

Crystal Orr

From: Tonia Moro [tonia@toniamoro.com]
Sent: Tuesday, September 24, 2019 4:42 PM
To: Planning Department
Cc: 'Jody McCaffree'
Subject: REM-19-001
Attachments: Memo_Navigation_Open_Record.pdf

This Message originated outside your organization.

Jill,

Please accept the additional supplemental comments and transmit them to the Hearings Officer. Thank you.

Tonia L. Moro
Attorney at Law PC

19 S. Orange Street
Medford Oregon 97501
541 973 2063

THIS TRANSMISSION CONTAIN INFORMATION WHICH IS CONFIDENTIAL OR PRIVILEGED. THE INFORMATION IS INTENDED TO BE FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THE CONTENTS OF THIS INFORMATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS IN ERROR, PLEASE CONTACT US IMMEDIATELY.

Exhibit: 72
Date: 9/24/19

Tonia L. Moro
Attorney at Law P.C.
19 S. Orange Street
Medford, Oregon 97501
541 973 2063
Tonia@ToniaMoro.com

**BEFORE COOS COUNTY PLANNING DEPARTMENT
HEARINGS OFFICER**

In the Matter of the on remand from the Land
Use Board of Appeals in *Oregon Shores
Conservation Coalition v. Coos
County*, 76 OR LUBA 346 (2017)

REM-19-001

Navigation Response; Safety/Security Zone
Re-open Record Reply

On behalf of Rogue Climate and Jody McCaffree (opponents), I submit the following additional argument and exhibits regarding Jordan Cove's (JC) failure to meet its burden of proof regarding its argument that the project will not substantially interfere with navigation, fishing, recreation and other public trust beneficial uses of the estuary.

In response to the Hearing Officer's (HO) letter dated September 19, 2019, in which the HO opines that "navigation rights limit fishing rights" or allows for a "balancing" in favor of navigation, opponents object. For the reasons stated by Oregon Shores and the Surfriders in their correspondence dated September 24, 2019, which opponents join, the *Anderson* case does not suggest that "fishing rights" - especially those that are at issue here that require navigation to exercise - are limited by other navigational needs/uses.

Opponents also argue that, to the extent that there is a hierarchy between fishing rights/fishing navigation and navigation to export a product, state and county policy elevates fishing navigation.

Statewide Goals 16 and 17 define "water dependent uses" and CBEMP Policy 5(I)(a) and LDO 2.1.200 implement them by verbatim adoption.¹ These provisions provide a definition of

¹ **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 applicable to the issues before the HO. Pursuant to the definition, only transportation/navigation (for any other purpose including fishing) and the receipt of shipment of goods are outright permitted uses for a terminal. Because "transportation (e.g. navigation)" is distinct from the other outright permitted use - "receipt of shipment of goods" -, then both the receipt and its counterpoint the conveyance (export) of shipments of goods are distinct from "transportation/navigation" which would be for any other purpose other than that related to goods and including fishing. Thus only navigation for the receipt of goods and navigation for fishing (and any other type of navigation that is not exporting goods) have priority as a matter of state and county policy.

You should recall the statutory construction argument. Exports do not require access to the water for water-borne transportation, because "water-borne transportation" is defined as: 1) uses of water for transportation (like navigation); 2) for uses of water for the receipt of goods; or 3) uses (like terminals) that support "water-borne transportation," i.e. support a transportation use or a use requiring the receipt of goods. If a project does not meet this definition it merely needs to demonstrate that as a non-water-dependent use, the activity is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing, and recreation.

The LNG terminal - the purported primary use to which the pipeline is accessory - is proposed to exclusively export LNG from Canada to Asia. By definition, the uses dependent upon "water borne transportation," however, are limited to uses for transportation (navigation) or

navigation, boat moorage) or at the current level of technology cannot exist without water access.

(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. 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).

import shipments. The transportation of goods category is limited to “water access: ... ii. which require the receipt of shipment of goods by water.” If the state or the county wished to define water-dependent uses as those requiring water access to transport all goods, imports and exports, it would have been stated.

While a “third category” of the “water-borne” definition allows “terminals,” that category, by its terms is limited to terminals or other supports for a transportation use (navigation) or an importation of goods use because only terminals and supports for “water-borne” transportation are permitted: “iii) [Uses] [w]hich are necessary to support water-borne transportation (e.g. moorage fueling, servicing of watercraft, ships boats, etc. terminal and transfer facilities).” Since the prior two subparagraphs define what “water-borne transportation” is, the third category of uses supporting that use, only allows uses supporting that water-borne transportation which is either a transportation use or an importation of goods use. The express language must be given its “plain, natural and ordinary meaning.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993); *Ramirez v. Hawaii T & S Enterprises, Inc.* 179 Or App. 416, 425 (2002). What has been omitted may not be inserted. Or Rev Stat § 174.010.

Thus, facilities supporting the export of goods is not an outright permitted use “water-borne transportation use” under county and state policy which policy is unquestionably reasonable as otherwise any party seeking to ship any goods overseas could claim a need to use the shores and waters of Coos Bay without further consideration of the merits of that use.

Because export facilities are not outright permitted, if the type of navigation is significant to any balancing of the navigation use, then navigation to export the shipment of goods would be secondary to all other navigation purposes.

Finally, regarding the security zone issues, the applicant continues to rely on the same conclusory, unresponsive type statement from its expert. We still have no more information about how the day to day case-by-case assessment would work. How for instance the COTP would determine if a vessel known or unknown would be assessed on a day to day basis to not pose a threat to be allowed in the zone. Surely the applicant could have obtained a declaration from an actual coast guard agent about how COTP conducts that analysis on a day by day basis, even if they have such procedures. Or they could have produced a document that reflects the so-called “regulatory process” so that we would have an example of what the applicant continues to merely speculate about - that anyone who at the time and place appears to be engaged in a legitimate activity will be allowed in the “federal navigation channel.” It is notable that the expert does not specifically talk about authorization to be in the “security zone.” This explanation suggests that the rule is that users will be excluded if thought to be a concern on each transit. This makes no sense because the rule is that all are excluded from the zone except those authorized. In the end, the applicant continues to provide nothing but a guess about what could possibly happen, not what will happen.

Opponents suspect that evidence of this widespread authorization does not exist. That is why it has not been tendered. And, because the cost of the security is so exorbitant in the first

place it is more likely that all vessels are excluded unless there is some emergency situation that requires access to the zone. As previously stated this is the crux of the matter and this project must be and will ultimately be denied because despite taking Oregonian's homes, lands, farms, and ranches, this Canadian corporation will not get to buy (with declining excise tax payment) the entirety of Coos Bay for 20 years simply because a few counties are desperate (and unable to work smarter) for a new tax base.

/s/ Tonia Moro
Tonia Moro
Attorney for Opponents