

# Vinson&Elkins

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March 19, 2020

## **Via FedEx Overnight**

The Honorable Wilbur L. Ross, Jr., Secretary  
United States Department of Commerce  
Herbert C. Hoover Building  
14th Street and Constitution Avenue, NW  
Washington, DC 20230

Oceans and Coasts Section  
NOAA, Office of General Counsel  
1305 East West Highway  
Room 6111 SSMC 4  
Silver Spring, MD 20910

Re: Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP's Notice of Appeal of Oregon's Coastal Zone Management Act Consistency Objection

Dear Secretary Ross:

Jordan Cove Energy Project L.P. ("JCEP") and Pacific Connector Gas Pipeline, LP ("PCGP") (collectively, "Appellants") respectfully submit this notice of appeal requesting that you override the Oregon Department of Land Conservation and Development's ("DLCD") objection to Appellants' certifications of consistency with the Oregon Coastal Management Program ("OCMP") for the proposed Jordan Cove Liquefied Natural Gas Project ("LNG Terminal") and Pacific Connector Gas Pipeline Project ("Pipeline," and together with the LNG Terminal, the "Project").

This notice of appeal is filed pursuant to 15 C.F.R. Part 930, Subpart H. Pursuant to 15 C.F.R. § 930.125(b), and as explained further below, Appellants' basis for appeal is that the Project is consistent with the objectives and purposes of the Coastal Zone Management Act ("CZMA"). As such, the Secretary can and should override the Oregon DLCD's objection under 16 U.S.C. § 1456(c)(3) and 15 C.F.R. § 930.120.

## BACKGROUND

In response to the increase in natural gas supplies in the U.S. Rocky Mountain and Western Canada production areas and the growth in international demand for liquefied natural gas (“LNG”), Appellants JCEP and PCGP propose to construct and operate, respectively, an LNG export terminal and an interstate natural gas pipeline. The LNG Terminal proposed by JCEP will be located in Coos County, Oregon on the North Spit of Coos Bay. The LNG Terminal will be capable of receiving and liquefying 1.2 million dekatherms per day of natural gas and producing a maximum of 7.8 million metric tons per annum of LNG for export. To supply the LNG Terminal, PCGP will build an approximately 229-mile pipeline to connect the LNG Terminal to existing pipeline systems. The Pipeline will be capable of transporting up to 1.2 billion cubic feet of natural gas per day.

On September 21, 2017, Appellants filed applications with the Federal Energy Regulatory Commission (“FERC”) under Sections 3 and 7 of the Natural Gas Act (“NGA”) to construct and operate the LNG Terminal and the Pipeline. In connection with the Project, Appellants also filed applications with the U.S. Army Corps of Engineers (“ACOE”) for permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Under the CZMA, applicants for federal permits for activities affecting a state’s coastal zone must certify that the proposed activity complies with the enforceable policies of the state’s federally approved coastal management program and will be conducted in a manner consistent with the program. 16 U.S.C. § 1456(c)(3)(A).<sup>1</sup> A designated state agency evaluates this certification and will ultimately concur or object. *Id.* DLCD is the designated state agency that implements the OCMP and undertakes the CZMA consistency review in Oregon.

Appellants began working with DLCD in October 2017 to obtain its views and assistance in order to ensure the Project would be conducted in a manner consistent with the OCMP, and continued to do so for the next year and a half. *See* 15 C.F.R. § 930.56. As part of this effort, Appellants worked with DLCD to obtain a list of the relevant “enforceable policies” of the OCMP applicable to the Project, and the “necessary data and information” that had to be submitted with the Appellants’ consistency certification. 15 C.F.R. §§ 930.57, 930.58. To coordinate and simplify public review and comment of the CZMA consistency review process, DLCD asked Appellants to combine their CZMA submissions into a single document. On April 12, 2019, Appellants submitted their certification that the Project is consistent with

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<sup>1</sup> FERC authorizations under NGA Section 3 and Section 7 and ACOE permits under Section 404 and Section 10 are federal license or permit activities listed in the OCMP as requiring CZMA consistency. *See* OCMP Table 7, [https://www.oregon.gov/lcd/OCMP/Documents/September2015\\_Table\\_7\\_Listed%20Activities.pdf](https://www.oregon.gov/lcd/OCMP/Documents/September2015_Table_7_Listed%20Activities.pdf); *see also* 15 C.F.R. § 930.53.

Oregon's coastal management program.<sup>2</sup> DLCD objected to Appellants' consistency certification on February 19, 2020.<sup>3</sup>

## PROCEDURAL CONTEXT FOR APPEAL

When a state objects to a consistency certification, the applicant may appeal the objection to the Secretary of Commerce by filing a notice of appeal within 30 days of receipt of the objection. 15 C.F.R. § 930.125. The notice of appeal must contain “a statement explaining the appellant’s basis for [the] appeal.” *Id.* Appellants’ statement of their basis for appeal—specifically, that the Project is “consistent with the objectives of [the CZMA],” 16 U.S.C. § 1456(c)(3)(A)—is provided herein.

Because this appeal concerns an energy project,<sup>4</sup> the governing regulations provide that the notice of appeal must be accompanied by the consolidated record maintained by the lead federal permitting agency. 15 C.F.R. § 930.127(i). In this case, FERC is the lead federal permitting agency. *See* 15 U.S.C. § 717n(b)(1). The FERC docket numbers for JCEP and PCGP’s applications under Sections 3 and 7 of the Natural Gas Act are, respectively, CP17-495 and CP17-494. Online access to these dockets, including downloadable copies of all filings therein, is available through FERC’s website at the following URL: [https://elibrary.ferc.gov/idmws/docket\\_search.asp](https://elibrary.ferc.gov/idmws/docket_search.asp).

Appellants believe that providing the above-referenced FERC docket numbers and link to FERC’s online docket system is sufficient to satisfy the requirement of 15 C.F.R. § 930.127(i)(2) that Appellants submit copies of the consolidated record with this notice of appeal, particularly in light of the Secretary’s “broad authority to implement procedures governing the consistency appeal process to ensure efficiency and fairness to all parties.” 15 C.F.R. § 930.127(e)(1). Appellants have conferred with Oregon, and the State agrees to the approach of linking to the FERC docket, in recognition that it is the most practical approach in light of the size of FERC’s record. Appellants will file with their opening brief an appendix containing the parts of the consolidated record they believe are relevant to the appeal, and will strive to coordinate with Oregon on the contents of that appendix. *See id.* § 930.127(c).

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<sup>2</sup> Appellants’ joint certification document is available on DLCD’s website at <https://www.oregon.gov/lcd/OCMP/Documents/01CZMA%20Consistency%20Application.pdf>. It is also included at Appendix 1.B of DLCD’s objection letter, which is available at FERC Docket Nos. CP17-494-000 and CP17-495-000 (Accession No. 20200220-5022) (filed Feb. 20, 2020).

<sup>3</sup> *See* Oregon Department of Land Conservation and Development, CZMA Federal Consistency Objection, Accession No. 20200220-5022, FERC Docket Nos. CP17-494-000 and CP17-495-000 (filed Feb. 20, 2020), *also available at* [https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-OBJECTION\\_JCEP-DECISION\\_2.19.2020.pdf](https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-OBJECTION_JCEP-DECISION_2.19.2020.pdf) (“DLCD Objection”).

<sup>4</sup> The Project is an “energy project” because it is a “project[] related to the siting, construction, expansion, or operation of [a] facility designed to explore, develop, produce, transmit or transport energy or energy resources.” 15 U.S.C. § 930.123(c).

However, should the Secretary determine that a different approach or additional materials are required for submitting the consolidated record, Appellants alternatively request an extension of time to prepare the full consolidated record for submission. *See* 15 C.F.R. § 930.127(i)(2) (“[T]he Secretary may extend the time for filing a notice of appeal in connection with an energy project for good cause shown to allow appellant additional time to prepare the consolidated record for filing.”). Good cause for an extension exists because of the sheer size and scope of the consolidated record maintained by FERC for the Project, much of which is not relevant to the issues on appeal, and because of the potential need for coordination to prepare the consolidated record in a form acceptable to the Secretary.

### **BASIS FOR APPEAL**

Pursuant to 15 C.F.R. § 930.125(b), Appellants submit the following statement explaining their basis for appeal.

The Secretary should override the Oregon DLCDC’s objection to Appellants’ consistency determination because the Project is consistent with the CZMA’s objectives and purposes. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120. A federally permitted activity is consistent with the objectives or purposes of the CZMA if the following three criteria are met:

- a. The activity furthers the national interest as articulated in § 302 or § 303 of the CZMA, in a significant or substantial manner,
- b. The national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively, and
- c. There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state’s management program.

15 C.F.R. § 930.121. As briefly explained below, the Project satisfies each of these criteria.

#### **I. The Project will significantly and substantially further the national interest articulated in the CZMA.**

The Project significantly and substantially furthers the national interest articulated in Sections 302 and 303 of the CZMA, which specifically articulate a national interest in the development of coastal resources and siting of major energy facilities.

Section 302 sets forth Congressional findings. 16 U.S.C. § 1451. It begins by declaring that “[t]here is a national interest in the effective management, beneficial use, protection, and development of

the coastal zone.” *Id.* § 1451(a). With respect to energy projects in particular, Section 302 notes that “new or expanded energy activity in or affecting the coastal zone” can help achieve “[t]he national objective of attaining a greater degree of energy self-sufficiency.” *Id.* § 1451(j). Section 303 provides Congressional declarations of policy. *Id.* § 1452. Similar to Section 302, it begins by setting out a national policy to both protect and develop coastal resources. *Id.* § 1452(1). Most of Section 303 is structured around how state management programs can “achieve wise use of the land and water resources of the coastal zone.” *Id.* § 1452(2). With respect to energy, state management programs “should at least provide for . . . priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to . . . energy.” *Id.* § 1452(2)(D).

Both Sections 302 and 303 therefore reflect that it is in the national interest to develop energy facilities in the coastal zone, particularly coastal-dependent energy facilities. In fact, the National Oceanic and Atmospheric Administration (“NOAA”) has specifically stated that the “siting of energy facilities” is an “example of an activity that significantly or substantially furthers the national interest” in the preamble to the CZMA regulations establishing this criterion. 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000).

Moreover, past appeal decisions have held that “coastal-dependent energy facilities further[] the national interest sufficiently for CZMA purposes.” *Decision and Findings in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C.* at 10 (June 26, 2008) (“*AES Sparrows Point*”) (citation omitted). The Project is a coastal dependent energy facility because it is a facility to be “used primarily . . . in the . . . conversion, storage, transfer, processing, or transportation of, [an] energy resource,” 16 U.S.C. § 1453(6), and “location in or near the coastal zone is required to achieve [its] primary goal,” *AES Sparrows Point* at 11 n.54 (quoting *Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C.* at 9 (May 5, 2004) (“*Islander East*”). The goal of the Project is to “export natural gas supplies derived from existing natural gas transmission systems . . . to overseas markets, particularly Asia” via the LNG Terminal, and to connect the LNG Terminal to existing natural gas transmission systems via the Pipeline. Final Environmental Impact Statement for the Jordan Cove Energy Project at 1-6, Accession No. 20191115-3040, FERC Docket Nos. CP17-494-000 and CP17-495-000 (Nov. 15, 2019) (“Final EIS”). The Project is coastal dependent because it requires LNG to be exported via tankers that will dock at the LNG Terminal. *See AES Sparrows Point* at 11.

As a major coastal dependent energy facility, whose construction and operation will develop the resources of the coastal zone, *see AES Sparrows Point* at 12-13, the Project will substantially and significantly further the national interest articulated in the CZMA.

## **II. The national interest furthered by the Project outweighs any adverse coastal effects.**

The national interest furthered by the Project outweighs any adverse coastal effects, when those effects are considered either separately or cumulatively. The Secretary will make this determination based on a preponderance of the evidence in the record. *AES Sparrows Point* at 16; *Islander East* at 35.

As a threshold matter, there is sufficient information in the record to identify adverse coastal effects and balance those effects against the national interest furthered by the Project. As noted above, consistent with 15 C.F.R. § 930.56, Appellants coordinated with DLCD for well over a year in an effort to identify the enforceable policies applicable to the Project before submitting their consistency certification in April of 2019. In any event, Oregon's contention that the Project's consistency certification was not supported by adequate information is not relevant to this issue. *See* DLCD Objection, *supra* note 3, at 1. As past decisions have explained,

It is important to note that the sufficiency determination on appeal is different from [the state's] sufficiency determination . . . . On appeal, the question is whether the record contains sufficient information on a project's adverse coastal effects to permit a balancing of those effects against any *national* interest furthered by a project. This inquiry differs from that conducted by a state in examining the sufficiency of information necessary to determine whether a project is consistent with its coastal management program.

*AES Sparrows Point* at 17-18 (emphasis added).

The consolidated record contains a wealth of information on the reasonably foreseeable coastal effects of the Project (as well as its public benefits) for the Secretary to consider in this inquiry. *See, e.g.*, Final EIS. Among other things, the record reflects that Appellants have proposed numerous ways to mitigate adverse coastal effects. In addition, the exhaustive Final Environmental Impact Statement prepared by FERC staff concludes that many of the Project's impacts will either not be significant or will be reduced to less than significant levels with proper mitigation. *See id.* at ES-6.

The record contains sufficient information to permit the Secretary to balance the coastal effects against the strong national interest furthered by the Project. When considered either separately or cumulatively, the Project's adverse coastal effects are outweighed by the strong national interest that the Project furthers.

### **III. There is no reasonable alternative available.**

Oregon has not proposed a reasonable available alternative that would permit the Project to proceed in a manner consistent with the enforceable policies of the OCMP. Instead, Oregon specifically declined to propose any alternative in its decision letter. *See* DLCD Objection, *supra* note 3, at 1, 48-50. Furthermore, it appears unlikely that any alternative would be acceptable to Oregon. Although DLCD professed in its objection letter to being "open to alternatives that would make the project fully consistent with the enforceable policies of the OCMP" (albeit without identifying any specific alternatives that would achieve consistency), it also declared, in bold letters, that "[a]t this time, [the] project *objectives* and our enforceable policies are incompatible," and that the project would "undermine the vision set forth by the OCMP." *Id.* at 1, 3, 49 (emphasis added).

Under 15 C.F.R. § 930.121(c), the “Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.” Past decisions have also made clear that the burden to initially propose an alternative lies with the state. *See AES Sparrows Point* at 42; *Islander East* at 37. As such, there is no alternative for the Secretary to consider, and the third criterion for a Secretarial override is met.

### CONCLUSION

Appellants respectfully submit this notice of appeal pursuant to 15 C.F.R. § 930.125. Appellants request that the Secretary override Oregon’s consistency objection because the Project is consistent with the objectives and purposes of the CZMA.

Sincerely,

*Michael Wigmore /mxe*

Michael B. Wigmore

#### Enclosures

cc: Jim Rue, Director  
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**CERTIFICATE OF SERVICE**

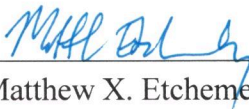
I, Matthew X. Etchemendy, certify and declare:

On March 19, 2020, I served a true and correct copy of the document to which this certificate is attached on the following via Federal Express overnight and electronic mail:

Jim Rue, Director  
Department of Land Conservation and Development  
Oregon Coastal Management Program  
635 Capitol Street NE, Suite 150  
Salem, OR 97301-2540  
jim.rue@state.or.us

I certify under penalty of perjury that the foregoing is true and correct.

SIGNED on March 19, 2020 at Washington, D.C.

  
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Matthew X. Etchemendy