



OREGON SHORES  
CONSERVATION COALITION

Monday, September 30, 2019

Coos County Planning Department  
c/o Planning Director Jill Rolfe  
Coos County Courthouse  
250 N. Baxter  
Coquille, Oregon 97423

*Via Email to: [planning@co.coos.or.us](mailto:planning@co.coos.or.us)*

**Re: Coos County File No. HBCU-19-003/FP-19-003  
Concurrent Land Use Applications by Jordan Cove Energy Project L.P.  
Multiple Proposals Related to Liquefied Natural Gas Terminal Facility  
Comments of Oregon Shores Conservation Coalition**

Dear Planning Commission Members:

Please accept these comments from the Oregon Shores Conservation Coalition and its members (collectively "Oregon Shores") to be included in the evidentiary record for File No. HBCU-19-003/FP-19-003 ("Omnibus II").<sup>1</sup> Oregon Shores is a non-profit organization dedicated to protecting the Oregon coast's natural communities, ecosystems, and landscapes while preserving the public's access to these priceless treasures in an ecologically responsible manner. Our mission includes assisting local residents in land use matters and other regulatory processes affecting their coastal communities, as well as engaging Oregonians and visitors alike in a wide range of advocacy efforts and sustainable stewardship activities that serve to protect our state's celebrated public coastal heritage. For nearly half a century, Oregon Shores has been a public interest participant in legal processes and policy decisions related to land use, shoreline, and estuarine management in the State of Oregon. Oregon Shores has been tracking and working to address the numerous adverse environmental and social impacts likely to arise from the

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<sup>1</sup> See Coos Cnty. Planning Dep't, *Notice of Land Use Hearing*, Coos Cnty. File No. HBCU-19-003, 1-3 (Sept. 10, 2019) [*hereinafter Omnibus II Pub. Notice*].

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proposed Jordan Cove Liquefied Natural Gas (LNG) facility, the Pacific Connector Gas Pipeline, and the component activities associated with the two in the Coos Bay estuary and its surrounding communities for well over a decade.

Oregon Shores requests that the Hearings Officer leave the record open to allow for submission of additional information and rebuttal of information presented for at least seven days. Please notify us of any further decisions, reports, or notices issued in relation to these concurrent applications. Oregon Shores will provide further comments as appropriate and allowed within the open record period.

## **I. Background**

### **A. Current Proposals within Omnibus II**

Jordan Cove Energy Project L.P. (“JCEP” or “Applicant”) proposes to develop a natural gas liquefaction facility and export terminal (LNG Terminal) on the North Spit of Coos Bay. The LNG Terminal would receive a maximum of 1.2 billion cubic feet per day of natural gas via the proposed Pacific Connector Gas Pipeline (“PCGP” or “Pipeline”) and cool it into its liquid form in preparation for export to overseas markets. The proposed Pipeline is a 36-inch subsurface interstate natural gas pipeline extending 229 miles from Malin, Oregon to the coast at Coos Bay’s North Spit. The Pipeline’s sole purpose is to transport natural gas extracted from locations in Western Canada and possibly locations in the western United States to the proposed LNG Terminal. The LNG Terminal will produce a maximum of 7.8 million metric tons of LNG for export each year. The proposed Project—including the LNG Terminal, Pipeline, and related components—is collectively known as Jordan Cove.

Over the past decade, Jordan Cove has failed to garner many of the required approvals, permits, and compliance determinations from local, state, and federal agencies. In some cases, authorizations were denied on the basis of the Applicant’s inability to demonstrate a public need for its proposed activities and/or inability to demonstrate that proposed activities could be implemented without serious and irreparable adverse impacts on protected conservation, environmental, recreational, and public safety uses. Most recently, the Oregon Department of Environmental Quality (“DEQ”) issued a decision denying Clean Water Act Section 401 Certification for both the proposed Pacific Connector Pipeline and the Jordan Cove Energy Project LNG terminal.<sup>2</sup> DEQ concluded that it did “not have a reasonable assurance that the construction and operation of the Project will comply with applicable Oregon water quality standards[...].”<sup>3</sup> In the State of Oregon’s comments on Jordan Cove’s Draft Environmental Impact Statement (“DEIS”), prepared by the Federal Energy Regulatory Commission (“FERC”) in conjunction permitting requests for the proposed LNG Terminal and Pipeline, several state agencies concluded that federal environmental impact findings for the Jordan Cove LNG project

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<sup>2</sup> See Or. Dep’t of Env’tl. Quality (“DEQ”), *Jordan Cove 401 Water Quality Certification Decision Cover Letter*, 1-3 (May 6, 2019) [hereinafter *DEQ Cover Letter*]; See also DEQ, *Evaluation and Findings Report: Section 401 Water Quality Certification for the Jordan Cove Energy Project*, 1 (May 2019) [hereinafter *DEQ Findings Report*].

<sup>3</sup> *DEQ Denial Letter*, 3.

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were inadequate and frequently inaccurate.<sup>4</sup> Both the DEQ’s denial and the State’s DEIS Comments serve to validate the concerns raised by Oregon Shores, and should be taken into consideration before any final decision in this matter.

At issue for the purposes of this public hearing are Jordan Cove’s Concurrent Application requests (“Application”) for several proposals to site, construct, and operate its proposed LNG Terminal at locations within and adjacent to the Terminal on the North Spit.<sup>5</sup> These proposed uses and activities will occur in zoning districts subject to the Coos Bay Estuary Management Plan (“CBEMP”) as well as Balance of County (“BOC”) Industrial (“IND”) Zone as follows:

Type	Proposed in CBEMP Zoning Districts:	Proposed in the BOC IND Zone
“New developments and activities”	<ul style="list-style-type: none"> <li>• Meteorological station in 4-CS</li> <li>• Temporary construction laydown uses and activities in the 6-WD, 3-WD, and 3- NWD zones</li> <li>• Shoreline stabilization in the 5-WD zone</li> <li>• Pile dike rock apron in the 5-DA zone</li> <li>• Temporary barge berth in the 6-DA zone</li> <li>• Temporary dredge material transport pipelines (“TDT Pipelines”) in the 6-DA, 7-NA, 13B-NA, and 14-DA zones</li> <li>• Relocation of primary access to the LNG Terminal Site in the 6-WD zone</li> <li>• Wastewater pipeline (high-intensity utility) in the 7-D zone<sup>6</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Industrial wastewater pipeline (“IWWP”)</li> <li>• Concrete batch plant</li> <li>• Safety, security, and emergency preparedness, management, and response center (“SORSC”)</li> <li>• Helipad</li> <li>• Offices</li> <li>• Temporary workforce housing</li> <li>• Wastewater treatment facility</li> <li>• Parking lot</li> <li>• Temporary construction laydown uses and activities</li> </ul>
“Modifications of previous proposals” <sup>7</sup>	<ul style="list-style-type: none"> <li>• Gas processing in the 6-WD zone</li> <li>• A fire station in the 6-WD zone</li> </ul>	
Other proposed uses <sup>8</sup>	<ul style="list-style-type: none"> <li>• Relocation of a guardhouse within the 6-DA zone</li> <li>• Relocation of LNG tanks within the 6-WD zone</li> </ul>	<ul style="list-style-type: none"> <li>• Relocation of meter station associated with the natural gas pipeline within the IND zone</li> </ul>

<sup>4</sup> See Or. Dep’t of Justice, *Oregon State Agency Comments on Jordan Cove Energy and Pacific Connector Gas Pipeline Project Draft Environmental Impact Statement (Docket # CP17-494-000 and CP17-495-000)*, 84-85 (July 3, 2019) [hereinafter *OR DEIS Comments*].

<sup>5</sup> See Jordan Cove Energy Project L.P. (“JCEP”), *In the Matter of a Concurrent Request to Authorize Development of Uses and Activities in Conjunction with the Jordan Cove Energy Project on the North Spit*, Cnty. File Nos. HBCU-19-003/FP-19-003, 1 (Aug. 9, 2019) [hereinafter *JCEP Revised Omnibus II Appl.*].

<sup>6</sup> See *Omnibus II Pub. Notice*, 2.

<sup>7</sup> See *JCEP Revised Omnibus II. Appl. Narrative*, 2.

<sup>8</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 33.

Oregon Shores provides these comments in order to underscore the apparent deficiencies in this Application request. Upon the current record, we argue that the Applicant has not demonstrated compliance with the applicable approval criteria within the CBEMP, the Coos County Zoning and Land Development Ordinance (“CCZLDO”), and the Oregon Statewide Planning Goals (“Goals”) for its proposed uses and activities.

**B. Neither the Applicant nor the County may rely upon previous approvals of the requests within Jordan Cove’s “Omnibus I” application.**

Separate from the current Omnibus II proposal, the Applicant acknowledges that “currently pending before the County is the remand of [previous] County authorizations for the LNG Terminal facility in 2016, which the County approved in County File No. HBCU-15-05/FP-15-09, Order No. 16-08-071PL.”<sup>9</sup> This predecessor land use application is commonly referred to as “Omnibus I.” In November 2017, the Oregon Land Use Board of Appeals (“LUBA”) found the County’s approvals for the proposals contained within Omnibus I to be invalid, and remanded the matter back to the County for further consideration.<sup>10</sup> Jordan Cove filed a letter initiating remand proceedings for Omnibus I in March 2019. As the Applicant recognizes, these proceedings are ongoing before the County as of the writing of this comment (See County File No. REM-19-001).<sup>11</sup> Hence, neither the County nor the Applicant can rely on previous approvals of the land use requests in Omnibus I. The Applicant does not possess valid land use approvals from Coos County in relation to its proposed LNG Terminal facility and associated components at this time, and must submit sufficient evidence within Omnibus II to independently justify authorization of its several proposed uses and activities.

Further, the Omnibus II application materials appear to request changes to the uses, activities, and development originally proposed in JCEP’s Omnibus I applications.<sup>12</sup> Because Omnibus I is on remand and is not a valid land use approval, it cannot be modified. Further, uses that are accessory to a use that is not yet approved cannot be approved, nor can the County authorize alternative routes or locations for uses that are not yet approved. In addition, the proposed Omnibus I application currently on remand no longer appears to reflect the Applicant’s most current overall project alignment. The County should consider whether it should approve Omnibus I on remand when it appears to no longer be the intended plan of development for the Jordan Cove terminal. While Applicant may be correct that it is entitled to seek permits, it is not in the best interest of the County to allow the Applicant to essentially collect land use approvals for various components of energy infrastructure development that can be combined in different ways to yield different developments with different impacts. This is particularly the case in an area as geographically significant and biologically sensitive as Coos Bay, the Jordan Cove embayment, and the North Spit.

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<sup>9</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 1.

<sup>10</sup> See *Oregon Shores Conservation Coal. v. Coos Cnty.*, 76 Or LUBA 346 (LUBA No. 2016-095, Nov. 27, 2017), *aff’d without opinion*, 291 Or App 251(2018), *rev. denied*, 363 Or 481 (2018). Please find this document enclosed as Attach. A (68 pages).

<sup>11</sup> See *Revised Omnibus II Appl. Narrative*, 1; See also *See Coos Cnty. Planning Dep’t, Notice of Land Use Hearing: Remand of 76 OR LUBA 346 (217)*, Coos Cnty. File No. REM-19-001, 1 (May 21, 2019) [*hereinafter Omnibus I Remand Pub. Notice*].

<sup>12</sup> See *JCEP Revised Omnibus II. Appl. Narrative*, 2.

**C. The County must evaluate the cumulative impacts of the proposals contained within Omnibus II alongside those contained in the multiple applications submitted by the Applicant regarding uses and activities associated with the proposed LNG Terminal Facility.**

As of the writing of this comment, the Applicant has initiated several local, state, and federal permitting processes and authorizations required for the siting, construction, and operation of the proposed LNG facility and related components. Many of proposals are directly related to components discussed within Omnibus II, and thus must be considered in any analysis of cumulative impacts arising from the activities as proposed within Omnibus II. Some related local land use permits currently before the County include, but are not limited to:

- County File No. AM-18-009/RZ-18-006/HBCU-18-001 – Proposed widening of the TransPacific Parkway at its intersection with U.S. Highway 101.<sup>13</sup>
- County File No. AM-18-010/HBCU-18-002 – Permit authorizations required to site, construct, and operate the proposed Pipeline.
- County File No. AM-18-011/RZ-18-007/HBCU-18-003 – Permit authorizations related to dredging the Coos Bay Deep Draft Navigation Channel (“DDNC” or “Channel”) to facilitate LNG Tanker transit.<sup>14</sup>
- County File No. REM-19-001 – Omnibus I. Includes numerous overlapping proposals, including dredging of the proposed marine slip and access channel.<sup>15</sup>

Because the applicant is proposing multiple applications with multiple components that will impacts the same areas, the County should consider the cumulative impacts of the proposed uses together, rather than as separate and unrelated approvals. Prior to any final decision in this matter, the Applicant must establish which facilities, infrastructure, construction activities, uses, and any other related project components contained within Omnibus II implicate and overlap with the proposals contained within the above applications so that the County and the public can consider Jordan Cove within context and analyze cumulative impacts from all the project components.

**D. The Applicant’s proposed uses, activities, and development within Omnibus II must demonstrate compliance with the applicable criteria in accordance with CCZLDO Section 1.1.300 – Compliance with Comprehensive Plan and Ordinance Provisions.**

The Coos County Comprehensive Plan is the basis for all land use development within the County.<sup>16</sup> Should any conflicts arise between the CCCP and the CCZLDO, the provisions of

<sup>13</sup> See *JCEP Revised Omnibus II Appl. Narrative*, Ex. 2, 1.

<sup>14</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 24.

<sup>15</sup> *Id.*

<sup>16</sup> See CCZLDO Section 1.1.300 Compliance with Comprehensive Plan and Ordinance Provisions.

the CCCP will prevail.<sup>17</sup> “It shall be unlawful for any person, firm, or corporation to cause, develop, permit, erect, construct, alter or use any building, structure or parcel of land contrary to the provisions of the district in which it is located.”<sup>18</sup> “No permit for construction or alteration of any structure shall be issued unless the plans, specifications, and intended use of any structure or land conform in all respects with the provisions of this Ordinance, unless approval has been granted by the Hearings Body.”<sup>19</sup> Finally, “any use permitted within a primary zone but specifically not permitted by an overlaying floating zone restriction (required by the Comprehensive Plan) shall not be permitted.”<sup>20</sup> Each use, activity, and development proposed in this Application must conform with the applicable criteria in accordance with CCZLDO Sec. 1.1.300.

**II. The Applicant’s proposed uses and activities fail to meet the requisite criteria for approval within CCZLDO 4.3.200 – Categories and Review Standards for Uses Industrial Zoning District (IND).**

This Application proposes several developments and activities in the Balance of County (“BOC”) Industrial Zone (IND).<sup>21</sup> Within each BOC zone there are activities, development and uses that are implemented through the CCZLDO to ensure compliance with the Coos County Comprehensive Plan (“CCCP”).<sup>22</sup> All uses within IND are subject to compliance with CCZLDO Sections 4.3.200, 4.3.220, 4.3.225, 4.3.330, as well as the Special Development Considerations and Overlays identified in CCZLDO Section 4.11.<sup>23</sup>

CCZLDO Sec. 4.3.200 contains Zoning Tables for Urban and Rural residential, mixed commercial-residential, commercial, industrial, minor estuary and south slough.<sup>24</sup> The table indicates the type of review process that is required for a proposed use for each identified BOC zone.<sup>25</sup> The zoning table sets out Uses, Developments and Activities that may be listed in a zone and the type of review that is required within that zone.<sup>26</sup> If there is a conflict between uses the more restrictive shall apply.<sup>27</sup> CCZLDO Section 4.3.220 contains Additional Conditional Use Review Standards for uses, development and activities listed in the CCZLDO Section 4.3.200 Zoning Tables. All new uses, activities and development in the BOC zones are subject to the general siting standards in CCZLDO Section 4.3.225, and the specific siting standards and

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<sup>17</sup> *Id.*

<sup>18</sup> CCZLDO Section 1.1.300 Compliance with Comprehensive Plan and Ordinance Provisions.

<sup>19</sup> *Id.*

<sup>20</sup> CCZLDO Section 1.1.300 Compliance with Comprehensive Plan and Ordinance Provisions.

<sup>21</sup> *Omnibus II Pub. Notice, 2; See also* CCZLDO Art. 4.1 - General Information (stating that Balance of County Zoning refers to all zones regulated by the County outside of the Coos Bay Estuary).

<sup>22</sup> *Id.*

<sup>23</sup> *Omnibus II Pub. Notice, 2.*

<sup>24</sup> *See* CCZLDO Sec. 4.3.200 - Zoning Tables for Urban and Rural residential, mixed commercial-residential, commercial, industrial, minor estuary and south slough.

<sup>25</sup> *See* CCZLDO Sec. 4.3.200 - Zoning Tables for Urban and Rural residential, mixed commercial-residential, commercial, industrial, minor estuary and south slough.

<sup>26</sup> *See* CCZLDO Sec. 4.3.200 - Zoning Tables for Urban and Rural residential, mixed commercial-residential, commercial, industrial, minor estuary and south slough.

<sup>27</sup> *See* CCZLDO Sec. 4.3.200 - Zoning Tables for Urban and Rural residential, mixed commercial-residential, commercial, industrial, minor estuary and south slough.

criteria set by the zoning district contained within CCZLDO Section 4.3.230 (Additional Siting Standards).<sup>28</sup>

Pursuant to CCZLDO Sec. 4.3.100, Development, Uses and Activities may be further restricted by Definitions, Review Standards, Development and Siting Criteria or Special Development Considerations and Overlays.<sup>29</sup> If a use is not listed then it is prohibited unless (1) a similar use determination is made pursuant to CCZLDO Article 5.14 or (2) it is found to exempt from review pursuant to CCZLDO Section 1.1.800 (Exclusions from Permit Requirements).<sup>30</sup> No structure shall be erected, converted enlarged, reconstructed, replaced, or altered, nor shall any structure or use be changed, except in accordance with the provisions of the CCZLDO.<sup>31</sup>

**A. Concrete batch plant as “mineral processing of aggregate” in the IND zone<sup>32</sup>**

JCEP proposes to construct a concrete batch plant in the IND zone, located in the vicinity of Boxcar Hill.<sup>33</sup> According to the Applicant, the plant will provide concrete supply for construction of the LNG Terminal and related facilities.<sup>34</sup> It is unclear whether this plant is proposed solely for the processing of concrete. If other aggregate will be processed in the proposed plant, these materials should be identified prior to any final decision in this matter. According to the Applicant, the concrete needed for construction is approximately 130,000 cubic yards, and the batch plant is proposed to operate for 30-36 months (2.5 to 3 years).<sup>35</sup> According to the Applicant, local aggregate sources have been investigated and have been found to have deficiencies (chert inclusions) that preclude their use for concrete.<sup>36</sup> Hence, regional sourcing for the availability of on-spec aggregates has been confirmed.<sup>37</sup> The Applicant provides no information regarding the traffic impacts associated with the trucks delivering the regionally sourced supply of aggregate to the batch plant on the North Spit for processing, and should do so prior to any final decision in this matter.

The Applicant states that “a concrete washout area will be located adjacent to the batch plant to allow for containment and disposal of waste water related to concrete batching operations.”<sup>38</sup> Oregon Shores was unable to identify the specific location, method of disposal, and estimated volume of waste water or runoff related to the concrete batch plant. The Applicant should provide this information prior to any final decision in this matter. The Application asserts that “the disposal of concrete waste water will follow all necessary environmental regulations.”<sup>39</sup>

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<sup>28</sup> See CCZLDO Sec. 4.3.225(1)-(7). General Siting Standards, Industrial Zone; See also CCZLDO Sec. 4.3.230(6)(a)-(e). Additional Siting Standards, Industrial.

<sup>29</sup> CCZLDO Sec. 4.3.100 - Uses Not Listed and Compliance with Other Sections.

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

<sup>31</sup> *Id.*

<sup>32</sup> See CCZLDO Section 4.3.200.79, See CCZLDO Section 4.3.210(58).

<sup>33</sup> See JCEP Revised Omnibus II Appl. Narrative, 7.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

The Application narrative fails to identify “necessary environmental regulations” applicable to the disposal of concrete waste water, and do not provide sufficient information regarding the method of concrete waste water disposal sufficient to evaluate compliance with any applicable environmental regulations. It further claims that “any discharges from the concrete batch plant will be subject to measures that minimize the potential for accidental discharges during construction, and additional best practices, including containment for washout, will be utilized.”<sup>40</sup> Oregon Shores was unable to locate sufficient information regarding the specific measures and best practices the Applicant proposes to use to allow for a robust evaluation of the proposed use against the applicable criteria. Further, Oregon Shores was unable to identify which sources of water (e.g. City, County, private well) the Applicant proposes to use for the production of concrete at the proposed plant. It is unclear how any byproduct water will be disposed. JCEP states that it will “employ dust suppression techniques to mitigate any impacts to air quality from concrete batching.”<sup>41</sup> Again, Oregon Shores was unable to locate sufficient information regarding the specific dust suppression techniques the Applicant proposes to use to allow for a robust evaluation of the proposed use against the applicable criteria.<sup>42</sup>

The Applicant should provide the above information to the County and the public for review prior to any final decision in this matter. On the basis of the present record, the County cannot approve the proposed concrete batch plant in the IND zone. As discussed below, the proposed concrete batch plant fails to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

**B. Safety, security, and emergency preparedness, management, and response center (“SORSC”) as “emergency preparedness centers” in the IND zone**

The Applicant propose an “Emergency Preparedness Response Center - Southwest Oregon Regional Safety Center (“SORSC”).” It contends that this proposed use “is considered a safety, security, and emergency preparedness, management and response center use” pursuant to CCZLDO Section 4.3.200.103 and subject to CCZLDO Section 4.3.210(30). Oregon Shores does not concede that this is the appropriate category and review standard for the proposed use. The CCZLDO does not define the term “emergency response center.” However, as discussed below, the proposed use is more aptly characterized “government and public services and structures” pursuant to CCZLDO Section 4.3.200.106, and thus should be reviewed pursuant to an administrative conditional use determination in the IND zone. Further, the proposed SORSC should demonstrate consistency with the criteria within CCZLDO 4.3.220.

JCEP proposes to construct an emergency preparedness and response center, to be known as the Southwest Oregon Regional Safety Center (“SORSC”), in the IND zone.<sup>43</sup> The Applicant states that the SORSC will be located adjacent to the proposed LNG Terminal and will include an adjacent administration building.<sup>44</sup> According to the Applicant, the SORSC will manage

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<sup>40</sup> *Id.*

<sup>41</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 7.

<sup>42</sup> *Id.*

<sup>43</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 8.

<sup>44</sup> *Id.*



safety, security and emergency response for the LNG Terminal and related facilities.<sup>45</sup> Per publicly available information, the SORSC appears to be located in the “blast zone” of the LNG Terminal facility, potentially endangering the lives of first responders and the public safety and welfare of the Coos Bay region. Given the stated role of the SORSC in emergency response, the County should consider whether the proposed siting is in accordance with industry safety standards. Further, the County should not issue any permits regarding this proposed use until the Applicant has obtained the requisite state and federal permits, authorizations, and agreements in relation to the SORSC.

The Application also states that the SORSC is “intended to serve as a cornerstone to improve communications between individual agencies and provide a platform for collaboration.” It contends that “this will increase efficiency of operations and improve the efficacy of emergency response throughout Coos County.” The Application provides insufficient evidence to meaningfully evaluate either of these claims. In fact, the contrary conclusion is likely to be true. It is unlikely that a facility isolated to the North Spit would be able to provide efficient emergency response and improve collaboration for populations living in the inland forests of Coos County.

For the above the reasons, the proposed SORSC fails to demonstrate compliance with the applicable criteria for the IND zone. On the basis of the present record, the County cannot approve the proposed use within the IND zone. As discussed below, the proposed SORSC fails to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

**C. Helipad in the as an “accessory use and structure to emergency services” in the IND zone**

The Applicant proposes to construct “a helipad on the site of the SORSC” as an accessory use to Emergency Services pursuant to CCZLDO Section 4.3.200.101 and subject to CCZLDO Section 4.3.210(1). The Applicant states that “the purpose of the helipad is to facilitate emergency incident management response by enabling enhanced emergency evacuation of or access to the LNG Terminal site.<sup>46</sup> Given its location on the site of the SORSC, the proposed helipad raises the same siting concerns raised above in conjunction with the proposed SORSC. Namely, the helipad appears to be located within the LNG Terminal’s “blast zone.” Given the stated role of the proposed helipad in emergency response, the County should consider whether the proposed siting is in accordance with industry safety standards. Further, the County should not issue any permits regarding this proposed use until the Applicant has obtained the requisite state and federal permits, authorizations, and agreements in relation to the helipad.

Oregon Shores does not concede that the proposed helipad is an accessory use as that term is defined under CCZLDO 2.1.200. Specific Definitions – Accessory Use and categorized under CCZLDO Sec. 4.3.210(1). Per Oregon Shores’ review of the Application materials, there is insufficient evidence to meaningfully evaluate how helicopter flights in and out of the

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<sup>45</sup> *Id.*

<sup>46</sup> See JCEP Revised Omnibus II Appl. Narrative, 9.

proposed helipad would impact other flight traffic from the airport. Absent this information, the County cannot approve the proposed helipad in the IND zone.

On the basis of the present record, the proposed helipad fails to demonstrate consistency with the applicable criteria for the IND zone. On the basis of the present record, the County cannot approve the proposed use within the IND zone. As discussed below, the proposed helipad fails to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

**D. Corporate and administrative offices in the IND zone**

According to the Application materials, JCEP proposes to develop an administration building as an “accessory development to industrial uses” in the IND zone, just south of the proposed SORSC.<sup>47</sup> The Application indicates that the administrative building will contain administrative and corporate offices, the purpose of which is to provide business, administrative, and information management support for the operations of the proposed LNG Terminal and related facilities.<sup>48</sup> Both the proposed administrative building and the proposed SORSC appear to be located just west of an identified wetland located on the boundary between the IND zone and 8-WD CBEMP zone. Oregon Shores’ was unable to locate any data sufficient to evaluate the potential impacts that the construction and operations of both the proposed SORSC and the proposed administrative building may have on this identified wetland. Such data must be provided to the County and public for review prior to any final decision in this matter. As discussed below, the proposed corporate and administrative offices fail to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

**E. Temporary workforce housing as a “Temporary Dwelling During Construction” in the IND zone**

Per the Application, JCEP proposes to construct temporary workforce housing in the IND zone pursuant to CCZLDO Section 4.3.200.32.a. and subject to CCZLDO Section 4.3.210(27)(m)(i).<sup>49</sup> It states that “Exhibit 2 shows the location of the workforce housing and Exhibit 4 is a conceptual plan that shows the location and layout for the temporary workforce housing.”<sup>50</sup> Upon review, Oregon Shores was unable to discover the exact number of residences to be constructed, the types of residences to be constructed, and the exact location of the residences in relation to the boundaries of the IND zone. The Applicant should provide such information to the County and the public for review prior to any final decision in this matter. The CCZLDO defines “dwelling” as

Any building that contains one or more dwelling units used, intended, or designed to be built, used, rented, leased, let or hired out to be occupied, or that are occupied for living

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<sup>47</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 9-10; See also CCZLDO Section 4.3.200.66. Zoning Tables – Accessory Development to industrial uses; See also CCZLDO Sec. 4.3.210(1). Categories and review standards: Accessory structures and uses.

<sup>48</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 9-10.

<sup>49</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 10.

<sup>50</sup> *Id.*

purposes. A dwelling shall consist of a kitchen, bathroom(s) and living space. Dwellings do not including [sic] a RV, tent, teepee, yurt, hotels, motels, vacation rentals or boarding houses.<sup>51</sup>

Given this definition, Oregon Shores argues that the scale of the proposed temporary housing during construction is not contemplated within category and review standards under CCZLDO Section 4.3.210(27)(m)(i). As such, the Applicant's proposed use is inconsistent with this criterion.

According to the Applicant, the temporary workforce housing will house construction workers during the construction of the SORSC and the administration building and other aspects of the LNG Terminal.<sup>52</sup> The temporary workforce housing "will include a kitchen and dining facility, a recreation complex, living quarters, and laundry facilities, among other things."<sup>53</sup> Pursuant to the CCZLDO, a temporary occupant is "any person that occupies any room or rooms for habitation for a continuous period not exceeding 30 days. This excludes any person who pays for lodging on a monthly basis."<sup>54</sup> Oregon Shores was unable to locate specific information about the number of temporary occupants to be housed within the proposed temporary workforce housing, whether said occupants would be required to pay for lodging, or the length of time each temporary occupant would be estimated to stay at the site. However, given the stated duration of construction operations (two and half to three years), and assuming the proposed housing will be in place during the full period of construction, it seems unlikely that the proposed workforce housing qualifies as temporary under the CCZLDO. As discussed below in relation to the proposed wastewater treatment facility, Oregon Shores argues that the wastewater treatment needed for the proposed temporary workforce housing qualifies as a community water treatment or sewer system. Finally, it is unclear from the Application how the proposed temporary workforce housing will be managed after construction of the proposed LNG Terminal is completed.

For the above reasons, the Applicant's proposed use is inconsistent with this criterion. As discussed below, the proposed temporary workforce housing fails to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

#### **F. Wastewater treatment facility as an accessory use in the IND zone**

The Applicant proposes to develop "wastewater treatment facilities to serve the [proposed] LNG Terminal and related facilities" as an "Accessory Development to industrial uses" at two locations within the IND zone.<sup>55</sup> To the best of Oregon Shores' knowledge, the Applicant proposes to use both of these facilities during both the construction and operation phases of the proposed LNG Terminal and related facilities.<sup>56</sup> According to the Applicant, during construction of the LNG Terminal and related facilities,

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<sup>51</sup> CCZLDO 2.1.200 – Specific Definitions, "Dwelling" (emphasis added).

<sup>52</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 10.

<sup>53</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 10.

<sup>54</sup> CCZLDO 2.1.200 – Specific Definitions, "Temporary Occupant."

<sup>55</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 10-11; See also *Omnibus II Pub. Notice*, 2.

<sup>56</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 10-11.

[T]here may be wastewater streams discharged to the IWWP, including: effluent from temporary sanitary treatment facilities, water from construction dewatering, hydrostatic test water, effluent from the oily water separator, contact stormwater not managed under JCEP's 1200-C permit<sup>57</sup> (stormwater that flows into and through the oily water separator and then the sump) and wheel wash and equipment wash water (no detergent or solvents used) that discharges into the oily water separator and then the IWWP.<sup>58</sup>

The Applicant further states that "Seepage from settling ponds, currently discharged via Outfall 003, will continue in the early phases of construction, overlapping for a short time with discharge of construction-related wastewaters until the ponds are filled during regrading of the South Dunes site."<sup>59</sup> Finally, according to the Applicant, "Exhibit 5 shows how, after construction, wastewater sources will be treated through permanent wastewater treatment facilities."<sup>60</sup>

Oregon Shores was unable to locate the exact sites for these proposed treatment facilities as well as the exact sites of the "settling ponds currently discharged via Outfall 003" in relation to the boundaries of the County's IND zone within the Application materials.<sup>61</sup> In addition, Oregon Shores was unable to discover the exact industrial and residential sources<sup>62</sup> and volumes of wastewater streams to be collected and treated by the proposed wastewater treatment facilities for both the construction and operations phases. Per Oregon Shores' review, it was unclear from the Application materials whether the proposed wastewater treatment facilities meant to operate during the construction phase of the proposed LNG Terminal and related facilities are the same structures as the "permanent wastewater treatment facilities" proposed to treat wastewater sources post-construction. This information is crucial to the evaluation of Omnibus II for consistency with the applicable criteria in the IND zone, and the Applicant should provide this information to the County and the public for review prior to any final decision in the matter. Absent this information, the Applicant cannot demonstrate consistency with the requisite criteria in the IND zone.

#### **CCZLDO Sec. 4.3.210. Categories and review standards – IND Zone**

As discussed above, JCEP proposes to construct two wastewater treatment facilities as an "accessory development to industrial uses" in the IND zone to serve the LNG Terminal and related facilities. A proposed "accessory development to industrial uses" is reviewed via a compliance determination in the IND zone, subject to the categories and review standards for

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<sup>57</sup> Please note: To the best of Oregon Shores' knowledge, as of September 2019, Jordan Cove had not yet obtained any of the four necessary NPDES 1200-C Construction Stormwater permits required for stormwater discharges during construction activities associated with the proposed (1) LNG Terminal site, (2) Kentuck Slough mitigation site, (3) APCO dredge material disposal sites, and (4) the Pipeline within the coastal zone.

<sup>58</sup> *JCEP Revised Omnibus II Appl. Narrative*, 10-11.

<sup>59</sup> *JCEP Revised Omnibus II Appl. Narrative*, 11.

<sup>60</sup> *Id.*, (emphasis added).

<sup>61</sup> See *JCEP Revised Omnibus II Appl.*, Ex. 2, Ex. 5; See *JCEP Revised Omnibus II Appl. Narrative*, 10-11.

<sup>62</sup> I.e. proposed LNG Terminal facility components within Omnibus I and Omnibus II.

“Accessory structures and uses.”<sup>63</sup> On the basis of the present record, Oregon Shores does not concede that the proposed wastewater treatment facilities constitute an accessory use as that term is defined by CCZLDO Chapter II or categorized by CCZLDO Chapter IV. The Applicant states that the proposed wastewater treatment facilities will serve “residential (temporary workforce housing) and industrial uses (i.e., SORSC, LNG Terminal)” in the IND Zone. This description arguably demonstrates that the proposed wastewater treatment facilities are more aptly categorized as community wastewater treatment plant/sewer system and should thus be evaluated for compliance with Goal 11 (“Public Facilities and Services”) prior to any final decision in this matter. As discussed further in relation to the proposed IWWP in the IND zone, the Applicant has not provided sufficient evidence or analysis to demonstrate compliance with Goal 11 and should do so or otherwise explain why Goal 11 is not applicable prior to any final decision in this matter. Absent this information, the County should not approve the Application.

For the above reasons, the proposed wastewater treatment facilities fail to demonstrate compliance with the appropriate category and review standards for the IND zone. As discussed below, the proposed wastewater treatment facilities fail to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

**G. “Park and ride” facility as “Storage Facility and Units including parking facilities” in the IND Zone**

The Application materials propose to construct a “park and ride” facility in the IND zone.<sup>64</sup> The purpose of this facility in the IND zone is to transport workers to and from the construction sites for the LNG Terminal, including all related project components described within Omnibus II.<sup>65</sup> According to the Applicant, the proposed park and ride has two component parts.

- Component 1: The first component is “in South Dunes, near the construction site for the SORSC and Administration Building in this Application. At this location, JCEP proposes to pick-up/drop-off workers and store buses used for transportation. The pick-up/drop-off location will be a covered parking area, and JCEP proposes to use available onsite parking areas at the sites of the SORSC and Administration Building to store buses.”<sup>66</sup>
- Component 2: “The second part of the park and ride is a pick-up/drop-off point for workers that is located at the site of the Myrtlewood Factory (north of the JCEP campus). Workers will park their vehicles at this site and board buses for pick-up and drop-off to construction sites for various components of the overall LNG Terminal project. Only IND-zoned areas of the site will be used for parking and pick-up/drop-off and JCEP will not make physical alterations to the site.”<sup>67</sup>

<sup>63</sup> See CCZLDO Section 4.3.200.66. Zoning Tables – Accessory Development to industrial uses; See CCZLDO Sec. 4.3.210(1). Categories and review standards: Accessory structures and uses.

<sup>64</sup> See JCEP Revised Omnibus II Appl. Narrative, 11-12.

<sup>65</sup> *Id.*

<sup>66</sup> See JCEP Revised Omnibus II Appl. Narrative, 11-12.

<sup>67</sup> See JCEP Revised Omnibus II Appl. Narrative, 11-12.

Parking facilities (parking lots and parking structures) in the IND Zone are a listed use in CCZLDO Section 4.3.200.81 subject to CCZLDO Section 4.3.210(79), and are subject to the General Siting Standards contained within CCZLDO 4.3.225. CCZLDO 4.3.225(5) states that off-street access, parking and loading requirements contained within CCZLDO Chapter VII (containing criteria related to transportation, access, and parking) apply to new uses, activities, and development in the IND zone. The Applicant discloses that its IND Zone Proposals are subject to the parking requirements of CCZLDO Art. 7.5 (Parking Standards). Most of the proposed IND zone uses, activities, and development listed in the Omnibus II Application are not specified uses under CCZLDO 7.5.175, which lists the parking space requirements for a number of specified types of uses. CCZLDO 7.5.100(5) explains that “[p]arking space requirements for a use not specifically mentioned shall be the same as for a use which has similar traffic-generating characteristics as determined by the Planning Director.” Further, under CCZLDO Sec. 7.5.150(5) (“Parking Area Design”) states that

For every 10 required parking spaces, 16 square feet of landscaping will be required. Each 16 square foot area should include one tree and three one-gallon shrubs or living ground cover.<sup>68</sup>

JCEP states that it will “supplement [the] Application narrative with a site plan that shows the various parking areas JCEP has proposed in various areas in and around the LNG Terminal site, which comply with the requirements of CCZLDO Chapter 7.” Oregon Shores was unable to locate the aforementioned supplement on the County’s Planning Site, including any details regarding how the Applicant plans to demonstrate compliance with the requirement of 16 square feet of landscaping (including one tree and three one-gallon shrubs or living ground cover) per every 10 required parking spaces. Any supplemental information regarding compliance with CCZLDO Art. 7.5 must be made available for the County’s and the public’s review with sufficient time within the established open record periods prior to (1) any determination of parking space requirements for each the Applicant’s proposed uses within the IND zone that are not specified in CCZLDO 7.5.175 and (2) any final decision in this matter. Absent such information, the Applicant fails to demonstrate compliance with CCZLDO 4.3.225(5) and CCZLDO Art. 7.5. On the basis of the present record, the Planning Commission should deny the Application. As discussed below, the proposed “park and ride” facility fails to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

#### **H. Temporary construction laydown uses and activities as “accessory use” in the IND zone**

Temporary construction lay down area located in Township 25S Range 13 Section 34C Tax lot 1700 This is considered an accessory use as listed in CCZLDO Section 4.3.200.101 subject to CCZLDO Section 4.3.210(1).<sup>69</sup> JCEP proposes to install construction laydown in the IND, 3-WD, 3-NWD, and 6-WD zones.<sup>70</sup> Approval criteria for proposed laydown activities in

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<sup>68</sup> CCZLDO Sec. 7.5.150(5).

<sup>69</sup> *Omnibus II Pub. Notice*, 2.

<sup>70</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 12-16; See *Id.*, Ex. 2, 1-2.

the IND zone are discussed in this section. Site-specific approval criteria for proposed laydown activities in the CBEMP zones 3-WD, 3-NWD, and 6-WD are discussed below.

According to the Application materials, proposed construction laydown in the IND zone is to be located at the Boxcar Hill and South Dunes laydown sites.<sup>71</sup> Exhibit 2 contained within the Application materials does disclose the location of laydown sites, and the locations of Boxcar Hill and South Dunes.<sup>72</sup> However, Oregon Shores was unable to locate a map or graphic clearly indicating the locations of these temporary construction laydown sites in relation to the boundaries of the IND zone. The Applicant should provide the Planning Commission and the public a map or graphic clearly indicating the boundaries of the IND zone and the location of any temporary construction laydown proposals therein prior to any final decision in this matter in order to ensure that the County and the public can review each temporary construction laydown proposal in context and with full understanding of which adjacent zoning districts may be impacted by the proposed temporary construction laydown use.

Per the Application materials, the temporary construction laydown will include offices, trailers, overflow parking, storage of material, and fabrication of construction materials.<sup>73</sup> The Applicant discloses that the “purpose of the laydown is to store and fabricate materials necessary for the construction of the LNG Terminal and related facilities.”<sup>74</sup> It is unclear which materials the Applicant intends to fabricate and store. Given that it is unclear exactly which uses will be occurring within the proposed temporary construction laydown area within the IND zone and for what duration, Oregon Shores does not concede that the proposed use is an accessory use as that term is defined within the CCZLDO. On the basis of the present record, the County cannot approve the temporary construction laydown use with the IND zone. As discussed below, the proposed temporary construction laydown in the IND zone fails to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

#### **I. Relocation of meter station associated with the natural gas pipeline within the IND zone**

JCEP requests confirmation that relocation of these “previously-authorized” facilities does not require land use approval.<sup>75</sup> It is unclear as to which authorizations the Applicant may be referring. However, as discussed above, neither the County nor the Applicant may rely on the invalidated approvals contained in Omnibus I. Further, the Applicant fails to provide sufficient evidence to support its assertion that it “proposes only a minor relocation within the same zone of each of these previously approved components.”<sup>76</sup> The County must conduct a comprehensive analysis of whether the proposed relocation of the meter station meets with the applicable criteria. On the basis of the present record, the County cannot approve the proposed use.

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<sup>71</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 12; See *Id.*, Ex. 2, 1-2.

<sup>72</sup> See *Id.*, Ex. 2, 1; See *Id.*, Ex 2, 2.

<sup>73</sup> *JCEP Revised Omnibus II Appl. Narrative*, 12.

<sup>74</sup> *JCEP Revised Omnibus II Appl. Narrative*, 12.

<sup>75</sup> *JCEP Revised Omnibus II Appl. Narrative*, 33.

<sup>76</sup> *JCEP Revised Omnibus II Appl. Narrative*, 33.

**J. Industrial wastewater pipeline (“IWWP”) as “Utility Facility – Service Lines” in the IND zone**

The Applicant proposes to construct a new industrial wastewater pipeline (“IWWP”) in the IND zone and the 7-D CBEMP zone.<sup>77</sup> The IND zone is discussed in this section. The 7-D CBEMP zone is discussed below.

It appears that much of the proposed IWWP runs parallel to and within the Trans Pacific Parkway (i.e. public road right-of-way).<sup>78</sup> The easternmost portion of the IWWP exits the public right-of-way and crosses the County’s IND and 7-D zones.<sup>79</sup> The westernmost terminus is an existing ocean outfall on Horsfall Beach, where the effluents carried within the proposed IWWP would be released into an area directly within, adjacent to, or flowing across the 5A-NS (Natural Shorelands) CBEMP zone and the REC zone (BOC – Open Space and Natural Resource District).<sup>80</sup> Per publicly available information, it appears that the ocean outfall referenced is a segment of the Oregon International Port of Coos Bay’s existing effluent outfall pipeline, which can be accessed through the 5A-NS CBEMP zone. It is unclear from the Application materials what permits or authorizations may be required to use said outfall, and whether the Applicant has secured said permits or authorizations for use of the outfall in conjunction with its proposed IWWP.

In addition to this lack of clarity regarding usage of the ocean outfall, Oregon Shores was unable to locate specific details regarding the proposed IWWP, such as method of installation, depth of burial, diameter of the pipe to be installed, composition of the industrial materials meant to be transported by the IWWP, volume of earth to be excavated, and plans regarding the disposal of excavated materials within the Application. This information is essential to determining potential impacts related to the IWWP. In addition, Oregon Shores was also unable to locate detailed information regarding the risk of breakage, leakage, seepage, or other failures during the construction or operation of the IWWP, as well as the Applicant’s plans to respond to such accidents should they occur. This is of significant concern due to the IWWP’s co-location next to a public road right-of-way, as well as the IWWP’s location within a critically important and sensitive wildlife habitat and the eventual outfall of the effluents carried therein into a popular recreation area. The Applicant should provide comprehensive details regarding the specifications and the potential adverse impacts arising from the construction and operation of the proposed IWWP to the Planning Commission prior to any final decision in this matter. Oregon Shores strongly urges the Planning Commission to make such information available to the public to review and offer comment as soon as possible. Absent this information, the Planning Commission must deny the Application request.

**CCZLDO Sec. 4.3.210(76)(e). Utility Facilities – Service Lines**

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<sup>77</sup> *JCEP Revised Omnibus II Appl. Narrative*, 5.

<sup>78</sup> *Id.*, Ex. 3; *See also Omnibus II Pub. Notice*, 2.

<sup>79</sup> *JCEP Revised Omnibus II Appl. Narrative*, 5.

<sup>80</sup> *See CCZLDO Section 3.2.265. 5A-NS Management Objective; See also CCZLDO Section 4.2.400 Open Space and Natural Resource Zoning Districts – Recreation (REC).*



The Applicant states that the IWWP qualifies as a “Utility Facility - Service Lines in conjunction with a Utility Facility.”<sup>81</sup> CCZLDO Sec. 4.3.210(76)(e) defines “Utility Facility – Service Lines” as a distribution line for supplying a utility service including but not limited to telephone, power, water, sewer, etc.<sup>82</sup> Per the Application materials, the IWWP is a utility line to “supply wastewater services.”<sup>83</sup> According to the Applicant, the IWWP “will support the function of various facilities that JCEP has proposed that are associated with the LNG Terminal, including by transporting industrial waste to an ocean outfall.”<sup>84</sup> The Applicant also states “[a]ll of the IND Zone Proposals are located outside an urban growth boundary.”<sup>85</sup>

The Application indicates that the proposed IWWP is a sewer line—a subterranean pipeline meant to channel industrial waste from the proposed LNG facility to an ocean outfall crossing a recreation area. Under CCZLDO Sec. 4.3.210(76)(e), “[s]ewer lines are not permitted to be located outside of an urban unincorporated boundary or urban growth boundary unless as required to mitigate a public health hazard as described in [Goal] 11 or as allowed by the CCCP or the CCZLDO.”<sup>86</sup> The Applicant fails to provide sufficient evidence or analysis to demonstrate compliance with Goal 11 or show that the proposed IWWP is allowed by the CCCP, and should do so or otherwise explain why Goal 11 is not applicable prior to any final decision in this matter. Absent this information, the County should not approve the Application. As discussed below, the proposed IWWP in the IND zone fails to meet the applicable approval criteria of CCZLDO 4.3.220, 4.3.225, 4.3.230 and 4.11.

### **III. The Applicant’s proposed uses and activities fail to meet the requisite criteria for approval within CCZLDO 4.3.220(6) - IND Zone - Additional Conditional Use Review Standards.**

CCZLDO 4.3.220(6) contains additional criteria applicable to a use, activity or development identified as a conditional use in the IND zone.<sup>87</sup> The following comments are provided for the purposes of clarity and preservation. Oregon Shores will provide further comment on these criteria as it applies to any of the Applicant’s proposed uses and activities in the IND zone as appropriate and allowed in any established open record periods. For the below reasons, we argue that the Applicant’s proposed concrete batch plant within the IND zone fails to meet the following additional conditional use review standards applicable within the IND Zone:

#### **A. CCZLDO 4.3.220(6)(f)(i) COMPATIBILITY.**

- i. The proposed use, activity or development is required to demonstrate compatibility with the surrounding properties or compatibility may be made through the imposition of conditions.<sup>88</sup> Compatibility means that the proposed use

<sup>81</sup> *JCEP Revised Omnibus II Appl. Narrative*, 5.

<sup>82</sup> CCZLDO Sec. 4.3.210(76)(e) defines “Utility Facility – Service Lines.”

<sup>83</sup> *JCEP Revised Omnibus II Appl. Narrative*, 5.

<sup>84</sup> *Omnibus II Pub. Notice*, 2.

<sup>85</sup> *JCEP Revised Omnibus II Appl. Narrative*, 33.

<sup>86</sup> CCZLDO Sec. 4.3.210(76)(e) defines “Utility Facility – Service Lines.”

<sup>87</sup> CCZLDO 4.3.220(6)(f) - IND Zone – Additional Conditional Use Review Standards – Conditional Use Review Criteria.

<sup>88</sup> CCZLDO 4.3.220(6)(f)(i) Compatibility.

is capable of existing together with the surrounding uses without discord or disharmony.<sup>89</sup> The test is where the proposed use is compatible with the existing surrounding uses and not potential or future uses in the surround [*sic*] area.<sup>90</sup>

The Applicant discloses that the proposed concrete plant is surrounded to the east and west by “a small sliver of recreation-zoned property abutting the bay and an area of recreation-zoned property.”<sup>91</sup> It states, absent supporting evidence, that the proposed batch plant “is compatible with the recreation-zoned areas to the east because this area is currently undeveloped.”<sup>92</sup> The opposite conclusion is more likely to be true. The potential truck traffic, noise levels, and dust associated with the proposed two and half to three-year operation of the plant suggest that the proposed concrete batch plant would not be capable of existing together with the existing surrounding recreation uses to the east without discord or disharmony. The Applicant states that “The single use to the west is a commercial campground facility, and discussions with the owner and operator indicate that they support the proposed use at this location and foresee no incompatibility.”<sup>93</sup> The Application does not provide sufficient information or evidence to evaluate the accuracy of this claim. On the basis of the present record, the proposed concrete batch plant to be located in the vicinity of Boxcar Hill fails to demonstrate that it is compatible with existing surrounding uses on surrounding properties. Absent conditions of approvals restricting hours of operations of the plant, traffic, and dust, the County cannot approve the proposed concrete plant within the IND zone.

#### **B. CCZLDO 4.3.220(6)(f)(iii.) - IND Zone - Design Standards**

CCZLDO 4.3.230(6)(e) contains four requisite design standards for proposed uses, activities, and development identified as a conditional use within the IND zone. The following comments are provided for the purposes of clarity and preservation. Oregon Shores will provide further comment on these criteria as appropriate and allowed in the established open record periods for this matter. For the below reasons, we argue that the Applicant’s proposed uses and activities within the IND zone fail to meet the following design standard requirements applicable for conditional uses within the IND Zone:

- 1. The landscape shall minimize soil erosion. The exterior portion of the property shall provide an ornamental, sight-obscuring fence, wall, evergreen or other screening/planting along all boundaries of the site abutting public roads or property lines that are common to other owners of property that are zoned for residential, except for points of ingress and egress;<sup>94</sup>**

The Application states that the “landscape for the concrete batch plant will be designed and installed to minimize soil erosion.”<sup>95</sup> Oregon Shores was unable to locate further analysis or

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 36.

<sup>92</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 36.

<sup>93</sup> *Id.*

<sup>94</sup> CCZLDO 4.3.220(6)(f)(iii.)(1).

<sup>95</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 39.

data (such as a soil erosion analysis or landscape design proposal) sufficient to meaningfully evaluate the accuracy of this claim. On the basis of the present record, the Application fails to demonstrate compliance with this criterion.

**3. Exposed storage areas, service areas, utility buildings and structures and similar accessory areas and structures shall be subject to the setbacks of the this [sic] zoning designation, screen plantings or other screening methods;<sup>96</sup>**

The Application states that “Exposed storage areas, service areas, utility buildings, structures, and similar accessory areas and structures at the site of the concrete batch plant will comply with all setbacks, screen plantings, or other screening methods of the IND zone.”<sup>97</sup> <sup>98</sup> Oregon Shores was unable to locate further analysis or data sufficient to meaningfully evaluate the accuracy of this claim. On the basis of the present record, the Application fails to demonstrate compliance with this criterion.

**4. Trash service shall be provided to the facility and the area for trash receptacle or receptacles shall be identified on the plot plan; and<sup>99</sup>**

The Applicant states “Trash service will be provided to the concrete batch plant.”<sup>100</sup> Oregon Shores was unable to locate further information sufficient to evaluate the accuracy of this claim. Further, Oregon Shores could not locate proposed areas for trash receptacles on the plot plan included within the Application materials.<sup>101</sup> As such, the Application fails to demonstrate consistency with this criterion.

**IV. The Applicant’s proposed uses and activities in the IND zone fail to meet the requisite criteria for approval within CCZLDO 4.3.225 - General Siting Standards**

Under CCZLDO 4.3.225, all new uses, activities, and development in the IND zone are subject to seven general siting standards. The following comments are provided for the purposes of clarity and preservation. Oregon Shores will provide further comment on these criteria as appropriate and allowed in any established open record periods. For the following reasons, we argue that the Applicant’s proposed uses and activities within the IND zone fail to meet the following general siting standards requirements in the IND Zone:

**CCZLDO 4.3.225(5) - IND Zone – General Siting Standards – Parking**

CCZLDO 4.3.225(5) states that off-street access, parking and loading requirements contained within CCZLDO Chapter VII (containing criteria related to transportation, access, and parking) apply to new uses, activities, and development in the IND zone.<sup>102</sup> The Applicant

<sup>96</sup> CCZLDO 4.3.220(6)(f)(iii).(3).

<sup>97</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 39.

<sup>98</sup> *JCEP Revised Omnibus II Appl. Narrative*, 45.

<sup>99</sup> CCZLDO 4.3.220(6)(f)(iii).(4).

<sup>100</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 39.

<sup>101</sup> See *JCEP Revised Omnibus II Appl. Narrative*, Ex. 2, 1 (containing “Plot Plan of Construction Facilities”).

<sup>102</sup> See CCZLDO 4.3.225(5) - IND Zone – General Siting Standards – Parking.

discloses that its IND Zone Proposals are subject to the parking requirements of CCZLDO Art. 7.5 (Parking Standards).<sup>103</sup> Most of the proposed IND zone uses, activities, and development listed in the Omnibus II Application are not specified uses under CCZLDO 7.5.175, which lists the parking space requirements for a number of specified types of uses. CCZLDO 7.5.100(5) explains that “[p]arking space requirements for a use not specifically mentioned shall be the same as for a use which has similar traffic-generating characteristics as determined by the Planning Director.” Further, under CCZLDO Sec. 7.5.150(5) (“Parking Area Design”) states that

For every 10 required parking spaces, 16 square feet of landscaping will be required. Each 16 square foot area should include one tree and three one-gallon shrubs or living ground cover.<sup>104</sup>

JCEP states that it will “supplement [the] Application narrative with a site plan that shows the various parking areas JCEP has proposed in various areas in and around the LNG Terminal site, which comply with the requirements of CCZLDO Chapter 7.”<sup>105</sup> As of the writing of this comment, Oregon Shores was unable to locate the aforementioned supplement on the County’s Planning Site. Any supplemental information submitted to establish compliance with CCZLDO Art. 7.5 must be made available for the County’s and the public’s review with sufficient time within the established open record periods prior to (1) any determination of parking space requirements for each the Applicant’s proposed uses within the IND zone that are not specified in CCZLDO 7.5.175 and (2) any final decision in this matter. Absent such information, the Applicant’s proposals within the IND zone fail to demonstrate compliance with CCZLDO 4.3.225(5) and CCZLDO Art. 7.5. On the basis of the present record, the Planning Commission must deny the Application.

#### **CCZLDO 4.3.225(6)(a) - IND Zone – General Siting Standards – Riparian**

Per CCZLDO 4.3.225(6)(a), all new uses, activities, and development in the IND zone shall maintain a “riparian vegetation setback within 50 feet of an estuarine wetland, stream, lake or river, as identified on the Coastal Shoreland and Fish and Wildlife habitat inventory maps.” The Applicant contends that these criteria do not apply to its IND Zone Proposals, based on the assertion that none of its “IND Zone Proposals are located within 50 feet of an estuarine wetland, stream, lake or river identified by the applicable County maps.”<sup>106</sup> However, the Application materials fail to provide sufficient information to meaningfully evaluate this claim with respect to any of JCEP’s proposals for the IND zone. The Applicant should provide the Planning Commission and the public a map or graphic clearly indicating the boundaries of the IND zone, the location of proposals therein, and the locations of any identified estuarine wetland, stream, lake, or river prior to any final decision in this matter. This information is crucial to ensuring the County’s and the public’s ability review each IND zone proposal in context and with full understanding of which adjacent zoning districts may be impacted by each proposed IND zone use. Absent such information, the Planning Commission should deny the Application.

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<sup>103</sup> JCEP Revised Omnibus II Appl. Narrative, 41.

<sup>104</sup> CCZLDO Sec. 7.5.150(5) – Parking Area Design.

<sup>105</sup> JCEP Revised Omnibus II Appl. Narrative, 41.

<sup>106</sup> JCEP Revised Omnibus II Appl. Narrative, 45.

**CCZLDO 4.3.225(7)(a) – IND Zone – General Siting Standards – Setbacks**

CCZLDO 4.3.225(7)(a) states that “All buildings or structures with the exception of fences shall be set back a minimum of thirty-five (35) feet from any road right-of-way centerline, or five (5) feet from the right-of-way line, whichever is greater. This setback may be greater under specific zoning siting requirements.”<sup>107</sup> The Applicant states that “all of the IND Zone Proposals except for the IWWP, which is not a building or structure, will comply with the thirty-five-foot setback from any road right-of-way centerline or five feet from the right-of-way-line, whichever is greater.”<sup>108</sup> It fails to provide further evidence or analysis to meaningfully evaluate this claim with respect to any of the proposed IND zone buildings and structures to which this standard may be applicable. On the basis of the present record, the Applicant fails to demonstrate compliance with the requisite general siting standards on setbacks for its proposals in the IND zone.

Absent further information, the County must deny the Application.

**V. The Applicant’s proposed uses and activities in the IND zone fail to meet the requisite criteria for approval in CCZLDO 4.3.230(6) - Additional Siting Standards.**

CCZLDO 4.3.230(6) contains additional siting standards that apply to all proposed uses, activities, and development within the IND zone. The following comments are provided for the purposes of clarity and preservation. Oregon Shores will provide further comment on these criteria as appropriate and allowed in any established open record periods. For the below reasons, we argue that the Applicant’s proposed uses and activities within the IND zone fail to meet the following additional siting standards requirements applicable within the IND Zone:

**A. CCZLDO 4.3.230(6)(a) - IND Zone - Additional Siting Standards - Minimum lot/parcel size**

CCZLDO 4.3.230(6)(a)(i) does not provide a minimum lot size standard for the IND zone. However, CCZLDO 4.3.230(6)(a)(ii) states that the standard for “[m]inimum street frontage and minimum lot width is 20 feet.” The Applicant materials assert, absent any supporting evidence or analysis, that the “IND Zone Proposals, with the exception of the IWWP which is a utility pipeline and not a building or structure, will comply with the 20 foot minimum street frontage and lot width requirement of [CCZLDO 4.3.230(6)(a)(ii)].”<sup>109</sup> Oregon Shores was unable to locate further analysis or data sufficient to meaningfully evaluate the accuracy of this claim. Absent such information, the Application fails to demonstrate compliance with CCZLDO 4.3.230(6)(a).

**B. CCZLDO 4.3.230(6)(e) - IND Zone - Additional Siting Standards – Design Standards**

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<sup>107</sup> CCZLDO 4.3.225(7)(a) – IND Zone – General Siting Standards – Setbacks.

<sup>108</sup> JCEP Revised Omnibus II Appl. Narrative, 42.

<sup>109</sup> JCEP Revised Omnibus II Appl. Narrative, 44.

CCZLDO 4.3.230(6)(e) contains five requisite design standards for proposed uses, activities, and development within the IND zone. The following comments are provided for the purposes of clarity and preservation. Oregon Shores will provide further comment on these criteria as appropriate and allowed in the established open record periods for this matter. For the below reasons, we argue that the Applicant's proposed uses and activities within the IND zone fail to meet the following design standard requirements applicable within the IND Zone:

**CCZLDO 4.3.230(6)(e)(i) - IND Zone - Design Standards – Soil Erosion**

- i. The landscape shall minimize soil erosion. The exterior portion of the property shall provide an ornamental, sight-obscuring fence, wall, evergreen or other suitable screening/planting along all boundaries of the site abutting public roads or property lines that are common to other owners of property that are zoned for residential, except for points of ingress and egress;<sup>110</sup>

The Application materials assert that “the landscape for the IND Zone Proposals will minimize soil erosion.”<sup>111</sup> Oregon Shores was unable to locate further analysis or data (such as a soil erosion analysis or landscape design proposal) sufficient to meaningfully evaluate the accuracy of this claim. This is of significant concern given that certain IND zone proposals appear to be located in areas that are identified as experiencing moderate and high landsliding risks by the Oregon Department of Geology and Mineral Industries (“DOGAMI”), as well as a limited development suitability dune site. The Applicant should provide the County and the public with this information regarding how its proposed landscape design will minimize soil erosion prior to any final decision in this matter. The Applicant further states that “the exterior portions of the properties where the IND Zone Proposals are located will provide an ornamental, sight-obscuring fence, wall, evergreen or other suitable screening/planting along all site boundaries abutting public roads.”<sup>112</sup> Again, Oregon Shores was unable to locate further analysis or data (such as a landscape design proposal) sufficient to meaningfully evaluate the accuracy of this claim. On the basis of the present record, the Application fails to demonstrate compliance with requirements of CCZLDO 4.3.230(6)(e)(i).

**CCZLDO 4.3.230(6)(e)(iii) - IND Zone - Design Standards – Exposed Areas, et. al.**

- iii. Exposed storage areas, service areas, utility buildings and structures and similar accessory areas and structures shall be subject to the setbacks of the this [*sic*] zoning designation, screen plantings or other screening methods;<sup>113</sup>

The Application materials assert “[w]ith respect to each of the IND Zone Proposals (except the IWWP, which is a utility pipeline) any exposed storage areas, service areas, utility buildings and structures and similar accessory areas and structures will comply with the applicable setbacks of the zoning designation.”<sup>114</sup> Oregon Shores was unable to locate further

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<sup>110</sup> See CCZLDO 4.3.230(e)(i), (emphasis added).

<sup>111</sup> JCEP Revised Omnibus II Appl. Narrative, 44.

<sup>112</sup> JCEP Revised Omnibus II Appl. Narrative, 44.

<sup>113</sup> See CCZLDO 4.3.230(e)(iii).

<sup>114</sup> JCEP Revised Omnibus II Appl. Narrative, 45.

analysis or data sufficient to meaningfully evaluate the accuracy of this claim. As discussed above, Oregon Shores was similarly unable to locate information within the Application materials regarding any proposed screening/planting along all boundaries of the proposed IND zone site abutting public roads, as required by this subsection and CCZLDO 4.3.230(e)(i). On the basis of the present record, the IND Zone Proposals fail to demonstrate compliance with CCZLDO 4.3.230(6)(e)(iii).

**CCZLDO 4.3.230(6)(e)(iv) - IND Zone - Additional Siting Standards – Design Standards**

- iv. Trash service shall be provided to the facility and the area for trash receptacle or receptacles shall be identified on the plot plan[.]<sup>115</sup>

The Applicant states that “trash service will be provided to each individual proposal, and the area for trash service is identified on the plot plan.”<sup>116</sup> Oregon Shores was unable to locate further information sufficient to evaluate the accuracy of this claim. Further, Oregon Shores could not locate proposed areas for trash receptacles on the plot plan included within the Application materials.<sup>117</sup> On the basis of the present record, the IND Zone Proposals fail to demonstrate compliance with CCZLDO 4.3.230(6)(e)(iv).

For the above reasons, the IND Zone Proposals fail to demonstrate compliance with CCZLDO 4.3.230(6).

**VI. The Applicant’s proposed uses and activities fail to meet the requisite criteria for approval within CCZLDO Art. 4.11 - IND Zone - Special Development Considerations**

CCZLDO Art. 11 contains special development considerations that apply to all proposed uses, activities, and development within the IND zone. The following comments are provided for the purposes of clarity and preservation. Oregon Shores will provide further comment on these criteria as appropriate and allowed in any established open record periods. For the below reasons, we argue that the Applicant’s proposed uses and activities within the IND zone fail to meet the following special development considerations applicable within the IND Zone:

**CCZLDO 4.11.125(4) - Beaches and Dunes (Policy 5.10)– Beaches and Dunes “Suitable for Development”**

The Applicant’s referenced geologist’s site investigation for the IWWP describes high erosion potential, which it appears to propose to stabilize through vegetation. Further information is required for a robust evaluation of this claim. The site investigation also appears to suggest that the IWWP, once buried, will have minimal potential for adverse impacts. However, as discussed above, there is insufficient information on the potential for accidents and indeed, the very design specifications of the IWWP. The Applicant must address and comply with the applicable criteria contained in Goal 18 (Beaches & Dunes), CCZLDO Sec. 4.11.125.4

<sup>115</sup> See CCZLDO 4.3.230(e)(iv).

<sup>116</sup> JCEP Revised Omnibus II Appl. Narrative, 45.

<sup>117</sup> See JCEP Revised Omnibus II Appl. Narrative, Ex. 2, 1 (containing “Plot Plan of Construction Facilities”).

(Beaches and Dunes (Balance of County Policy 5.10) – Beaches and Dunes “Suitable for Development”), and CBEMP Policy #30 (Restricting Actions in Beach and Dune Areas with “Limited Development Suitability” and Special Consideration for Sensitive Beach and Dune Resources) prior to any final decision in this matter. On the basis of the present record, the County must deny the Application.

**VII. The Applicant’s proposed uses and activities fail to meet the requisite criteria for approval within CCZLDO 4.11.200- IND Zone – Overlay Zones.**

CCZLDO 4.11.200 contain overlay zones that apply to all proposed uses, activities, and development within the IND zone. The following comments are provided for the purposes of clarity and preservation. Oregon Shores will provide further comment on these criteria as appropriate and allowed in any established open record periods. For the below reasons, we argue that the Applicant’s proposed uses and activities within the IND zone fail to meet the following overlay zone criteria applicable within the IND Zone:

**A. Tsunami Hazard Overlay Zone (“THOZ”)**

The proposed SORSC and Helipad fall within the THOZ for the IND Zone. These proposed uses are prohibited in the THOZ unless there are no reasonable lower-risk alternative sites available, adequate evacuation measures, they are built to withstand earthquake and tsunami event, and there has been consultation with DOGAMI. The Applicant states, absent supporting evidence, that it will comply with the THOZ requirements. The County should request that JCEP provide evidence of consultation with DOGAMI with respect to the proposed SORSC and Helipad. Finally, the Applicant states, without sufficient supporting evidence, that there are no alternative locations and that it will provide evacuation measures. Absent this information, the County cannot conclude that the proposed uses comply with the applicable criteria within the THOZ.

**VIII. The Applicant’s proposed uses and activities fail to demonstrate compliance with the applicable management objective, uses, and activities criteria for the CBEMP management units in which they are located.**

The Application proposes several developments and activities to be located in various CBEMP zoning districts throughout the Coos Bay estuary. The CBEMP is contained within Vol. II, Part 1 of the Comprehensive Plan of Coos County (“CCCP”).<sup>118</sup> As stated above, the CCCP is the basis for all land use development within the County.<sup>119</sup> Should any conflicts arise between the CCCP and the CCZLDO, the provisions of the CCCP will prevail.<sup>120</sup>

The purpose of CCZLDO Chapter III (Estuary Zones) is to provide requirements pertaining to individual zoning districts in accordance with the CBEMP (contained in Vol. II,

<sup>118</sup> See CCCP, *Coos Bay Estuary Management Plan (CBEMP) – Plan Provisions*, Vol. 2, Pt. 1, available at <http://www.co.coos.or.us/Portals/0/Planning/Vol%202%20Part%201%20-%20CBEMP.pdf?ver=2015-05-18-145041-903> [hereinafter CBEMP].

<sup>119</sup> CCZLDO Section 1.1.300 Compliance with Comprehensive Plan And Ordinance Provisions.

<sup>120</sup> *Id.*



Part 1 of the CCCP).<sup>121</sup> The requirements contained within CCZLDO Chapter III are intended to “encourage the most appropriate use of land and natural resources; to facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, and other public requirements; and to secure safety from flood or other natural hazard.”<sup>122</sup> Unless an exception is specifically listed in the CCZLDO, any use not listed or specifically identified as not permitted are prohibited.<sup>123</sup> However, in recognition that “not all uses of land and water can be listed nor can all future uses be anticipated” in the development of a comprehensive zoning and land development ordinance, CCZLDO 3.1.400 provides an avenue for the classification of a new permitted or conditional use.<sup>124</sup> Specifically,

1. The classification of a new permitted or conditional use may be approved by the Planning Director, or may be referred to the Board of Commissioners for consideration;<sup>125</sup>
2. To classify and add a new permitted or conditional use to the uses already listed within a zoning district without formal amendment to the text of this Ordinance, the Planning Director must find that the proposed use to be added is similar and not more obnoxious or detrimental to the public health, safety, and welfare as other uses listed in the respective zoning district.<sup>126</sup>

CCZLDO 3.1.400 also contains the requisite public process for such a classification. Further, CCZLDO Section 3.1.450 contains five supplemental provisions that apply to all zoning listed in CCZLDO Chapter III.<sup>127</sup> These provisions include:

1. **Special Allowance for Accessory Housing within the Coquille River and Coos Bay Estuary Shoreland Boundaries.**<sup>128</sup> The dwelling is necessary for a watchman or caretaker that is needed to reside on-premise.<sup>129</sup> That the primary purpose of the dwelling is not solely to provide rental housing.<sup>130</sup> Dwellings may be allowed as an accessory use to a number of specified, legally established uses.<sup>131</sup> These include, in relevant part industrial and port facilities and utilities.<sup>132</sup>

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<sup>121</sup> CCZLDO Sec. 3.2.100. Purpose of CBEMP Zoning Districts/Uses and Activities/Land Development Standards

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See Id.*

<sup>125</sup> CCZLDO 3.1.400.1. Prohibited Uses.

<sup>126</sup> CCZLDO 3.1.400.2. Prohibited Uses.

<sup>127</sup> CCZLDO Section 3.1.450 Supplemental Provisions That Apply to All Zoning Listed in Article 3.

<sup>128</sup> CCZLDO Section 3.1.450.1. Supplemental Provisions That Apply to All Zoning Listed in Article 3 (emphasis added).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> CCZLDO Section 3.1.450.1.f.; CCZLDO Section 3.1.450.1.l.

2. **Accessory Structures** are customarily accessory to a lawfully established principle use shall be allowed as set forth below.<sup>133</sup>
  - a. An accessory structure may be located on the same lot, parcel or tract under the same ownership as the lot, parcel or tract that contains the principle use.<sup>134</sup>
  - b. Any attached or detached accessory structure shall maintain the same setbacks established by the zoning district for the principle use.<sup>135</sup>
3. **Residential Care Home/Facility.** Residential Care Home/Facility shall be allowed in any dwelling authorized by this Ordinance.<sup>136</sup>
4. **Special Temporary Uses.**<sup>137</sup> The special temporary uses and their accessory structures and uses may be temporarily permitted by the Planning Director as set forth in the Zoning Districts.<sup>138</sup> The Planning Director's decision may be reviewed by the Hearing's Body.<sup>139</sup>
5. **Accessory Uses.**<sup>140</sup> Uses customarily accessory to the lawfully established principal use shall be allowed in all cases unless specifically prohibited or restricted:
  - a. An accessory use may be located on the same lot, parcel or tract or on a contiguous lot, parcel or tract under the same ownership as the lot, parcel or tract that contains the principal use;<sup>141</sup>
  - b. The use complies with the definition of "Accessory Structure or Use" pursuant to this Ordinance;<sup>142</sup>
  - c. The noncontiguous lot, parcel or tract is in the "same ownership" as the lot, parcel or tract on which the principal use is located;<sup>143</sup>

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<sup>133</sup> CCZLDO Section 3.1.450.2. Supplemental Provisions That Apply to All Zoning Listed in Article 3 (emphasis added).

<sup>134</sup> CCZLDO Section 3.1.450.2.a.

<sup>135</sup> CCZLDO Section 3.1.450.2.b.

<sup>136</sup> CCZLDO Section 3.1.450.3. Supplemental Provisions That Apply to All Zoning Listed in Article 3 (emphasis added).

<sup>137</sup> CCZLDO Section 3.1.450.4. Supplemental Provisions That Apply to All Zoning Listed In Article 3 (emphasis added).

<sup>138</sup> CCZLDO Section 3.1.450.4. Supplemental Provisions That Apply to All Zoning Listed in Article 3 (emphasis added).

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

<sup>140</sup> CCZLDO Section 3.1.450.5. Supplemental Provisions That Apply to All Zoning Listed in Article 3 (emphasis added).

<sup>141</sup> CCZLDO Section 3.1.450.5.a.

<sup>142</sup> CCZLDO Section 3.1.450.5.b.

<sup>143</sup> CCZLDO Section 3.1.450.5.c.

- d. The accessory use shall only be allowed subject to an administrative conditional use and findings that establish that the use is compatible with surrounding uses or may be made compatible through the imposition of conditions.<sup>144</sup>

Site-specific “Management Objective” criteria followed by a “Use and Activity” table are presented for each CBEMP management unit.<sup>145</sup> The Use and Activity tables for each district are subordinate to the Management Objectives for the respective districts.<sup>146</sup> This means that authorized uses and activities must be consistent with a respective CBEMP district’s ‘Management Objective’ statements in order to be permissible.<sup>147</sup> Each site specific Management Objective and Use and Activity Table are subordinate to CBEMP Policies, which have bay-wide application.<sup>148</sup>

**A. IWWP as a “high-intensity utility” in 7-D (Development Shorelands)**

The easternmost portion of the Applicant’s proposed crosses the County’s IND and the 7-D CBEMP zone.<sup>149</sup> 7-D is located around Jordan Cove. Its western boundary is the Roseburg Forest Products access road and a line extending to the north where the road curves to the east. Its eastern boundary is the Southern Pacific Railroad line. The district is bounded to the north by the inland limits of the 100-year floodplain (including freshwater wetlands associated with it).<sup>150</sup> The 7-D shoreland district (which is directly adjacent to the 7-NA natural aquatic area) “shall be managed for industrial use.”<sup>151</sup> “Continuation of and expansion of existing non-water-dependent/non-water-related industrial uses [in this district] shall be allowed provided that such uses do not adversely impact [the] Natural Aquatic District.”<sup>152</sup> Finally, “development shall not conflict with state and federal requirements for the wetlands located in the northwest portion of this district.”<sup>153</sup> For the purposes of CCZLDO Ch. 3, “utilities” are defined as public service structures falling into two categories:

1. low-intensity facilities consist of communication facilities (including power and telephone lines), sewer, water and gas lines, and
2. high-intensity facilities, which consist of storm water and treated waste water outfalls (including industrial waste water).<sup>154</sup>

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<sup>144</sup> CCZLDO Section 3.1.450.5.d.

<sup>145</sup> See CCZLDO Sec. 3.2.175. Site-Specific Zoning Districts (CBEMP).

<sup>146</sup> CCZLDO Sec. 3.2.175. Site-Specific Zoning Districts (CBEMP)

<sup>147</sup> CCZLDO Sec. 3.2.175. Site-Specific Zoning Districts (CBEMP)

<sup>148</sup> CBEMP Sec. 3.3 – Policies, 19.

<sup>149</sup> JCEP Revised Omnibus II Appl. Narrative, 5.

<sup>150</sup> See CCZLDO Sec. 3.2.285. Management Objective, 7-D

<sup>151</sup> CCZLDO Sec. 3.2.285. Management Objective, 7-D

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> CCZLDO 2.1.200 – Specific Definitions – Utilities; See CBEMP Sec. 3.2 – Definitions, 18..

High-intensity utility facilities are permitted in 7-D subject to its management objective and listed "General Conditions."<sup>155</sup> The Applicant asserts that the IWWP "will support industrial uses associated with the LNG facility to construct on the North Spit by transporting industrial waste associated with that facility to its ocean outfall," and is thus consistent with 7-D's management objective requirement that the district be managed for industrial use.<sup>156</sup> The Applicant materials then contend, on the basis that the proposed IWWP is a "new proposal" and is "associated with, and supportive, of water-dependent development," that 7-D's zone's management objective does not require JCEP demonstrated that the proposed IWWP will not adversely impact the adjacent 7-NA district. It provides no evidence sufficient to meaningfully evaluate this assertion, or the bases for this conclusion. Oregon Shores does not concede that the proposed IWWP is water-dependent or water-related as those terms are defined for the purposes of the assessing consistency with the CBEMP. Under 7-D's management objective, any expansion or continuation of non-water-dependent/non-water-related industrial use that adversely impacts the adjacent 7-Natural Aquatic district is not permitted. The IWWP is arguably a non-water-dependent/non-water-related industrial use which risks imposing serious adverse harms on the 7-NA district. The Applicant should detail what specific potential adverse impacts its proposed IWWP may impose on the 7-NA district, and describe what measures it proposed to implement to help avoid such impacts prior to any final decision in this matter. On the basis of the present record, the proposed IWWP is inconsistent with the management objective for the 7-D zone.

7-D's management objective further requires that development be consistent with state and federal requirements for the wetlands located in the northwest portion of 7-D. The Applicant asserts, absent sufficient supporting evidence, that its proposed "IWWP will not conflict with state and federal requirements for the wetlands located in the 7-D zone."<sup>157</sup> Specifically:

Although the County's Shoreland Values Inventory Map shows a wetland near the area for the IWWP, the IWWP is not within a delineated wetland. Exhibit 3 includes a site plan depicting the IWWP and the delineated wetland. The site plan shows that the IWWP does not cross the wetland.<sup>158</sup>

Per Oregon Shores review, Exhibit 3 of the Application does not clearly delineate the boundaries of the 7-D sufficient to evaluate consistency with this criterion of the 7-D's management objective. The Applicant should the County and the public with a map or graphic indicating the boundaries of 7-D and delineated wetlands contained therein in relation to its proposed IWWP prior to any final decision in this matter. Further, the fact that the proposed IWWP may not be within the delineated wetland does not preclude the potential for the siting, construction, and operation of the proposed IWWP to conflict with state and federal requirements for delineated wetlands. In fact, the contrary is more likely to be true: namely, failure of a major facility such as the IWWP could result in toxic substances seeping into sensitive wetland habitat. The Application fails to provide sufficient data to evaluate the

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<sup>155</sup> CCZLDO Sec. 3.2.286.A.15.a. Uses, Activities, and Special Conditions, 7-D – Uses: Utilities – High-Intensity, P (GENERAL CONDITIONS)

<sup>156</sup> JCEP Revised Omnibus II Appl. Narrative, 6.

<sup>157</sup> JCEP Revised Omnibus II Appl. Narrative, 6

<sup>158</sup> JCEP Revised Omnibus II Appl. Narrative, 6

proposed IWWP's impacts on the wetlands at issue, and is thus inconsistent with the management objective of 7-D.

For these reasons, the County should deny the proposed use in the 7-D zone. The proposed IWWP in the 7-D zone is subject to compliance with CBEMP Policies #14, #17, #18, #23, #27, #30, #49, #50 and #51.<sup>159</sup> The proposed use fails to demonstrate compliance with these policies. This proposed IWWP is in an area categorized as limited development suitability for beaches and dunes. The Applicant fails to address this matter, inconsistent with CBEMP Policy #30. The Applicant argues, absent supporting information, that the proposed IWWP as a "high intensity" utility is compatible with protecting identified freshwater wetlands. It provides no evidence for how the buried pipeline will not impact wetlands. As such, the County must deny the request.

**B. Meteorological station as a "low-intensity utility" in 4-CS (Coastal Shorelands) zone**

JCEP proposes to construct a meteorological station in the County's 4-CS CBEMP zone.<sup>160</sup> The location JCEP proposes for the meteorological station is on the west side of the lagoon adjacent "to the northern extent of the snowy plover nesting area."<sup>161</sup> According to the Applicant, the station will be mounted on an approximately 40-foot-high lattice tower or wooden pole, with a 30-foot-by-30-foot triangular or square footprint.<sup>162</sup> The Application states that the purpose of the meteorological station is to provide real-time meteorological data for LNG Tankers transporting LNG processed at the proposed LNG Terminal on the North Spit and their "support vessels," both as they enter and leave the Coos Bay DDNC.<sup>163</sup>

4-CS is located on the Lower Bay side of the North Spit, due slightly northeast of the dredge material spoil islands within the bay and apparently just south of the proposed route of the IWWP to its proposed outfall onto Horsfall Beach. 4-CS comprises the waste treatment lagoon and the berms that contain it. The management objective for 4-CS states that "[t]his shoreland district shall be managed to maintain the existing lagoon and its ability to handle effluents and to allow development of a freshwater marsh."<sup>164</sup> For the purposes of CCZLDO Ch. 3, "utilities" are defined as public service structures falling into two categories:

1. low-intensity facilities consist of communication facilities (including power and telephone lines), sewer, water and gas lines, and
2. high-intensity facilities, which consist of storm water and treated waste water outfalls (including industrial waste water).<sup>165</sup>

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<sup>159</sup> *Omnibus II Pub. Notice*, 2.

<sup>160</sup> *JCEP Revised Omnibus II Appl. Narrative*, 3.

<sup>161</sup> *JCEP Revised Omnibus II Appl. Narrative*, 3.

<sup>162</sup> *JCEP Revised Omnibus II Appl. Narrative*, 3.

<sup>163</sup> *See JCEP Revised Omnibus II Appl. Narrative*, 3.

<sup>164</sup> CCZLDO Section 3.2.255. Management Objective – 4-CS.

<sup>165</sup> *Id.*

<sup>165</sup> CCZLDO 2.1.200 – Specific Definitions – Utilities; CBEMP Sec. 3.2 – Definitions – Utilities, 18.

Low-intensity utility facilities are permitted in the 4-CS zone subject to its management objective and listed “General Conditions.”<sup>166</sup> The Applicant asserts, absent sufficient supporting evidence, that “the meteorological station will not affect the 4-CS zone's purpose of maintaining the existing lagoon and its ability to handle effluents and to allow development of a freshwater marsh.”<sup>167</sup> The mere fact that the station “is a small, ground-based facility which has the limited purpose of communicating weather data to ensure the safety of maritime navigation in and out of the port” does not preclude the possibility of some sort of impact to the shoreland district’s ability to (1) maintain the existing lagoon and its ability to handle effluents and (2) allow development of a freshwater marsh.<sup>168</sup> Similarly, the mere fact that the station is not located within the lagoon or the nearby marsh does not preclude the possibility of the station having adverse impacts on either feature.<sup>169</sup> The Applicant should provide the County with a detailed study of potential adverse impacts arising from the proposed meteorological station, and if such impacts exist, any plans to mitigate potential harms to this sensitive zone prior to any final decision in this matter. Oregon Shores strongly urges the County to make this information available to the public to review and offer comment as soon as possible. Absent such information, the meteorological station is inconsistent with the 4-CS zone's management objective.

The Applicant states that the meteorological station is a “communication facility” that serves the public.<sup>170</sup> It fails to provide sufficient data or analysis to support this claim. Publicly available data suggests that the opposite conclusion seems more likely to be true: namely, that the meteorological station is a facility whose construction and operation will accrue solely to the benefit of the Applicant. Oregon Shores was unable to locate any evidence within the Application materials to demonstrate how the existing fleet currently navigating Coos Bay could access weather data communications from the meteorological station “to ensure the safety of navigation into and out of port.”<sup>171</sup> Similarly, Oregon Shores was unable to locate any information within the Application materials to suggest that navigation into and out of the Port of Coos Bay is presently unviable, unsafe, or inefficient, such that communication from the meteorological station “will enhance the viability, safety, and efficiency of maritime navigation into and out of the Port of Coos Bay” for the existing fleet.<sup>172</sup> On the basis of the present record, it appears that the only type of maritime vessel that stands to benefit from weather data communications issued from the meteorological station are the LNG Tankers whose sole purpose is to service the Applicant’s proposed facility. For these reasons, the Applicant fails to demonstrate consistency with the management objective as well as the uses and activities matrix of the 4-CS zone.

### **CCZLDO Section 3.2.257. 4-CS Zone - Land Development Standards**

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<sup>166</sup> See CCZLDO Sec. 3.2.255; See also CCZLDO Sec. 3.2.256.A.15.a Low Intensity Utility (P-G) P (GENERAL CONDITIONS).

<sup>167</sup> JCEP Revised Omnibus II Appl. Narrative, 3.

<sup>168</sup> See JCEP Revised Omnibus II Appl. Narrative, 3.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See JCEP Revised Omnibus II Appl. Narrative, 3.

<sup>172</sup> *Id.*

CCZLDO Section 3.2.257 governs land development standards for the 4-CS zone. It states that “the requirements set forth in Table 3.2 shall govern development in the 4-CS district.”<sup>173</sup> The Applicant states “that the proposed meteorological station will comply with the above general development standards of the 4-CS zone.”<sup>174</sup> It provides no further data or analysis sufficient to evaluate the accuracy of this claim. As such, it fails to demonstrate compliance with the requisite criteria contained within CCZLDO Section 3.2.257 and CCZLDO 3.2.100, Table 3.2.

For the above reasons, the County should deny the proposed use in the 4-CS zone. The proposed Meteorological Station is subject to CBEMP Policies #13, #14, #17, #18, #30, #49, #50, and #51.<sup>175</sup> The Applicant fails to demonstrate consistency with each of these policies.

**C. “Temporary” construction laydown uses and activities as “special temporary use” in the 3-WD (Water-Dependent Development), 3- NWD (Non-Water Dependent Development), and 6-WD zones.**

The Applicant proposes to develop temporary construction laydown uses and activities, each as a “special temporary use,” in the 6-WD, 3-WD, and 3- NWD zones. The Applicant contends that its proposed temporary barge berth should be considered a “Special Temporary Use” in accordance with CCZLDO Section 3.1.450.4 within the 3-WD, 3- NWD, and 6-WD zones.<sup>176</sup> Oregon Shores does not concede that “special temporary uses” are contemplated or permitted by the CBEMP. The CBEMP does not contain a definition for a “temporary use.”<sup>177</sup> As discussed above, unless an exception is specifically listed in the CCZLDO, any use not listed or specifically identified as not permitted are prohibited.<sup>178</sup> The County should follow the process provided in CCZLDO 3.1.400 regarding the Applicant’s proposed classification. Absent such a determination, the use is inconsistent with the 6-WD, 3-WD, and 3- NWD zones.

Per the Application materials, the proposed temporary construction laydown will include offices, trailers, overflow parking, storage of material, and fabrication of construction materials.<sup>179</sup> The Applicant discloses that the “purpose of the laydown is to store and fabricate materials necessary for the construction of the LNG Terminal and related facilities.”<sup>180</sup> According to the Application materials, the construction laydown activities in the 3-WD and 3- NWD zone are located at the Port Laydown site.<sup>181</sup> According to the Application materials, the construction laydown in the 6-WD zone is located at Ingram Yard, apparently adjacent to a delineated wetland.<sup>182</sup> Exhibit 2 contained within the Application materials does disclose the

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<sup>173</sup> See CCZLDO 3.2.100, Table 3.2.

<sup>174</sup> JCEP Revised Omnibus II Appl. Narrative, 4.

<sup>175</sup> Omnibus II Pub. Notice, 1.

<sup>176</sup> Omnibus II Pub. Notice, 1.

<sup>177</sup> See CBEMP Sec. 3.2 – Definitions, 16-17.

<sup>178</sup> *Id.*

<sup>179</sup> JCEP Revised Omnibus II Appl. Narrative, 12.

<sup>180</sup> JCEP Revised Omnibus II Appl. Narrative, 12.

<sup>181</sup> See JCEP Revised Omnibus II Appl. Narrative, 12; See *Id.*, Ex. 2, 1-2.

<sup>182</sup> See JCEP Revised Omnibus II Appl. Narrative, 12; See *Id.*, Ex. 2, 1-2.

location of laydown sites, and the locations of the Port and Ingram Yard.<sup>183</sup> However, Oregon Shores was unable to locate a map or graphic clearly indicating the locations of these temporary construction laydown sites within the County-zoning boundaries of 3-WD, 3-NWD, and 6-WD. The Applicant should provide the Planning Commission and the public a map or graphic clearly indicating the boundaries of the 3-WD, 3-NWD, and 6-WD zones and the location of any temporary construction laydown proposals therein prior to any final decision in this matter in order to ensure that the County and the public can review each temporary construction laydown proposal in context and with full understanding of which adjacent zoning districts may be impacted by the proposed temporary construction laydown uses. Absent this information, the County should deny the Application.

It appears that the Applicant is asserting that the proposed construction laydown activities are simultaneously qualify as water-dependent, water-related, and non-water-dependent uses. Oregon Shores strongly urges the County to seek clarification on the appropriate categorization of the proposed temporary laydown activities prior to any final decision in this matter. On the basis of the present record, the County cannot conclude the proposed laydown is consistent with the applicable criteria for the IND, 6-WD, 3-WD, and 3-NWD zones.

#### 1. Temporary construction laydown uses and activities in 3-WD

According to the Application materials, the construction laydown in the 3-WD and 3-NWD zone is located at the Port Laydown site.<sup>184</sup> The 3-WD CBEMP zone's northern boundary consists of a line extending from the north-east corner of the waste-treatment lagoon located within the 4-CS district to the southwest, and along its eastern edge, including an area of about 73 acres.<sup>185</sup> The southern boundary is a line to the northwest from the southern boundary of the aquaculture facility.<sup>186</sup> The western boundary is a line running approximately SSW across dune hummocks from the southern side of the lagoon to an open sand dune.<sup>187</sup> The area and boundaries of 3-WD have been reduced by approximately 50 acres being designated 3-NWD as described in that Shoreland Unit.<sup>188</sup> According to its Management Objective, 3-WD shall be managed

[T]o efficiently utilize the property for water-dependent or related commercial/industrial development. Development must be conducted in a manner that is consistent with the Plan's general policy regarding beaches and dunes. Any area of disturbed snowy plover habitat shall be replaced elsewhere on the North Spit (see Districts #1CS and #2CS) such that: (1) sites created as habitat are made available before or concurrently with alteration of existing habitat, and (2) there is no net loss of habitat.<sup>189</sup>

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<sup>183</sup> See *Id.*, Ex. 2, 1; See *Id.*, Ex 2, 2.

<sup>184</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 12; See *Id.*, Ex. 2, 1-2.

<sup>185</sup> See CCZLDO 3.2.240. Management Objective, 3-WD

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> CCZLDO 3.2.240. Management Objective, 3-WD

<sup>189</sup> *Id.* (emphasis added).



The Applicant asserts, absent sufficient supporting evidence, that the temporary construction laydown is water-related industrial development.<sup>190</sup> The proposed LNG Terminal's water-dependent status does not by default make all proposed related and subordinate uses and activities also "water-dependent" or "water-related" absent sufficient evidence and analysis demonstrating such a qualification is warranted. The Applicant fails to provide sufficient evidence to demonstrate the temporary construction laydown will comply with applicable CBEMP policies pertaining to beaches and dunes and will not result in the loss of any identified existing snowy plover habitat. As such, the temporary construction laydown fails to demonstrate compliance with the 3-WD zone's management objective.

## **2. Temporary construction laydown uses and activities in 3-NWD**

Per 3-NWD's management objective, "This shoreland district shall be managed to efficiently utilize the property for non-water-dependent commercial/industrial development."<sup>191</sup> Development must be conducted in a manner that is consistent with the Plan's general policy regarding beaches and dunes.<sup>192</sup>

The Applicant asserts, absent sufficient supporting evidence, that the temporary construction laydown is water-related industrial development. The proposed LNG Terminal's water-dependent status does not by default make all proposed related and subordinate uses and activities also "water-dependent" or "water-related" absent sufficient evidence and analysis demonstrating such a qualification is warranted. The Applicant fails to provide sufficient evidence to demonstrate the temporary construction laydown will comply with applicable CBEMP policies pertaining to beaches and dunes. Therefore, the temporary construction laydown fails to demonstrate compliance with the 3-NWD zone's management objective, uses, and activities tables.

## **3. Temporary construction laydown uses and activities as "special temporary use" in 6-WD**

The Applicant proposes temporary construction laydown uses and activities in 6-WD. According to the Application materials, the construction laydown in the 6-WD zone is located at Ingram Yard.<sup>193</sup> The Applicant states, without sufficient supporting evidence, that the temporary construction laydown will not prejudice the use of the 6-WD zone's shoreline for water-dependent uses.<sup>194</sup> It fails to provide sufficient evidence to support the claim that the "laydown does not occur within or otherwise impact any identified wetlands in the 6-WD zone."<sup>195</sup> Therefore, the temporary construction laydown fails to demonstrate consistency with the management objective of the 6-WD zone.

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<sup>190</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 14.

<sup>191</sup> CCZLDO Section 3.2.242.01. Management Objective, 3-NWD

<sup>192</sup> CCZLDO Section 3.2.242.01. Management Objective, 3-NWD

<sup>193</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 12; See *Id.*, Ex. 2, 1-2.

<sup>194</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 15.

<sup>195</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 15.

For the above reasons, the County should deny the proposed temporary construction laydown.

**D. Shoreline stabilization within the 5-WD (Water-Dependent Development Shorelands)**

The Applicant proposes “shoreline stabilization” in the form of “an approximately 100-foot-long extension of a sheetpile bulkhead” to be located at “the northwest corner of its proposed slip and access channel in the 5-WD zone.”<sup>196</sup> The Application materials state that the proposed marine sheetpile bulkhead extension is meant to “minimize slope cut-back at this location.”<sup>197</sup> Oregon Shores was unable to locate a map or diagram identifying the exact location of any existing marine sheetpile bulkhead or the exact location and design specifications of the proposed 100-foot extension in relation to the boundaries of the 5-WD zone within the Application materials. The Applicant should make this information available to the County and the public with sufficient time for review prior to any final decision in this matter. Absent such information, the County cannot approve this application.

The proposed shoreline stabilization under consideration in Omnibus II was recently subject to a supplemental comment period solicited by the U.S. Army Corps of Engineers (“USACE” or “Corps”) in relation to the Applicant’s pending Clean Water Act Section 404/ Rivers and Harbors Act Section 10 application (“Section 404/10 Permit”) for the proposed LNG Terminal and Pipeline.<sup>198</sup> Oregon Shores provides the following comment based in part upon the location of the proposed marine sheetpile extension identified in publicly available drawings of modified LNG Terminal project components provided by the Corps. Oregon Shores reserves the right to provide further comment and analysis on the proposed marine sheetpile extension should the Applicant submit further information more clearly describing the proposed use in the 5-WD zone to the County.

**CCZLDO Section 3.2.260. Management Objective – 5-WD**

The management objective of the 5-WD zone states the following:

A large portion of [5-WD], compared to other areas of the bay, possesses characteristics that make it an exceptional future development resource not only for the Bay Area, but for Coos County and the State of Oregon as well. The site's location on the deep-draft channel in the lower bay gives it even greater attributes as a water-dependent industrial development site. Therefore, the Plan reserves this portion of the district for an integrated industrial use that takes advantage of the site's unique characteristics, particularly its

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<sup>196</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 17-18; See also *Omnibus II Pub. Notice*, 1.

<sup>197</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 17.

<sup>198</sup> See USACE, *PUBLIC NOTICE: Application for Permit and to Alter Federally Authorized Projects*, Applicant: Jordan Cove LNG, LLC., USACE Permit No. NWP-2017-41, (July 26, 2019), available at <https://www.nwp.usace.army.mil/Missions/Regulatory/Notices/Article/1918564/nwp-2017-41/> [hereinafter *USACE 404/10 Supp. Pub. Notice*]; See also *USACE 404/10 Supp. Pub. Notice*, Drawing #3, available at [https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/publicnotices/NWP-2017-41\\_figures.pdf](https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/publicnotices/NWP-2017-41_figures.pdf).

attributes for deep-draft development. Uses need not be limited to those specifically mentioned in Exception #22.<sup>199</sup>

Utilizing the site for development purposes as described will require the filling of 123 acres of freshwater and saltwater wetlands, commonly known as Henderson Marsh (Dredged Material Site #4x).<sup>200</sup>

The Plan intends that development within the road corridor will be for the purposes of developing and maintaining an access road, rail and utility corridor, and pulp mill effluent pipeline.<sup>201</sup>

Uses and Activities listed within 5-WD's Uses and Activities Table "can occur while the planned fill and mitigation are on-going and are consistent with state and federal permits."<sup>202</sup> Shoreline stabilization measures in the form of retaining walls may be permitted pursuant to an administrative conditional use determination subject to general and special conditions.<sup>203</sup> For the purposes of the CBEMP, shoreline stabilization is defined as "the protection of the banks of tidal or non-tidal streams, rivers, or estuarine waters by nonstructural (vegetative) or structural (riprap, bulk heading, etc.) means."<sup>204</sup> The terms "Riprap" and "Bulkhead" are referenced under the definition of shoreline stabilization. For the purposes of the CBEMP, a bulkhead is defined as "a retaining wall along a waterfront that separates uplands from aquatic areas."<sup>205</sup> Retaining walls such as the 100-foot bulkhead extension proposed by the applicant in the 5-WD CBEMP zone may be permissible subject to the following special condition: "A retaining wall is a temporary activity that will not pre-empt the ultimate use of the site. These activities, where occurring at the interface with the estuary, are only permitted subject to the findings required by Policy #9, 'Solutions to Erosion and Flooding Problems.'"<sup>206</sup>

The Applicant fails to provide any meaningful data or discussion regarding its proposed extension of the marine slip sheetpile sufficient to evaluate whether the proposed use would be a temporary activity consistent with the special condition criteria for 5-WD and whether the proposed use could be conducted in such a way that it would not pre-empt the ultimate use of the site. The proposed use, as demonstrated in the Corps' public notice, will be occurring at the interface with the estuary. As discussed below, the Applicant fails to provide sufficient discussion or analysis to meaningfully evaluate compliance with CBEMP Policy #9, as required by the special conditions of the 5-WD zone. This is of significant concern due to the fact that the construction and operation of the proposed marine slip and access channel, as well as their associated components, will result in the destruction of substantial amounts of eelgrass habitat (which plays an important role in shoreline stabilization) currently located in aquatic and intertidal areas adjacent to the 5-WD zone.

<sup>199</sup> CCZLDO Section 3.2.260. Management Objective – 5-WD.

<sup>200</sup> CCZLDO Section 3.2.260. Management Objective – 5-WD.

<sup>201</sup> CCZLDO Section 3.2.260. Management Objective – 5-WD.

<sup>202</sup> CCZLDO 3.2.261. Uses, Activities, and Special Conditions – 5-WD.

<sup>203</sup> *Id.*

<sup>204</sup> CBEMP, Sec. 3.2. Definitions – Shoreline Stabilization, 16 (emphasis added).

<sup>205</sup> CBEMP, Sec. 3.2. Definitions – Bulkhead, 3.

<sup>206</sup> See CCZLDO Section 3.2.262.B.6.c. (ACU-S,G) (emphasis added).

For the above reasons, the proposed marine sheetpile extension is inconsistent with the requisite criteria for the 5-WD zone. The proposed Shoreline stabilization within the 5-WD zone is subject to compliance with CBEMP Policies #9, #14, #17, #18, #20, #27, #30, #49, #50, and #51.<sup>207</sup> The proposed use fails to demonstrate compliance with the aforementioned policies.

**E. Pile dike rock apron as “shoreline stabilization” in 5-WD and 5-DA (Development Aquatic) zone**

According to the Application materials, JCEP seeks approval for a pile dike rock apron as “shoreline stabilization” in the 5-DA and 5-WD zones.<sup>208</sup> It states that the pile dike rock apron will be “located along the side slope of the access channel.”<sup>209</sup> According to the Applicant, “the purpose of the pile dike rock apron is to protect Pile Dike 7.3, which is located immediately west of the access channel.”<sup>210</sup> Specifically, the Applicant asserts that the proposed “rock apron will arrest slope migration (or equilibration) before it progresses to a condition that has potential negative impacts on Pile Dike 7.3,” with the proposed design adding “additional rock to proactively maintain the current function and longevity of Pile Dike 7.3.”<sup>211</sup> The Applicant fails to provide sufficient evidence to meaningfully evaluate the following:

- The importance of Pile Dike 7.3 as a navigational structure for the fleet currently operating in the DDNC sufficient to justify the placement of a large shoreline stabilization/rip rap structure in a sensitive shoreline area and in the vicinity of known snowy plover nesting sites.
- The risk, if any, posed by “channel slope migration” or equilibration to the current function of Pile Dike 7.3 as a navigational structure for the fleet currently operating in the DDNC such that a proposed pile dike rock apron is the preferable method of shoreline stabilization (rather than non-structural, vegetative shoreline stabilization).
- Given the tendency of rip rap to increase shoreline erosion, the potential adverse impacts the proposed pile dike rock apron itself may have on increasing coastal erosion, particularly for the BLM boat dock site.
- Given the tendency of rip rap to alter wave action and currents, the potential adverse impacts the proposed pile dike rock apron might impose on the fleet currently operating in the DDNC.

Further, Oregon Shores was unable to discover the total volume of rock required to construct the proposed pile dike rock apron design of “a 50-foot-wide by 3-foot-high by approximately 1,100-foot-long rock apron set back approximately 20 feet from the top (slope catch point) of the side slope of the access channel.”<sup>212</sup> Although the Applicant describes proposed median stone size for the proposed pile dike rock apron, Oregon Shores was unable to

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<sup>207</sup> See *Omnibus II Pub. Notice*, 1.

<sup>208</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 20-24.

<sup>209</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 20; See *Id.*, Ex. 2; See *Id.* Ex. 7.

<sup>210</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 22.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

identify the type of stone or the source of stone to be used in the construction of the proposed use.<sup>213</sup> This information is necessary to conduct a robust evaluation of any potential impacts to sensitive eelgrass habitat in 5-DA (e.g. invasive species as a result of the source of rock, etc), and sensitive upland areas in 5-WD. Further, the pile dike rock apron appears to involve fill activity in a submerged/aquatic area within the definition of that term for the purposes of the CBEMP. The CBEMP defines fill, in relevant part, as “the placement by man of sand, sediment, or other material, usually in submerged lands or wetlands, to create new uplands or raise the elevation of land.”<sup>214</sup> Given the length, width, and height of the proposed design, it also appears that the proposed pile dike rock apron will involve well over the amount that qualifies as “minor fill” under the definition of the term within the CBEMP.<sup>215</sup> Further, this The majority of the proposed pile dike rock apron appears to be located in the 5-DA zone, and is a component identified as a modified element of the proposed LNG Terminal subject to the Corps’ 404/10 July 2019 Supplemental Public Notice. To the extent that the proposed activity is reviewed as fill, the County should require the Applicant to obtain the requisite Section 404/10 permit from the Corps prior to the commencing of any proposed use or activity in the 5-WD and the 5-DA zone.

The Applicant should provide information sufficient to meaningfully evaluate the above prior for the County’s and the public’s review and comment prior to any final decision in this matter. On the basis of the present record, the County cannot conclude that the proposed pile dike rock apron is consistent with the requisite criteria in the 5-WD and 5-DA zone.

Finally, it is unclear that the proposed pile dike rock apron qualifies as “shoreline stabilization” as that activity is envisioned within the CBEMP for the purposes of 5-D and 5-WD. As discussed above, the CBEMP defines shoreline stabilization as “the protection of the banks of [...] estuarine waters by nonstructural (vegetative) or structural (riprap, bulk heading, etc.) means.”<sup>216</sup> Riprap is permitted as a shoreline stabilization activity in the 5-WD zone pursuant to an administrative conditional use determination subject to special conditions. However, the Applicant does not propose to the pile dike rock apron to protect the banks of estuarine waters. Instead, the proposed pile dike rock apron is allegedly to protect Pile Dike 7.3, and not the bank between 5-WD and the 5-DA zones. The Applicant’s argument that the purpose of the proposed pile dike rock apron is to facilitate navigation, rather than protect the bank of 5-WD, further seems to contradict the Applicant’s assertion that the proposed activity qualifies as shoreline stabilization. For this reason, the riprap activity likely fails to meet the requisite criteria for the 5-D and 5-WD zone.

#### 1. Pile dike rock apron as “Riprap” in the 5-WD zone

#### 5-WD Zone – Management Objective – CCZLDO 3.2.260

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<sup>213</sup> *Id.*

<sup>214</sup> CBEMP, Sec. 3.2. Definitions – Fill, 7.

<sup>215</sup> CBEMP, Sec. 3.2. Definitions – Fill, 7. (stating that “Minor Fill” is the “placement of small amounts of material as necessary, for example, for a boat ramp or development of a similar scale. Minor fill may exceed 50 cubic yards and therefore require a permit.”)

<sup>216</sup> CBEMP, Sec. 3.2. Definitions – Shoreline Stabilization, 16 (emphasis added).

The Applicant asserts that the proposed pile dike rock apron is consistent with the management objective of 5-WD.<sup>217</sup> The Applicant contends that the “the purpose of the pile dike rock apron is to protect the integrity of Pile Dike 7.3, which in turn facilitates navigation in the deep draft navigation channel, which in turn facilitates water-dependent industrial development.”<sup>218</sup> Finally, the Applicant claims that the “the pile dike rock apron supports the LNG Terminal and associated industrial development,” which development qualifies as ‘integrated industrial use.’<sup>219</sup> As discussed above in Part VIII.E. of this comment, the Applicant fails to provide sufficient evidence to evaluate the accuracy of these claims. On the basis of the present record, the pile dike rock apron fails to demonstrate consistency with the 5-WD zone’s management objective.

### **5-WD Zone - General Conditions - CCZLDO 3.2.261.3.**

Oregon Shores does not concede that the proposed pile dike rock apron is consistent with the management objective of the 5-WD zone. The following comments are provided for the purposes of clarity and preservation. Riprap shoreline stabilization in the 5-WD zone is subject to seven general conditions.<sup>220</sup> General condition #3 is discussed in this section. General conditions involving CBEMP policies is discussed below. General condition #3 states:

Wherever possible, dredged material, especially from the federal channel or other major project, is to be used for the fill material. This method of obtaining fill will be incorporated into the overall project phasing, unless it can be demonstrated that it will have an adverse impact on the development effort.<sup>221</sup>

The Applicant states that “the pile dike rock apron does not involve fill.”<sup>222</sup> As discussed above, the Applicant’s proposed riprap shoreline stabilization activity likely qualifies as a major fill activity under the definition of that term as envisioned in the CBEMP, with impacts to waters requiring a Section 404/10 permit from the Corps. To the extent that the proposed activity is reviewed as fill, the County should require the Applicant to obtain the requisite Section 404/10 permit from the Corps prior to the commencing of any proposed use or activity in the 5-WD and the 5-DA zone.

The proposed pile dike rock apron within the 5-WD zone is subject to compliance with CBEMP Policies #9, #14, #17, #18, #20, #27, #30, #49, #50, and #51.<sup>223</sup> As discussed below, the Applicant fails to demonstrate compliance with the requisite criteria within these CBEMP Policies.

## **2. Pile dike rock apron as “Rip-rap” in the 5-DA zone**

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<sup>217</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 22.

<sup>218</sup> *Id.*

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

<sup>220</sup> See 5-WD Zone - General Conditions - CCZLDO 3.2.261.1 - CCZLDO 3.2.261.7.

<sup>221</sup> CCZLDO 3.2.261.3. General Conditions - 5-WD Zone.

<sup>222</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 22.

<sup>223</sup> See *Omnibus II Pub. Notice*, 1.

The Applicant asserts that the proposed pile dike rock apron “will have a primary function of facilitating access to the deep-draft navigation channel in support of upland water-dependent industrial uses.”<sup>224</sup>

The 5-DA zone “extends southeast to the deep-draft channel beginning at the south side of the inlet east of the waste treatment lagoon and ending at a line extending south from the east edge of Henderson Marsh.” According to 5-DA’s management objective, the district “shall be managed so as to efficiently utilize the aquatic area for access to the deep-draft channel in support of upland water- dependent uses.”<sup>225</sup> The Applicant states, absent sufficient supporting evidence, that “supporting navigation channels is one of the primary functions of pile dikes, including Pike Dike 7.3.”<sup>226</sup> It states that “Pile Dike 7.3 is proximate to the slip and access channel so that ships can access in and out of Ingram Yard.”<sup>227</sup> However, it is unclear from the Application materials how Pile Dike 7.3’s proximity to the slip and access channel would facilitate access in and out of Ingram Yard. Absent this information, the Application fails to demonstrate consistency with the management objective of 5-DA.

Oregon Shores does not concede that the proposed pile dike rock apron is consistent with the management objective of the 5-DA zone. The following comments are provided for the purposes of clarity and preservation. Riprap shoreline stabilization in the 5-DA CBEMP zone may be permissible subject to the following special condition: riprap activities “are only permitted subject to the general findings required by Policy #9, ‘Solutions to erosion and flooding problems’ preferring non-structural to structural solutions, and to the specific findings for rip-rap.”<sup>228</sup> As discussed below, the Applicant fails to provide sufficient discussion or analysis to meaningfully evaluate compliance with CBEMP Policy #9, as required by the special conditions of the 5-DA zone. This is of significant concern due to the fact that the construction and operation of the proposed marine slip and access channel, as well as their associated components, will result in the destruction of substantial amounts of eelgrass habitat (which plays an important role in shoreline stabilization) currently located in aquatic and intertidal areas within the 5-DA zone.

## **F. Proposed uses and activities within the 6-DA zone**

The Applicant proposes a temporary barge berth, TDT Pipelines, and the relocation of a guardhouse within the 6-DA zone. Pursuant to its management objective, the 6-DA zone “shall be managed to provide water access for the industrial uses in the adjacent uplands.”

### **1. Temporary barge berth in the 6-DA zone**

The Applicant contends that its proposed temporary barge berth should be considered a “Special Temporary Use” in accordance with CCZLDO Section 3.1.450.4.<sup>229</sup> Oregon Shores

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<sup>224</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 21.

<sup>225</sup> CCZLDO 3.2.270. Management Objective – 5-DA.

<sup>226</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 21.

<sup>227</sup> *Id.*

<sup>228</sup> See CCZLDO Section 3.2.271.B.8.b. (ACU-S,G) (emphasis added).

<sup>229</sup> *Omnibus II Pub. Notice*, 1.

does not concede that “special temporary uses” are contemplated or permitted by the CBEMP. The CBEMP does not contain a definition for a “temporary use.”<sup>230</sup> As discussed above, unless an exception is specifically listed in the CCZLDO, any use not listed or specifically identified as not permitted are prohibited.<sup>231</sup> The County should follow the process provided in CCZLDO 3.1.400 regarding the Applicant’s proposed classification. Absent such a determination, the use is inconsistent with the 6-DA zone. Further, the Applicant fails to provide information sufficient to evaluate the potential impacts of its proposed modification of the temporary barge berth. Oregon Shores was unable to discover specifications for the construction of the proposed temporary barge berth as modified. The Applicant should disclose, amongst other things, whether the construction will involve fill, placement of docks, pier, etc. Absent the above information, the proposed temporary barge berth fails to demonstrate consistency with the management objective and use and activity table of the 6-DA zone.

## **2. Relocation of a guardhouse within the 6-DA zone**

As discussed above, the Applicant does not have approval for the guardhouse within the 6-DA zone. Any proposal to relocate the guardhouse within the 6-DA zone should be evaluated in full for compliance with the applicable criteria of the 6-DA zone. The Applicant fails to provide sufficient information or analysis to meaningfully evaluate whether its proposed relocation complies with the requisite criteria. On the basis of the present record, the County must deny the Application.

## **G. Proposed uses and activities within the 6-WD zone**

The Applicant proposes temporary construction laydown uses and activities, relocation of primary access to the LNG Terminal, Gas Processing, a Fire Station, and relocation of LNG Tanks in the 6-WD Zone.

The 6-WD Zone’s management objective is as follows:

This district shall be managed so as to protect the shoreline for water-dependent uses in support of the water-related and non-dependent, non-related industrial use of the area further inland. To assure that the district shoreline is protected for water-dependent uses while still allowing non- water-dependent uses of the inland portion of the property (outside of the Coastal Shoreland Boundary), any new proposed use of the property must be found by the Board of County Commissioners (or their designee) to be located in such a manner that it does not inhibit or preclude water-dependent uses of the shoreline. Further, use of wetlands in the district must be consistent with state and federal wetland permit requirements.<sup>232</sup>

## **1. Relocation of primary access to the LNG Terminal Site from the IND zone to the 6-WD zone**

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<sup>230</sup> See CBEMP Sec. 3.2 – Definitions, 16-17; See also CCZLDO 2.1.200 – Specific Definitions - “Temporary Use.”

<sup>231</sup> *Id.*

<sup>232</sup> CCZLDO Section 3.2.275. Management Objective, 6-WD



According to the Application materials, JCEP originally proposed the Transpacific Parkway within the 6-WD as the primary access point to the proposed LNG Terminal site.<sup>233</sup> JCEP now proposes to relocate the primary site access to Jordan Cove Road, with secondary access from Trans Pacific Parkway.<sup>234</sup> The Applicant discloses that this new access point will require a “driveway confirmation.”<sup>235</sup> JCEP has submitted a driveway confirmation application with its original incomplete application for Omnibus II on April 12, 2019. The County uploaded JCEP’s driveway confirmation application to the Planning Department Application site file for this matter on September 25, 2019 as “Exhibit 1.” Based on Oregon Shores’ review of this Application, the proposed relocation fails to provide sufficient information to meaningfully evaluate whether it complies with the requisite criteria within CCZLDO Chapter 7 and CCZLDO 7.1.425 (Access Connection A=and Driveway Design). Further, any and all traffic analysis and review required by the Oregon Department of Transportation (“ODOT”) to assess conformance with applicable state access management standards and other applicable state standards must be completed before the driveway confirmation application is accepted by the County.

## **2. Gas processing in the 6-WD zone**

The Applicant fails to demonstrate consistency with CBEMP Policy #14 and #16, inconsistent with the requirements of the 6-WD zone. Further, the Application fails to provide the necessary evidence regarding the required proximity between the terminal and the proposed gas processing use. As such, the County cannot approve the proposed modification of gas processing within the 6-WD zone.

## **3. Fire station as an “accessory use” in the 6-WD zone**

For the purposes of the CBEMP, accessory use is defined as:

Structure or use which: (1) is subordinate to and serves a principal structure or principal use; (2) is subordinate in area, extent, or purpose to the principal structure or principal use served; (3) contributes to the comfort, convenience, or the necessity of occupants of the principal structure or principal use; and (4) is located on the same lot, parcel, or tract as the principal structure or principal use, unless otherwise permitted or conditionally permitted by this Ordinance. Examples of accessory structures and uses are private garages, storage sheds, playhouses, swimming pools, and parking for recreational vehicle, boat, log truck, or other vehicle.<sup>236</sup>

Oregon Shores does not concede that the proposed fire station is an “accessory use” within the meaning of the CBEMP. The Application fails to provide evidence that a standalone fire station is customarily incidental and subordinate to an LNG Facility. Further, it fails to demonstrate consistency with the requirements of CCZLDO 3.1.450(2) and CCZLDO 3.1.450(5). The proposed fire station will have water tanks. The Applicant fails to identify the source of that water. Further, the Application fails to provide evidence demonstrating that the

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<sup>233</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 24.

<sup>234</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 24.

<sup>235</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 24.

<sup>236</sup> CCZLDO 2.1.200. Specific definitions, Accessory uses.

fire station will not inhibit future water dependent use of the shoreline, inconsistent with 6-WD's management objective. For the above reasons, the County cannot conclude that the proposed use is consistent with the applicable criteria.

#### **4. Relocation of LNG tanks within the 6-WD zone**

As discussed above, it appears that the Applicant does not have valid approval for the proposed LNG tanks within the 6-WD zone. Any proposal to relocate the tanks within the 6-WD zone should be evaluated in full for compliance with the applicable criteria of the 6-WD zone. The Applicant fails to provide sufficient information or analysis to meaningfully evaluate whether its proposed relocation complies with the requisite criteria. On the basis of the present record, the County must deny the Application.

The Applicant seeks confirmation that other modifications related to its proposed LNG Terminal facility "do not require new approval" on the basis of "minor relocation." It provides no evidence sufficient to evaluate whether the proposed relocations are minor in its potential adverse impacts. As such, the County should not approve or confirm such relocations without a comprehensive evaluation of each respective relocation's impacts and consistency with the applicable criteria.

#### **H. Temporary dredge material transport pipelines ("TDT Pipelines") in 6-WD, 7-D, 13B-NA, and 14-DA**

The Applicant proposes TDT Pipelines in the 6-WD, 7-D, 13B-NA, and 14-DA zones.<sup>237</sup> According to the public notice for Omnibus II, the Applicant also propose to construct TDT Pipelines in the 6-Development Aquatic and 7-Natural Aquatic zones.<sup>238</sup> The Applicant has not addressed the applicable criteria for the 6-DA or the 7-NA zones in conjunction with the proposed TDT Pipelines, and should do so or otherwise explain why said criteria is inapplicable prior to any final decision in this matter.

According to the Application, JCEP proposes to construct two temporary dredge lines. JCEP proposes to construct the first temporary dredge line in the 6-WD and 7-D zones.<sup>239</sup> It states that this temporary dredge line will transport dredged material from JCEP's dredging in the slip and access channel to a disposal site in South Dunes.<sup>240</sup> JCEP proposes to construct the second temporary dredge line in the 13B-NA and 14-DA zones.<sup>241</sup> It states that this temporary dredge line will transport dredged material from the Coos Bay Deep Draft Navigation Channel, which JCEP seeks approval to widen in a separate pending application, to the Kentuck Mitigation Site.<sup>242</sup>

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<sup>237</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 24.

<sup>238</sup> *Omnibus II Pub. Notice*, 1.

<sup>239</sup> See *JCEP Revised Omnibus II Appl. Narrative*, 24.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

The Applicant contends that its proposed TDT Pipeline should be considered a “Special Temporary Use” in accordance with CCZLDO Section 3.1.450.4 for the purposes of demonstrating compliance with the 6-WD and the 7-D zones.<sup>243</sup> Oregon Shores does not concede that “special temporary uses” are contemplated or permitted by the CBEMP. The CBEMP does not contain a definition for a “temporary use.”<sup>244</sup> As discussed above, unless an exception is specifically listed in the CCZLDO, any use not listed or specifically identified as not permitted are prohibited.<sup>245</sup> The County should follow the process provided in CCZLDO 3.1.400 regarding the Applicant’s proposed classification. Absent such a determination, the use is inconsistent with the 6-WD and the 7-D zone. Further, the Applicant fails to provide information sufficient to meaningfully evaluate the impacts to wetlands in both the 6-WD and 7-D zone, inconsistent with the districts’ management objectives. For the above reasons, the County should deny the proposed TDT Pipeline within 6-WD and 7-D.

The Applicant asserts that its proposed TDT Pipeline is a “Temporary Alteration” for the purposes of demonstrating compliance with the 13B-NA and 14-DA CBEMP zones. Oregon Shores does not concede that the TDT Pipeline is a temporary alteration within the meaning of the CBEMP. The Consolidated Applications seek authorization of the TDT Pipeline as a “Temporary Alteration” in the 50-NA CBEMP zone.<sup>246</sup> 50-NA consists of the aquatic area of Pony Slough. The 50-NA CBEMP zone shall be managed to protect its natural resource productivity. Maintenance/repair of the railroad bridge crossing support structures is allowed. Alterations and fill of Pony Slough, along the southern end of runway 13-31 in accordance with FAA requirements for Runway Safety Areas shall be allowed. “Temporary alterations” are permitted in the both 13B-NA and 14-DA subject to compliance with CBEMP Policy #5A. For the purposes of the CBEMP, “temporary alterations” are defined as

Dredging, filling, or another estuarine alteration occurring over a specified short period of time which is needed to facilitate a use allowed by an acknowledged plan. Temporary alterations may not be for more than three (3) years and the affected area must be restored to its previous condition. Temporary alterations include: (1) Alterations necessary for federally authorized navigation projects (e.g., access to dredged material disposal sites by barge or pipeline and staging areas or dredging for jetting maintenance); (2) alterations to establish mitigation sites, alterations for bridge construction or repair, and for drilling or other exploratory operations; and (3) minor structures (such as blinds) necessary for research and educational observation.<sup>247</sup>

The Applicant asserts, absent any supporting evidence, that its proposed TDT Pipeline will not prejudice the productivity of the productivity of the extensive tideflats and subtidal beds in the 13B-NA zone. Similarly, the Applicant fails to provide sufficient evidence to support its claim that the TDT Pipeline will not affect access to the natural Kentuck Channel for transporting jetty stone quarried in the uplands above 14-DA. As such, the proposed TDT pipeline is inconsistent with the management objectives of 13B-NA and 14-DA. Further, the

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<sup>243</sup> *Omnibus II Pub. Notice*, 1.

<sup>244</sup> *See CBEMP Sec. 3.2 – Definitions, 16-17; See also CCZLDO 2.1.200 – Specific Definitions - “Temporary Use.”*

<sup>245</sup> *Id.*

<sup>246</sup> *JCEP Appl. Narrative*, 6.

<sup>247</sup> *CBEMP, Sec. 3.2 – Definitions.*

TDT Pipeline is not a “temporary alteration” as defined for the purposes of the CBEMP. There is no evidence sufficient to suggest that it is an alteration necessary for federally authorized navigation projects, to establish mitigation sites, for bridge construction or repair, or for drilling or exploratory options. It is not a minor structure necessary for research and educational observation. For the above reasons, the proposed use is inconsistent with the applicable criteria. On the basis of the present record, the County should deny the Application.

It should be noted that dredge material disposal is not permitted in the 13B-NA and 14-DA zones. Further, the proposed TDT pipeline does demonstrate compliance with CBEMP Policy #4. Further, the Applicant fails to include sufficient analysis or evidence to support its conclusion that there will be no degradation of estuary values (temporary or permanent), inconsistent with CBEMP Policy #5.

**IX. The Applicant’s proposed uses and activities fail to demonstrate compliance with the “General Conditions” to which they are subject within the CBEMP zoning districts in which they are located.**

As discussed above, the Applicant’s proposed uses and activities within the CBEMP fails to comply with the management objective requirements of each of the applicable CBEMP zoning districts. The management objective standards of a district are controlling; the use and activity tables are subordinate.<sup>248</sup> To the extent the County conducts an analysis of whether a proposed use in the district is permitted outright or allowable subject to general conditions, Oregon Shores provides general comments on JCEP’s responses to certain CBEMP policies for the purposes of clarity and preservation. Oregon Shores will provide further comment on these policies as appropriate and allowed within the established open record periods.

For the purposes of Site-Specific CBEMP Zoning District “Use and Activity” tables, reference to “policy numbers” refers to policies set forth in the Coos Bay Estuary Management Plan.<sup>249</sup> Section 3.3. of Volume 2, Part 1 of the Coos County Comprehensive Plan (CCCP) establishes the authority of these plan policies.<sup>250</sup> It states that the “policies set forth [within the CBEMP] *are mandatory* and provide specific guidance regarding (i) natural, conservation, and development objectives; and (ii) implementation of the Coos Bay Estuary Management Plan.”<sup>251</sup>

The proposed Pile Dike Rock Apron fails to demonstrate compliance with CBEMP Policy #9, CBEMP Policy #27, and CCZLDO F/P zone. The proposed pile dike apron is partly within AE flood zone, but the Applicant appears to be asserting that the proposed use will not

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<sup>248</sup> See CCZLDO 3.2.150. How to use this article (stating that the narrative contained in each CBEMP zoning district’s “Management Objective” provides general policy guidance regarding uses and activities that are, or may be allowed in the district, while each district’s Use and Activity table helps determine whether an authorized use is permitted outright, allowable with conditions, or conditionally allowably subject to an ACU or HBCU review).

<sup>248</sup> CCZLDO Sec. 3.2.175. Site-Specific Zoning Districts (CBEMP)

<sup>249</sup> CCZLDO Sec. 3.2.286.

<sup>250</sup> Coos County Comprehensive Plan (CCCP), *Coos Bay Estuary Management Plan (CBEMP) – Plan Provisions*, Vol. 2, Pt. 1, Sec. 3, PDF Page 53, available at

<http://www.co.coos.or.us/Portals/0/Planning/Vol%202%20Part%201%20-%20CBEMP.pdf?ver=2015-05-18-145041-903>.

<sup>251</sup> *Id.*, (emphasis added).

have any impact. Further information is required to evaluate the accuracy of this claim. The Applicant should demonstrate compliance with the aforementioned policies and criteria prior to any final decision in this matter.

The proposed meteorological station fails to demonstrate compliance with CBEMP Policy #13. Oregon Shores does not concede this is a water-dependent or water-related use, and thus the Applicant should be required to demonstrate public need. As discussed above, on the basis of the present record, the proposed meteorological station seems to be for the sole use and benefit of the Applicant. The Applicant should demonstrate compliance with the aforementioned policies and criteria prior to any final decision in this matter.

The proposed meteorological station and the IWWP will be adjacent to an identified Snowy Plover nesting area. The Applicant fails to address this in its discussion of CBEMP Policy #17 and omits analysis entirely with respect to CCZLDO 4.11.125.6 (Policy 5.6). With respect to the meteorological station, the Applicant's analysis of Goal 30 for mitigation of impacts to birds is insufficient. The proposed station may impose potential adverse impacts to birds during and following construction, which are not sufficiently addressed. The Applicant fails to address potential adverse impacts on viewsheds. Finally, the Applicant fails to provide specifications sufficient to evaluate whether the meteorological station as constructed will be stable such that it will not impact sensitive habitat or wildlife life inconsistent with the applicable criteria.

The Applicant fails to demonstrate consistency with CBEMP Policy #27. In its updated flood rise analysis, it concludes, absent supporting evidence, that "minimal fill" below the BFE will have no measurable impact on the estuary or affect flooding elsewhere in the estuary region. Further information is required prior to any final decision in this matter.

**X. Conclusion**

For the above reasons, the County should deny this Application.

Sincerely,



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Encl.

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

11/27/17 PM 2:07 LUBA

3  
4 OREGON SHORES CONSERVATION COALITION,  
5 *Petitioner,*

6  
7 and

8  
9 JOHN CLARKE, DEB EVANS, RON SCHAAF,  
10 ROGUE CLIMATE, HANNAH SOHL,  
11 STACEY McLAUGHLIN, JODY McCAFFREE, and THE  
12 CONFEDERATED TRIBES OF COOS, LOWER UMPQUA  
13 and SIUSLAW INDIANS,  
14 *Intervenors-Petitioners,*

15  
16 vs.

17  
18 COOS COUNTY,  
19 *Respondent,*

20  
21 and

22  
23 JORDAN COVE ENERGY PROJECT L.P.,  
24 *Intervenor-Respondent.*

25  
26 LUBA No. 2016-095

27  
28 FINAL OPINION  
29 AND ORDER

30  
31 Appeal from Coos County.

32  
33 Courtney Johnson, Portland, filed the petition for review and argued on  
34 behalf of petitioner. With her on the brief was Crag Law Center.

35  
36 Kathleen P. Eymann, Bandon, filed a petition for review and argued on  
37 behalf of intervenor-petitioner John Clarke.

1 Tonia L. Moro, Medford, filed a petition for review and argued on behalf  
2 of intervenors-petitioners Deb Evans, Ron Schaaf, Rogue Climate and Hannah  
3 Sohl.  
4

5 Jody McCaffree, North Bend, filed a petition for review and argued on  
6 her own behalf.  
7

8 Stacy McLaughlin, Myrtle Creek, represented herself.  
9

10 Denise Turner Walsh, Carlsbad, California, filed a petition for review on  
11 behalf of intervenor-petitioner Confederated Tribes of Coos Lower Umpqua  
12 and Siuslaw Indians. Richard K. Eichstaedt argued on behalf of the  
13 Confederated Tribes.  
14

15 Keith A. Leitz, Coos County Legal Counsel, Coquille, filed a response  
16 brief and argued on behalf of respondent.  
17

18 Seth J. King, Portland, filed response briefs and argued on behalf of  
19 intervenor-respondent. With him on the brief was Perkins Coie LLP.  
20

21 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board  
22 Member, participated in the decision.  
23

24 REMANDED 11/27/2017  
25

26 You are entitled to judicial review of this Order. Judicial review is  
27 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county board of commissioners' decision approving a conditional use permit for a liquified natural gas (LNG) export terminal at Jordan Cove in Coos County, near the city of Coos Bay.

**INTRODUCTION**

Petitioner Oregon Shores and several intervenors-petitioners filed petitions for review. With minor exceptions, the five petitions for review filed do not present overlapping challenges. Therefore, we provide here only a general summary of the facts and legal context. Specific facts and legal standards relevant to particular challenges are set out under the pertinent assignments of error.

In 2015, intervenor-respondent Jordan Cove Energy Project L.P. (JCEP) applied to the county to construct an LNG export terminal at Jordan Cove, located on the North Spit at Coos Bay, located in Coos County.<sup>1</sup> The proposed facility would receive approximately 1.04 billion cubic feet per day of natural

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<sup>1</sup> JCEP had previously obtained county approvals for an LNG import terminal. See *SOPIP, Inc. v. Coos County*, 57 Or LUBA 44, *aff'd* 223 Or App 495, 196 P3d 123 (2008), and *SOPIP, Inc. v. Coos County*, 57 Or LUBA 301 (2008). The county also approved a separate application for a 49.72-mile section of a natural gas pipeline to serve the LNG import terminal. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011). Various components and iterations of the project have over the years generated a number of permits and decisions from several bodies, including proceedings before the Federal Energy Regulatory Commission (FERC).



1 gas via pipeline, liquify the gas to produce approximately 6.8 million metric  
2 tons of LNG, and load the LNG on tanker ships for export to international or  
3 domestic markets in the non-contiguous United States.

4 The LNG facility consists of a number of components, including (1) the  
5 LNG export terminal, (2) a marine slip and access channel, (3) a barge berth,  
6 (4) a gas processing center, and (5) a fire station and emergency training center,  
7 along with associated roads and utilities. The project would also require  
8 significant dredging, dredge disposal, shoreline stabilization, and wetland  
9 impact mitigation.

10 The terminal, gas processing facility, and fire station and emergency  
11 training center will be located on upland areas zoned for industrial uses. Much  
12 of the port facilities (slip, barge berth, tugboat dock, etc.) will be located in  
13 coastal shoreland areas, which are generally zoned to allow for water-  
14 dependent uses. The marine slip and access channel will require dredging in  
15 Jordan Cove, designated a natural estuary, and Henderson Marsh, a Statewide  
16 Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open  
17 Spaces) inventoried wetland.

18 The county hearings officer held a hearing on December 18, 2015, and  
19 held the record open thereafter for additional testimony and rebuttal. On May  
20 2, 2016, the hearings officer issued a decision with recommendations to  
21 approve the applications. On August 16, 2016, the county board of  
22 commissioners held a public meeting to deliberate on the recommendations,

1 and voted to adopt the hearings officer's findings as the county's decision, with  
2 minor modifications. The county's final decision was issued on August 30,  
3 2016. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR (OREGON SHORES)**

5 The Coos Bay Estuary Management Plan (CBEMP) governs the use of  
6 the Coos Bay estuary and adjacent shorelands, implementing Statewide  
7 Planning Goal 16 (Estuarine Resources). The CBEMP designates a number of  
8 estuarine resources in the Jordan Cove area. Some are designated as  
9 "Development" zones, others as "Natural" zones in which development,  
10 including dredging and filling, is limited or prohibited.

11 Under the first assignment of error, petitioner Oregon Shores  
12 Conservation Coalition (Oregon Shores) cites to testimony that development of  
13 the gas processing facility will involve placement of fill in the 7-NA (Natural  
14 Aquatic) zoning district, a zone that comprises much of Jordan Cove, in which  
15 placing fill is prohibited. According to Oregon Shores, the county adopted no  
16 findings addressing the proposal to place fill in the 7-NA zone to support the  
17 gas processing facility.

18 Intervenor-respondent JCEP (JCEP) responds that the application did not  
19 propose placing fill anywhere in the 7-NA zone. JCEP also notes that the  
20 county rejected testimony that the application proposes to place fill in the 7-NA  
21 zone. Record 197 (findings discussing an opponents' letter "arguing,  
22 incorrectly, that the applicant's map on page 407 shows that the applicant

1 intends to place fill in the 7-NA aquatic zone.”). As far as we can tell, JCEP is  
2 correct that the application did not propose, and the decision does not approve,  
3 the placement of fill in the 7-NA zone.

4 The first assignment of error (Oregon Shores) is denied.

5 **SECOND ASSIGNMENT OF ERROR (OREGON SHORES)**

6 **THIRD ASSIGNMENT OF ERROR (ROGUE INTERVENORS)<sup>2</sup>**

7 The application proposes dredging within areas zoned 5-DA and 6-DA  
8 (Development Aquatic Management Units), to construct an access channel  
9 from the navigation channel to the marine slip. Such dredging is subject to  
10 CBEMP Policy 5(I),<sup>3</sup> which implements Goal 16, Implementation Requirement

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<sup>2</sup> We follow the parties in referring to intervenors-petitioners Deb Evans, Ron Schaaf, Rogue Climate, and Hannah Sohl as “Rogue Intervenors.”

<sup>3</sup> CBEMP Policy 5(I) (Estuarine Fill and Removal) provides, in relevant part:

“Local government shall support dredge and/or fill only if such activities are allowed in the respective management unit, and:

“a. The activity is required for navigation or other water-dependent use that requires an estuarine location or, in the case of fill for non-water-dependent uses, is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing, and recreation, as per ORS 541.625(4) and an exception has been taken in this Plan to allow such fill.

“b. A need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights.

“c. No feasible alternative upland locations exist; and

1 2 (Goal 16 IR2).<sup>4</sup> Under CBEMP Policy 5(I), dredging is allowed in the  
2 estuary only if, in relevant part, (1) it is “required for navigation or other water-  
3 dependent use that requires an estuarine location,” and (2) a “need (i.e., a  
4 substantial public benefit) is demonstrated and the use or alteration does not  
5 unreasonably interfere with public trust rights.”

6 In two sub-assignments under the second assignment of error, Oregon  
7 Shores challenges the county’s findings that JCEP has demonstrated that  
8 dredging required for the marine slip and access channel will (1) provide a  
9 substantial public benefit, and (2) not unreasonably interfere with public trust  
10 rights. In their third assignment of error, intervenors-petitioners Rogue  
11 Intervenors advance additional arguments under both the “substantial public  
12 benefit” and “interference with public trust rights” standards.

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“d. Adverse impacts are minimized.”

<sup>4</sup> Goal 16, Implementation Requirement 2 provides, as relevant:

“Dredging and/or filling shall be allowed only:

“a. If required for navigation or other water-dependent uses that  
require an estuarine location or if specifically allowed by  
the applicable management unit requirements of this goal;  
and,

“b. If a need (i.e., a substantial public benefit) is demonstrated  
and the use or alteration does not unreasonably interfere  
with public trust rights; and

“c. If no feasible alternative upland locations exist; and,

“d. If adverse impacts are minimized.”

1           **A. Need/Substantial Public Benefit**

2           Under CBEMP Policy 5(I)(a), the county found that the proposed  
3 dredging is required for a “water-dependent use that requires an estuarine  
4 location[,]” the water-dependent use being components of the LNG terminal.  
5 The Statewide Planning Goals define “water-dependent” in relevant part as “[a]  
6 use or activity which can be carried out only on, in, or adjacent to water areas  
7 because the use requires access to the water body for water-borne  
8 transportation, recreation, energy production, or source of water.” See full  
9 quote at n 26, below. Oregon Shores does not challenge the county’s finding  
10 that the LNG terminal is a “water-dependent” use for purposes of CBEMP  
11 Policy 5(I)(a) or Goal 16.<sup>5</sup>

12           With respect to CBEMP Policy 5(I)(b), Oregon Shores argues that the  
13 county misconstrued the need/substantial public benefit standard in three  
14 ways.<sup>6</sup> First, Oregon Shores argues that the county erred in interpreting  
15 CBEMP Policy 5(I)(b) to require evaluation only of the public benefits of the

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<sup>5</sup> However, as discussed below, intervenors-petitioners Rogue Intervenors challenges the conclusion that an LNG *export* terminal qualifies as a “water-dependent use” for purposes of Goal 16 and CBEMP Policy 5(I)(a).

<sup>6</sup> Because CBEMP Policy 5 implements Goal 16, on review the county’s interpretations of the policy are not entitled to deference under ORS 197.829(1) or *Siporen v City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

1 dredging activity itself, divorced from the public benefits of the land-based use  
2 that the dredging serves.<sup>7</sup>

3 We agree with Oregon Shores. If the “substantial public benefit”  
4 analysis is limited to evaluation of the public benefits of the dredge or fill  
5 activity itself, then the standard would never be met, as it is difficult to  
6 conceive of any public benefit from dredging or filling that is distinct from the  
7 use that dredging or filling serves. While the text of CBEMP Policy 5(I)(b)  
8 and Goal 16 IR2 is not entirely clear on this point, the context indicates that the  
9 four standards do not apply only to the proposed dredging or fill. We note that  
10 Goal 16 IR2(c) requires a finding that “no feasible alternative upland locations  
11 exist,” which clearly contemplates evaluation of the proposed land use, not  
12 proposed dredging, since dredging does not generally take place on upland  
13 locations. We conclude that, contrary to the county’s finding, CBEMP Policy  
14 5(I)(b) requires the county to evaluate the substantiality of the public benefits  
15 provided by the use that the proposed dredging serves, in this case the LNG

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<sup>7</sup> The county’s findings state on this point:

“The Board concludes that the term ‘need (substantial public benefit)’ used in Goal 16 and CBEMP Policy #5 refers to a public benefit *for the dredging activity*, and does not require the applicant to prove that there is a public need or benefit for the underlying proposed land use (*i.e.*, a marine slip and ship terminal, or more generally, an LNG export facility).” Record 86 (emphasis in original).

1 terminal, or at least those components of the terminal that are properly viewed  
2 as water-dependent uses.

3 Next, Oregon Shores argues that the county erred in interpreting CBEMP  
4 Policy 5(I)(b) to require evaluation only of the public benefits, and not to  
5 require any consideration of detriments or adverse impacts.<sup>8</sup> The county's  
6 interpretation of Policy 5(I)(b) is based on the observation that the adjoining  
7 Policy, CBEMP Policy 5(I)(a), expressly requires that the proponent of a non-  
8 water-dependent use demonstrate that there is a need for the use that  
9 "outweighs harm to navigation, fishing and recreation[.]" See n 3. As the  
10 findings note, this expressly required balancing test implements a statute. The  
11 county inferred that because CBEMP Policy 5(I)(b) does not expressly require  
12 a similar balancing test, the drafters of CBEMP Policy 5(I)(b) did not intend  
13 the county to engage in a similar balancing of benefits and detriments.

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<sup>8</sup> The county's findings state, in relevant part:

"[T]he Board specifically rejects the argument that the ['public need/benefit' standard requires the County to balance need/benefit with (and weigh against) public detriments. In the previous sentence of Policy 5, the drafters required that an applicant for a non-water-dependent use to demonstrate that dredging and fill 'is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing and recreation.' That specific language did not come out of Goal 16, but rather is taken from ORS 196.825(4). Had the drafters of the CBEMP intended to impose a similar balancing test requirement on to the 'public need/benefit' standard, they could [] easily have done so (as they expressly did in the prior sentence), but they chose not to do so." Record 88.

1           As Oregon Shores argues, the question is not what the drafters of  
2 CBEMP Policy 5 intended, but what the drafters of Goal 16 IR2 intended,  
3 which CBEMP Policy 5(I)(b) implements almost verbatim. The text of Goal 16  
4 IR2(b) does not expressly require balancing or weighing of benefits against  
5 detriments, but requires only a demonstration of a “substantial public benefit.”  
6 That could be understood to represent a “net” public benefit, after  
7 consideration of both benefits and detriments. However, the fact that another  
8 implementation requirement, Goal 16 IR2(d), requires that “adverse impacts  
9 are minimized” suggests that potential adverse consequences of the proposed  
10 use are evaluated under a different standard. Given the absence of an express  
11 or a fairly implied requirement to balance or weigh benefits against adverse  
12 consequences under Goal 16 IR2(b), and the fact that adverse consequences are  
13 expressly addressed under a different standard, we decline to read Goal 16  
14 IR(2)(b) to include an implicit requirement to balance or weigh public benefits  
15 of the proposed use against adverse consequences.

16           Finally, Oregon Shores challenges the county’s view that the  
17 “need/substantial public benefit” standard is satisfied if the dredging activity is  
18 needed to construct a permitted or conditional use allowed on the nearby  
19 coastal shorelands or upland areas.<sup>9</sup> Oregon Shores argues that this

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<sup>9</sup> The county’s findings state, in relevant part:

“The Board believes that the ‘need/substantial benefit’ standard is met if the applicant demonstrates that the dredging or fill activity



1 interpretation conflates CBEMP Policy 5(I)(a) with 5(I)(b), and Goal 16 IR2(a)  
2 with IR2(b). According to Oregon Shores, the fact a water-dependent use is  
3 allowed on coastal shorelands under the county's zoning code does not  
4 automatically demonstrate that there is a "substantial public benefit" for  
5 purposes of CBEMP Policy 5(I)(b) and Goal 16 IR2(b).

6 We agree with Oregon Shores. CBEMP Policy 5(I)(a) and Goal 16  
7 IR2(a) in relevant part require that the proposed dredging serve a water-  
8 dependent use allowed under the county's code. The county's view that the  
9 "need/substantial public benefit" standard in CBEMP Policy 5(I)(b) and Goal  
10 16 IR2(b) is met simply by the fact that the proposed dredging serves a use  
11 allowed under the county's code, conflates CBEMP Policy 5(I)(a) and (b) and  
12 gives no independent effect to the latter. Even if the proposed dredging serves  
13 a water-dependent use allowed under the county's code, the county can allow

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is needed to enable [construction of] a permitted or condition[al]  
use allowed in the neighboring coastal shoreland zone and related  
upland zones. In other words, Coos County has, via its enactment  
of the CBEMP (aka: Zoning Ordinance), set forth the panoply of  
uses that the County believes would serve a need and/or a  
substantial public benefit in each particular zone (*i.e.*, it has  
established a list of uses that are deemed to be appropriate in each  
zone in question.). If the applicant is proposing one of those  
favored uses, and there is a need to conduct fill or dredging  
activity in order to facilitate that favored use, then there is, *ipso  
facto*, a substantial benefit to allowing the applicant to conduct  
that fill/removal so that it can construct and operate the use."  
Record 88 (emphasis in original).

1 the dredging only if it also finds that the use provides a substantial public  
2 benefit.

3 **B. Interference with Public Trust Rights**

4 CBEMP Policy 5(I)(b) and Goal 16 IR2(b) also require that the proposed  
5 dredging does not unreasonably interfere with public trust rights. The public  
6 trust doctrine protects public access to and use of navigable waters and  
7 submerged lands, for navigation, fishing and commercial uses. *See, e.g., Weise*  
8 *v. Smith*, 3 Or 445, 450 (1869) (stating that navigable waters are “public  
9 highways” that each person has an “undoubted right to use \* \* \* for all  
10 legitimate purposes of trade and transportation.”).

11 **1. Navigable Water**

12 Oregon Shores first argues that the county erred by limiting the scope of  
13 public trust assets to submerged lands, and failing to include the waters  
14 overlaying those lands. JCEP responds that, while the findings cite to a circuit  
15 court case stating that the public trust doctrine protects only submerged lands,  
16 the findings in fact evaluate impacts on navigation and fishing and other uses  
17 of the navigable waters overlaying submerged lands. As discussed below,  
18 JCEP is correct that the county in fact evaluated impacts on navigation, fishing  
19 and other uses of navigable water, and did not limit its analysis to impacts on  
20 submerged lands.

1                   **2. Security Zone**

2           Oregon Shores next challenges the county's findings regarding the  
3 impact of security zones around LNG tankers on commercial and recreational  
4 boat movements in the estuary. The application proposes that approximately  
5 100 LNG tankers will traverse the Coos Bay Estuary to and from the LNG  
6 terminal per year. For each passage, the Coast Guard will impose a security  
7 zone extending 500 yards from the tanker in all directions, in which all other  
8 vessel movements are restricted. Oregon Shores argues that, because portions  
9 of the estuary are less than 1,000 yards wide, each tanker passage will  
10 completely halt navigation, fishing and commercial use of those portions of the  
11 estuary until the LNG tanker passes. Oregon Shores contends that the county's  
12 conclusion that the proposed security zone provisions will not unreasonably  
13 interfere with public trust rights relies on an inference from testimony in the  
14 record that is not supported by substantial evidence.

15           The record includes a statement from the Coast Guard that it will "allow  
16 vessels to transit the Safety/Security zone based on a case-by-case assessment  
17 conducted on scene." Record 3033. JCEP's consultant, Amergent Techs,  
18 interpreted this statement to mean that the Coast Guard would allow some  
19 boats to transit the security zone with minimal delay. Record 1817. In its  
20 findings, the county understood Amergent's testimony to be that all "known"  
21 boats would be allowed to transit the security zone without delay, presumably  
22 meaning only unknown boats will be delayed. Based on that understanding,

1 the county concluded that tanker passage would not unreasonably interfere  
2 with navigation or public trust access to the estuary.<sup>10</sup>

3 Nothing in the record cited to us explains the distinction between a  
4 “known” and “unknown” boat. That problem aside, as Oregon Shores argues,  
5 the county’s understanding that all “known” boats would be able to transit the  
6 security zone with minimal delay is not supported by the Amergent Techs  
7 memo, much less by the Coast Guard statements in the record. Neither the  
8 Amergent Techs memo nor the Coast Guard statements suggest that the Coast  
9 Guard’s case-by-case evaluation would rely on a distinction between “known”  
10 and “unknown” boats, and allow the former passage through the security zone

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<sup>10</sup> The county’s findings state, in relevant part:

“The testimony from Amergent Techs provides clarifications regarding the limited impacts caused by LNG vessel passage and docking in Coos Bay. Importantly, the memo clarifies that the Safety/Security zones are not ‘exclusion zones.’ Rather, they are regulated navigation areas. Essentially, that means that the Coast Guard will control traffic near the LNG ships but will still allow boat pilots [to] transit the zone on a case-by-case basis. The Board’s understanding of this explanation is that the Coast Guard will let known vessels pass but can forcibly exclude vessels or delay [vessels] that it does not recognize. As a practical matter, local commercial fishermen operating known vessels should experience no significant delays as they will receive permission from the COTP [Captain of the Port] to proceed. Less frequent users of the bay, such as recreational boaters, may experience some delay as the COTP makes efforts to identify them and conduct a threat assessment. Given that clarification, the Board believes that there will be no unreasonable interference with public trust rights. \* \* \*” Record 100-01.

1 without delay, although that may well be the case. The county's findings rely  
2 on its understanding of the Amergent Techs testimony as the primary basis for  
3 its conclusion that the transit of approximately 100 LNG tankers per year  
4 through the narrow estuary will not unreasonably interfere with navigation or  
5 public trust access to the estuary. JCEP argues that there is other evidence in  
6 the record that could support that conclusion, noting testimony that delay  
7 caused to recreational or fishing vessels by an LNG vessel would last only 20-  
8 30 minutes, and that the LNG transit times would be announced in advance, so  
9 local vessels could make plans to avoid the narrow portions of the estuary at  
10 those times. Record 3764. While that evidence could lend support to a finding  
11 that LNG tanker transit will not unreasonably interfere with public trust rights,  
12 the findings do not cite that evidence, and JCEP does not argue that that  
13 evidence is sufficient, in itself, to "clearly support[]" the county's decision on  
14 this point, in the absence of adequate findings. ORS 197.835(11)(b).<sup>11</sup> We

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<sup>11</sup> ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1 agree with Oregon Shores that remand is necessary for the county to adopt  
2 more adequate findings, supported by substantial evidence, on this point.

### 3 **3. Adverse Impacts of Climate Change**

4 Rogue Intervenors argue in their third assignment of error that the county  
5 erred in failing to consider the adverse impacts of climate change created by  
6 LNG shipped via the LNG terminal, in evaluating whether the proposed  
7 dredging serves a use that provides “substantial public benefits” and does not  
8 unreasonably interfere with public trust rights. Rogue Intervenors contend that  
9 in evaluating both standards the county must consider the impact of greenhouse  
10 gas emissions on ocean acidification, sea level rise and other climatic changes.

11 We disagree with Rogue Intervenors. As discussed above, the  
12 “substantial public benefits” standard does not include an implicit requirement  
13 to balance the public benefits of the proposed LNG terminal against detriments  
14 or adverse impacts of that use, much less consider the adverse effects of  
15 greenhouse gases on climate that could be attributed to the eventual  
16 consumption of the natural gas that is shipped to markets around the world via  
17 the LNG facility. Nor have Rogue Intervenors established that the public trust  
18 doctrine requires evaluation of the contributions of greenhouse gases  
19 attributable to consumption of natural gas shipped via the terminal.

20 The second assignment of error (Oregon Shores) is sustained, in part.

21 The third assignment of error (Rogue Intervenors) is denied.

1 **THIRD ASSIGNMENT OF ERROR (OREGON SHORES)**

2 As noted above, CBEMP Policy 5(I)(d) allows dredging in development  
3 aquatic management units (5-DA and 6-DA) only if “[a]dverse impacts are  
4 minimized.” CBEMP Policy 5(II) provides that “[i]dentification and  
5 minimization of adverse impacts as required in [Policy 5(I)(d)] shall follow the  
6 procedure set forth in Policy 4.” CBEMP Policy 4(I)(d) provides in relevant  
7 part that dredging and fill in development aquatic units must be supported by  
8 findings demonstrating “the public’s need and gain which would warrant any  
9 modification or loss to the estuarine system, based upon a clear presentation of  
10 the impacts of the proposed alteration, as implemented in Policy #4a.”<sup>12</sup>  
11 CBEMP Policy 4(II) sets out standards for an impact assessment.<sup>13</sup> CBEMP

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<sup>12</sup> CBEMP Policy 4(I)(d) provides, in part”

“Where the impact assessment requirement (of Goal #16 Implementation Requirements #1) has not been satisfied in this Plan for certain uses or activities [as identified in Policy #4] then such uses or activities shall not be permitted until findings demonstrate the public’s need and gain which would warrant any modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a.”

<sup>13</sup> CBEMP Policy 4(II) provides, in relevant part:

“An impact assessment need not be lengthy or complex, but it should give reviewers an overview of the impacts to be expected. It may include information on:

“a. the type and extent of alterations expected;

1 Policy 4a includes additional requirements and procedures for the impact  
2 assessment.

3 Oregon Shores argues that the county failed to adopt any findings  
4 addressing CBEMP Policy 4 or 4a, or provide a “clear presentation of the  
5 impacts of the proposed alteration[.]” Oregon Shores notes that the record  
6 includes an analysis of the impacts of proposed dredging, prepared by David  
7 Evans & Associates (DEA), at Record 1900-03. However, Oregon Shores  
8 argues that the county did not adopt the DEA analysis as part of its findings,  
9 and further that the DEA analysis did not follow the procedure set out in  
10 CBEMP Policy 4a.

11 JCEP concedes that the county did not adopt findings directly addressing  
12 CBEMP Policy 4 or 4a, but argues that the record includes evidence that  
13 “clearly supports” a finding of compliance with those policies, and therefore  
14 the decision may be affirmed on this point notwithstanding inadequate  
15 findings, pursuant to ORS 197.835(11)(b). *See* n 11. JCEP argues that the  
16 record includes ample evidence that the “public’s need and gain” would

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“b. the type of resource(s) affected;

“c. the expected extent of impacts of the proposed alteration on  
water quality and other physical characteristics of the  
estuary, living resources, recreation and aesthetic use,  
navigation, and other existing and potential uses of the  
estuary; and

“d. the methods which could be employed to avoid or minimize  
adverse impacts.”



1 warrant any modification or loss to the estuarine system, in the forms of  
2 economic gains from the proposed terminal. CBEMP Policy 4(I)(d). JCEP  
3 contends that the DEA analysis at Record 1900-03 provides the “clear  
4 presentation of the impacts” of the proposed dredging that CBEMP Policy 4  
5 requires, and LUBA should rely on the DEA analysis to conclude that CBEMP  
6 Policy 4 is met.

7       The “clearly supports” standard of review at ORS 197.835(11)(b) allows  
8 LUBA to overlook nonexistent or inadequate findings only if compliance with  
9 the applicable approval standard is “obvious” or “inevitable.” *Marcott*  
10 *Holdings v. City of Tigard*, 30 Or LUBA 101 (1995). CBEMP Policy 4  
11 requires the county to exercise considerable subjective judgment, including  
12 identifying “the public’s need and gain,” and determining whether that need or  
13 gain warrants modification or loss to the estuarine system, and to ensure that  
14 impacts of the proposed alteration are minimized or mitigated. ORS  
15 197.835(11)(b) does not authorize LUBA to affirm decisions based on LUBA’s  
16 evaluation of evidence under standards such as CBEMP Policy 4, which  
17 require the exercise of significant subjective judgment. Accordingly, we agree  
18 with Oregon Shores that remand is necessary for the county to adopt findings  
19 addressing compliance with CBEMP Policy 4 and 4a.

20       The third assignment of error (Oregon Shores) is sustained.

1 **FOURTH ASSIGNMENT OF ERROR (OREGON SHORES)**

2 Proposed development in coastal shorelands, in the 6-WD (Water-  
3 Dependent Development Shorelands) and 7-D (Development Shorelands)  
4 zones, is subject to compliance with CBEMP Policy 30, which requires in  
5 relevant part that the county justify development in these areas “only upon the  
6 establishment of findings that shall include at least \* \* \* [m]ethods for  
7 protecting the surrounding area from any adverse effects of the development[.]”  
8 CBEMP Policy 30(I)(c).<sup>14</sup> This language implements Statewide Planning Goal  
9 18 (Beaches and Dunes), Implementation Requirement 1(c) (Goal 18 IR1(c)).

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<sup>14</sup> CBEMP Policy 30(I) provides:

“Coos County shall permit development within areas designated as ‘Beach and Dune Areas with Limited Development Suitability’ on the Coos Bay Estuary Special Considerations Map only upon the establishment of findings that shall include at least:

- “a. The type of use proposed and the adverse effects it might have on the site and adjacent areas;
- “b. Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;
- “c. Methods for protecting the surrounding area from any adverse effects of the development; and
- “d. Hazards to life, public and private property, and the natural environment which may be caused by the proposed use; and

1 JCEP's consultant prepared a site investigation report addressing  
2 CBEMP Policy 30(I), which identified "erosion and migration of disturbed  
3 dune sands from the site" as an adverse effect of development for purposes of  
4 CBEMP Policy 30(I)(c). To identify "methods for protecting" the surrounding  
5 beach and dune areas from those adverse impacts, the report relied on "State  
6 DEQ and FERC permits that require mitigation of erosion, re-vegetation, and  
7 monitoring of permanent stabilization measures." Record 9801.

8 Oregon Shores argues that the report fails to identify methods for  
9 "protecting" surrounding beaches and dunes from the identified adverse  
10 impacts. According to Oregon Shores, the term "protect[]" as used in CBEMP  
11 Policy 30(I)(c) and Goal 18 IR1(c) has the same meaning as the term "protect"  
12 as defined in the statewide planning goals, *i.e.*, "[s]ave or shield from loss,  
13 destruction, or injury for future intended use." Oregon Shores notes that  
14 LUBA has interpreted the term "protect" as used in the context of Goal 16 to  
15 require measures that will reduce the adverse impacts of development to a *de*  
16 *minimis* or insignificant level. *Columbia Riverkeeper v. Clatsop County*, 61 Or  
17 LUBA 96, 111, *aff'd* 238 Or App 439, 464-65, 243 P3d 82 (2010). Oregon

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"e. Whether drawdown of groundwater would lead to  
loss of stabilizing vegetation, loss of water quality, or  
intrusion of saltwater into water supplies.

"Implementation shall occur through an administrative conditional  
use process which shall include submission of a site investigation  
report by the developer that addresses the five considerations  
above."

1 Shores contends that mitigation and monitoring do nothing to reduce impacts to  
2 a *de minimis* level.

3 JCEP responds that the report describes more than mitigation and  
4 monitoring, but also prescribes re-vegetation and stabilization measures to  
5 reduce erosion and migration of disturbed sand. Record 9800-01. Oregon  
6 Shores does not present any argument regarding why the proposed re-  
7 vegetation and stabilization of soils are insufficient to ensure compliance with  
8 CBEMP Policy 30(I)(c). Absent a more developed argument, we agree with  
9 JCEP that Oregon Shores fails to explain why re-vegetation and stabilization  
10 measures are insufficient to satisfy CBEMP Policy 30(I)(c).

11 Oregon Shores also argues that the county erred in dismissing concerns  
12 raised by Oregon Shores and the State of Oregon regarding potential  
13 subsidence from dewatering activities during construction of the tank/slip  
14 facilities within the 6-WD zone. Record 7751, 8178. The county concluded  
15 that subsidence or site stability due to dewatering is not an issue that is within  
16 the scope of the only provision of the policy that explicitly addresses impacts  
17 on groundwater, CBEMP Policy 30(I)(e). See n 14; record 135. Oregon  
18 Shores argues, however, that subsidence due to dewatering is a potential issue  
19 under CBEMP Policy 30(I)(c), because it could constitute an “adverse effect[]  
20 of the development” on the surrounding area within the meaning of subsection  
21 (c).

1 JCEP responds that the county adopted an alternative finding that the  
2 proposed groundwater dewatering is “within historic levels that did not lead to  
3 the loss of stabilizing vegetation,” and that Oregon Shores failed to challenge  
4 that alternative finding. Record 135. However, the quoted finding addresses  
5 “loss of stabilizing vegetation,” which is an issue addressed under CBEMP  
6 Policy 30(I)(e). *See* n 14. Oregon Shores’ argument is based on the language  
7 of CBEMP Policy 30(I)(c). If there are findings concluding that subsidence  
8 from proposed dewatering is not a potential issue under CBEMP Policy  
9 30(I)(c), JCEP does not cite them. We conclude that remand is necessary to  
10 address whether subsidence is a potential issue under CBEMP Policy 30(I)(c)  
11 and, if so, adopt findings resolving that issue.

12 Finally, Oregon Shores argues that the finding of compliance with  
13 CBEMP Policy 30(I)(c) relies on the applicant obtaining FERC permits, but  
14 notes that FERC has denied JCEP the permits for the proposed LNG terminal.  
15 This issue is raised under the sixth assignment of error, and we address it there.

16 The fourth assignment of error is sustained in part.

17 **FIFTH ASSIGNMENT OF ERROR (OREGON SHORES)**

18 The county approved placing fill in the 7-D (Development Shorelands)  
19 zone, which is subject to “special conditions” at Coos County Land  
20 Development Ordinance (LDO) 3.2.286. Special Condition 5 states that “[t]he  
21 wetland in the southeast portion of this district can be filled for a development  
22 project contingent upon satisfaction of the prescribed mitigation described in

1 Shoreland District #5.” The county’s finding of compliance with Special  
2 Condition 5 states:

3 “The Board finds that the application proposes fill in the southeast  
4 portion of this district for a development project and will mitigate  
5 in accordance with all prescribed mitigation. Therefore, the Board  
6 finds that the proposed fill is consistent with Special Condition 5.”  
7 Record 70.

8 Oregon Shores argues that the foregoing finding is inadequate and not  
9 supported by substantial evidence, because the county failed to identify the  
10 proposed mitigation, or explain how the proposed mitigation satisfies the  
11 “prescribed mitigation described in Shoreland District #5.”

12 JCEP does not dispute that the above-quoted finding is inadequate, but  
13 argues that no party raised any issue under Special Condition 5 during the  
14 proceedings below, and thus no party can challenge on appeal whether the  
15 county’s finding of compliance with Special Condition 5 is adequate, pursuant  
16 to ORS 197.763(1).

17 Oregon Shores replies that a participant submitted testimony below that  
18 at one point quotes Special Condition 5 and at another point raises objections  
19 to proposed mitigation at the West Jordan Cove Mitigation Site, which is  
20 apparently where the application proposed to conduct mitigation. Record  
21 5984. While that testimony does not advance any specific issues under Special  
22 Condition 5, it is sufficient to allow Oregon Shores to challenge the adequacy  
23 of the county’s findings addressing Special Condition 5. *Lucier v. City of*  
24 *Medford*, 26 Or LUBA 213, 216 (1993).

1           On the merits, we agree with Oregon Shores that the county's only  
2 finding of compliance with Special Condition 5 is conclusory and inadequate.  
3 The findings do not identify the proposed mitigation for fill in the wetland in  
4 the southeast portion of the 7-D district, or relate it in any way to "the  
5 prescribed mitigation described in Shoreland District #5." Remand is  
6 necessary for the county to adopt more adequate findings on this point.

7           The fifth assignment of error (Oregon Shores) is sustained.

8           **SIXTH ASSIGNMENT OF ERROR (OREGON SHORES)**

9           Oregon Shores argues that the county found compliance with CBEMP  
10 Policies 5, 8 and 30 based in part on the condition that JCEP obtain and comply  
11 with state and federal permits, including FERC permits.<sup>15</sup> However, Oregon  
12 Shores cites testimony that on March 11, 2016, during the proceedings before  
13 the hearings officer, FERC denied JCEP's application for a permit for the  
14 proposed LNG terminal. Because the required FERC permits have been  
15 denied, Oregon Shores argues, the county erred in relying on FERC permits to  
16 demonstrate compliance with applicable approval criteria. *See Bouman v.*  
17 *Jackson County*, 23 Or LUBA 626, 647 (1992) (where a local government

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<sup>15</sup> Oregon Shores advances a similar challenge to the county's findings of compliance with CBEMP Policy 17. However, in response to intervenor's waiver challenge Oregon Shores concedes that no issues were raised below under CBEMP Policy 17. Intervenor also argues that no issues were raised below under CBEMP Policy 30, but in its reply brief Oregon Shores cites to locations in the record where issues of compliance with Policy 30 were raised.

1 relies on the applicant obtaining state agency permits, the record must include  
2 substantial evidence that the applicant is not precluded as a matter of law from  
3 obtaining the state agency permits).

4 JCEP responds that at the time of the county's decision JCEP's request  
5 for FERC to reconsider its denial was still pending, and thus the record at that  
6 time included substantial evidence that JCEP was not precluded as a matter of  
7 law from obtaining the required FERC permits. JCEP acknowledges that FERC  
8 later denied its request for reconsideration, but argues the decision denying  
9 reconsideration post-dates the county's decision and thus is not in the  
10 evidentiary record (although LUBA has taken official notice of the decision  
11 denying reconsideration). JCEP also notes that LUBA has taken official notice  
12 of the fact that JCEP has initiated a pre-filing with FERC, which is a necessary  
13 step to filing a new application for a FERC permit. Thus, JCEP argues that  
14 even if LUBA looks beyond the evidentiary record there is no reason to  
15 conclude that JCEP is precluded, as a matter of law, from obtaining FERC  
16 permits for the LNG terminal.

17 The county's findings observe that "[i]f it stands" FERC's March 11,  
18 2016 permit denial decision "may very well kill the entire project, at least for  
19 the time being." Record 83. The findings note, however, that the primary basis  
20 for denial (lack of LNG contracts) could potentially be remedied, and further  
21 noted that JCEP had appealed the March 11, 2016 denial. *Id.* However, the  
22 findings do not appear to address whether or not the March 11, 2016 denial



1 means that JCEP is precluded, as a matter of law, from obtaining FERC permits  
2 for the LNG terminal. As noted, with respect to several policies the findings  
3 expressly rely on JCEP obtaining FERC permits in order to satisfy applicable  
4 county criteria. In our view, given that the required FERC permit had, in fact,  
5 been denied during the proceeding before the county, the county erred in  
6 adopting findings of compliance with local approval standards that are  
7 unconditionally predicated on the applicant obtaining a FERC permit, without  
8 first addressing whether the denial means that JCEP is precluded, as a matter of  
9 law, from obtaining the FERC permit. Remand is necessary for the county to  
10 consider that question, and on remand the county may consider the FERC  
11 decisions or applications that post-date the county's decision in this appeal.

12 The sixth assignment of error (Oregon Shores) is sustained.

13 **SEVENTH ASSIGNMENT OF ERROR (OREGON SHORES)**

14 JCEP proposes to construct the Southwest Oregon Regional Safety  
15 Center (SORSC) on a parcel zoned for industrial and water-dependent uses.<sup>16</sup>  
16 The SORSC is a large "multiorganizational office complex" on eight acres that  
17 includes a fire station as one component. Record 143-44. A fire station is a  
18 permitted use in the industrial zone. Record 143. The proposed fire station  
19 would have a daily staff of four persons. Record 9826. The SORSC also

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<sup>16</sup> Apparently, the SORSC facility is intended to meet the requirements of a 2014 Memorandum of Understanding entered into between intervenor and the State of Oregon.

1 includes a number of other components, including (1) offices for the Coos  
2 County sheriff, Coast Guard, and Port of Coos Bay, (2) a security center, (3) a  
3 personal safety access point (apparently a type of emergency call center), and  
4 (4) a training center for the sheriff and Southwestern Oregon Community  
5 College. Record 144. These uses would have a daily staff of approximately 12  
6 persons. The training center includes classrooms to train up to 100 persons.  
7 Record 9826. All the latter components of the SORSC are not allowed uses in  
8 the industrial zone. However, the county approved them as “accessory uses” to  
9 the fire station.

10 According to the county’s decision, LDO 2.1.200 defines “accessory  
11 uses” as uses that (1) are subordinate to and serve a principal use; (2)  
12 subordinate in area or purpose to that principal use; (3) contribute to the  
13 comfort, convenience, or necessity of occupants of the principal use; and (4)  
14 are located on the same unit of land as the principal use. Record 144.<sup>17</sup> The

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<sup>17</sup> The version of the LDO 2.1.200 definition of “accessory use” available on the county’s website is different than the version paraphrased in the decision, perhaps reflecting an inaccurate paraphrase, or more recent amendments. The website version states:

“ACCESSORY USE: A use, building or structure that is (1) customarily incidental and subordinate to the principal use, main building or structure, and (2) subordinate in extent, area and purpose to the principal use. A use that constitutes, in effect, conversion to a use not permitted in the district is not an accessory use.”

1 county rejected arguments that the various SORSC components are not  
2 “subordinate” to the fire station:

3 “The SORSC serves, and is subordinate in purpose to, the Fire  
4 Station because the SORSC is a training center for firefighters  
5 who will work at the Fire Station. The SORSC contributes to the  
6 comfort and convenience of the firemen who utilize the Fire  
7 Station because the SORSC offers training to current and future  
8 firefighters. \* \* \*

9 “\* \* \* \* \*

10 “\* \* \* Although the SORSC will house government offices for the  
11 Coos County Sheriff, the Coast Guard, and the Port, these ‘offices’  
12 are permitted in conjunction with a permitted or conditionally  
13 permitted use. [LDO] 4.4.200(26). In this regard, this is no  
14 different than a fast food restaurant that has a manager’s office—  
15 the office is not a separate land use from a restaurant but is rather  
16 an inherent part of the restaurant. In this case, the offices will  
17 occur in conjunction with the Fire Station, which is a permitted  
18 use under [LDO 4.4.200(20). \* \* \*” Record 144.

19 Oregon Shores argues that the county’s finding that the SORSC is  
20 “subordinate” to the fire station misconstrues the applicable law and is not  
21 supported by substantial evidence. According to Oregon Shores, no reasonable  
22 person could conclude that the various government office and educational  
23 components that make up the bulk of the SORSC, including a regional training  
24 facility for up to 100 persons, are “subordinate” to a local fire station staffed by  
25 four firefighters.

26 JCEP responds that the county’s interpretation of the code term  
27 “accessory use” is not inconsistent with the express language of that term, as  
28 defined, and must be affirmed under the deferential standard of review that

1 LUBA must apply to a governing body's code interpretations, under ORS  
2 197.829(1) and *Siporen*, 349 Or at 259.<sup>18</sup> JCEP argues that the county viewed  
3 the SORSC office components to be an enhancement to the fire station, finding  
4 that "offices for public safety and security entities \* \* \* will have a role in  
5 responding to fire and other natural events as service providers." Record 144.  
6 With respect to the training center, JCEP does not dispute that it will function  
7 as a training center for fire fighters and other emergency responders from  
8 around the region, not limited to training staff at the fire station, but argues that

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<sup>18</sup> ORS 197.829 provides:

- "1. [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
  - "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
  - "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
  - "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
  - "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
- "2. If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

1 the LDC definition of "Accessory Uses" does not require that an accessory use  
2 serve *only* the principal use.

3 The county's "interpretation" is conclusory, and largely inadequate for  
4 review. The findings do not attempt to explain the meaning of "subordinate"  
5 and the other key terms in the LDO 2.1.200 definition of "accessory use," and  
6 the rationales offered for the county's conclusion are strained at best. The  
7 findings analogize the proposed government offices (sheriff, port, coast guard)  
8 to the offices for a primary business use, providing the example of an office for  
9 a restaurant. The flaw in that analogy is that the proposed government offices  
10 are not "offices" for the fire station. It may be true that staff in the government  
11 offices will occasionally provide support for the fire station, during an  
12 emergency, for example. But that is not the *function* of those government  
13 offices; any support the offices might provide to the fire station in an  
14 emergency would be, at best, ancillary to the offices' main function. Even if,  
15 as JCEP argues, the LDO 2.1.200 definition of "accessory use" does not limit  
16 an accessory use to serving *only* the primary use, it is difficult to understand  
17 how a use can be viewed as "accessory" to the primary use when any support or  
18 service it provides to the primary use is ancillary, and the purported  
19 "accessory" use has a main function that has nothing to do with the primary  
20 use.

21 Similarly, with respect to the regional training center, the fact that the  
22 four firefighters staffing the fire station may take classes at the 100-seat

1 training center does little to demonstrate that the training center is  
2 “subordinate” to the fire station, under any conceivable interpretation of that  
3 term. LDO 2.1.200 requires that the accessory use be “subordinate in area or  
4 purpose to that principal use[.]” However, the findings do not discuss whether  
5 any of the SORSC components are subordinate in “area” or “purpose” to the  
6 fire station. The findings do not describe how much area is occupied by the fire  
7 station, versus the area occupied by other SORSC components, or discuss the  
8 purpose of those components, and to what extent those components “serve” the  
9 fire station, as opposed to serving other purposes.<sup>19</sup>

10 Because the findings are conclusory and do not address key language  
11 and considerations in the code definition of “accessory use,” it is hard to say  
12 whether the county’s conclusion that the SORSC components are accessory to  
13 the fire station embodies an interpretation of LDO 2.1.200 that is inadequate  
14 for review, or an interpretation that is simply implausible, *i.e.*, inconsistent with  
15 the express language, purpose and policy underlying LDO 2.1.200. To the  
16 extent the county’s decision interprets LDO 2.1.200 to the effect that a use is  
17 “subordinate” to a primary use as long as it provides some support to the  
18 primary use, regardless of how minimal and tangential that support is compared

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<sup>19</sup> As far as we can tell, the findings do not discuss the proposed security center, or the personal safety access point (which we understand to be a type of emergency call center). It is possible that these uses are allowed in the industrial zone under the category of “emergency services,” a permitted use that includes the proposed fire station. LDO 4.4.210(4). However, without findings about the nature of these uses, it is hard to tell.

1 to the putative accessory use's purpose and function, we reject the  
2 interpretation as implausible.

3 We do not intend to foreclose the possibility that the board of  
4 commissioners can adopt an interpretation of LDO 2.1.200 that is sustainable  
5 under the deferential standard of review we apply under ORS 197.829(1)(a),  
6 supporting a conclusion that some or all of the SORSC components are  
7 "accessory" to the fire station, as defined at LDO 2.1.200. However, the  
8 present decision includes no such interpretation. Further, any sustainable  
9 interpretation of LDO 2.1.200 must give effect to all of its applicable terms.  
10 The findings do not include an interpretation, at least one adequate for review,  
11 explaining why the proposed SORSC components are subordinate to and serve  
12 a principal use, and subordinate in area or purpose to that principal use. Or, in  
13 the words of the version of LDO 2.1.200 on the county's website, whether the  
14 SORSC uses are "customarily incidental and subordinate to the principal use,"  
15 and "subordinate in extent, area and purpose to the principal use." *See* n 17.  
16 Because it may be possible on remand for the county to adopt a more  
17 sustainable interpretation under which at least some components of the SORSC  
18 can be viewed as subordinate to the fire station use, we conclude that it is  
19 appropriate to remand this issue to the county for further proceedings.

20 The seventh assignment of error (Oregon Shores) is sustained.

1 **FIRST ASSIGNMENT OF ERROR (McCAFFREE)**

2 Intervenor-petitioner Jody McCaffree (McCaffree) argues that (1) the  
3 county commission chair, Sweet, was biased in favor of the proposed LNG  
4 terminal and (2) the county commissioners failed to declare *ex parte*  
5 communications.

6 **A. Bias**

7 McCaffree alleges that Chair Sweet was biased in favor of the proposed  
8 LNG terminal. According to McCaffree, on April 22, 2016, Chair Sweet sent a  
9 letter, on county letterhead, to FERC expressing support for the Jordan Cove  
10 LNG terminal and Pacific Connector Pipeline Project applications then pending  
11 before FERC. Supplemental Record 527. In addition, McCaffree quotes Chair  
12 Sweet as making public statements in support of the Jordan Cove project. *Id.* at  
13 529-30. McCaffree contends that the letter and statements demonstrate that  
14 Chair Sweet was incapable of deciding the land use application pending before  
15 the county with the requisite impartiality.

16 In order to succeed in a bias claim, the petitioner must first establish that  
17 the evidence of bias offered by petitioner relates to the “matter” before the  
18 tribunal. *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 608-10,  
19 341 P3d 790 (2014). The “matter” is “precisely and narrowly defined,” as the  
20 individual land use decision that the county board of commissioners considered  
21 and decided in the local proceeding. *Id.* at 608.



1           Second, in order to disqualify a decision-maker from participating, a  
2 party must meet the “high bar for disqualification,” demonstrating that “actual  
3 bias” has occurred, not simply an “appearance of bias.” *Columbia Riverkeeper*,  
4 267 Or App at 610; cf. *Friends of Jacksonville v. City of Jacksonville*, 42 Or  
5 LUBA 137 (2002) (finding actual disqualifying bias occurred when a city  
6 council member stated during his election campaign that he could not be  
7 objective in reviewing a pending application were he to be elected).

8           Finally, to demonstrate actual bias, the petitioner must establish that “the  
9 decision maker has so prejudged the particular matter as to be incapable of  
10 determining its merits on the basis of the evidence and arguments presented.”  
11 *Columbia Riverkeeper*, 267 Or App at 602. To demonstrate actual bias,  
12 petitioner must identify “explicit statements, pledges, or commitments that the  
13 elected local official has prejudged the specific matter before the tribunal.” *Id.*  
14 at 609-10.

15           We disagree with McCaffree that Chair Sweet’s April 11, 2016 letter, or  
16 his public statements, demonstrate that Chair Sweet was incapable of  
17 determining the merits of the land use application based on the evidence and  
18 arguments presented. As the Court of Appeals recently explained in *Columbia*  
19 *Riverkeeper*, 267 Or App at 599:

20           “A judge is expected to be detached, independent and nonpolitical.  
21 A county commissioner, on the other hand, is expected to be  
22 intensely involved in the affairs of the community. He is elected  
23 because of his political predisposition, not despite it, and he is  
24 expected to act with awareness of the needs of all elements of the

1 county, including all government agencies charged with doing the  
2 business of the people.

3 “\* \* \* \* \*

4 “The goal of [the *Fasano v. Washington County Commission*, 264  
5 Or 574, 588, 507 P2d 23 (1973) impartiality requirements] is that  
6 land-use decisions should be made fairly. \* \* \* *Fasano* cannot be  
7 applied so literally that the decision-making system is aborted  
8 because an official charged with the public duty of adjudication  
9 fears that his motivation might possibly be suspect.” (Internal  
10 citations and quotation marks omitted).

11 As far as McCaffree has established, Chair Sweet’s statements of support  
12 of the LNG terminal represent no more than the general appreciation of the  
13 benefits of local economic development that is common among local  
14 government elected officials. Those statements fall far short of demonstrating  
15 that Chair Sweet was not able to make a decision on the land use application  
16 based on the evidence and arguments of the parties.

17 **B. *Ex Parte* Communications**

18 McCaffree also argues that the commission erred by failing to disclose  
19 the contents of Chair Sweet’s April 11, 2016 letter to FERC during the  
20 proceedings below, and by failing to disclose that Chair Sweet attended a  
21 luncheon in 2014 at which JCEP’s representative offered a presentation about  
22 the proposed LNG terminal. Another commissioner, Main, also attended the  
23 luncheon, and disclosed that he had attended the luncheon and heard the  
24 presentation, which he characterized as general in nature.

25 ORS 215.422(3) provides:

1 "No decision or action of a planning commission or county  
2 governing body shall be invalid due to *ex parte* contact or bias  
3 resulting from *ex parte* contact with a member of the decision-  
4 making body, if the member of the decision-making body  
5 receiving the contact:

6 "(a) Places on the record the substance of any written or oral *ex*  
7 *parte* communications concerning the decision or action;  
8 and

9 "(b) Has a public announcement of the content of the  
10 communication and of the parties' right to rebut the  
11 substance of the communication made at the first hearing  
12 following the communication where action will be  
13 considered or taken on the subject to which the  
14 communication related."

15 In response, JCEP argues, and we agree, that the letter from Chair Sweet  
16 to FERC does not qualify as *ex parte* contact for two reasons. First, the letter  
17 from Chair Sweet to FERC is not "*ex parte* contact" because it does not  
18 "concern[] the decision or action" made by the county commission as required  
19 by ORS 215.422(3)(a), but rather it concerns a separate decision or action by  
20 FERC. Second, the letter from Chair Sweet does not qualify as an "*ex parte*  
21 contact" because the letter was *from* Chair Sweet *to* FERC. As the text of ORS  
22 215.422(3) indicates, the statute only governs required disclosures when the  
23 decision-maker "receiv[es] the contact." As a result, no disclosure of the April  
24 11, 2016 letter was required pursuant to the statute.

25 With respect to Chair Sweet's attendance at a 2014 luncheon  
26 presentation by JCEP on the LNG project, intervenor does not dispute that  
27 Sweet failed to disclose the content of the presentation, which the other

1 attending commissioner, Main, treated as an *ex parte* communication. It may  
2 be that the presentation does not qualify as an *ex parte* communication, or if so  
3 that Main's disclosure was sufficient for both commissioners. However,  
4 because the county's decision must be remanded for other reasons, it is  
5 appropriate to remand also to allow Chair Sweet to disclose the substance of  
6 any *ex parte* communications that occurred at the presentation.

7 The first assignment of error (McCaffree) is sustained, in part.

8 **SECOND ASSIGNMENT OF ERROR (McCAFFREE)**

9 In her second assignment of error, McCaffree argues that in the  
10 proceedings below, the county hearings officer misapplied applicable law and  
11 prejudiced McCaffree's rights due to bias against unrepresented parties. Citing  
12 to various statements by the hearings officer, McCaffree argues that the  
13 statements demonstrate a bias in favor of testimony coming from attorneys for  
14 the project applicant, over testimony from unrepresented project opponents.  
15 According to McCaffree, the hearings officer's bias against unrepresented  
16 opponents violated Statewide Planning Goal 1 (Citizen Involvement).

17 JCEP responds that McCaffree failed to preserve the issue by objecting  
18 before the local decision-maker. Even if the issue is preserved, JCEP argues  
19 that McCaffree has failed to demonstrate that the hearings officer was biased,  
20 or that any bias prejudiced McCaffree's procedural rights. Further, JCEP  
21 argues that McCaffree has failed to establish that any error committed by the  
22 hearings officer tainted the county commission's consideration and final

1 decision. Finally, JCEP argues that Goal 1 is not directly applicable to the  
2 proposed permit applications.

3 It is not clear to us that a decision-maker's bias is properly viewed as a  
4 *procedural* error, even if evidence of the alleged bias stems from comments  
5 made by the decision-maker during a hearing. McCaffree does not identify any  
6 *procedure* that the hearings officer failed to follow. In any case, as we  
7 understand, some of the unrepresented parties below objected to the hearings  
8 officer's apparent preference for argument from represented parties.<sup>20</sup> To the  
9 extent preservation principles require lodging an objection to the alleged bias  
10 of the hearings officer against unrepresented parties, an objection was made.

11 On the merits, we have no trouble agreeing with McCaffree that the  
12 hearings officer's comments regarding the testimony were unnecessary and  
13 unfortunate. Nonetheless, we do not believe that those comments are sufficient  
14 to demonstrate that the hearings officer was biased in the sense that the  
15 hearings officer was unable to make a decision based on the arguments and  
16 evidence presented. Moreover, even if we concluded that the hearings officer  
17 was biased, JCEP is correct that the hearings officer was not the final county  
18 decision-maker. McCaffree offers no argument as to why the hearings officer's  
19 alleged bias tainted the proceedings before, or the decision of, the board of

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<sup>20</sup> After the hearings officer expressed a preference for hearing testimony from represented parties, one participant stated: "I'm not going to waste my time [testifying before the hearings officer]. I am not an attorney and you ain't going to listen to me anyway[.]" McCaffree Petition for Review 18.

1 commissioners, the final decision-maker. Accordingly, McCaffree's arguments  
2 under this assignment of error do not provide a basis for reversal or remand.

3 The second assignment of error (McCaffree) is denied.

4 **THIRD ASSIGNMENT OF ERROR (McCAFFREE)**

5 In her third assignment of error, McCaffree argues that the findings  
6 adopted by the county commissioners demonstrate bias in favor of the  
7 application, because the findings generally cite and rely on evidence submitted  
8 by proponents, and ignore or erroneously discredit opposing evidence.

9 As an example, McCaffree argues that the county chose to rely on a  
10 report from one of JCEP's experts (Sullivan) regarding sedimentation from  
11 dredging, notwithstanding that Sullivan is a landscape architect and not an  
12 engineer, while rejecting the opponent's expert testimony (Ravens) from a  
13 licensed engineer. The Ravens testimony had been submitted in an earlier  
14 proceeding related to the LNG pipeline, but the county chose not to rely upon it  
15 in that proceeding. McCaffree submitted the Ravens testimony again in this  
16 present proceeding on the LNG terminal. According to McCaffree, the  
17 county's rejection of the Ravens testimony and reliance on a report filed by a  
18 landscape architect indicates that county decision-makers were biased in favor  
19 of the applicant.

20 JCEP responds that the Sullivan report was prepared by multiple authors  
21 including an environmental specialist, and a biologist. Record 1907-08.  
22 Further, JCEP argues that, while the county chided McCaffree for

1 mischaracterizing the testimony of the opponents' engineer regarding  
2 sedimentation, the county in fact accepted and considered that testimony, and  
3 did not reject it.<sup>21</sup> JCEP argues that simply because the commissioners did not  
4 find the Ravens testimony persuasive does not mean that the commissioners  
5 were biased or that the Ravens testimony does not constitute substantial  
6 evidence.

7       Although couched as an argument regarding "bias," McCaffree's  
8 arguments can be more accurately described as a substantial evidence  
9 challenge. JCEP argues, and we agree, that McCaffree's arguments regarding  
10 how the county weighed the evidence regarding sedimentation does not  
11 demonstrate that the county was "biased" in favor of the application or, more  
12 accurately, that the county's findings regarding sedimentation are not  
13 supported by substantial evidence.

14       The third assignment of error (McCaffree) is denied.

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<sup>21</sup> The county's findings state, in relevant part:

"On page 23 of her letter dated January 12, 2016, Ms. McCaffree cites to previously submitted testimony from Dr. Tom Ravens, and states that '[o]ur sedimentation expert actually proved [Pacific Connector] to be wrong on this issue \* \* \*.' This statement is demonstrably false. In fact, the hearings officer [in a different decision] previously rejected Dr. Ravens' analysis. See Hearings Officer Recommendation HBCU 10-01 (Remand) at pp. 40-57, which is incorporated herein by reference." Record 107 (emphasis added).

1 **ASSIGNMENT OF ERROR (THE TRIBES)**

2 Intervenor-petitioner The Confederated Tribes of the Coos, Lower  
3 Umpqua & Siuslaw Indians (the Tribes) advance four sub-assignments of error,  
4 each essentially arguing that the county failed to properly apply CBEMP Policy  
5 18, Protection of Historical, Cultural and Archaeological Sites.

6 CBEMP Policy 18 provides in relevant part that a development proposal  
7 involving a cultural, archeological or historical site shall include a site plan  
8 application showing all areas proposed for excavation, clearing, and  
9 construction, and submit that site plan to the Tribes for a 30-day review  
10 period.<sup>22</sup> The county must then conduct a review of the site plan and approve

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<sup>22</sup> CBEMP Policy 18 provides, in relevant part:

“Local government shall provide protection to historical, cultural and archaeological sites and shall continue to refrain from widespread dissemination of site specific information about identified archaeological sites.

“I. This strategy shall be implemented by requiring review of all development proposals involving a cultural, archaeological, or historical site to determine whether the project as proposed would protect the cultural, archaeological, and historical values of the site.

“II. The development proposal, when submitted, shall include a Site Plan Application, showing, at a minimum, all areas proposed for excavation, clearing, and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify [the Tribes] in writing, together with a copy of the Site Plan Application. [The Tribes] shall have the right to submit a written



1 or deny based in part on whether the Tribes and the applicant have agreed on  
2 “appropriate measures” to protect cultural, archeological or historical  
3 resources.<sup>23</sup>

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statement to the local government within thirty (30) days of receipt of such notification, stating whether the project as proposed would protect the cultural, historical, and archaeological values of the site or, if not, whether the project could be modified by appropriate measures to protect those values. [giving examples of appropriate measures].”

<sup>23</sup> CBEMP Policy 18 continues:

“III. Upon receipt of the statement by [the Tribes], or upon expiration of [the Tribes’] thirty day response period, the local government shall conduct an administrative review of the Site Plan Application and shall:

“a. Approve the development proposal if no adverse impacts have been identified, as long as consistent with other portions of this plan, or

“b. Approve the development proposal subject to appropriate measures agreed upon by the landowner and [the Tribes], as well as any additional measures deemed necessary by the local government to protect the cultural, historical, and archaeological values of the site. If the property owner and [the Tribes] cannot agree on the appropriate measures, then the governing body shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical, and archaeological values of the site.”

1           Initially, the county failed to provide notice and a 30-day comment  
2 period to the Tribes as required by CBEMP Policy 18(II). On December 18,  
3 2015, the Tribes submitted an initial set of testimony that included information  
4 on archeological sites in the area, and noting that the Tribes had earlier  
5 designated the entirety of Jordan Cove as a site of archeological significance.  
6 The Tribes also took the position that the project would not protect the cultural  
7 and archeological values of the site, and objected that the applicant had not  
8 provided the site plan as required by CBEMP Policy 18(II), which limited the  
9 Tribes' ability to provide focused objections. The county corrected its notice  
10 error and gave the Tribe 30 days to submit additional testimony, and the Tribes  
11 submitted a second set of testimony on January 12, 2016. However, the county  
12 did not initiate the administrative review process set out in CBEMP Policy  
13 18(III), but instead apparently chose to consider the Tribes' testimony within  
14 the ongoing conditional use permit proceeding.

15           As noted, the county hearings officer held the only public hearing on  
16 December 18, 2015, and issued his recommendations on May 4, 2016. In his  
17 findings, later adopted by the commissioners, the hearings officer expressed  
18 skepticism about the Tribes' claim that the entirety of Jordan Cove has been  
19 designated as an archeological site, and criticized the Tribes for failing to  
20 provide site-specific objections and for failing to take a clear position on  
21 whether the proposal would protect the cultural, historical, and archaeological  
22 values of the site. With respect to the site plan required by CBEMP Policy

1 18(II), the hearings officer speculated that a plot plan found in the application  
2 was intended to be that site plan. Ultimately, however, the hearings officer  
3 made no findings of compliance with CBEMP Policy 18, but instead accepted  
4 JCEP's request to impose a condition of conditional use permit approval,  
5 deferring entirely consideration of CBEMP Policy 18 to a subsequent  
6 proceeding.<sup>24</sup> Accordingly, the county imposed Condition E.1., which provides,  
7 in its entirety:

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<sup>24</sup> Intervenor requested the following condition of approval:

“Upon receipt of the statement from the Tribe(s) under CBEMP Policy 18.II, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archeological resources on the site have been identified, the County shall find that the Applications are consistent with CBEMP Policy 18; (2) if the Tribe(s) and the applicant reach agreement regarding the measures needed to protect the identified resources, the County shall find that the Applications are consistent with CBEMP Policy 18, subject to any additional measures the County believes are necessary to protect those resources; or (3) if the County finds that there will be adverse impacts to identified CBEMP Policy 18 resources on the site and the applicant and the Tribe(s) have not reached agreement regarding protection of such resources, then the Board of County Commissioners shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by [a] preponderance of the evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical, and archeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of [LDO 5.7.300] with the Board of Commissioners serving as the

1       “The Board shall hold a quasi-judicial hearing to determine  
2 compliance with CBEMP Policy 18. The hearing shall be a public  
3 hearing at which the governing body shall determine by  
4 preponderance of the evidence whether the development project  
5 may be allowed to proceed, subject to any modifications deemed  
6 necessary by the governing body to protect the cultural, historical,  
7 and archaeological values of the site. For purposes of this  
8 condition, the public hearing shall be subject to the provisions of  
9 section 5.7.300 of the CCZLDO with the Board of Commissioners  
10 serving as the Hearings Body. The Board’s decision in that matter  
11 shall constitute the Board’s decision regarding the Applications’  
12 consistency with CBEMP Policy 18.” Record 216.

13       **A. Subassignments of Error A, C, and D**

14       In these subassignments of error, the Tribes allege the county erred by  
15 deferring its CBEMP Policy 18 project review obligations by: (1) refusing to  
16 recognize and consider the Tribe’s testimony regarding identified  
17 archaeological sites and districts within the project area and significant adverse  
18 impacts from the project; (2) approving the LNG Terminal without requiring  
19 the applicant to submit the site plan required by CBEMP Policy 18(II); and (3)  
20 deferring CBEMP Policy 18 determinations for an undetermined amount of  
21 time.

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Hearings Body. The Board’s decision in that matter shall  
constitute the Board’s decision regarding the Applications’  
consistency with CBEMP Policy 18.” Record 126.

1                   **1. Deferral**

2                   Because subassignments of error A, C, and D rest upon the petitioners'  
3 challenge to the county's decision to defer its CBEMP Policy 18 obligations,  
4 we begin with that issue.

5                   The Tribes contend that, as a matter of law, the county cannot defer the  
6 procedures and determination of compliance with CBEMP Policy 18. To the  
7 extent deferral of compliance with CBEMP Policy 18 is permissible in some  
8 cases, the Tribes argue that it is not permissible in the present case.

9                   In response, JCEP cites *Rhyne v. Multnomah County*, 23 Or LUBA 442,  
10 447-48 (1992), for the proposition that local governments are permitted to  
11 defer a determination of compliance with a permit approval standard until a  
12 second stage in the approval process, as long as the second stage approval  
13 process provides the same notice and hearing as the initial stage:

14                   “Where the evidence presented during the first stage approval  
15 proceedings raises questions concerning whether a particular  
16 approval criterion is satisfied, a local government essentially has  
17 three options potentially available. First, it may find that although  
18 the evidence is conflicting, the evidence nevertheless is sufficient  
19 to support a finding that the standard is satisfied or that feasible  
20 solutions to identified problems exist, and impose conditions if  
21 necessary. Second, if the local government determines there is  
22 insufficient evidence to determine the feasibility of compliance  
23 with the standard, it could on that basis deny the application.  
24 Third, if the local government determines that there is insufficient  
25 evidence to determine the feasibility of compliance with the  
26 standard, instead of finding the standard is not met, it may defer a  
27 determination concerning compliance with the standard to the  
28 second stage. In selecting this third option, the local government  
29 is not finding all applicable approval standards are complied with,

1 or that it is feasible to do so, as part of the first stage approval (as  
2 it does under the first option described above). Therefore, the  
3 local government must assure that the second stage approval  
4 process to which the decision is making is deferred provides the  
5 statutorily required notice and hearing, even though the local code  
6 may not require such notice and hearing for second stage decisions  
7 in other circumstances. *Holland v. Lane County*, 16 Or LUBA  
8 583, 596-97 (1998).” *Id.* (Footnotes omitted).

9 There are several problems with JCEP’s reliance on *Rhyne*. First, *Rhyne*  
10 contemplates a multi-stage approval process, where consideration of criteria  
11 that apply at the first stage can be safely deferred to the second stage, if the  
12 requisite determinations and assurances are made, because no development is  
13 possible until the final, second stage approval is obtained. However, the permit  
14 applications in the present case do not involve a multi-stage approval process.  
15 The county has, in effect, created an *ad hoc* multi-stage conditional use permit  
16 approval process, where compliance with most standards are finally determined  
17 in the first stage, leaving only compliance with one standard (CBEMP Policy  
18 18) to be resolved at a second stage solely devoted to that purpose. That *ad*  
19 *hoc* approach might be permissible in some cases, with respect to some kinds  
20 of approval standards, but it requires basic assurances that Condition E.1 lacks.

21 Notably, nothing in Condition E.1 requires that the second stage  
22 approval be obtained prior to development, or indeed provides any assurances  
23 that there will be a second stage approval process at all. Condition E.1 is silent  
24 regarding the timing and initiation of the second stage. JCEP’s request  
25 suggested that the second stage process would be initiated only when the

1 Tribes submitted the statement described in CBEMP Policy 18(II). See n 23  
2 (“Upon receipt of the statement from the Tribe(s) \* \* \*.”). But that is not  
3 consistent with CBEMP Policy 18, which contemplates that the CBEMP Policy  
4 18 process is initiated by the applicant filing the development application with  
5 the required site plan. The Tribes took the position that JCEP has not yet  
6 submitted the required site plan to the county, and that its efforts to provide a  
7 response to the application were hampered by the lack of the site plan. In his  
8 findings, the hearings officer identified a “plot plan” that he believed was  
9 intended to represent the site plan required by CBEMP Policy 18(II), but that  
10 issue was never resolved. Absent an adequate condition of approval that  
11 specifies how and when the CBEMP Policy 18 review process will be initiated,  
12 there is no assurance that it will ever be initiated and completed prior to  
13 development.

14 In addition, as a predicate to the deferral option, *Rhyme* requires that the  
15 local government determine that there is insufficient evidence to determine  
16 compliance or the feasibility of compliance with the applicable standard. See  
17 also *Gould v. Deschutes County*, 227 Or App 601, 611-12, 206 P3d 1106  
18 (2009) (to defer a finding of compliance with first stage approval criteria to a  
19 second stage approval process, the county must find that eventual compliance  
20 with the applicable approval standards is “feasible” in the sense that the county  
21 can rule out denial as the outcome required by the hearing record). The county  
22 made none of the determinations required by either *Rhyme* or *Gould*, but simply

1 stated that intervenor's request to defer consideration of Policy 18 "seemed  
2 reasonable." Record 126.

3 More fundamentally, we question whether CBEMP Policy 18 is the  
4 kind of approval standard that can be deferred. CBEMP Policy 18 is more than  
5 an approval standard, it also invokes a particular process. That process is  
6 explicitly linked to the initial development application. See ns 22 and 23  
7 (requiring the county to notify the Tribes within three days of receiving the  
8 application, and providing 30 days for the Tribes to respond). CBEMP Policy  
9 18 clearly contemplates that resolution of issues raised by the Tribes, which  
10 may change the scope, scale and footprint of the development proposal  
11 considerably, or even cause it to be denied outright, will be completed before  
12 the development is approved.

13 Moreover, it is important to note that CBEMP Policy 18 requires  
14 coordination with and the resolution of disputes raised by a *sovereign*  
15 government. Under CBEMP Policy 18, the Tribes are not merely another  
16 participant in the proceedings. The Tribes are entitled under CBEMP Policy 18  
17 to special notification and consideration of issues raised, as well as the power  
18 to compel the applicant into negotiations to resolve those issues, and to compel  
19 county resolution of unsuccessfully negotiated issues. That power is  
20 considerably vitiated if the applicant can first obtain county approval of the  
21 proposed development, and only then sit down with the Tribes to negotiate  
22 changes to the approved development. Given the inertia of an existing



1 conditional use permit approval, the county is less likely in a deferred CBEMP  
2 Policy 18 proceeding to force the applicant to accept changes to a development  
3 proposal that the county has already considered and approved. It is even less  
4 likely in such a deferred proceeding that the county would take seriously  
5 arguments that the application cannot comply with CBEMP Policy 18 and must  
6 be (retroactively) denied.

7 The county's findings include no interpretation of CBEMP Policy 18  
8 explaining why it believes compliance with the policy can be deferred to a  
9 second stage proceeding, other than deferral "seemed reasonable." Record 126.  
10 It is not clear to us if the question of whether compliance with CBEMP Policy  
11 18 can be deferred to a second stage proceeding is a matter of local or state  
12 law. Even if it is purely a matter of local law, in the absence of an adequate  
13 local interpretation, for the reasons set out above we conclude under ORS  
14 197.829(2) that the county erred in deferring compliance with CBEMP Policy  
15 18 to a second stage proceeding.

16 **B. Subassignment of Error B**

17 In this subassignment of error, the Tribes argue the county erred to the  
18 extent it rejected the Tribes' claim that the entirety of Jordan Cove is a cultural  
19 and archeological site for purposes of CBEMP Policy 18. That claim is based

1 in part on the fact that in 2015 the Tribes designated Jordan Cove as a  
2 “significant” archaeological site under ORS 358.905(1)(b)(B).<sup>25</sup>

3 JCEP responds that the skepticism expressed in the hearings officer’s  
4 findings that the entirety of Jordan Cove is a cultural or archeological site for  
5 purposes of CBEMP Policy 18 was merely nonbinding *dicta*, which would  
6 have no preclusive effect on any future proceeding to consider compliance with  
7 CBEMP Policy 18. We agree with JCEP that the challenged findings are *dicta*,  
8 given that the county completely deferred consideration of compliance with the  
9 policy to a second stage proceeding. As explained above, that deferral was  
10 erroneous, and remand is necessary for the county to conduct the proceedings  
11 required by CBEMP Policy 18, before approving the conditional use permit  
12 application. On remand, questions regarding the location and scope of  
13 archeological sites affected by the development remain issues to be resolved.

14 The first assignment of error (The Tribes) is sustained, in part.

15 **FIRST ASSIGNMENT OF ERROR (ROGUE INTERVENORS)**

16 As noted, the application proposes development in areas designated as  
17 coastal shorelands under Statewide Planning Goal 17. OAR chapter 660,  
18 division 037 implements Goal 17 and the state policy to generally limit  
19 development of coastal shorelands to uses that are “water-dependent.” The

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<sup>25</sup> ORS 358.905(1)(b)(B) provides that a “Site of archaeological significance” means “Any archaeological site that has been determined significant in writing by an Indian tribe.”

1 Goals define “water-dependent” to mean “[a] use or activity which can be  
2 carried out only on, in, or adjacent to water areas because the use requires  
3 access to the water body for water-borne transportation, recreation, energy  
4 production, or source of water.” Statewide Planning Goals, Definitions 8.

5 OAR 660-037-0040(6) provides additional definitions for purposes of  
6 the rule, which the county has implemented verbatim in LDO 2.1.200. In  
7 relevant part, OAR 660-037-0040(6)(C) defines “water-borne transportation”  
8 to mean uses of water access that fit into one of three subcategories, uses which  
9 are themselves transportation, uses which “require the receipt of shipment of  
10 goods by water,” or uses which are themselves not water-borne transportation,  
11 but that are “necessary to support water-borne transportation,” with the  
12 example provided of “terminal and transfer facilities.”<sup>26</sup>

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<sup>26</sup> OAR 660-037-0040(6) provides, in relevant part:

“Water-Dependent Use.

“(a) The definition of ‘water-dependent’ contained in the Statewide Planning Goals (OAR chapter 660, division 015) applies. In addition, the following definitions apply:

“(A) ‘Access’ means physical contact with or use of the water.

“(B) ‘Requires’ means the use either by its intrinsic nature (e.g., fishing, navigation, boat moorage) or at the current level of technology cannot exist without water access.

1           The county concluded that the components of the LNG facility located  
2 on coastal shorelands are “water-dependent uses” as defined at LDO 2.1.200

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“(C) ‘Water-borne transportation’ means uses of water access:

“(i) Which are themselves transportation (e.g., navigation);

“(ii) *Which require the receipt of shipment of goods by water; or*

“(iii) Which are necessary to support water-borne transportation (e.g. moorage fueling, servicing of watercraft, ships, boats, etc.[, and] *terminal and transfer facilities*).

“\* \* \* \* \*

“(b) Typical examples of water dependent uses include the following:

“(A) Industrial — e.g., manufacturing to include boat building and repair; water-borne transportation, *terminals, and support*; energy production which needs quantities of water to produce energy directly; water intake structures for facilities needing quantities of water for cooling, processing, or other integral functions.

“\* \* \* \* \*

“(c) For purposes of this division, examples of uses that are not ‘water dependent uses’ include restaurants, hotels, motels, bed and breakfasts, residences, parking lots not associated with water-dependent uses, and boardwalks.” (Emphasis added.)

1 and OAR 660-037-0040(6), because the facility involves “water-borne  
2 transportation” and is also a “terminal and support.” Record 44.

3 On appeal, Rogue Intervenors argue that the county erred in concluding  
4 that the facility constitutes “water-borne transportation,” to the extent it relied  
5 upon OAR 660-037-0040(6)(a)(C)(ii), for uses of water access “[w]hich  
6 require the receipt of shipment of goods by water[.]” Rogue Intervenors argue  
7 that “water-borne transportation” under subcategory (ii) is limited to uses  
8 related to the *import* of goods, and therefore does not include a facility  
9 dedicated to exporting LNG.

10 JCEP responds that Rogue Intervenors do not challenge the county’s  
11 alternative conclusion that the facility is a “terminal,” and therefore an express  
12 example of a water-dependent industrial use. JCEP is correct. OAR 660-037-  
13 0040(6)(a)(C)(ii) is one of three separate subcategories of uses of water access  
14 that concern “water-borne transportation.” The third, OAR 660-037-  
15 0040(6)(a)(C)(iii), expressly includes “terminals and transfer facilities.” *See*  
16 *also* OAR 660-037-0040(6)(b) (citing “terminals” as a typical example of an  
17 industrial water-dependent use). Even if the OAR 660-037-0040(6)(a)(C)(ii)  
18 subcategory is limited to import facilities, as Rogue Intervenors argue, there  
19 can be no possible dispute that a facility that loads goods onto cargo ships is a  
20 “terminal” for purposes of OAR 660-037-0040(6)(a)(C)(iii) and thus properly  
21 viewed as “water-borne transportation” for purposes of the definition of  
22 “water-dependent use.”

1           The first assignment of error (Rogue Intervenors) is denied.

2   **SECOND ASSIGNMENT OF ERROR (ROGUE INTERVENORS)**

3           The proposed LNG facility includes a 20-acre gas-processing facility,  
4 located on an industrially zoned portion of the site. The gas-processing facility  
5 first refines natural gas arriving by pipeline to remove water and carbon  
6 dioxide.<sup>27</sup> The refined gas is then sent through a multi-stage liquefaction  
7 process to cool and liquefy the gas. Record 18. The resulting product, LNG, is  
8 stored at a temperature of -260 degrees in large storage tanks and eventually  
9 transferred to LNG tankers via a cryogenic line. When the LNG reaches its  
10 ultimate destination, it is unloaded and converted back into gaseous form.

11           The industrial zone allows the processing of mineral resources as an  
12 allowed use. LDO 2.1.200 defines "Mineral Resources—Processing" as "[t]he  
13 act of refining, perfecting, or converting a natural mineral into a useful

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<sup>27</sup> The county's decision describes the refinement process:

"\* \* \* Once natural gas is transferred to the Applicant through the metering station, the gas would go through a processing plant. The processing facility would consist of two feed gas pre-treatment trains, each containing two systems in the series: a CO<sub>2</sub> removal process which utilizes a primary amine to absorb CO<sub>2</sub>, followed by a dehydration system which uses two solid absorbents to remove water and mercury from the feed gas. The gas processing units would remove substances that would freeze during the liquefaction process, namely CO<sub>2</sub> and water. Mercury would also be removed to prevent corrosion to downstream equipment. Trace amounts of hydrogen sulfide (H<sub>2</sub>S) would be removed as well. \* \* \*" Record 22.

1 product.” In this assignment of error, Rogue Intervenors argue that the county  
2 misconstrued LDO 2.1.200 in concluding that the gas-processing facility  
3 processes a mineral resource. According to Rogue Intervenors, the gas-  
4 processing facility does not convert natural gas into a “useful product,” but  
5 instead takes natural gas that is of household quality, and converts it for  
6 transportation purposes only into LNG, which is not itself a “useful product.”  
7 Rogue Intervenors argue that, as a matter of law, transforming a useful product  
8 into a non-useful product for transportation does not fit within the definition of  
9 “Mineral Resources—Processing” at LDO 2.1.200.

10 The county board of commissioners rejected that argument below:

11 “\* \* \* In its gaseous form, natural gas on the mainland of the U.S.  
12 is not a useful product for consumers living in Hawaii, for  
13 example, because there is no way to get it to that market in an  
14 unrefined form. The natural gas is refined and then converted into  
15 a liquid form so that it may be transported and used as a ‘useful  
16 product’ throughout the Pacific Rim.” Record 141.

17 The county concluded that “[i]f a mineral needs to be further processed or  
18 ‘perfected’ to make transportation economically viable, then it follows that  
19 further processing is required to make the mineral a ‘useful product’ for the  
20 intended market.” *Id.*

21 JCEP argues, and we agree, that the commissioners’ interpretation of  
22 LDO 2.1.200—that processing a natural mineral into a form that allows it to be  
23 transported to markets renders that natural mineral a “useful product” for that  
24 purpose—is consistent with the express language of LDO 2.1.200’s definition

1 and accordingly must be affirmed. That the natural gas arriving at the gas-  
2 processing facility is of “household quality” and is already one form of useful  
3 product does not mean that it cannot be further processed into a different, but  
4 still useful, product, even if the usefulness of that product is to allow  
5 transportation to markets where the product will be processed further to return  
6 it to a gaseous and more useful form.

7 The second assignment of error (Rogue Intervenors) is denied.

8 **FOURTH ASSIGNMENT OF ERROR (ROGUE INTERVENORS)**

9 Rogue Intervenors argue that the county erred in failing to impose a  
10 condition making the conditional use permit approval effective only when and  
11 if JCEP obtains all required state and federal approvals for the proposed LNG  
12 terminal, including FERC approval. In addition, Rogue Intervenors note that  
13 the gas processing facility will require a new electrical power plant, for which  
14 JCEP has not yet filed applications. Rogue Intervenors argue that the county  
15 should have made its permit decision effective only when and if the county  
16 approves the application for the new power plant.

17 The county’s decision requires JCEP to obtain all required state and  
18 federal permits (which are required in any event by state and federal law), but  
19 does not delay the effective date of the conditional use permit approval until all  
20 required permits and approvals are obtained. JCEP responds, and we agree,  
21 that Rogue Intervenors have not identified any law that requires the county to  
22 impose a condition delaying the effectiveness of its permit approval until all



1 other permits and approvals have been obtained. Absent a more developed  
2 argument, Rogue Intervenors' fourth assignment of error provides no basis for  
3 reversal or remand.

4 The fourth assignment of error (Rogue Intervenors) is denied.

5 **FIRST ASSIGNMENT OF ERROR (CLARKE)**

6 The proposed gas processing facility includes two "amine contactor"  
7 towers, or thermal oxidizers, that will vent heated gas into the atmosphere. The  
8 facility is located across the estuary from the Southwest Oregon Regional  
9 Airport. A portion of the LNG terminal site is within the approach surface of  
10 Runway 13, but as proposed the gas processing facility is not within the  
11 approach surface or the associated flight path.

12 In three sub-assignments of error, intervenor-petitioner John Clarke  
13 (Clarke) challenges the county's findings regarding compliance with LDO  
14 4.11.445(4), which provides:

15 "Industrial Emissions. No new industrial, mining or similar use  
16 \* \* \* shall, as part of its regular operation, cause emissions of  
17 \* \* \* steam that could obscure visibility within airport approach  
18 surfaces, except upon demonstration, supported by substantial  
19 evidence, that mitigation measures imposed as approval conditions  
20 will reduce the potential for safety risk or incompatibility with  
21 airport operations to an insignificant level. The review authority  
22 shall impose such conditions as necessary to ensure that the use  
23 does not obscure visibility."

24 JCEP submitted a "thermal plume" study to demonstrate compliance  
25 with LDO 4.11.445(4). The study evaluated the plumes generated by the gas  
26 processing facility, as well as the electrical power plant that is not part of this

1 application. According to the study, the thermal oxidizers will generate only  
2 four percent of the heat plumes from both sources, and the plumes from all  
3 sources will meet applicable aviation standards. Clarke objected during the  
4 proceedings below that the thermal oxidizers will produce steam, which will  
5 obscure visibility within the airport approach surface, stating that “[b]asic  
6 physics tell you that heated air released into cool, damp air will produce  
7 steam.” Record 7158. JCEP responded with a letter from Himes, a registered  
8 engineer with 46 years of experience including 10 years designing LNG  
9 facilities, who testified in relevant part that “[t]here are no visible or steam  
10 plumes from the facility.” Record 3757. The county found that Himes’  
11 testimony constitutes substantial evidence and is more credible than any  
12 evidence to the contrary. Record 172.

13 Clarke argues that (1) Himes’ statement that the thermal oxidizers will  
14 not produce visible steam plumes is not substantial evidence, given the  
15 “common knowledge” that heated air released into a cool atmosphere will  
16 produce steam; (2) although the gas processing facility is proposed to be  
17 located outside of Runway 13’s surface approach area, the applicant did not  
18 seek, and the county did not approve, site plan approval, and it is possible that  
19 the gas processing facility could be moved to a location within the surface  
20 approach area; and (3) the county failed to adopt any “mitigation measures” to  
21 ensure that steam plumes will not obscure visibility within the airport surface  
22 approach area.

1 JCEP responds, and we agree, that Clarke's arguments do not provide a  
2 basis for reversal or remand. Himes' expert testimony is substantial evidence  
3 that the thermal oxidizers will not produce visible plumes of steam, and that  
4 testimony is not undermined by Clarke's statement, based on "common  
5 knowledge," that heated air released into cool air produces steam. In any case,  
6 LDO 4.11.445(4) is concerned only with obscured visibility within the surface  
7 approach area. Clarke's speculation that the gas processing facility could be  
8 moved from its proposed and approved location into the surface approach area  
9 is just that—speculation. JCEP proposed a specific location for the gas  
10 processing facility, and justified that facility's compliance with LDO  
11 4.11.445(4) based in part on that proposed location, outside the surface  
12 approach area. Clarke does not explain how the gas processing facility could  
13 be relocated from that approved location west to a site within the surface  
14 approach area without modifying the conditional use permit or otherwise  
15 triggering evaluation under LDO 4.11.445(4)

16 The first assignment of error (Clarke) is denied.

17 The county's decision is remanded.