



# Oregon

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## Frequently Asked Questions

Federal Consistency Review & Objection of Jordan Cove Energy Project



The following information has been prepared by the Department of Land Conservation and Development (DLCD) to respond to expected questions resulting from the issuance of an objection to the Jordan Cove Energy Project Consistency Certification. All details relating to DLCD's federal consistency decision can be found within the decision letter issued on February 19, 2020. The decision letter document can be located on DLCD's website

at: <https://www.oregon.gov/LCD/OCMP/Pages/Federal-Consistency.aspx>.

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## Proposed Project Information

### FEDERAL PERMIT APPLICATIONS:

DLCD's Consistency Review Decision applies to two major federal permits/licenses needed for the proposed project:

1. U.S. Army Corps Section 404/Section10 permit
2. Federal Energy Regulatory Commission's Energy Siting Certificate.

### PROJECT OVERVIEW

The Jordan Cove Energy Project (JCEP) consists of two primary components, a Liquefied Natural Gas (LNG) Export Terminal, and the Pacific Connector Gas Pipeline (PCGP). The JCEP LNG Export Terminal and associated facilities are proposed to be located on the bay side of the North Spit of Coos Bay in southwest Oregon. While the PCGP would extend for approximately 229 miles across Klamath, Jackson, Douglas, and Coos Counties, Oregon and terminate at the proposed Jordan Cove LNG Export Terminal in Coos County. The pipeline would occupy 4,947.7 acres of land during construction and 1,398.57 acres of land as part of a permanent easement.

The export terminal and associated facilities (collectively, the "LNG Export Facilities") include the following components: LNG Export Terminal, Slip and Access Channel, Materials Offloading Facility, Navigation Reliability Improvements, Meteorological Station, Industrial Wastewater Pipeline, Trans Pacific Parkway / US 101 Widening, APCO Sites 1 and 2, Kentuck Site, Eelgrass Mitigation Site, and Temporary Construction Areas.

PCGP consists of the construction and operation of a new 229-mile 36-inch diameter gas pipeline. The proposed pipeline would receive natural gas from interconnections near Malin, Oregon and deliver the gas to the Jordan Cove LNG Export Terminal near Coos Bay, Oregon. There, the natural gas would be

liquefied, stored, and loaded onto vessels for transit to Pacific markets. The proposed pipeline would transport up to 1,200,000 decatherms per day (Dth/d) at 1600 psig and produce up to 7.8 million metric tons per annum (mtpa) LNG for export.

#### DLCD PROJECT REVIEW OVERVIEW:

- DLCD has completed an independent review of the JCEP project for consistency with the enforceable policies of the Oregon Coastal Management Program (OCMP) using the official record before the agency. The record includes all submitted application materials and supplemental information provided by JCEP, public comment, and documentation provided by networked agency partners. **The outcome of this review was an objection of the consistency certification, which was issued on February 19, 2020.**
- DLCD's review authority of the project comes from the Coastal Zone Management Act of 1972. This authority is only delegated to states with federally approved coastal management programs.
- DLCD has been in coordination with the applicant on this project since 2017.
- DLCD received the formal consistency certification and application for the proposed project on April 12, 2019, with active review beginning on May 13, 2019.

## What is the Oregon Coastal Management Program?

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The Oregon Coastal Management Program (OCMP) was approved by the National Oceanic and Atmospheric Administration (NOAA) in 1977 in accordance with the U.S. Coastal Zone Management Act. The program's jurisdiction covers Oregon's coastal zone which reaches from the crest of the coast range out to sea 3 nautical miles.

Oregon's program is uniquely networked and consists of 10 state agencies, 33 cities, and 7 counties. DLCD is the lead agency of the Oregon Coastal Management Program.

## What is Federal Consistency?

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One of the incentives for state participation in the Coastal Zone Management Act is the federal consistency authority. The authority includes a review process that coastal states with federally approved coastal programs undertake, every time a federal activity is proposed in that state's Coastal Zone. The review process is usually triggered under three circumstances:

1. When a federal activity is proposed by a federal agency;
2. When a federal permit or license is needed for a proposed project;
3. When a project receives federal assistance (e.g. funding).

The process assists early coordination between the state and a federal agency planning an activity that may affect coastal resources and uses ensures that those activities are consistent with federally-approved enforceable policies of the coastal program.

## How do federal consistency reviews consider political influences?

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Federal consistency review is a non-political evaluation of potential projects. DLCD takes the responsibilities of this independent evaluation extremely seriously. Federal regulations and Oregon State Administrative Rules outline a clear standard that does not allow for political influence in a decision-making process. Federal consistency reviews are conducted by unbiased expert staff and based on the best available science and information. (15 CFR §930.50 to §930.66; OAR 660-35-0000)

## What is an Enforceable Policy?

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### GENERAL OVERVIEW OF ENFORCEABLE POLICIES:

Enforceable policies are legally binding state policies that have been approved by NOAA to be used during federal consistency reviews. These policies can come from state constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions. These approved policies have met the criteria outlined in federal regulations (15 CFR §923.84(b)1).

Once an enforceable policy is approved by NOAA to be incorporated into a state coastal management program, proposed projects requiring federal permits must show that the project will be conducted consistently with the standards of the approved policy. (15 §930.11(h))

### OREGON'S ENFORCEABLE POLICIES:

Oregon's program is uniquely networked and consists of 10 state agencies, 33 cities, and 7 counties. DLCD is the lead agency of the Oregon Coastal Management Program.

Each local entity has documents governing how they operate and guiding how they administer land use in their community. Each state agency has chapters of statutes guiding operations and helping them administer state law. These documents include comprehensive plans and land use regulations, state statutes, and statewide planning goals. DLCD incorporates the documents in their entirety into the Program. DLCD is the lead state agency for conducting federal consistency reviews.

## How does DLCD evaluate local enforceable policies?

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DLCD has the sole authority to determine consistency or inconsistency with the enforceable policies of the OCMP, specifically those derived from local comprehensive plans and implementing regulations. DLCD cannot delegate or defer its federal consistency review decision-making authority to a local government permit decision. Federal law mandates that only the lead state agency authorized under NOAA as part of the OCMP can determine whether an activity is consistent with the State's enforceable policies. Federal consistency review cannot be based on decisions, actions, or non-actions by a local government. While DLCD may consider local permit decisions in its findings, the agency provides its own independent judgement on consistency with statewide planning goals and enforceable policies. (OAR 660-035-0020 and 15 CFR § 930.6) NOAA's Office for Coastal Management (OCM) further clarified this role of DLCD in its Program Evaluation Findings, published in 2017.

## How does DLCD evaluate state enforceable policies?

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It is the applicant's responsibility to show the proposed project is consistent with Oregon's enforceable policies. An applicant submits a consistency statement to DLCD certifying that they believe the project is consistent with all enforceable policies of the state. Once a consistency certification is submitted, DLCD evaluates all information within the application materials with the enforceable policies of the state to determine if the project is in fact consistent with the standards within each enforceable policy. DLCD administrative rules state that issued state permits or authorizations are the only acceptable evidence demonstrating consistency with the enforceable policies that the permit or authorization covers (OAR 660-035-0050). DLCD rules provide that "For activities located within the state's jurisdiction that require state... permits or authorizations, *the issued permit or authorization is the only acceptable evidence demonstrating consistency with the enforceable policies that the permit or authorization covers.*<sup>1</sup>" These rules have been approved by NOAA as enforceable policies of the OCMP. 15 CFR § 930.6(c) states "the issuance or denial of relevant state permits can constitute the state agency's consistency concurrence or objection". (15 CFR § 930.6(c) and OAR 660-035-0050)

## What are "coastal effects"?

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Federally approved coastal management programs have the authority to review federal activities for consistency with the state's enforceable policies, as well as reasonably foreseeable effects the proposed activity may have on coastal resources. This includes any reasonably foreseeable effect on any coastal use or resource resulting from a federal activity. Coastal effects include direct, indirect, secondary, and cumulative impacts on coastal resources and coastal users. (15 C.F.R. § 930.11(g))

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<sup>1</sup> OAR 660-035-0050(4) (emphasis added).

## How are inconsistencies determined?

Where a copy of a state application is provided to establish compliance with an enforceable policy and that state application has either been denied or withdrawn, the consistency certification has not established compliance with an enforceable policy. (15 CFR § 930.6(c) and OAR 660-035-0050)

For non-state permits and authorizations, DLCD conducts an independent review of the materials submitted by the applicant to demonstrate consistency, along with consulting the relevant state agency or local jurisdiction. For enforceable policies overseen by networked state agency partners, a letter of recommendation is requested by the respective agency that formally recommends whether or not a project should be considered consistent with the associated enforceable policies, with an emphasis on how the project is inconsistent and the associated coastal effects from the project. Federal consistency review cannot be based on decisions, actions, or non-actions by a local government. While DLCD may consider local permit decisions in its findings, the agency provides its own independent judgement on consistency with statewide planning goals and enforceable policies. (OAR 660-035-0020 and 15 CFR § 930.6)

## Basis of Objection

After an independent review of the Jordan Cove Energy Project application materials, DLCD determined it to be inconsistent with Oregon’s federally approved enforceable policies. These include:

Enforceable Policy	Mechanism for Inconsistency
Goal 6 - Air, Water, and Land Resources	Permit Application Denied
ORS chapter 196 - Removal-Fill	Permit Application Withdrawn
ORS chapter 274 - Submersible and Submerged Lands	Authorization Applications Withdrawn
ORS chapter 468B - Water Quality	Permit Application Denied
ORS chapter 469 - Energy; Conservation Programs; Energy Facilities Public Health and Safety	Insufficient Information to Establish Consistency
ORS chapter 496 - Wildlife Administration	Insufficient Information to Establish Consistency
ORS chapter 509 - General Protective Regulations (Fish Passage)	Insufficient Information to Establish Consistency

Many of these enforceable policies can only be met by receiving necessary state permits and authorizations (e.g. DSL Removal-Fill, DEQ Section 401 Water Quality Certification). Where a copy of a state application is provided to establish compliance with an enforceable policy and that application has either been denied or withdrawn, the consistency certification has not established compliance with an enforceable policy. The Jordan Cove Energy Project received a denial of their 401 Water Quality Certification in May of 2019, and has withdrawn their applications for DSL Removal-Fill and Proprietary Authorization in January of 2020. The decision letter outlines each policy that the project is inconsistent with and how the policy was not met.

## DLCD View of Decision

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Economic development is a high priority and cornerstone of the core work conducted by DLCD. The agency respects and highlights that Oregon's economy and well-being are in large part dependent upon proper management of the state's natural resources for current and future generations. These resources afford Oregonians the economic, physical, cultural, and scientific benefits that make our communities unique.

DLCD has dedicated its mission to non-biased, science-based planning efforts for sustainable land conservation and development. This decision was issued after a four year-long coordination process between state-agency partners and the applicant (Pembina). After long deliberation and review of the record before the agency, it is clear that there is no reasonable assurance that the proposed project is or will be consistent with the laws, regulations, and policies that continue to maintain the Oregonian way of life. Overall, the issuance of this decision protects the interests of the State of Oregon and those who call Oregon home.

## Why did DLCD issue before the decision deadline of February 28, 2020?

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DLCD was acting in accordance with federal regulations which state that state agencies shall notify the federal agency and applicant with a consistency decision at the earliest practicable time.

Exact Federal Regulation Language - "At the earliest practicable time, State agency shall notify the Federal agency and the applicant whether the State agency concurs with or objects to a consistency certification." (15 CFR §930.62)

## Implications of this Objection

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If a federal permit is determined by that state as inconsistent with the state's federally approved enforceable policies, and an objection is issued, the federal permit or license cannot be authorized and the project cannot move forward. The only way for the activity to move forward is for the objection to be appealed and subsequently overridden by the U.S. Secretary of Commerce. (15 CFR Part 930, Subpart H). In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security.

## Right to Appeal

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An applicant can appeal a federal consistency objection to the U.S. Secretary of Commerce (head of the National Oceanic and Atmospheric Administration) within 30 days of the issuance of the decision. The Secretary may decide to dismiss an appeal, override the State's objection, stay the appeal, or remand

the appeal to the State agency for reconsideration if new information is presented. Unless the Secretary stays the closing of the decision record, it will close no later than 160 days after the appeal is published in the Federal Register. (15 CFR Part 930, Subpart H). Currently, the Secretary has delegated his appeal authority to the NOAA Administrator. This appeal process considers the project's coastal impacts with the national interest. We do not know at this time if an appeal will be filed.

## Federal Preemption

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Federal regulations are clear that federal consistency decisions cannot be federally preempted. If a federal permit is determined by that state as inconsistent with the state's federally approved enforceable policies and an objection is issued, the federal permit or license cannot be authorized and the project cannot move forward. Federal preemption does not apply to federal consistency reviews under the CZMA. All enforceable policies of a state coastal management program are federally-approved and deemed consistent with the CZMA and its corresponding national objectives. Further, states apply federally-approved enforceable policies to federal actions and if a state's enforceable policies, as specifically described or applied, are not preempted by federal law, the state **may apply them through CZMA federal consistency to a preempted field**. For example, Oregon's removal-fill requirements can be federally preempted by FERC under the Natural Gas Act, but because the associated enforceable policies are federally-approved and incorporated into the OCMP, they can be applied and enforced for federal consistency review purposes.

The only way for the activity to move forward is for the objection to be appealed and subsequently overridden by the U.S. Secretary of Commerce. (15 CFR Part 930, Subpart H). In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security.

Specific to this decision, the Natural Gas Act, as amended in 2005, explicitly states that it does not affect the right of states under the Coastal Zone Management Act. (Natural Gas Act SEC. 3(d)). The CZMA and the NGA are laws of equal dignity and should be read to complement rather than preempt one another. Objections are properly appealed to the Secretary of the U.S. Department of Commerce.