</sup> In *Land Conservation and Dev. Com'n*, 731 P2d 1015 (Or., 1987), the Oregon Supreme Court affirmed an Oregon Court of Appeals decision that dismissed challenges to the grant of a Goal 16 exception to allow for the construction of a proposed marina, motel, recreational vehicle park, restaurant and shops on a 2425 acre salt marsh in the Nehalem estuary known as “Botts Marsh,” including dredging 9.77 acres of that marsh for a boat moorage and filling 14.48 acres to accommodate non-water dependent uses. The Oregon Supreme Court described an exception as:

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" \* \* \* essentially a variance that allows state land use goal requirements to be waived where, for some compelling reason, it is 'not possible to apply the appropriate goal to specific properties or situations.' "

*Id.* at 1018 n.3. An exception is permitted to resource goals, including Goal 16, OR. ADM. R. §660-00400010(1). *Perkins v. City of Rajneeshpuram*, 706 P2d 949, 953 (1985); *1000 Friends of Oregon v. Land Conservation and Dev. Com'n*, 642 P2d 1158, 1162 (1982),

The Bott's Marsh controversy was a defining moment for LCDC. Bob Bailey, a long-time plan reviewer for LCDC describes that controversy thus:

The Nehalem Bay Estuary Plan, a component of the Tillamook County Plan, included the Botts Marsh site and the controversy over that. In that instance, the Department \* \* \* and Commission bowed to political pressure and acknowledged the plan with Botts Marsh designated for development. That decision set off a nearly 25-year struggle over various development proposals (none of which could ever get the requisite permits) that finally culminated a year or so ago with the site being purchased for conservation.

Personal Communication from Bob Bailey (September 17, 2017). The Tillamook County Planning Director at the time also recounts a lengthy story of subsequent failed litigation by the Bott's Marsh landowner, with the result that the area never developed because the Division of State Lands found, notwithstanding the exception, the resource values of the site were too high to allow development. Personal Communication with Victor Affolter (October 3, 2017). Personal Communication from Bob Cortright (October 21, 2017).

Victor Affolter, former Tillamook County Planning Director, adds:

As you know **Botts Marsh** was the one Goal 16 issue in which I was very much involved when it came before LCDC. I'll elaborate on [the matter] including the long standing issue's denouement on April 26, 2017 when OWEB [the Oregon Watershed Enhancement Board] authorized payment of \$65,000 to enable purchase of the property from the current owner by the Lower Nehalem Community Trust (LNCT) for management as a conservation area with no development.

LCDC's "bowing to political pressure," despite DLCD staff's strong recommendation that the proposed Estuary Development zoning and the development it enabled be approved, came in large part because it was the one remaining issue that stood between Tillamook County's full acknowledgement and remand on that issue. I think DLCD was as anxious as I was to achieve our county's acknowledgement, and they were quite supportive on the other work we had done to bring it to conclusion.

The Oregon Court of Appeals and Supreme Court elected to essentially affirm DLCD's decision. The development constraint on this issue has been DSL's permitting process. I discussed in a previous email the failed efforts to achieve resolution of the conflict between DLCD's acknowledgement of the proposed Estuary Development zoning and DSL's permitting requirements led by Gail Achterman, representing the governor's offices. Resolution had been reached after a series of meetings in Salem that included [the developer and his attorney], but that was torpedoed the following Monday morning when [the attorney] filed [a challenge] against DSL's permit denial in local Circuit Court.

**The key point is that DSL's permitting authority prevented LCDC and the State Court System's approval of Tillamook County's proposed zoning of the Botts Marsh property that permitted development of an ecologically valuable portion of an estuary. The Estuary Development zoning has endured to this day, but so has DSL's permitting constraints that fended off development until OWEB's April 26 authorization of funding for purchase by a community based conservation entity.**

requirements of the goal, either directly (before acknowledgment) or indirectly (applying the goal through acknowledged plans and land use regulations).

Some of the litigation deals with the location of the estuary and, hence, the application of the goal. The acknowledged inventory maps cannot be set aside on the basis of more recent information or their alleged loss— instead, they must be amended to be effective.<sup>117</sup> Moreover, if it has already been determined in a previous case that fill is

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Emphasis in original. Personal Communication with Victor Affolter (October 17, 2017)

In another exceptions case, the acknowledgment of the Coos Bay Estuary Management Plan (CBEMP), including an exception to Goal 16 was also found to have adequate findings supported by substantial evidence in the whole record. *1000 Friends v. Land Conservation and Dev. Com'n*, 706 P2d 987 (Or App, 1985).

<sup>117</sup> *Southern Oregon Pipeline Info. Project v. Coos County*, 57 Or LUBA 44, 54 (2008). In that case, the County had submitted two sets of wetland maps in support of its acknowledgement under Goal 16, inventory maps and “special consideration” maps for the Coos Bay Estuary Management Plan (CBEMP). LUBA concluded that the inventory maps, which showed wetlands in a proposed development area, could not be contradicted by a later wetland delineation approved by the Division of State Lands, which showed no wetlands affected by a development proposal. As to the alleged loss of those maps:

At oral argument, [the pipeline applicant’s] attorney and [Petitioner’s] attorney suggested that the CBEMP inventory maps may no longer exist because they have been lost or destroyed. The challenged decision is less than clear on this point, but the text quoted above does not take that position, at least it does not clearly take that position. If the CBEMP inventory maps have been lost or destroyed, it might be that the county could rely on the applicant's wetland delineation without first adopting that delineation as a CBEMP inventory map. CBEMP Policy 3(I) clearly anticipates that the CBEMP inventory maps rather than the Special Considerations Maps will be relied on in applying the CBEMPs regulatory protections, but it just as clearly anticipates that the CBEMP inventory maps will be available for that purpose. If they in fact are not available, it may be that other detailed maps could be used in their place. However, given the Court of Appeals' consistent rejection under Goal 2 of attempts to rely on studies that have not been adopted as part of the comprehensive plan in place of studies that have been adopted as part of the comprehensive plan, any attempt by the county to rely on a wetland delineation in place of the CBEMP inventory maps that were relied upon to secure acknowledgment, without first amending the CBEMP to allow such reliance, seems questionable. While the CBEMP inventory maps may not have been adopted as part of the CBEMP, the CBEMP expressly requires that those inventory maps be used to precisely locate resources.

*Id.* at 58.

not, or is no longer, within an estuary, that issue may not be raised in a further case among the parties.<sup>118</sup>

Other litigation ended without a decision on the merits.<sup>119</sup> Most cases were unexceptional, decided on the adequacy of public agency findings.<sup>120</sup> However, two are more noteworthy.

In *People for Responsible Prosperity v. City of Warrenton*,<sup>121</sup> The Oregon Land Use Board of Appeals<sup>122</sup> rejected an attack on reclassification of a portion of the Young's Bay Estuary and the grant of a permit for a liquid natural gas (LNG) terminal in the

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<sup>118</sup> *Willhoft v. City of Gold Beach*, 41 Or LUBA 130, 134-35 (2001). The previous determination regarding removal of fill had not been challenged. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

<sup>119</sup> In *Coos Waterkeeper v. Port of Coos Bay*, 395 P.3d 14 (Or. App. 2017), Petitioner challenged a permit to dredge part of Coos Bay to create a new multipurpose slip and marine terminal, along with an access channel connecting Coos Bay with that slip, but did not raise any issues involving the goal or the local comprehensive plan and land use regulations, apparently preferring to mount their challenge on the state's fill and removal law provisions for mitigation of impacts. See OR. REV. STAT. §§196.600 to 905. In *State ex rel. Butler v. Bandon*, 131 P.3d 855 (Or. App. 2006), Relator sought to require the issuance of a land use permit because the time for local consideration had expired and the local government had not acted. Both the trial and appellate courts agreed that the time had expired and the permit did not violate the local plan or land use regulation. The essence of the challenge was that the acknowledged plan was incorrect in its treatment of the subject site; however, both courts agreed that this was an improper collateral attack on these documents. In *Kalmiopsis Audubon Society v. Div. of State Lands*, 676 P.2d 885 (Or. App. 1984), a land use-based appeal of a fill and removal permit was moot, as both the LUBA appeal period, and the permit itself, had expired. Finally, in *Board of Commissioners of Coos County v. Land Conservation and Dev. Com'n*, 565 P.2d 1107 (Or. App. 1977), a local government challenged LCDC's treatment of its plan, but the Court found the challenge premature, as the statewide planning goals were not yet effective.

<sup>120</sup> See *Federation of Indep. Seafood Harvesters v. Oregon Fish and Wildlife Comm'n*, 632 P.2d 777 (Or. 1981); *Audubon Soc'y of Portland v. Oregon Dep't of Fish and Wildlife*, 681 P.2d 135 (Or. App. 1983); *Oregon Shores Conservation Coal. v. Coos County*, 55 Or. LUBA 545 (2008), *aff'd*, 182 P.3d 325 (Or. App. 2008); *Southern Oregon Pipeline Info. Project v. Coos County*, 57 Or LUBA 44 (2008); *Holloway v. Clatsop County*, 52 Or. LUBA 644, *aff'd* 151 P.3d 961 (Or. App. 2007); *Oregon Shores Conservation Coal. v. Coos County*, 50 Or. LUBA 444 (2005); *Willhoft v. City of Gold Beach*, 41 Or. LUBA 130 (2001); *Oregon Nat. Resources Council v. City of Seaside*, 29 Or. LUBA 39 (1995); *Marine Street, L.L.C. v. City of Astoria*, 37 Or. LUBA 587 (2000).

<sup>121</sup> *People for Responsible Prosperity v. City of Warrenton*, 52 Or. LUBA 181 (2006).

<sup>122</sup> The Land Use Board of Appeals ("LUBA") was established to hear and decide most local government and some state decisions regarding land use. See OR REV. STAT. §§ 197.805 to 850.

Columbia River Estuary. Goal 16 and the City’s plan and implementing regulations regarding estuarine areas were a principal focus of the case.<sup>123</sup> LUBA rejected the contention that the City must anticipate and deal with immediately all potential negative economic impacts, requiring the applicant to conform with its development code and that it “not unreasonably interfere with public trust rights such as commercial or recreational boating.”<sup>124</sup> Moreover, LUBA found Implementation Requirement 1 for the Goal to evaluate the impacts of alterations to the estuarine ecosystem to be satisfied by the City’s code provisions applicable to “any development that could have an adverse impact on the estuary.”<sup>125</sup> Finally, LUBA found the City’s decision to be supported by substantial evidence, noting the findings demonstrated the estuarine area at issue had little biological significance and was a suitable candidate for designation for development, appropriately addressing countervailing arguments to the contrary.<sup>126</sup>

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<sup>123</sup> *Id.* at 188-89. LUBA agreed with Petitioner that Goal 16 applied in this post-acknowledgment amendment case, rather than being completely satisfied with the adoption of the City’s initial plan and implementing regulations, so there was a continuing obligation to “maintain the diversity of important and unique environmental, economic and social features within the estuary,” as required by the Goal. However, LUBA also requires grounds for challenge to be raised with some specificity and limited itself to consideration only to those goal and local enactment issues that were fairly raised in the petition for review.

<sup>124</sup> *Id.* at 190. The City successfully contended that all impacts could not be determined at this early stage and provided for a method by which adverse impacts could be identified and addressed. LUBA agreed and found the City’s response to Petitioner’s other negative economic impacts to be speculative and unreliable and provided no basis for denial on that ground. In particular, LUBA noted the myriad contingencies of federal coastal reviews and subsequent conditions.

<sup>125</sup> *Id.* at 194-95. LUBA saw the standard to be that of maintaining the diversity of the estuary, as set out in note 123, *supra*. and that the City’s findings were sufficient to meet that standard. *Id.*

<sup>126</sup> *Id.* at 200-04. LUBA concluded that the applicant was not required both to anticipate and address all future impacts, both known and unknown. *See Id.* at 203.

We see no error in finding that the general type of uses allowed by a plan amendment are consistent with applicable goal requirements, and at the same time relying on permitting processes that implement the goal and are designed to address and mitigate the possibility that specific development proposals may have more intense impacts than others, as an additional basis for concluding that the plan amendments are consistent with the goals.



A cluster of important Goal 16 findings cases also dealt with an LNG terminal. In the first of these cases with the same name, *Columbia Riverkeeper v. Clatsop Cty.*,<sup>127</sup> the focus for assignments of error that were fully sustained was on findings regarding two interpretive issues.

With respect to the first issue, LUBA remanded the case in which the applicable plan allowed “development activities” of “small or moderate” scale and prohibited filling more than 20 acres of the site<sup>128</sup> and did not initially involve estuarine issues. However, on remand the County entered new findings and Petitioners challenged those new findings in a second case<sup>129</sup> that turned, in part, on Goal 16.<sup>130</sup>

LUBA found that the dredging of 46 acres of the river channel adjacent to the LNG project was a “development activity” and had to be calculated along with the terminal area, pipelines, power lines in evaluating whether the project were “small or moderate,” (which the County set at 100 acres).<sup>131</sup> Petitioners successfully argued that “protection” should not be measured against the economic development element of the County Plan, but rather against the Estuarine Element, weighing the impacts of the

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*Id.* LUBA also found the potential loss of two acres of salmon habitat was not fatal to the project, could be mitigated and was consistent with the “diversity” standard. *Id.* at 200-01, 204.

<sup>127</sup> 58 OR. LUBA 190, 217-19, 229-32 (2009) [hereinafter *Riverkeeper I*].

<sup>128</sup> *Id.* at 229.

<sup>129</sup> *Columbia Riverkeeper v. Clatsop Cty.*, 60 OR. LUBA 454 (2010) [hereinafter *Riverkeeper III*].

<sup>130</sup> *Columbia Riverkeeper v. Clatsop Cty.*, 58 OR. LUBA 235 (2009)[hereinafter *Riverkeeper II*]. This other 2009 case, also entitled *Columbia Riverkeeper v. Clatsop County*, dealt with a variance to the County’s road standards in conjunction with the LNG development. The variance was upheld, but the case is not important to the Estuarine Goal. Neither the goal, nor county plan or implementing ordinance standards regarding estuaries arose in this case. In addition, there are other cases with the same name that do not relate to Goal 16. *Id.*

<sup>131</sup> *Riverkeeper III*, 60 OR. LUBA at 7, 22.

development on the estuary<sup>132</sup> and concluded that the impacts of dredging the 46 acres of the river channel were “development activities” that would put the project at over 100 acres and remanded the case for a further evaluation of whether the development activities were of a small or moderate scale.<sup>133</sup> The Oregon Court of Appeals upheld this portion of the LUBA decision.<sup>134</sup>

The other findings issue in this case arose over the definition of “protect” in Goal 16<sup>135</sup> as implemented by the County’s plans.<sup>136</sup> In its initial review of the County’s decision, LUBA found the County’s interpretation of the goal or county policies incorrect because it used a dictionary definition of “protect,” instead of applying the goal definition.<sup>137</sup> While LUBA denied another challenge under Goal 16, under which

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<sup>132</sup> See *Id.* at 40-41.

<sup>133</sup> *Id.* at 22-23. This would be a very difficult proposition, given the County’s 100 acre limitation on “small or moderate” development. See *Id.* at 23-24.

<sup>134</sup> *Columbia Riverkeeper v. Clatsop Cty.*, 243 P.3d 82, 90-91 (2010) [hereinafter *Riverkeeper IV*]. In doing so, the Court also upheld LUBA’s holding that an attempt to redefine the relevant area was not within the remand instructions and a different area could not be substituted for the original one. *Id.*

<sup>135</sup> *Id.* at 89. The definitions applicable to all statewide planning goals include the following:

“‘PROTECT’ means to save or shield from loss, destruction, or injury or for future intended use.” *Id.* at 80 (emphasis added).

<sup>136</sup> *Riverkeeper I*, 58 OR. LUBA . at 217. Petitioners raised two county policies for implementing Goals 16 and 17 (Shorelands). LUBA summarized the issues in its initial decision as follows:

CCCP Policy 20.2(1) provides that “[t]raditional fishing areas shall be protected when dredging, filling, pile driving or when other potentially disruptive activities occur.” CCCP Policy 20.8 provides that “[e]ndangered or threatened species habitat shall be protected from incompatible development.” Thus, the plan requires that both traditional fishing areas and the habitat of endangered or threatened species be “protected.” The parties disagree as to what “protect” means in this context.

*Id.*

<sup>137</sup> LUBA concluded in *Riverkeeper I*, note 128, *supra.*:

As the decision notes, the definitions to Statewide Planning Goals define the term “protect” to mean “[s]ave or shield from loss, destruction, or injury or for future intended use.” The term “protect” is used in both Goal 16 and Goal 17, and it is reasonable to assume that the term

dredging the adjacent channel is permitted only if there were a demonstrated need for that activity and the same would not interfere with public trust rights,<sup>138</sup> it found the implementation of the “protect” language incorrect and remanded the matter to the County for reconsideration.<sup>139</sup>

The County adopted new findings regarding the “protect” language on remand, but the matter came before LUBA a second time in *Columbia Riverkeeper v. Clatsop County*<sup>140</sup> and LUBA again found the County findings inadequate because it again did not utilize the state goal definition of “protect” in dealing with its obligations under the goals and the two plan policies implementing those goals that were raised by Petitioners.<sup>141</sup> Because the estuarine portion of the site was located in a “natural” management unit, LUBA found a more exacting level of protection was required:

Although we agree with the county that the Goal definition of “protect” does not require that estuarine resources identified for protection be completely or absolutely protected from any “loss, destruction, or injury” whatsoever, the county has made a planning decision under the CCCP policies at issue that implement Goal 16 and the scheme set forth in the second paragraph of Goal 16, quoted above, to “protect” as opposed to a decision to “maintain,” “develop,” or “restore” traditional fishing areas and endangered or threatened species habitat. Having made that “protect” planning decision, the local program to protect those estuarine resources must not allow “loss, destruction, or injury” beyond a de minimis level. Thus, the development that is to be allowed by the disputed rezone is not consistent with the Goal definition of “protect” unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a

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“protect” as used in CCCP Policy 20.2(1) and CCCP Policy 20.8, which implement Goal 16 and 17, is intended to have the same meaning.

*Id.* at 218-19.

<sup>138</sup> *Id.* at 219-221.

<sup>139</sup> *Id.* at 219.

<sup>140</sup> *Columbia Riverkeeper v. Clatsop Cty.*, 60 OR. LUBA 454, 24-39 (2010) (Riverkeeper III).

<sup>141</sup> *Id.* LUBA said that the County was entitled to no deference in its interpretation of state law and pointed out the use of “protect” in Goal 16. *Id.* at 26-27.

degree that there is at most a de minimis or insignificant impact on the resources that those policies require to be protected.<sup>142</sup>

LUBA then analyzed the adequacy of methods to shield estuarine resources under the County's plan and land use regulations, LUBA found the County measures were more oriented towards mitigation of impacts, rather than protection of those resources beyond a *de minimis* level,<sup>143</sup> and that moreover the measures did not protect two specific estuarine resources (traditional fishing areas and endangered and threatened species habitat) but rather chose to stress that estuarine values as a whole were protected.<sup>144</sup>

On review of LUBA's decision, the Oregon Court of Appeals affirmed on the "protect" issue as well,<sup>145</sup> determining that the applicant could not relitigate the definition

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<sup>142</sup> Riverkeeper III, 60 OR. LUBA at 30-31.

<sup>143</sup> *Id.* at 31-34. LUBA concluded:

To the extent those measures allow greater than de minimis impacts to the traditional fishing areas protected by CCCP Policy 20.2(1) and the endangered or threatened species habitat that must be protected from incompatible development under CCCP Policy 20.8, those measures do not "protect" the resources, within the meaning of that word in those policies and Goal 16.

*Id.* at 33-34.

<sup>144</sup> *Id.* at 34-35. LUBA determined that there was no tradeoff to be made that would result in a denigration of these resources beyond a *de minimus level*:

In conclusion, we agree with petitioners that to the extent the county concludes that the proposed development activities "protect" the specified resources, where the proposed activities include attempts to protect, an intent to protect, or proposals that reduce impacts to the protected resources but still allow significant adverse impacts to the resources to occur, the county's interpretation misconstrues the term "protect" as defined in the Goals.

*Id.* at 36-37.

LUBA then detailed the inadequacy of the County's findings with regard to protection of traditional fishing areas and of endangered or threatened species habitat. *Id.* at 37-48.

<sup>145</sup> *Columbia Riverkeeper v. Clatsop Cty.*, 243 P.3d 82, 91 (2010)(Riverkeeper IV)

of “protect,” not having appealed the LUBA decision on that point<sup>146</sup> and concluded that LUBA had correctly analyzed the County’s decision on that point.<sup>147</sup>

There were other important decisions that dealt with the mechanics of the estuarine goal. In *Or. Shores Conservation Coal. v. Lane Cty.*,<sup>148</sup> Lane County and the City of Florence amended a portion of their joint Coastal Resources Management Plan (CRMP) for the Siuslaw River Estuary relating to a Natural Management Unit, which these public agencies wished to designate as a Conservation Unit to allow the possible use of riprap to control erosion on a bank of the Siuslaw River. LUBA rejected Petitioners’ contention that Conservation Management Units had the same restrictions on the use of riprap as did Natural Management Units,<sup>149</sup> noting that the acknowledged

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<sup>146</sup> *Id.* at 93-94. As did LUBA, the Court noted the natural management unit status of the subject area (even though other parts of the Columbia River Estuary were designated for deep draft development), which severely limited uses there in accordance with the estuarine classification system established in OR. ADM. R. 660, division 17. The Court concluded :

We agree with LUBA's analysis of the meaning of " protect" under Goal 16. " Protect" is used in the policies relating to natural management units, which are designated, in part, to " assure the protection of significant fish and wildlife habitats." A use in those units must be " consistent with the resource capabilities of the area," which is defined to mean that the impacts of the use are not " significant" or that significant wildlife habitats can continue to be " protect[ed]." In other management units, where resource values are conserved or not immunized from development effects, alterations of the estuary that produce significant impacts are allowed. " Protect," in this context, means more than minimizing the adverse impacts of conflicting development through mitigation. It means inhibiting development that causes significant adverse impacts on the protected resource. (footnote omitted)

*Id.* at 96.

<sup>147</sup> *Id.*

<sup>148</sup> 52 Or. LUBA 471, 473-74 (2006).

<sup>149</sup> OR. ADMIN. R. §660-017-0025(1)(a) limits riprap use in Natural Management Units:

Riprap is not an allowable use, except that it may be allowed to a very limited extent where necessary for erosion control to protect:

(A) Uses existing as of October 7, 1977;

(B) Unique natural resource and historical and archeological values, or;

estuary plan allowed riprap use in those units under certain circumstances and pointing out that there was no permit to use riprap in this case – only a management unit reclassification.<sup>150</sup> However, Respondents failed to consider adequately the cumulative impacts of their decision as required by Goal 16,<sup>151</sup> and lack of adequate findings to justify the redesignation.<sup>152</sup>

## VI. Conclusion

In late 2017, it is difficult to predict the future of the Oregon estuary program. Federal funding and participation in that program is uncertain. It is unlikely the state will undertake new initiatives, and local governments (as well as LCDC) will find it difficult to attract and keep sufficient staff to go beyond existing plans and regulations.<sup>153</sup> It is also

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(C) Public facilities; and where consistent with the natural management unit description in Goal #16 (and as deemed appropriate by the permitting agency).

<sup>150</sup> 52 Or. LUBA 471, 477-79 n.3 (2006). At note 3 of the decision, LUBA states that, while it need not decide the matter of a riprap application in this case, it appeared that its use was sanctioned under Goal 16, as well as the local estuary plan.

<sup>151</sup> *Id.* at 478-80. LUBA stated at 480:

\* \* \* It may be that the cumulative impacts of likely measures taken to reduce erosion in Sub-Area C-1 may be negligible; nonetheless, Goal 16 requires that they be considered and the results of that consideration included in the comprehensive plan, in this case the CRMP.

<sup>152</sup> *Id.* at 484-85. In addition to the inadequacy of the findings on cumulative impacts, Respondents also asserted that the Conservation Management Unit designation would “buffer” the adjacent Natural Unit, which was an additional ground for remand. *Id.* at 484-85.

<sup>153</sup> Matt Spangler, the Lincoln County Planning Director during the formulation, and later the administration, of coastal plans and implementation measures for that county and now a coastal specialist for LCDC, observes on the nature and durability of the estuarine planning process as follows:

There are really two distinct type of decisions in the estuary-planning realm. Broadly speaking, those are planning decisions, or decisions that are made as a part of the formulation and adoption of the plan, and implementation decisions, perhaps better described as project review decisions. In general, planning decisions consist mostly of the basic spatial allocation decisions, meaning the identification of management unit boundaries and the assignment of designations to these units as either natural, conservation or development. These decisions are directed by the detailed framework of Goal 16 and typically have been made in a very public process with participation by various interests and agencies. The result is that the basic spatial foundation of Oregon’s estuary plans are well vetted, framed by the structure of Goal 16 and informed by considerable expertise

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beyond the local staff level. One reason, in my opinion, that Oregon's estuary plans have been generally successful and quite durable over time is because of this focus on advance decision-making. It should also be noted that the staff capacity of local governments during the initial phase of plan development was considerable, thanks to substantial financial assistance from the state. \* \* \* [T]his capacity is now quite diminished and a major reason why most estuary plans are little changed since their original formulation back in the early to mid-1980s.

Implementation decisions, or the review of individual estuarine development proposals place a different, more technical burden on local governments. In practice, environmental consultants retained by applicants provide most of the technical analysis required for individual project permitting. Most local staff and decision makers are not technical experts in estuarine resources, and so rely to a considerable extent on the input of state and federal resource agencies in the review of this information in rendering decisions on individual project proposals. \* \* \* [T]hese decisions, if of a significant nature, typically generate scrutiny from a variety of interested entities, some of which are possessed of their own technical expertise and exert considerable influence in the project review process.

Personal Communication with Matt Spangler (August 18, 2017). Thus, Spangler suggests, the estuarine planning process is relatively self-contained and any changes for specific sites are likely to be competently justified.

Bill Grile, the Coos County Planning Director during most of that county's extended and acrimonious acknowledgment process recalls the frustration of that local government to the acknowledgment process:

No write-up on Coos Bay's estuary interagency consensus process would be complete without mentioning that "consensus does not equal compliance." DLCD sat at the table with local governments during nearly 20+/- facilitated meetings without objecting to consensus decisions then ultimately approved 20+ Goal 2 exceptions to allow the consensus decisions to stand. Some of these were Goal 17 exceptions but the unmistakable conclusion was that DLCD itself didn't really know how to make Goals 16 and 17 reasonably work in a "Development Estuary" without applying the flexibility allowed by Goal 2.

\* \* \*

What I can say about the acknowledgment process is that it was a miserable experience. The LCDC was feeling its way along at the same time we were, and so "we'll tell you when you have it right" was how it felt to us. [The] Consultant \* \* \* did the best he could to negotiate consensus decisions, all the way along with the DLCD non-remonstrance, But when I evaluated the decisions against a detailed goal compliance matrix that I built, it became evident to me that major exceptions would be necessary. If DLCD would have known that the consensus decisions were noncompliant, it should have expressed its opinion "during the facilitated negotiations... and it did not do so.

Personal Communications with Bill Grile (October 12-13, 2017).

Bob Bailey, a long-time plan reviewer for LCDC notes with respect to the Coos Bay Estuary Management Plan (CBEMP) and estuary plans generally:

The CBEMP has been amended very few times in the past 32 years...partly, I think, because the economic drivers of the community radically changed beginning in the mid- to late-1980s because of the collapse of the timber industry, because the planning process was so painful that no one wanted to revisit it and when changes were, in fact proposed, they could never be justified under the goal. But since acknowledgement, each of the jurisdictions has more or less gone its own way through implementation. There is today no single CBEMP document and no formal process for maintaining it.

likely that nonprofit, coastal environmental groups will have the knowledge and expertise to ward off many proposals that might threaten coastal resources. Moreover, neither logging nor fishing appears likely to stage a comeback in the near future. What may stir interest is the prospect of something new in a development management unit— upgrading port facilities, new energy facilities (whether wave energy or transmission of oil or gas) and the like.<sup>154</sup>

What has been disappointing in evaluating the Oregon Estuary Program is that it did not live up to some of its early aspirations, especially those that saw detailed planning achieving faster and easier decisions on projects. That was clearly not to be.<sup>155</sup>

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I would also say that there have been very few, if any, amendments to any of the estuary plans over the years. Coastwide, the implementing zoning ordinances for these plans have been amended only a bit more often (e.g. the NOAA berth on Yaquina Bay). As a result, Goals 16 and 17 combined were major factors, in my view, in halting the loss of estuarine habitats and preventing conversion of estuarine areas to non-estuarine uses.

Personal Communication from Bob Bailey (September 17, 2017). Bailey also terms the success of Goal 16 in halting further destruction of estuarine habitats and setting the stage for reclamation work “amazing,” but noting that the transformative changes in timber and farm practices, due in part to environmental regulations) made these result much easier. *Id.*

<sup>154</sup>Cameron La Follette of the Oregon Coast Alliance, an environmental advocacy group, concludes the state’s estuary program has served it well by providing a legal structure to balance ecosystem needs and providing protection of natural resources. However, beyond the obvious problems posed by falling funding and the push for coastal energy infrastructure, La Follette cites additional issues:

- The cumulative impacts of sedimentation
- Urban pollution through stormwater runoff, lawn fertilizers, pesticides and additional impervious pavement
- Nearshore Dead Zones, probably climate-change related, endangering anadromous and other fish and mollusks

Personal Communication with Cameron La Follette (October 28, 2017).

<sup>155</sup> Matt Spangler, former Lincoln County Planning Director and presently Senior Coastal Policy Analyst for DLCD, observes:

Going in, many of us naively thought that the conservation/development balance represented by the management unit scheme would provide for predictability in matters both conservation and development. But by the time the Oregon plans were completed, it was clear that there would be no “affirmative” consistency on the development side of the ledger. The regulatory agencies, primarily the Corps and EPA, could not, as a matter of law, commit in advance to the issuance of permits in designated development management units, irrespective of what the plan might say. By



Nevertheless, the adoption and implementation of the Oregon Estuary Program is a significant achievement; Not only does it staunch the loss of productive habitat, act as natural filtration of sediment and pollutants, and provide for storage of floodwaters, but estuaries are an indicator of our commitment to the planet. Moreover, the Oregon Estuary program provides for land use benefits to estuary users. When an entrepreneur presents a new proposal, she will find a process in place to evaluate that proposal, as well as an ongoing system that protects estuarine values.<sup>156</sup> She will know where the proposal may

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design, these permit reviews are conducted case-by-case, and not necessarily with any recognition of the broader context provided by the plan. This situation has grown more complex over time, especially with the ESA listings triggering NMFS consultation as a part of the estuarine regulatory process. While the estuary plans have provided certainty in securing broad, system-wide conservation objectives through the designation of natural and conservation management units, in today's environment the outcome of the regulatory process for proposed aquatic area development is far from certain, even in development management units.

Personal Communication with Matt Spangler (October 24, 2017).

<sup>156</sup> Bob Bailey has also observed:

\* \* \* After the plans and ordinances were acknowledged and the use designations of various estuarine and shorelands thereby cemented in place, the burden on local staff to fully understand estuarine resources issues per se probably lessened. If a proposal affecting estuarine areas or shorelands was brought to a city or county, that local staff, per the requirements of the zoning ordinance or perhaps the comp plan, put the burden on the applicant/proponent to provide necessary resource evaluation/rationale for the proposal. State and federal resources agencies, as well as NGOs, provided the check on whether the provided information and evaluation were sufficient and if there was a dispute over sufficiency, an appeal to LUBA was often decisive. More importantly, DLCD, in particular, and [the Division of State Lands] have made it a priority to provide local governments with advice and technical assistance on estuarine resources and development issues and, in some cases, technical assistance grants to help acquire the needed information to make a decision.

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I think that overall, the message to everyone relative to estuarine land use decisions on the Oregon coast is to tread carefully; stay within the comp plan and zoning ordinance if at all possible. If you must change a plan or ordinance, do your homework, take your time, be transparent, and be prepared to deal with strong opposition.

Personal Communication from Bob Bailey (September 18, 2017).

not occur and she will be assured that there will be an estuarine system that will provide protection of important resource values for the majority of Oregon estuaries.