

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SOUTHERN OREGON PIPELINE
5 INFORMATION PROJECT,
6 OREGON SHORES CONSERVATION
7 COALITION, NUTE NEMETH,
8 CITIZENS AGAINST LNG and
9 JODY McCAFFREE,
10 *Petitioners,*

11
12 vs.

13
14 COOS COUNTY,
15 *Respondent,*

16
17 and

18
19 OREGON INTERNATIONAL
20 PORT OF COOS BAY,
21 *Intervenor-Respondent.*

22
23 LUBA No. 2008-016

24
25 FINAL OPINION
26 AND ORDER

27
28 Appeal from Coos County.

29
30 Pamela Hardy, Bend, filed the petition for review and argued on behalf of petitioners.

31
32 No appearance by Coos County.

33
34 Roger A. Alfred, Portland, filed the response brief and argued on behalf of
35 intervenor-respondent. With him on the brief were Mark D. Whitlow and Perkins Coie LLP.

36
37 HOLSTUN, Board Member; RYAN, Board Chair, participated in the decision.

38
39 BASSHAM, Board Member, did not participate in the decision.

40
41 AFFIRMED

08/22/2008

42
43 You are entitled to judicial review of this Order. Judicial review is governed by the
44 provisions of ORS 197.850.

NATURE OF THE DECISION

Jordan Cove Energy Project (JCEP) proposes to develop a liquefied natural gas (LNG) facility on the north spit of Coos Bay. The proposed site is located across from the North Bend Municipal Airport and less than two miles west of Highway 101. The proposed facility will be made up of three components: (1) a marine terminal that includes a slip, two berths and an access channel to the Coos Bay deep-draft navigation channel; (2) an LNG import terminal to receive and regasify liquefied natural gas from ocean-going tankers that will berth at the marine terminal; and (3) a pipeline to transmit the gas to market. The first component is the subject of this appeal, and the applicant for the conditional use approval necessary for that component was intervenor Oregon International Port of Coos Bay. The second component was the subject of a separate appeal that was decided by LUBA on July 15, 2008. *Southern Oregon Pipeline Information Project v. Coos County*, ___ Or LUBA ___ (LUBA No. 2007-260, July 15, 2008), *rev pending* (CA 139623) (*SOPIP I*).

FACTS

The subject property is currently dry land that is partially occupied by a one-hundred foot high sand dune. The proposed slip would be excavated and designed to be large enough to accommodate two berths, one of which would be dedicated to large ocean-going LNG tankers. The challenged decision grants permits for the excavation and development of the slips, associated docking facilities, and dredging of the access channel to the deep-draft navigation channel to allow the expected LNG tankers to pass between the berth, and the Coos Bay deep-draft navigation channel. The facility that is the subject of this appeal, in concert with the LNG import terminal on adjacent land, would allow ocean-going LNG tankers to enter Coos Bay, just north of Charleston, travel north along the Coos Bay deep-draft channel approximately seven miles to the proposed access channel and ultimately dock in the dedicated berthing facility in the proposed slip. After the liquefied natural gas is off-

1 loaded to the LNG import terminal, the LNG tanker would repeat the journey through Coos
2 Bay to the Pacific Ocean. It is anticipated that approximately 80 tankers would off-load
3 LNG each year, resulting in an annual total of approximately 160 LNG tanker passages
4 through Coos Bay.

5 The first assignment of error concerns the timing of amendments to the application,
6 and we therefore describe those amendments in some detail. The application that led to the
7 disputed decision was submitted on March 5, 2007 and the application was deemed complete
8 on April 3, 2007. Record 68, 76. That application included a 54-page application narrative.
9 Record 65-1.¹

10 The application was amended three times. The first amendment was dated April 3,
11 2007 and stamped received by the county on April 4, 2007. That amendment added
12 mitigation sites. The revised application narrative grew to 70 pages. Record 249-169. And
13 90 pages of appendices were attached to the narrative. Record 168-78.

14 The second amendment is dated August 10, 2007 and was received by the county on
15 August 13, 2007. A letter explaining the changes in that amendment appears at Record 574-
16 72. The application narrative remained 70 pages in length, but the appendices increased
17 from 90 pages to 156 pages.

18 The third and final amendment is dated August 24, 2007, and was received by the
19 county on that date. The amended application narrative grew from 70 pages to 75 pages.
20 Record 819-745. The appendices to the third amendment (Appendices A through G) appear
21 to be the same as the appendices to second amendment. Record 731-575.

22 A public hearing on the application was held before a hearings officer on September
23 17, 2007. The record was held open for 21 additional days, until October 8, 2007. There
24 followed two seven-day periods for the applicant and opponents to submit rebuttal evidence,

¹ For some reason, the 11-volume record in this appeal is numbered backwards. The last page of volume 11 is Record 1. The first page of volume 1 is Record 3320.

1 and the applicant submitted its final legal arguments on October 29, 2007. The hearings
2 officer issued a decision recommending that the application be denied on November 29,
3 2007. On January 2, 2008, the Board of County Commissioners issued its decision
4 approving the application. This appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 The process that the county follows in reviewing requests for conditional use
7 approval is set out at Coos County Zoning and Land Development Ordinance (LDO) 5.2.400.
8 LDO 5.2.400(A)(1) calls for an application for conditional use approval to be submitted “at
9 least 45 days prior to a public hearing on the matter.”² Petitioners argue the third amendment

² The part of LDO 5.2.400 that describes the process for reviewing hearings body conditional use applications is set out below:

“Process for Conditional Uses.

“A. Hearings Body Conditional Uses:

- “1. An application complete with all submittal requirements is filed with the Planning Department *at least 45 days prior to a public hearing on the matter.*
- “2. The Planning Department shall forward a copy of the application to any affected city or special district pursuant to applicable provisions of Article 5.7 or this Ordinance.
- “3. The Planning Director shall cause an investigation and report to be made to determine compatibility with this Ordinance and any other findings required.
- “4. The Planning Department shall mail a copy of the staff report, required in (3) above, to the affected city, special district, applicant and Hearings Body at least seven (7) days prior to the scheduled public hearing.
- “5. The Planning Director shall cause a public notice to be distributed to interested persons and the news media which have requested notice and post said notice in the Planning Department office and the Coos County Courthouse not less than twenty (20) days prior to any scheduled public hearing. Said notice shall contain:
 - “a. A preliminary agenda listing the principal matters anticipated to be considered at the meeting, but this requirement shall not limit the ability of the Hearings Body to consider additional matters, and

1 to the application came only 24 days before the September 17, 2007 public hearing rather
2 than the 45 days required by LDO 5.2.400(A)(1):

3 “Here, the applicant filed their fourth complete application only 24 days prior
4 to the public hearing on the matter. * * * Confusing the matter, this was long
5 after the [application] was deemed complete by Staff on April 3. The new
6 August 24 application contained several new provisions. The most significant
7 of [these new provisions] is the addition of the dredged material disposal in
8 Zone 1-CS. Early applications did not contain this proposal. * * *

9 “Citizens were confused about whether they should examine and comment on
10 the original application that had been deemed complete, or the new modified
11 application. Given the enormous volume of the record, and the expense of
12 copying those pages, this represented a significant disadvantage to those
13 wishing to make considered comments.” Petition for Review 6-7 (record
14 citations omitted).

15 Intervenor responds that LDO 5.2.400(A)(1) simply requires that a complete
16 application be filed at least 45 days before the public hearing on that application. According
17 to intervenor, its application was filed on March 5, 2007 and deemed complete by the county
18 on April 3, 2007, well before the 45 days required by LDO 5.2.400(A)(1). Intervenor
19 characterizes its April 3, 2007, August 10, 2007 and August 24, 2007 submittals as
20 “supplemental materials,” which intervenor contends are not application *amendments* and do
21 not require a new completeness determination by the county. We understand intervenor to
22 argue that LDO 5.2.400(A)(1) is simply not implicated by the August 2007 submittals.
23 Intervenor also argues that even if LDO 5.2.400(A)(1) had been implicated by its August 24,

“b. The time, date and location of the meeting.

“6. The Planning Director shall cause notice of the hearing to be mailed to all affected property owners pursuant to Section 5.7.100.

“7. Coos County shall hold a public hearing on the application pursuant to Article 5.7.

“8. Notice of the decision shall be afforded to the applicant and those persons participating in the public hearing.

“9. Any appeal of a Hearings Body decision shall be made pursuant to Article 5.8.” (Emphasis added.)

1 2007 submittal, that submittal predated the September 17, 2007 hearing by 24 days and the
2 county held the record open for 21 days for additional evidence and an additional 14 days for
3 rebuttal evidence. According to intervenor, petitioners have failed to demonstrate that any
4 procedural error the county may have committed by allowing the August 24, 2007 submittal
5 prejudiced their substantial rights, given the additional time that was given to respond to that
6 submittal.

7 Our difficulty in resolving this assignment of error stems from the parties' failure to
8 discuss the changes made by the August 10, 2007 submittal at all and their very limited
9 discussion of the changes made by the August 24, 2007 submittal. Intervenor refers to that
10 submittal as a "revised application narrative" and "additional materials in support of the
11 application." Response Brief of Oregon International Port of Coos Bay 4. The only change
12 that petitioners specifically note in their petition for review is a new proposal to dispose of
13 dredge material "in Zone 1-CS." Petition for Review 6.

14 As we note in our resolution of the fourth assignment of error, intervenor does not
15 propose to dispose of dredge material in Zone 1-CS, and petitioners' understanding that
16 intervenor proposes to dispose of dredge material in Zone 1-CS is simply mistaken.
17 Although the August 24, 2007 submittal does include new proposals regarding disposal of
18 dredge material, we question whether that submittal must be viewed as new or amended
19 "complete application," within the meaning of LDO 5.2.400(A)(1), such that it should have
20 been submitted at least 45 days before the September 17, 2007 public hearing. Petitioners
21 make no attempt to explain why the August 24, 2007 submittal must be viewed as a new
22 "complete application," other than to assume that it should be viewed in that way. Even if
23 the August 24, 2007 submittal is properly viewed as a new or amended "complete
24 application," within the meaning of LDO 5.2.400(A)(1), the county's error in proceeding
25 with a public hearing on that application less than 45 days later would be a procedural error.
26 Procedural errors provide no basis for remand unless such errors result in prejudice to

1 petitioner's substantial rights. ORS 197.835(9)(a)(B); *Dimone v. City of Hillsboro*, 41 Or
2 LUBA 167, 183 (2001); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rev'd*
3 *and rem'd on other grounds*, 73 Or App 334, 698 P2d 529 (1985); *Frey Dev. Co. v. Marion*
4 *Cty*, 3 Or LUBA 45, 50 (1981). We agree with intervenor that petitioners have not shown
5 that the 21 days the hearing officer held the record open and the additional 14-day rebuttal
6 period provided insufficient time to avoid any prejudice to petitioners' substantial rights that
7 might have been caused by submitting the dredge disposal proposals to the county 24 days
8 before the September 17, 2007 hearing, instead of 45 days before that hearing.

9 Finally, on September 4, 2007, intervenor submitted a Joint Permit Application with
10 the U.S. Army Corps of Engineers and the Oregon Department of State lands to obtain state
11 and federal approval for fill and removal that will be required to construct the proposed
12 project. With supporting material, that application is 976 pages long. Intervenor submitted
13 the Joint Permit Application with supporting material at the September 17, 2007 hearing.
14 Record 1872-897. Petitioners contend their substantial rights were prejudiced because they
15 had insufficient time to review that lengthy permit application.

16 To the extent that petitioners contend the Joint Permit Application is properly viewed
17 as an amendment to intervenor's completed application, we do not agree. The Joint Permit
18 Application is evidence, and apparently was submitted to the hearings officer to respond to
19 concerns about the fill and dredging that will be required to construct the project. We do not
20 see that it was error for the county to accept the Joint Application, since one of the purposes
21 of the September 17, 2007 public hearing was to allow parties to submit evidence in support
22 of or in opposition to the disputed application. After the Joint Permit Application was
23 submitted to the hearings officer, it was available for review at the county planning
24 department. That petitioners apparently had difficulty in obtaining an electronic copy of the

1 Joint Permit Application, and were therefore required to travel to the county planning
2 department to review that document, does not constitute procedural error.³

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 Under the LDO, the county was required to find that the passage of the LNG tankers
6 through Coos Bay will not unreasonably interfere with the public trust rights of commercial
7 and recreational boat traffic. The county found that there will be no unreasonable
8 interference and in their second assignment of error, petitioners challenge the adequacy of
9 those findings and their evidentiary support.

10 Intervenor will need to dredge 5.6 million cubic yards of material from Coos Bay to
11 deepen the existing deep-draft channel and create the access channel that will connect the
12 proposed slip with the deep-draft channel. That dredging will occur in the county’s 5-DA
13 and 6-DA zones. In both of those zones, such dredging is “only allowed subject to finding
14 that adverse impacts have been minimized (see Policy #5) * * *.” LDO 4.5.271 (5-DA
15 zone); 4.5.281 (6-DA zone). The reference to Policy #5 is a reference to Coos Bay Estuary
16 Management Plan (CBEMP) Policy 5. As relevant here, CBEMP Policy 5 effectively
17 required the county to find that the LNG tanker access that the proposed dredging would
18 enable will (1) provide a “substantial public benefit” and (2) “not unreasonably interfere with
19 public trust rights.”⁴

³ According to intervenor, once the Joint Application was filed with DSL and the Corps, it was a public record and anyone could have obtained a copy directly from DSL or the Corps.

⁴ As relevant, CBEMP Policy #5 is set out below:

#5 Estuarine Fill and Removal

“I. 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

1 Under the public trust doctrine, the public has a right to use of the waters of the state
2 for navigation, fishing and recreation. In an April 21, 2005 opinion, the Oregon Attorney
3 General gave the following description of the public trust doctrine:

4 “The ‘bellweather’ case for what has become known as the public trust
5 doctrine is *Illinois Central Railroad*, 146 US 387. [*Morse v. Oregon Division*
6 *of State Lands (Morse II)*, 285 Or 197, 201, 590 P2d 709 (1979)]; [*Morse v.*
7 *Oregon Division of State Lands (Morse I)*, 34 Or App 853, 860, 581 P2d 520
8 (1978) *aff’d as modified* 285 Or 197; 590 P2d 709 (1979)]. The United States
9 Supreme Court upheld Illinois’ legislative repeal of a statute that had
10 purportedly granted a substantial part of the portion of the bed of Lake
11 Michigan that could be used as a harbor for the City of Chicago to a private
12 railroad. *Illinois Central Railroad*, 146 US at 447-52, 454, 460, 463-64;
13 *Morse II*, 285 Or at 201 (explaining *Illinois Central Railroad*). Because of the
14 public interest - the *jus publicum* - in the use of the waters, the Court held that
15 the legislature did not have the power to grant a large area of the lake bed to
16 the railroad which would have allowed the railroad to impede navigation if it
17 so desired. *Illinois Central Railroad*, 146 US at 451, 452-53, 458, 463-64;
18 *Morse II*, 285 Or at 201.

19 “The most recent extensive treatment of the public trust doctrine by the
20 Oregon Supreme Court is *Morse II*, 285 Or 197 (1979). In *Morse II*, the Court
21 recognized the authority of the Division to permit the fill of approximately 32
22 acres in Coos Bay for the expansion of a public airport, although it remanded
23 the decision for additional findings by the agency. *Morse II* indicates that the
24 Oregon courts will allow the state to authorize non-water-related public uses

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
- “d. Adverse impacts are minimized.
- “e. Effects may be mitigated by creation, restoration, or enhancement of another area to ensure that the integrity of the estuarine ecosystem is maintained.
- “f. The activity is consistent with the objectives of the Estuarine Resources Goal and with other requirements of state and federal law, specifically the conditions in ORS 541.615 and Section 404 of the Federal Water Pollution Control Act (P.L.92-500).” (Emphasis added.)

1 of waterways where the use does not materially interfere with the public rights
2 of navigation, recreation, commerce and fisheries. *Morse II*, at 201.

3 “In sum, we believe that the public trust doctrine prevents the state from
4 alienating or otherwise encumbering the public’s rights to use state-owned
5 waterways so as to materially affect or impede those public rights. *See also* 25
6 Op Atty Gen 274 (1951) (summarizing Oregon case law describing the
7 circumstances under which the state may alienate or encumber state-owned
8 waterways); Letter of Advice to Janet Neuman, Assistant Director, Oregon
9 Division of State Lands, January 24, 1990 (OP-6358) (analyzing the public
10 rights to use a navigable lake, and the extent to which those rights could be
11 regulated by the Division and limited by a lessee of the Division); 36 Op Atty
12 Gen 638 (1973) (same). This does not prevent the state from regulating the
13 public’s use of a waterway if necessary to protect navigation, commerce,
14 recreation, or fisheries. But it probably does mean that the State of Oregon
15 cannot grant rights to use waterways in a manner that materially interferes
16 with the public rights. In our view and as discussed above, the Oregon
17 appellate courts will require that the State of Oregon protect the trust uses of
18 navigation, commerce, recreation, and fisheries, from any substantial
19 impairment.” 50 Op Atty Gen ___ (No. 8281, April 21, 2005) (unpublished
20 slip opinion at 16) (footnote omitted).

21 It is reasonably clear that government action to fill and occupy public waterways
22 permanently or allow others to fill and permanently occupy waterways that are subject to a
23 public right of use under the public trust doctrine may be prohibited by the public trust
24 doctrine, if that action will materially interfere with public trust rights. But it was
25 permissible under the public trust doctrine to fill a portion of the Coos Bay Estuary to allow
26 airport development if the public need for that airport development outweighs “the detriment
27 to navigation, fishing and recreational uses of the water * * *.” *Morse II* at 209. We have
28 some question whether allowing dredging to improve navigation (a public trust right) could
29 ever run afoul of the public trust doctrine simply because it may favor one public trust right
30 over another or favor one type of maritime traffic over another. But under LDO 4.5.271,
31 4.5.281 and CBEMP Policy 5, dredging is only allowed in the Coos Bay estuary if it will (1)
32 provide a “substantial public benefit” and (2) “not unreasonably interfere with public trust
33 rights.” The county appears to have assumed that under these local laws, if the proposed
34 LNG tanker traffic that will be made possible by the proposed dredging would “unreasonably

1 interfere” with rights of commercial and recreational boat traffic to travel the waters of Coos
2 Bay, these local laws would require that the proposed dredging be denied. As a matter of
3 local law, we see no basis for questioning that implied interpretation.

4 The 80 LNG tanker trips that are expected each year will result in 160 daylight trips
5 through Coos Bay that must occur at high slack tide, which is the time also favored by
6 recreational crabbers and commercial fishermen attempting to cross the bar between Coos
7 Bay and the Pacific Ocean. Petitioners contend that unlike today’s conventional ocean-going
8 cargo ships, which are similar to the historic timber industry related ships that have long
9 navigated Coos Bay, the LNG tanker traffic that will be made possible by the disputed
10 dredging will have exclusion or security zones that may extend two miles in front of the
11 LNG tankers and one mile behind the LNG tankers. According to petitioners, “the fact that it
12 is still unclear what kind of exclusion zone will be required by LNG tankers entering and
13 exiting Coos Bay makes it impossible for the Board [of Commissioners] to have concluded
14 that there will be no unreasonable interference with these rights.” Petition for Review 11.
15 According to petitioners, the county wrongly equated the impacts of expected LNG tanker
16 traffic with the impacts of other kinds of ocean going cargo ships.

17 The board of county commissioners adopted the following findings to address
18 CBEMP Policy 5:

19 Regarding impacts on public trust rights, the Board finds that the Port’s
20 proposal will not unreasonably interfere with fishing, navigation and
21 commerce (the traditional public trust rights) or environmental protection,
22 aesthetics or recreation (additional rights considered under the public trust).
23 The applicant has submitted substantial evidence to support a finding that
24 development of the Marine Terminal and use of the Port Slip and Access
25 Waterway by commercial vessels (including LNG tankers) will not
26 permanently remove any waterway areas from public use. Operators of
27 fishing or recreational boats will not be permanently restricted from using any
28 portion of Coos Bay that is subject to public trust rights. Evidence submitted
29 by the applicant in Resource Report #8 and in pertinent ECONorthwest
30 studies indicates that, at most, other waterway uses could experience
31 temporary delays while LNG or other large commercial vessels move into or
32 out of the Port Slip and through the channel.

1 The Board adopts and incorporates by reference the documents provided by
2 the applicant as Attachment 3 to its submittal dated October 8, 2007, entitled
3 ‘Analysis of Public Trust Doctrine,’ together with the memorandum dated
4 October 4, 2007 explaining the history and scope of the Public Trust Doctrine
5 and the attached Exhibits 1-6. A majority of the opponents’ stated concerns
6 relate to the potential effects of the LNG tankers and their ‘security zones’ on
7 other users of the Bay. However, the applicant has submitted a study prepared
8 by ECONorthwest entitled ‘Potential Economic Effects of the Jordan Cove
9 Energy Project on Tourism and Recreational Activities, dated November 2006
10 and Resource Report #8, both of which provide detailed analyses of the likely
11 interactions between LNG tankers and other recreational and commercial
12 boaters. Those studies conclude that conflicts will be minimal and at most
13 could result in temporary delays. Exhibit 4 to the applicant’s October 8, 2007
14 memorandum is a letter from the Coos Bay Pilots Association in support of
15 the application, which states that fishing and recreational boaters would be
16 ‘minimally affected’ by use of the new Marine Terminal by deep-draft
17 channel traffic.

18 “* * * The Board finds that evidence submitted by the Port establishes that
19 substantial public benefits will accrue from the Marine Terminal, while public
20 trust rights will not be significantly impacted, and that the proposed use will
21 not unreasonably interfere with public trust rights.” Record 3296-95.

22 All parties recognize that this is not a case where waters subject to public trust rights
23 will be permanently occupied and thereby result in a permanent loss of the public’s ability to
24 use those waters. The right of the public to use the waters of Coos Bay for navigation,
25 recreation, fishery and other uses will continue, albeit subject to interruption for some part of
26 approximately one hour on approximately 160 days per year. The focus of petitioners’
27 concern, which the above-quoted findings recognize, is the fact that the LNG tankers will be
28 assigned security or exclusion zones that will to some extent prolong the interruption that
29 other boats in Coos Bay may experience. The board of county commissioners adopted and
30 incorporated reports that were prepared by the Port to address that concern, and portions of
31 those reports are quoted below:

32 “JCEP anticipates vessels delivering the gas will call at the facility about 80
33 times per year, entering or exiting Coos Bay at or near slack high tide during
34 daylight hours. The bar pilots who direct the movement of deep-draft vessels
35 into and out of port anticipate that the impacts of LNG vessels on fishing and
36 other boats would closely resemble those of the other deep-draft vessels that
37 call on Coos Bay to collect wood chips. The actual impacts will depend, in

1 part, on the dimensions of the safety/security zone surrounding each LNG
2 ship, within which traffic other than escort boats will be excluded. JCEP
3 anticipates that the Coast Guard will define these dimensions in 2007, and that
4 this zone will be similar to those associated with other vessels carrying
5 sensitive cargoes, such as naval vessels and cruise ships, and will require that,
6 as each LNG vessel enters or [exits] Coos Bay, it will be surrounded by a
7 safety/security zone that excludes all other vessels, including commercial
8 fishing boats, recreational fishing boats, and other recreational water users.
9 The safety/security zone will extend ahead, to the sides, and behind the LNG
10 vessel, and may be enforced by armed escort boats.

11 “In general, as deep-draft vessels move in the navigation channel, boats in or
12 near the channel get out of the way and others defer entering the channel until
13 the vessels have passed. The bar pilots anticipate similar interactions would
14 occur as LNG vessels move in the navigation channel, but more smoothly and
15 with greater certainty, insofar as escort boats accompanying the LNG vessels
16 would be on the scene to ensure that boats move out of the way in a timely
17 manner. They also would be available to assist boats that might be
18 experiencing mechanical or other difficulties in moving out of the way.”
19 Record 2477 (footnotes omitted).

20 “The recreational use of the crabbing, clamming, fishing, and other
21 recreational (SCUBA diving) areas in the lower bay will not be any more
22 affected by the passage of LNG ships than they are currently affected by the
23 passage of deep-draft ships. Since the crabbing and clamming areas are
24 outside the channel and the USCG has not yet determined if the moving safety
25 and security zones extend beyond the port and starboard sides of the LNG
26 shop outside of the channel, it has been assumed that recreational crabbers
27 and clammers will not have to leave their spot when an LNG ship passes.
28 However, if crabbing, clamming, fishing, or SCUBA diving activities were to
29 occur in the channel, that activity would have to cease and move out of the
30 channel out of the way of an LNG ship or any deep draft ship that transits the
31 channel. It is anticipated that recreational activities that can occur outside of
32 the channel will not be affected by the passage of the LNG ships or for that
33 matter by any deep draft ships transiting the channel, pending the final
34 security determinations by the USGC.

35 “When LNG ships enter and leave the LNG terminal and transit Coos Bay,
36 boaters in the immediate area of the LNG ship may encounter delays due the
37 moving safety/security zone requirements. A ship traffic study conducted by
38 Moffatt & Nichol (2006) concluded that the additional LNG ship traffic
39 associated with the JCEP can be accommodated in Coos Bay. As a LNG ship
40 is in transit to the berth, the USCG will likely impose a moving safety/security
41 zone of two miles ahead and one mile astern of the LNG ship. The geometry
42 of Coos Bay combined with this safety/security zone and other restrictions
43 imposed by the Pilots, essentially makes the waterway a one-way channel for
44 large beam ships like wood chip carriers. The Pilots, who direct the

1 movement of the deep-draft ships into and out of the Port, anticipate that the
2 effect of LNG ships on fishing and other boats would closely resemble those
3 of the other deep-draft ships that call on Coos Bay to collect wood chips
4 (ECONorthwest, 2006a). The actual impacts will depend, in part, on the
5 dimensions of the safety/security zone surrounding each LNG ship. It is
6 anticipated that the USCG will define the safety/security zone in 2007 when it
7 completes its analysis of the waterway suitability assessment. The Pilots
8 currently encounter approximately six recreational boats and two commercial
9 fishing boats during the transit of cargo ships into and out of the Port. These
10 numbers are typically lower in winter and on weekdays than during the
11 summer and on weekends. The Pilots have indicated that they will bring the
12 LNG ships through the navigation channel at slack high tide and during
13 daylight hours. The Pilots anticipate the travel time between the offshore
14 buoy and the access channel at the LNG ship berth will be approximately one
15 hour, and probably no less than 45 minutes and no more than 75 minutes. The
16 effect on boats at any point in the channel, assuming that they were not
17 allowed to move past the LNG ship outside of the channel, will last
18 approximately 20 minutes. In other words, the Pilots anticipate that, if a
19 pleasure boat were in or near the channel, it would have to move out of the
20 way as the LNG ship approached and would be able to return to its previous
21 location about 20 minutes later.” Record 2552.

22 It is simply not accurate to say that the county was unaware that the LNG tankers
23 may have more of an impact on other traffic in the deep-water channel than existing deep-
24 draft vessels that do not have security or exclusion zones. While the precise size of the
25 exclusion zone was not known at the time of the decision, the report recognizes that the LNG
26 tankers likely will be assigned a forward two-mile exclusion zone and a sternward one-mile
27 exclusion zone. During the 45 minutes to 75 minutes it will take for an LNG tanker to travel
28 the distance between the ocean and the slip, the deep-draft channel will become one-way
29 passage and the LNG tanker will likely require a moving three-mile segment of that channel,
30 that excludes all others. Boats that encounter the LNG tankers will experience an
31 approximately 20 minute delay while the ship passes.⁵ The report also recognizes that the
32 United States Coast Guard (USCG) has not yet established precisely how far in front and

⁵ The current passage of deep-draft ships that do not have security/exclusion zones apparently does not require that other boats in the channel stop while the deep-draft ship passes through the channel so long as those boats do not impede the deep-draft ship’s passage. The ECONorthwest report noted that the LNG tankers may require that such boats come to a complete halt until the LNG tanker passes. Record 2477 n 10.

1 behind the LNG tankers the security zone will extend and that a larger security zone may
2 lengthen the delay that other traffic in the channel may encounter. The county also
3 recognized that if there is a security zone that extends to port and starboard outside the deep-
4 water channel, other boats and activity outside the channel may be temporarily affected while
5 the LNG tanker passes. The key point in the county’s analysis and the reports it relies on is
6 that the impact on other public trust rights will be limited to approximately 160 days a year
7 and limited in duration. In reaching a conclusion about how much delay is reasonable, the
8 county balanced that delay against the considerable benefits that are expected from the
9 proposal.⁶

10 Although the precise duration of the delay that persons exercising public trust rights
11 will experience cannot be calculated until the dimensions of the security/safety zone is
12 established by the Coast Guard, and even though that delay could be affected by other factors
13 as well, we believe a reasonable person could conclude that the LDO 4.5.271, 4.5.281 and
14 CBEMP Policy 5 requirement that LNG tanker traffic not “unreasonably interfere with
15 public trust rights” is satisfied, notwithstanding that for some persons their exercise of public
16 trust rights will be prevented temporarily on the days when LNG tankers pass through the

⁶ A memorandum that was adopted by the county listed the following benefits of the proposal:

- “• About 200 permanent jobs at full tenancy. * * *
- “• Development of the Slip and infrastructure as part of a public-private partnership where the private partner has agreed to pay up to 85% of the costs of the two-berth Slip without repayment by the Port if the private component is not implemented.
- “• An increase in marketability of the Port and its facilities to foreign commerce and shippers.
- “• Partial restoration of shipping and trade opportunities lost when the region’s economy shifted away from its dependence on exporting natural resources.
- “• Increased local tax base.
- “• Stimulation of the local economy by bringing ships to the Port that will need services, including tugs, food and repairs, among others.” Record 2615.

1 Coos Bay deep-draft channel. That another decision maker might have reached a different
2 conclusion regarding the significance of those temporary delays under LDO 4.5.271, 4.5.281
3 and CBEMP Policy 5, based on this record, is not a sufficient basis for remand.

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Henderson Marsh, a major salt-water marsh and significant wildlife habitat adjoins
7 the proposed slip to the west. Under their third assignment of error, petitioners allege the
8 county improperly relied on the fact that all development of the proposed slip and port
9 facilities will be set back at least 50 feet from Henderson Marsh in concluding that the
10 proposal complies with CBEMP Policy 17. CBEMP Policy 17 is set out below:

11 **“#17 Protection of ‘Major Marshes’ and ‘Significant Wildlife Habitat’**
12 **in Coastal Shorelands**

13 “Local governments shall protect from development *major marshes and*
14 *significant wildlife habitat*, coastal headlands, and exceptional aesthetic
15 resources located within the Coos Bay Coastal Shorelands Boundary, except
16 where exceptions allow otherwise.

17 “I. Local government shall protect:

18 “a. ‘Major marshes’ to include areas identified in the Goal #17,
19 ‘Linkage Matrix’, and the Shoreland Values Inventory map;
20 and

21 “b. ‘Significant wildlife habitats’ to include those areas identified
22 on the ‘Shoreland Values Inventory’ map; and

23 “* * * * *

24 “II. *This strategy shall be implemented through:*

25 “a. Plan designations and use and activity matrices set forth
26 elsewhere in this Plan that limit uses *in these special areas* to
27 those that are consistent with protection of natural values; and

28 “b. Through use of the Special Considerations Map that identified
29 such special areas and *restricts uses and activities therein* to
30 uses that are consistent with the protection of natural values.
31 Such uses may include propagation and selective harvesting of

1 forest products consistent with the Oregon Forest Practices
2 Act, grazing, harvesting wild crops, and low-intensity water-
3 dependent recreation; and

4 “c. Contacting Oregon Department of Fish and Wildlife for review
5 and comment on the proposed development *within the area of*
6 *the 5b or 5c bird sites.*

7 “This strategy recognizes that special protective consideration must be given
8 to key resources in coastal shorelands over and above the protection afforded
9 such resources elsewhere in this Plan.” (Emphases added.)

10 In rejecting a nearly identical challenge in the appeal of the LNG terminal in *SOPIP*
11 *I*, we explained:

12 “CBEMP 17 * * * requires that ‘[l]ocal governments * * * protect from
13 development major marshes and significant wildlife habitat * * *.’ If CBEMP
14 Policy 17 stopped there, *SOPIP*’s argument might have merit. But CBEMP
15 Policy 17(II) goes further and expressly explains *how* this mandate to protect
16 certain coastal resources is implemented. CBEMP Policy 17(II)(a) explains
17 that the CBEMP ‘limit[s] uses *in these special areas* to those that are
18 consistent with protection of natural values.’ (Emphasis added.) CBEMP
19 Policy 17(II)(b) provides that CBEMP Policy 17 is implemented by ‘the
20 Special Considerations Map, that identified * * * special areas and restricts
21 uses and activities *therein* to uses that are consistent with the protection of
22 natural values.’ (Emphasis added.). CBEMP Policy 17(II)(b) goes on to list
23 some uses that are consistent with those values. With regard to bird sites,
24 CBEMP Policy 17(II)(c) provides that CBEMP Policy 17 is implemented by
25 contacting the Oregon Department of Fish and Wildlife so that it may
26 ‘comment on the proposed development *within the area of the 5b or 5c bird*
27 *sites.*’ There is simply nothing in the text of CBEMP Policy 17 that suggests
28 it is to be implemented by limiting uses on properties that adjoin or are
29 located near inventoried major marshes or significant wildlife habitat to avoid
30 possible impacts on such marshes and habitat.” *SOPIP I*, slip op at 8-9
31 (emphases in original).

32 For the reasons set out in *SOPIP I*, slip op at 7-10, petitioners’ third assignment of
33 error is denied.

34 **FOURTH ASSIGNMENT OF ERROR**

35 In their fourth assignment of error, petitioners assign error to the county’s failure to
36 adopt findings that establish that certain legal requirements that apply when placing dredge
37 material in the County’s 1-CS zone are satisfied.

1 Intervenor responds that the hearings officer erroneously found intervenor proposes
2 to place fill in the I-CS zone. Record 3211. According to intervenor, the board of county
3 commissioners adopted findings in which it identified errors in the hearings officer's
4 decision. Record 3260-58. Those findings include the following:

5 “1. [LDO] 4.5.221 Special Condition for Dredge Materials in 1-CS

6 “The applicant proposes no dredged material disposal, or any other use or
7 activity, in district 1-CS. Dredged material disposal is proposed at the
8 Beachfront Nourishment [Dredged Material Disposal] site adjacent to this
9 district.” Record 3258.

10 At oral argument, petitioners appeared to concede that intervenor no longer proposes
11 to deposit dredged material in the 1-CS zone. But petitioners suggested that LUBA remand
12 the county's decision in any event, so that the county can explain where the dredge that was
13 at one time proposed for the 1-CS zone is now going to be placed. We reject petitioners'
14 belated attempt to rewrite the fourth assignment of error.

15 The fourth assignment of error is denied.

16 The county's decision is affirmed.