

## Crystal Orr

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**Sent:** Tuesday, July 16, 2019 4:55 PM  
**To:** Jill Rolfe; Amy Dibble; Planning Department  
**Cc:** Pfeiffer, Steven L. (Perkins Coie); Rapp, Reagan S. (Perkins Coie)  
**Subject:** JCEP Terminal Remand - Final Written Argument  
**Attachments:** 20190716 Ltr to A. Stamp w\_Final Written Argument (Remand).pdf

Attached please find the applicant's final written argument for Coos County File No. REM-19-001 (HBCU-15-05/FP-15-09). Please place a copy of this letter into the official record for this matter and please place a copy before the Hearings Officer before he makes a decision in this matter. Thank you for your courtesies.

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Exhibit: 57  
Date: 7/16/19

July 16, 2019

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

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

**Re: Jordan Cove Energy Project Land Use Applications  
Coos County File No. REM-19-001 (HBCU-15-05/FP-15-09)  
Applicant's Final Written Argument**

Dear Mr. Stamp:

This office represents Jordan Cove Energy Project L.P. ("JCEP"), the applicant requesting approval of concurrent land use applications to construct a liquefied natural gas facility, export terminal, and related project components ("Project") in Coos County File No. REM-19-001 (HBCU-15-05/FP-15-09) ("Applications"). This letter constitutes JCEP's final written argument for the Applications on remand. Please consider this letter, together with JCEP's other submittals into the record, before making a recommendation to the Board of Commissioners ("Board").

**I. Argument**

The remand concerns a limited number of issues identified by the Board and in the public notice. As explained below, JCEP has presented additional evidence, argument, and/or findings responsive to each issue. Opponents' contentions to the contrary lack merit, and in the instances where they submit additional evidence, it does not undermine the credible, persuasive evidence offered by JCEP. Therefore, the Hearings Officer should enter an order recommending that the Board approve the Applications on remand.

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**A. The scope of the remand is limited to the issues identified by LUBA.**

When the Board referred the matter to the Hearings Officer on remand on May 7, 2019, it directed the Hearings Officer to limit the scope of review to the issues remanded by LUBA. The County's May 21, 2019 public hearing notice reiterated this point and identified the seven remand issues. See public notice at 2. The Board's action is consistent with *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), which affirmed a local government's decision to limit the scope on remand to the issues remanded by LUBA but not to reconsider resolved issues. Based upon the Board's official direction, the Hearings Officer should limit the scope of review to the remanded issues and should deny arguments and evidence pertaining to other issues.

**B. Response to Remand Issue 1 - CBEMP Policy #5**

**1. Public Need**

In order for the County to approve dredging in the 5-DA and 6-DA CBEMP zones, the County must adopt findings that, there is a "need (i.e., a substantial public benefit) is demonstrated \* \* \* \*." CBEMP Policy #5.I. In *OSCC*, LUBA held that the "public need" analysis under CBEMP Policy #5 should be focused on the "public need" for the use the dredging serves, not on the need for the dredging *per se*:

"If the 'substantial public benefit' analysis is limited to evaluation of the public benefits of the dredge or fill activity itself, then the standard would never be met, as it is difficult to conceive of any public benefit from dredging or filling that it distinct from the use that dredging or filling serves. \* \* \* \* We conclude that, contrary, to the county's finding, CBEMP Policy 5(I)(b) requires the county to evaluate the substantiality of the public benefits provided by the use that the proposed dredging serves, in this case the LNG terminal, or at least those components of the terminal that are properly viewed as water-dependent uses."

*OSCC*, 76 Or LUBA at 354. However, LUBA denied *OSCC*'s contention that regardless of the language of CBEMP Policy 5, Goal 16 requires a balancing of the benefits and detriments of a proposed use before it can be allowed under CBEMP Policy #5.I.b:

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“Given the absence of an express or fairly implied requirement to balance or weigh benefits against adverse consequences under Goal 16 IR2(b), and the fact that adverse consequences expressly addressed under a different standard, we decline to read Goal 16 IR(2)(b) to include an implicit requirement to balance or weigh public benefits of the proposed use against adverse consequences.”

OSCC, 76 Or LUBA at 355. The use the dredging serves is the Project. Therefore, the County should find that the water-dependent aspects of the Project that are dependent upon dredging are the relevant uses for purposes of the “public need” analysis. Further, consistent with the above-quoted passage from LUBA’s decision, the County should not consider any potential adverse consequences associated with the Project in applying this provision. That is, the County’s task is limited to determining whether there are likely benefits associated with the Project, and allegations of potential adverse consequences are simply not relevant.

The County should find there is a public need for the water-dependent aspects that are dependent upon the dredging of the access channel in the 5-DA and 6-DA CBEMP zones. As support for this conclusion, the County should rely upon the following testimony in the record:

- The narrative for the Applications dated November 3, 2015, which described enhanced commerce, job creation, and ad valorem tax revenues generated by the Project (Rec. 9370);
- ECONorthwest’s report entitled “Economic Impact Analysis of the Construction of an LNG Terminal and Natural Gas Pipeline in Oregon” and dated March 6, 2012 (Rec. 11753 - 11770), which made the following conclusions about the economic impact of the Project:
  - Direct economic output from the Project of approximately \$6.641 billion in Oregon and Washington, including downstream impacts.

- Overall net value added to the economy of approximately \$1.738 billion over a three-year period.
- Over 5,000 jobs created per year during Project construction.
- The letter from Robert Braddock describing the following energy-related benefits to the Project (Rec. 3753-3755):
  - “One public benefit of the Project is it will contribute to reduced air emissions by expanding the use of natural gas in areas of the western Pacific basin where coal has been the historically dominant fuel used for the generation of electric power. Natural gas results in fewer lifecycle greenhouse gas emissions than coal, even when natural gas production, transportation, liquefaction, revaporization and leakage are accounted for.”
  - The reduction in energy consumption associated with a West Coast LNG facility, which would result in shorter transit distance to Asian markets compared to East Coast facilities and as a result, lower the energy consumed to deliver the LNG to the point of consumption.
  - The opportunity to accelerate the conversion to cleaner marine fuel by having a reliable and cost-effective supply of LNG fuel available.
- U.S. Department of Energy Order No. 3041 FTA Nations December 2011 (Rec. 4847 - 4862) and U.S. Department of Energy Order No. 3413 Non-FTA Nations March 2014 (Rec. 4863 - 5026), which concluded that exporting LNG from the facility to either Free Trade Agreement Nations or Non-Free Trade Agreement Nations is not inconsistent with the public interest.
- Oral testimony from several local residents at the public hearing for the Applications, which detailed the importance of diversifying and expanding the local economy in light of the decline in the fishing and lumber sectors.

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- Letter from Richard Whitman, then-Natural Resources Advisor to Governor Kitzhaber, dated February 12, 2015 (Rec. 7514), which explained that “the project has great potential to support the economy of the central and southern Oregon coast, creating jobs and a strong energy infrastructure in one of the areas of Oregon that is continuing to suffer from the recession and long-term structural changes in the economy.”

Although OSCC contends that the 2012 ECONorthwest report is outdated and thus not reliable, the County should find that JCEP has submitted updated analyses addressing economic impacts of the Project during construction and operation, and these reports identify extensive public benefits resulting from the Project, including 6000 construction jobs, 8500 spin-off jobs from construction, 215 permanent family-wage jobs, 1500 spin-off jobs after start-up, \$70 million in annual spending from workers for local businesses during construction, \$29.5 million in annual local spending from workers during operations, \$2.8 million per year for public schools, and over \$500 million to Community Enhancement Plan. See Exhibits 1-7 of JCEP’s June 24, 2019 submittal.

A reasonable person would find that this diverse and extensive evidence supports the conclusion that there is a public need/benefit associated with the Project. Therefore, dredging to develop an access channel to facilitate use of the Project satisfies CBEMP Policy #5.I.b. The Hearings Officer should recommend find that this evidence and these findings address LUBA’s remand on this issue.

## **2. Public Trust**

Additionally, in order for the County to approve dredging in the 5-DA and 6-DA CBEMP zones, the County must adopt findings that, “the use or alteration does not unreasonably interfere with public trust rights.” CBEMP Policy #5.I. On remand, the County should find that the Project will not unreasonably interfere with public trust rights. As support for this conclusion, the County should rely upon the U.S. Coast Guard Waterway Suitability Report, which provides that security zones around LNG vessels would not be exclusion zones and, in fact, upon gaining permission from the U.S. Coast Guard Captain of the Port’s representative, fishing vessels would be allowed to enter the security zone: “The expectation is that the COTP’s Representative will work with the

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Pilots and patrol assets to control traffic, and will allow vessels to transit the Safety/Security zone based on a case-by-case assessment conducted on scene.” Rec. 3033.

Further, Amergent Techs, a maritime security expert firm, explained that, based upon expected transit time for an LNG vessel (approximately 90 minutes each from breakwater entrance to dock), maximum delay to fishing caused by an LNG vessel would last only 20-30 minutes per vessel trip. Rec. 3764. Further, the number of LNG vessels would be limited to 100 per year. Rec. 3763. At the rate of 100 vessels per year, and a 20-30 minute delay associated with each trip of each vessel, over the course of a seven-day period, there would be a maximum of six out of a possible 168 hours when use of the Bay would be potentially restricted due to LNG vessel passage. Rec. 3763. This is less than one hour per day. That leaves a total of 162 hours per week of unrestricted use of the Bay. The Board should find that this is not an unreasonable interference with public trust rights. Further, the dates and times that LNG vessels would be in transit in the Bay would be announced in advance and would be posted online and on a message board, which allows local vessels to make plans to avoid the narrow portions of the estuary at those times. *Id.*

Based upon these facts, the Board should find that the Project will not unreasonably interfere with public trust rights. Further, in light of the limited time when use of the Bay is even potentially restricted, the Board need not concern itself with whether vessels are “known” or “unknown” to the Coast Guard. Stated another way, even if a vessel must wait out the passage of an LNG vessel, it is of such a short duration that the Board should find that it is not an unreasonable interference.

Although opponents contend that the Project will unreasonably interfere with public trust rights, the County should deny these contentions. Many of the opponents’ contentions are based upon the incorrect premise that LNG vessels serving the Project will only transit at high tide, which is a common time to conduct crabbing and other activities in the Bay. However, Project LNG vessels are only required to transit at high tide when they are loaded with gas, meaning when they are leaving port. See Resource Report 8 at 29 in Exhibit 15 of JCEP’s June 24, 2019 submittal. Incoming vessels are not bound to the high tide restriction and thus will not interfere with high-tide activities.

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This factual clarification alone eliminates half of the potential interference identified by most opponents. Further, opponents' contentions largely fail because they are based upon generalized statements about using the Bay and speculative possible interference without demonstrating a specific likelihood that it will occur. In fact, the likelihood is low. In addition to the limited number of vessels and the limited duration of their transit summarized above, the Coos Bay Pilots have testified that they anticipate that the effects of LNG carriers on fishing and other boats would closely track those of the other deep-draft ships that call on the Bay, including vessels that export wood chips and logs. *Id.* In the Pilots' experience, the typical deep-draft ship encounters only six recreational boats and two commercial shipping boats during the typical transit into and out of the Port. *Id.* Thus, the impacts from LNG carriers will be significantly less than the far-reaching, economy-wrecking allegations from opponents. Finally, opponents' testimony also fails because it does not acknowledge the mitigation measures JCEP has proposed and summarized above, including announcing LNG vessel transit times in advance, which will allow the public to plan their activities around the LNG vessels' use of the Bay. Another such mitigation measure is that LNG carrier transit will be prioritized at night, when there is typically less recreational boating and fishing traffic in the Bay, which will reduce the impact of the moving safety/security zone on public activities in the Bay. *Id.*

For all of these reasons, the Hearings Officer should recommend that the Board find that these findings address LUBA's remand on this issue.

**C. Response to Remand Issue 2 - CBEMP Policies #4 and #4a**

In areas subject to CBEMP Policy #5, an applicant must minimize the adverse impacts of dredging activities. CBEMP Policy #5.I.d. Further, "[i]dentification and minimization of adverse impacts" must follow the procedure in CBEMP Policy #4. In turn, that policy requires that dredging in development aquatic units must be supported by findings demonstrating "the public's need and gain which would warrant any modification or loss to the estuarine system, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a." CBEMP Policy #4.II.d. The impact assessment is not required to be "lengthy or complex," but it should provide a summary



of the expected impacts. CBEMP Policy #4.III. The assessment may include information on:

- “a. the type and extent of alterations expected;
- “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.”

*Id.* The impact assessment must follow the procedures and meet the standards outlined in CBEMP Policy #4a.

The County should find that JCEP has identified and minimized impacts associated with its proposed dredging activities. As support for this conclusion, the Board should rely upon the memorandum from David Evans and Associates, Inc. (“DEA”) dated January 26, 2016. Rec. 1900-1903. Consistent with the impacts assessment methodology under CBEMP Policy #4, DEA’s memo begins with an explanation of the type and extent of alterations expected:

“Dredging within Coos Bay will be required for the Jordan Cove LNG Project as part of the construction of the LNG terminal’s slip and access channel and for construction of a barge berth that will be used to receive shipments of large equipment needed for construction of Project facilities and maintenance of the facility.”

Rec. 1900. The record reflects that JCEP is proposing to dredge approximately 1.36 acres for the access triangle, which will include impacts to areas that are intertidal, algae/mudflats/sand, shallow subtidal, deep subtidal, developed below high mean tide,

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and eelgrass. Rec. 9652. Dredging in the access channel will affect approximately 30 acres below the mean higher high water (“MHHW”) line. Dredging of the access channel would affect about 15.2 acres of deep subtidal below -15.3 feet; about 5.8 acres of shallow subtidal to the mean lower low water (“MLLW”) line; and about 8.1 acres of intertidal strata between the MHHW and MLLW lines. Rec. 9304. DEA’s memo further describes the types of resources affected, including coho salmon habitat and benthic habitat. Rec. 1902-1903.

DEA’s memo describes in detail the expected impacts associated with dredging, first noting activities and resources that will not be impacted by Project-related dredging:

“Dredging activities associated with the Project are not expected to adversely or unreasonably impact navigation, access to waterways for commercial fishing and crabbing, oyster harvesting and other resource extraction, and public rights to water resources.”

Rec. 1900. The memo then explains the expected type and extent of impacts, which DEA concludes will be small, localized in nature, and will not result in population-level impacts:

“While dredging may result in increased in turbidity or removal of aquatic habitat, these impacts will be localized to the dredging area and [are] short-term in nature. In addition, the portions of Coos Bay affected by dredging are a small fraction of the overall size of the bay; therefore, any impacts associated with dredging activities will likewise be relatively small geographically and will not result in population-level impacts to aquatic species and/or habitat or unreasonably harm navigation, fishing and recreation.”

*Id.* DEA’s memo then includes separate sections addressing each impact type in detail, including sediment transport, deposition, and flow velocity; erosion and sedimentation; turbidity; water quality; and aquatic species and habitat. Rec. 1901-1903.

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Finally, JCEP has proposed to comply with many measures to avoid and minimize adverse impacts, including the following:

- Limiting dredging to the smallest area possible to accommodate cargo vessels (Rec. 9652);
- Limiting work to the Oregon Department of Fish and Wildlife-approved in-water work window, which extends from October 1 through February 15 (Rec. 1902);
- Utilizing a turbidity curtain to minimize impacts to water quality (Rec. 9371-9372); and
- Carrying out dredging in accordance with the requirements of state and federal law, including Section 404 of the Clean Water Act (“CWA”); Section 7 of the Endangered Species Act; Section 401 of the CWA, which addresses water quality; and Oregon’s Removal-Fill law (Rec. 1900).

Impacts that cannot be avoided or minimized will be mitigated for at the Kentuck, West Jordan Cove, West Bridge, and Eelgrass mitigation sites. *Id.* DEA submitted an additional memorandum explaining that development of the slip and access channel will result in a net increase in deep subtidal habitat that can be colonized by invertebrates and utilized by marine mammals, adult and juvenile fish, waterfowl, and other species. See Exhibit 1 to JCEP’s July 9, 2019 submittal at 3. In that memo, DEA also explained that, the improvements to the slip and access channel, together with the off-site mitigation sites would result in a net increase in aquatic habitats in Coos Bay. *Id.* at 2. Additional measures to avoid, reduce, and minimize ecological impacts are set forth in the Project’s Biological Assessment and the Draft Environmental Impact Statement for the Project. See Exhibits 13 and 17, respectively, of JCEP’s June 24, 2019 submittal.

The County should find that JCEP has demonstrated, based upon substantial evidence in the whole record, that adverse impacts associated with Project dredging will be minimized.

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The Hearings Officer should recommend that the Board find that these findings respond to LUBA's remand concerning CBEMP Policy #4.

Further, none of the prerequisites to providing notice to state agencies under CBEMP Policy #4a are triggered by the Applications. Therefore, this policy requires the County to complete the impacts assessment consistent with CBEMP Policy #4. Upon completion of that assessment, the Hearings Officer should recommend that the Board find that its findings address this issue consistent with LUBA's remand.

**D. Response to Remand Issue 3 - CBEMP Policy #30**

LUBA remanded for the Board to adopt additional findings addressing whether subsidence due to dewatering during construction of the Project is a potential issue under CBEMP Policy #30.I.c, and if it is, to adopt findings resolving the issue. *OSCC*, 76 Or LUBA at 363. CBEMP Policy #30.I.c provides that the County may only permit development in areas designated as "Beach and Dune Areas with Limited Development Suitability" on the Special Considerations Map upon adoption of findings that identify "[m]ethods for protecting the surrounding area from any adverse effects of the development."

On remand, the County should find that subsidence from dewatering associated with Project construction will not have an adverse effect on the surrounding area and therefore there is no need to identify methods for protecting the surrounding area from subsidence caused by dewatering. As support for this conclusion, the County should rely upon the memorandum from Scott Schlechter, PE, GE, of GRI in Exhibit 10 to JCEP's first open record period submittal on remand. As explained in that memorandum, Mr. Schlechter concluded that the risk of subsidence in the surrounding area was "very low" and thus there was no need for additional mitigation measures were necessary to protect the surrounding area. *Id.* Mr. Schlechter reached his conclusion based upon: (1) the nature of the soils in the Project area, which are not susceptible to typical consolidation settlements because they consist of relatively clean, fine-grained sand; and (2) the fact that potential changes in water levels are within common water-level fluctuations in the area. *Id.* Notably, as stated in the memo, Mr. Schlechter relied upon

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a 2015 report prepared by GSI Water Solutions, Inc., a copy of which was included in the original record for this matter.

No one presented evidence (or referred to evidence already in the record) that undermines or calls into question Mr. Schlechter's expert analysis and conclusions. Therefore, a reasonable person would rely upon the GRI memo to support the conclusion that dewatering associated with constructing the Project will not adversely affect surrounding development for purposes of Policy #30.I.c. *See Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 276 (2006) ("[t]he critical issue for the local decision maker will generally be whether any expert or lay testimony offered by \* \* \* opponents raises questions or issues that undermine or call into question the conclusions and supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts.").

The Hearings Officer should recommend that the Board find that these findings and evidence address this issue consistent with LUBA's remand.

**E. Response to Remand Issue 4 - Special Condition 5 of CBEMP 7-D Zone**

LUBA remanded for the Board to adopt more adequate findings addressing how the Project's proposed fill activities in the CBEMP 7-D management unit comply with Special Condition 5:

"The wetland in the southeast portion of this district can be filled for a development project contingent upon satisfaction of the prescribed mitigation described in Shoreland District #5."

CCZLDO 3.2.286. On remand, the County should find that JCEP is proposing to fill a small area of the wetland in the southeast portion of the CBEMP 7-D zone (Wetland J) in conjunction with the Project. *Compare* Rec. 9408 (depicting Wetland J) and Rec. 9403 (depicting fill areas in the 7-D zone). Therefore, JCEP is proposing to fill the wetland in the southeast portion of the district for a development project, and this activity is subject to Special Condition 5.

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In order for the fill to be allowed, the County must find that, to the extent applicable regulations in Shoreland District #5 prescribe mitigation, they have been satisfied.

The County should find that Shoreland District #5 is commonly known as the CBEMP 5-WD zone. Special Conditions 8, 9a, and 9b of this zone require mitigation in accordance with the Henderson Marsh Mitigation Plan (“HMMP”). See CCZLDO 3.2.261.

Wetland J lies east of and outside of Henderson Marsh and associated HMMP boundaries. See HMMP map (cover page to [Exhibit 11](#) to JCEP’s first open record period submittal on remand). As such, there is no prescribed mitigation associated with filling Wetland J in the HMMP. Moreover, the HMMP does not provide general guidance for fill or mitigation for wetlands not expressly identified in the HMMP area. While Condition 15 of the HMMP addresses specific wetlands outside of the main Henderson Marsh area and prescribes specific mitigation components for these additional wetlands as supplements to the main mitigation of the HMMP, Wetland J is not included in the list in Condition 15. Further, although OSCC contends on remand that Condition 16 of the HMMP requires mitigation for wetlands not otherwise listed in the plan, the Hearings Officer should deny this contention because, as explained above, Wetland J is not located within the boundaries of the HMMP. Accordingly, Condition 16 is not applicable to Wetland J.

For these reasons, the County should find that Shoreland District #5 does not prescribe any mitigation in this instance. As a result, Special Condition 5 does not limit JCEP’s proposed fill in the 7-D zone. The County should find that the filling of Wetland J will still be subject to compliance with other applicable requirements of the CBEMP, which were found to be met in the original decision, as well as the requirements of the Department of State Lands and the U.S. Army Corps of Engineers, including JCEP’s proposed Compensatory Wetland Mitigation Plan, which is included in [Exhibit 16](#) to JCEP’s first open record period submittal on remand. The Hearings Officer should recommend that the Board adopt these findings, which address this issue consistent with LUBA’s remand.

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**F. Response to Remand Issue 5 - Consequences of FERC Denial**

Because the Board relied upon the issuance of a FERC site certificate for the Project as a basis to find compliance with local criteria and because FERC denied JCEP's application for a site certificate for the Project, LUBA remanded the decision for the Board to determine whether JCEP was precluded as a matter of law from obtaining a FERC permit. *OSCC*, 76 Or LUBA at 365.

Where a local government relies upon a land use applicant obtaining permits from another agency as a means of demonstrating compliance with applicable approval criteria, the local government must find, based upon substantial evidence in the whole record, that the applicant is not precluded as a matter of law from obtaining the permits from the other agency. *Bouman v. Jackson County*, 23 Or LUBA 626, 647 (1992). This standard does not require the local government to determine that "it is feasible to comply with all discretionary state agency permit approval standards because the state agency, which has expertise and established standards and procedures, will ultimately determine whether those standards are met." *Id.* Instead, the local government need only determine that the necessary agency permit is "available." *Miller v. City of Joseph*, 31 Or LUBA 472, 478 (1996).

On remand, the Hearings Officer should recommend that the Board should find that JCEP is not precluded as a matter of law from obtaining a FERC permit for the Project. As support for this conclusion, the Board should rely upon the fact that FERC's 2016 denial was "without prejudice to Jordan Cove and/or Pacific Connector submitting a new application to construct and/or operate LNG export facilities or natural gas transportation facilities should the companies show a market need for these services in the future." Rec. 1320. As a result, FERC's decision did not preclude JCEP from applying for another FERC certificate for an LNG export terminal and related pipeline on the North Spit. The Board should also rely upon the fact that, subsequent to FERC's denial, JCEP applied for a new FERC permit, and that application is currently pending. See FERC Notice of Applications dated October 5, 2017 in Exhibit 3 to JCEP's remand submittal. The County is not required to ascertain whether it is feasible for JCEP's new application to satisfy FERC's approval standards. Therefore, a reasonable person would rely upon

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this evidence to show that a FERC permit is “available” and thus not precluded as a matter of law.

Although OSCC contends on remand that the FERC permit is not “available” because the proposal in the Applications is not entirely consistent with the proposal included in JCEP’s application currently pending before FERC, the Hearings Officer should deny this contention. OSCC’s contention misconstrues LUBA’s holding in OSCC: LUBA did not require findings on remand that a specific FERC permit is available; rather, LUBA required an analysis of whether “a” FERC permit is available. Regardless of any discrepancies between the County and FERC permit applications, “a” FERC permit is and continues to be “available” because, as explained, FERC’s previous denial was without prejudice to a re-application. Further, although CTCLUSI contends that the Applications are moot because they are inconsistent with the FERC application, the Hearings Officer should deny this contention because there is no authority to support it. JCEP is free to pursue a County permit application that differs from a federal permit. Whether JCEP is ultimately able to implement any County approval of the Applications is a separate question and one that turns to some degree upon the nature of federal approvals for the Project. However, the existence of some differences between local and federal applications does not render either application moot. Neither OSCC nor CTCLUSI disputed that FERC’s earlier denial was “without prejudice.” Therefore, the County should deny their contentions on this issue.

For these reasons, the Hearings Officer should recommend that the Board find that these findings address this issue consistent with LUBA’s remand.

**G. Response to Remand Issue 6 - SORSC**

LUBA remanded the matter for the Board to adopt an interpretation giving effect to all applicable terms that explains why some or all of the SORSC components are “accessory” to the fire station, as defined at CCZLDO 2.1.200. OSCC, 76 Or LUBA at 368-369. On remand, JCEP withdraws the request to include the SORSC in the Applications. Accordingly, the Hearings Officer should recommend that the Board find: (1) the SORSC is not proposed to be located in the Industrial zoning district; and (2) as a result, no interpretation involving the SORSC is necessary on remand. By doing so, the Board’s decision will not include the findings that led to remand on this issue. JCEP included



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these proposed findings in its remand narrative. No one objected to them during the local proceedings. Therefore, the Hearings Officer should recommend that the Board adopt these proposed findings in its final order.

#### H. Response to Remand Issue 7 - CBEMP Policy #18

CBEMP Policy #18 applies to all Project uses and activities on lands subject to the CBEMP. Pursuant to CBEMP Policy #18, the County must provide a copy of the site plan for the proposed development to the Coquille Tribe and CTCLUSI, who then have 30 days to respond whether the project 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.” CBEMP Policy #18.II. If no adverse impacts have been identified, and the proposal is otherwise consistent with the CBEMP, the County must approve the development proposal. CBEMP Policy #18.III. If the applicant and the Tribes have agreed upon “appropriate measures” to protect the site, the County is required to impose these measures on any approval. *Id.* If the applicant and the Tribes cannot agree upon “appropriate measures,” the Board must hold a quasi-judicial hearing to resolve the dispute. *Id.* At the hearing, the Board must “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.” *Id.*

After the County deferred an analysis and findings of compliance with CBEMP Policy #18 in the original decision, LUBA remanded for the Board to either consider CBEMP Policy #18 on the merits or to provide an adequate interpretation why the policy could be deferred. *OSCC*, 76 Or LUBA at 380.

On remand, the Board should consider CBEMP Policy #18 on the merits and adopt the following findings:

For two reasons, the County should find that historical, archaeological, and cultural resources are protected in the Project area consistent with CBEMP Policy #18. First, the Project will not adversely affect County-inventoried resources. There is only one County-inventoried resource from the Shoreland Values Map located within the Project

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area. JCEP retained the professional archaeologists and researchers at Historical Research Associates, Inc. ("HRA") to survey the area where the resource is mapped to determine whether the Project would impact this resource. After conducting site-specific research, reviewing the results of past excavations in the area, and completing a pedestrian survey, HRA found no evidence of the resource. Accordingly, HRA concluded that the resource was not located within the Project area and the Project would not have adverse impacts to the resource. HRA also concluded, based upon available information, that no modifications were necessary to the Project to protect the cultural, historical, and archaeological values of the site or the resource. Due to the sensitive nature of the cultural resources involved, HRA's full report is confidential and cannot be disclosed in this proceeding. HRA has prepared a summary of its methodology and findings, which is included in Exhibit 4 to JCEP's remand submittal. The intent of the HRA report is to address the County-inventoried resource in the Project area.

Second, JCEP has entered a Memorandum of Agreement ("MOA") with CTCLUSI to implement CBEMP Policy #18. A copy of the MOA is included in Exhibit 5 to JCEP's remand submittal. The MOA incorporates a Cultural Resources Protection Agreement entered between JCEP and CTCLUSI ("CRPA"). The CRPA provides a process for the exchange of Project-related information, confidentiality requirements, commitments to mitigation, monitoring agreements, agreements for the treatment of unanticipated discovery of cultural resources, site access agreements, and cost recovery agreements. The CRPA, in turn, incorporates an Unanticipated Discovery Plan ("UDP"), which provides procedures in the event of an unanticipated discovery of historic properties, archaeological objects, archaeological sites or human remains, funerary objects, sacred items, and items of cultural patrimony, during the construction and operation of the Project. The CRPA and UDP are included as exhibits to the MOA in Exhibit 5 to JCEP's remand submittal. In the MOA, JCEP and CTCLUSI agreed that the CRPA and the UDP constituted appropriate measures under CBEMP Policy #18 that would protect the cultural, historical, and archaeological values of the sites in the Project area. JCEP is willing to accept a condition of County approval of the Applications requiring compliance with the MOA and its attachments. CTCLUSI also testified that adoption of a condition to this effect would address its concerns regarding potential impacts to resources, whether inventoried by the County or not. See June 9, 2019 letter from CTCLUSI counsel at 3.

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For these reasons, and subject to the proposed condition, the County should find that the Applications are consistent with CBEMP Policy #18. Further, the Hearings Officer should recommend that the Board find that these findings address this remand issue as directed by LUBA.

**I. Response to Remand Issue 8 - Ex Parte Communication**

LUBA remanded the matter to the Board to allow Commissioner John Sweet to disclose the substance of any *ex parte* communication that occurred at a 2014 luncheon presentation by JCEP on the LNG project. OSCC, 76 Or LUBA at 372. Because the alleged communication involved Commissioner Sweet, it must be addressed at the Board level.

Specifically, before beginning deliberations on remand, the Board should call for Board members to disclose any conflicts of interest, bias, or *ex parte* communications. As part of these disclosures, Commissioner Sweet should disclose on the record the substance of any *ex parte* communications that occurred at the 2014 luncheon. The Board should then permit parties to rebut the substance of any such communication on the record. The Board should then proceed with its deliberations and make a decision on the Applications on remand. Upon following these steps, the Board should find that it has followed the correct procedures and has complied with LUBA's remand on this issue. During the remand proceedings, no one rebutted this procedure or explained why a different procedure should be followed. The Hearings Officer should make findings to this effect in his recommended order.

**II. Conclusion**

I have asked staff to place a copy of this submittal into the official record for this file and to place a copy before you.

For the reasons explained above and elsewhere in the record, the Applications satisfy all applicable criteria. The Hearings Officer should recommend that the Board approve the Applications on remand. Thank you for your courtesies in this matter.

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Very truly yours,

A handwritten signature in blue ink, appearing to read 'SJK', is positioned below the closing text.

Seth J. King

cc: Jill Rolfe (via email)  
Steve Pfeiffer (via email)  
Client (via email)