

November 4, 2019

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VIA EMAIL TO PLANNING@CO.COOS.OR.US

Andrew Stamp
Land Use Hearings Officer
c/o Coos County Planning Department
225 N Adams St
Coquille, OR 97423

**Re: Jordan Cove Energy Project Land Use Applications
Coos County File Nos. HBCU-19-003/FP19-003
Applicant's Final Written Argument**

Dear Mr. Stamp:

This office represents Jordan Cove Energy Project L.P. ("JCEP"), the applicant requesting approval of concurrent land use applications to construct various components of a larger project to process, liquefy, and export natural gas from the North Spit ("Project") in Coos County ("County") File Nos. HBCU-19-003/FP-19-003 ("Applications"). This letter and its one exhibit constitute JCEP's final written argument in support of the Applications. This submittal (including the exhibit) does not include any new "evidence" as that term is defined in ORS 197.763(9)(b). Please consider this submittal before completing your recommended order for this matter.

I. Executive Summary.

There is ample, credible, unrefuted evidence in the record to find that the Applications satisfy the relevant approval criteria. Therefore, the Hearings Officer should enter an order recommending that the Board approve the Applications. As support for this conclusion, the Hearings Officer should rely upon the materials submitted into the record to date by JCEP as well as these additional detailed arguments addressed below:

- The concrete batch plant will be compatible with existing uses on surrounding properties.

- The temporary dredge transport line is consistent with the resource capabilities of the 13B-NA estuarine zone.
- The current facts and law do not support a finding that the County's land use jurisdiction is preempted in this matter.
- The pile dike rock apron is correctly classified as "shoreline stabilization."
- Opponents' additional contentions fail because they challenge Project components that are not included in the Applications and/or because they assert non-compliance with provisions that are not mandatory approval criteria applicable to the Applications.

II. Detailed Arguments.

A. The concrete batch plant will be compatible with existing uses on surrounding properties.

JCEP's temporary concrete batch plant is a conditional use in the IND zone. CCZLDO 4.3.200. As a result, it must demonstrate that it is compatible with surrounding properties or that it can be made so through the imposition of conditions. CCZLDO 4.3.220(f)i. A conditional use is "compatible" if it is "capable of existing together with the surrounding uses without discord or disharmony." *Id.* Compatibility is to be measured against "existing surrounding uses and not potential or future uses." *Id.* The County's practice is to limit "surrounding uses" to those that are within the applicable 250-foot notice radius from the boundaries of the property ownership. Further, the compatibility analysis does not require consideration of impacts to "activities," which are separate and apart from "uses" under the CBEMP.

The Hearings Officer should find that JCEP's concrete batch plant is compatible with existing surrounding uses. As support for this conclusion, the Hearings Officer should rely upon the written testimony from KBJ in JCEP's Exhibit 35, which explains how the plant will either not have off-site impacts or will minimize or mitigate same:

- The plant will be located within the boundaries of a five-acre property and set back behind a security fence.

- JCEP or its contractors will obtain and comply with all required permits to erect and operate the plant, including an applicable air permit and a 1200-A permit.
- JCEP will develop and comply with a stormwater management plan, a site-specific fugitive dust plan, and will develop a wastewater treatment system.
- Concrete batch plants do not typically generate significant plumes of steam or smoke as part of their operations, which should prevent impacts to local visibility.
- When the facility is closed, lighting will be limited to a level that is appropriate for security purposes.
- Typical hours will be from 6:00am to 6:00pm on weekdays, with some extended hours for special projects.
- The plant will only be in operation for 30-36 months, and once work is complete, it will be decommissioned.
- The plant will be limited to supplying materials for construction of the Project and will not offer concrete to the general public.

JCEP will also comply with dust control and emissions control measures set forth in Section 9.2.3 of JCEP's Exhibit 34.

Additionally, surrounding properties are not developed with sensitive uses. As set forth in the staff report, surrounding properties are zoned Recreational and Industrial. To the east is the estuary, which is not developed with a use; to the south is undeveloped industrial property where the Project is proposed; and to the west and north are recreational areas. Although opponents contend that noise from the batch plant will disturb or interfere with use of the recreational areas, their own testimony notes the extensive use of noisy off-road vehicles in the dunes, an indication that the area is not a pristine location free of ambient noise. Further, although the County has approved a land use application to permit the owner of the Boxcar Hill property to expand/relocate his campground to the north of the property, this is not yet an existing use and thus relevant to the analysis.

Given that the area is not surrounded by sensitive uses, the short-term nature of the batch plant, its limited impacts, and JCEP's proposed mitigation measures, the Hearings Officer should find that the concrete batch plant can exist together with surrounding uses without discord or disharmony. Therefore, the plant will be consistent with this provision.

B. The temporary dredge transport line is consistent with the resource capabilities of the 13B-NA estuarine zone.

JCEP's proposed temporary dredge transport line is classified as a "Temporary Alteration" in the 13B-NA estuarine zone. CCZLDO 3.2.446.B.12. In order to approve the line at this location, the County must adopt findings that it is consistent with CBEMP Policy #5a. *Id.* Among other things, this policy requires findings that the temporary dredge transport line is consistent with the resource capabilities of the area under CBEMP Policy #4. The Hearings Officer should find that the temporary dredge transport line is consistent with the resource capabilities of the area under CBEMP Policy #4. As support for this conclusion, the Hearings Officer should rely upon the discussion of the potential impacts of the temporary dredge transport line on specific habitat areas and proposed mitigation measures set forth in JCEP's Exhibit 22 at Sections 3.1.4 and 3.3.

C. The current facts and law do not support a finding that the County's land use jurisdiction is preempted in this matter.

At the hearing in this matter, the Hearings Officer requested a discussion of the federal court decisions pertaining to the Algonquin Gas Transmission project in Massachusetts. A summary of those decisions (with citations) and a discussion of preemption in the Natural Gas Act context in general are set forth in JCEP's Exhibit 39.¹ In summary, in that case, the town denied a wetland impact permit application for a gas compressor station in the Coastal Zone based upon non-compliance with a local provision that: (1) was not an enforceable policy incorporated within the Massachusetts Coastal Management Plan; and (2) concerned criteria that FERC had already determined had been met by the project under parallel federal criteria. In the present case, the County

¹ Although this discussion occurs in a separate exhibit, it consists only of legal argument and analysis and does not include new "evidence" as that term is defined in ORS 197.763(9)(b).

is not currently seeking to deny the Applications under analogous facts or law. Accordingly, JCEP is not currently asserting that the County is preempted from exercising its land use jurisdiction in this matter. To the extent that the Hearings Officer finds that the County's land use jurisdiction is preempted in this matter, JCEP requests that such findings be in the alternative and not to the exclusion of findings on the merits of the Applications.

D. The pile dike rock apron is correctly classified as "shoreland stabilization."

Mr. Graybill alleges that the proposed rock apron fails to comply with definition of "shoreline stabilization," which is an allowed ACU within the 5-DA zone, on the sole basis that the proposed rock apron is not parallel to the shoreline. According to this testimony, structures such as this rock apron which are designed and intended to minimize slope migration or erosion within a waterway constitute "shoreline stabilization" only if located entirely at or on the shoreline. As discussed below, there is no basis for this unduly narrow interpretation when, as in this instance, the purpose, in part, of the structure is to prevent or minimize erosive impacts to the adjacent pile dike and, in turn, to the intertidal area extending to mean higher high tide, i.e. shoreline.

The proposed rock apron commences at the shoreline and extends waterward toward the federal navigation channel and is intended to comply with USACE direction to protect Pile Dike 7.3 and adjacent inter-tidal areas extending to MHHT from erosive impacts. See Exhibit 26 at 75. Pile Dike 7.5 has two purposes, which are (1) improve the stability of the Channel and (2) abate bank erosion in the adjacent inter-tidal area. ID at 75. See *also* Exhibit 27 at 239. In this instance, it is important to note, as stated in the applicant's written application narrative, that the rock apron constitutes "riprap," which is expressly included in the definition of "shoreline stabilization" set forth in CCZLDO 2.1.200 as an acknowledged type of structural shoreline stabilization. The term "riprap" is defined in CCZLDO 2.1.200 to include:

"Riprap: A layer, facing, or protective mound of stones randomly placed to prevent erosion, scour or sloughing of a structure or embankment . . ."

Taken together, these definitions confirm that the placement of riprap for the purpose of protecting an in-water structure, which in this instance is designed to protect both the channel and adjacent intertidal areas extending to the mean higher high tide line i.e. shore, from degradation via erosive hydraulics constitutes “shoreline stabilization.”

Mr. Graybill also argues that the in-water placement of 6500 cy of rock associated with this protective structure constitutes prohibited fill in this zoning district. To the contrary, the placement of this material is an inherent and essential component of the rock apron as riprap for purposes of achieving shoreline stabilization, and, as such, is accessory to such requested activity. While construction of the rock apron necessarily involves the placement of Fill material, the deposited material is an incidental accessory activity which would not occur but for the rock apron as a primary shoreline stabilization structure and, accordingly, is not subject to regulation under the CCZLDO as a primary use in this district. Further, the fact that the Department of State Lands regulates broadly the placement of organic material in waters of the state as “fill” under an independent regulatory scheme has no relevance as to how such activity is defined or regulated under the CCZLDO. Finally, applicant addressed the reason for selecting shoreline stabilization as opposed to alternative measures at page 89 of the narrative in support of the Applications. Mr. Graybill does not directly refute or rebut this discussion in his testimony. Therefore, the Hearings Officer should deny Mr. Graybill’s contentions on this issue.

E. Opponents’ additional contentions fail because they challenge Project components that are not included in the Applications and/or because they assert non-compliance with provisions that are not mandatory approval criteria applicable to the Applications.

The Hearings Officer should deny several contentions raised by the opponents because they are outside the scope of this proceeding on the grounds that they either challenge components of the Project that are not included in the Applications or that they contend that the Applications are not consistent with provisions that are not mandatory approval criteria. By way of example but not limitation, the Hearings Officer should find that the following contentions are not relevant to the decision in this case:

- Barge berth in the 6-WD estuarine zone: The barge berth is located in the 6-DA estuarine zone; therefore, the provisions of the 6-WD zone are not applicable to this Project component.
- Dredging for the access channel and the navigation reliability improvements: These activities are not part of the Applications.
- Cumulative impacts analysis: There is no legal authority for the County to require an analysis of the cumulative impacts of the entire Project as part of the Applications. Instead, the County has assessed the impacts of each element of the Project within the context of the individual land use application presented, and has imposed mitigation measures on each application in proportion to those impacts. Together, these individual impact assessments and mitigation measures address the entirety of the Project. Any new attempt by the County to address impacts previously or separately addressed could result in imposing mitigation measures that exceed the Project's actual impacts. As an aside, FERC is conducting a cumulative impacts assessment for the Project, so this step will occur at the federal level.
- CBEMP Policy #5: This policy does not apply to the Applications. Although the "impact minimization" standard of this policy is potentially applicable pursuant to CBEMP Policy #5a.II.b, that policy is not triggered by the Applications for the reasons at explained at page 87 of the narrative in support of the Applications.
- Coos County Housing Analysis and Action Plan: This plan appears to be aspirational in nature, and the County has not amended the CCZLDO or CBEMP to make it an approval criterion that would be applicable to the Applications.

Because these issues are outside the scope of the Applications, they do not provide a basis to deny or condition the Applications.

III. Conclusion.

The evidence and argument in the whole record, including this submittal, demonstrates that the Applications satisfy all applicable approval criteria. Therefore, the Hearings

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Officer should enter an order recommending that the County Board of Commissioners approve the Applications.

Thank you for your careful review of this information.

Very truly yours,

A handwritten signature in blue ink, appearing to read "SJK", with a stylized flourish at the end.

Seth J. King

Encl.

cc: Jill Rolfe (via email) (w/encl.)
Steve Pfeiffer (via email) (w/encl.)
Client (via email) (w/encl.)