

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

11/27/17 PM 2:07 LUBA

3  
4 OREGON SHORES CONSERVATION COALITION,

5 *Petitioner,*

6  
7 and

8  
9 JOHN CLARKE, DEB EVANS, RON SCHAAF,  
10 ROGUE CLIMATE, HANNAH SOHL,  
11 STACEY McLAUGHLIN, JODY McCAFFREE, and THE  
12 CONFEDERATED TRIBES OF COOS, LOWER UMPQUA  
13 and SIUSLAW INDIANS,

14 *Intervenors-Petitioners,*

15  
16 vs.

17  
18 COOS COUNTY,

19 *Respondent,*

20  
21 and

22  
23 JORDAN COVE ENERGY PROJECT L.P.,

24 *Intervenor-Respondent.*

25  
26 LUBA No. 2016-095

27  
28 FINAL OPINION

29 AND ORDER

30  
31 Appeal from Coos County.

32  
33 Courtney Johnson, Portland, filed the petition for review and argued on  
34 behalf of petitioner. With her on the brief was Crag Law Center.

35  
36 Kathleen P. Eymann, Bandon, filed a petition for review and argued on  
37 behalf of intervenor-petitioner John Clarke.

1 Tonia L. Moro, Medford, filed a petition for review and argued on behalf  
2 of intervenors-petitioners Deb Evans, Ron Schaaf, Rogue Climate and Hannah  
3 Sohl.

4  
5 Jody McCaffree, North Bend, filed a petition for review and argued on  
6 her own behalf.

7  
8 Stacy McLaughlin, Myrtle Creek, represented herself.

9  
10 Denise Turner Walsh, Carlsbad, California, filed a petition for review on  
11 behalf of intervenor-petitioner Confederated Tribes of Coos Lower Umpqua  
12 and Siuslaw Indians. Richard K. Eichstaedt argued on behalf of the  
13 Confederated Tribes.

14  
15 Keith A. Leitz, Coos County Legal Counsel, Coquille, filed a response  
16 brief and argued on behalf of respondent.

17  
18 Seth J. King, Portland, filed response briefs and argued on behalf of  
19 intervenor-respondent. With him on the brief was Perkins Coie LLP.

20  
21 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board  
22 Member, participated in the decision.

23  
24 REMANDED 11/27/2017

25  
26 You are entitled to judicial review of this Order. Judicial review is  
27 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county board of commissioners' decision approving a conditional use permit for a liquified natural gas (LNG) export terminal at Jordan Cove in Coos County, near the city of Coos Bay.

**INTRODUCTION**

Petitioner Oregon Shores and several intervenors-petitioners filed petitions for review. With minor exceptions, the five petitions for review filed do not present overlapping challenges. Therefore, we provide here only a general summary of the facts and legal context. Specific facts and legal standards relevant to particular challenges are set out under the pertinent assignments of error.

In 2015, intervenor-respondent Jordan Cove Energy Project L.P. (JCEP) applied to the county to construct an LNG export terminal at Jordan Cove, located on the North Spit at Coos Bay, located in Coos County.<sup>1</sup> The proposed facility would receive approximately 1.04 billion cubic feet per day of natural

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<sup>1</sup> JCEP had previously obtained county approvals for an LNG import terminal. See *SOPIP, Inc. v. Coos County*, 57 Or LUBA 44, *aff'd* 223 Or App 495, 196 P3d 123 (2008), and *SOPIP, Inc. v. Coos County*, 57 Or LUBA 301 (2008). The county also approved a separate application for a 49.72-mile section of a natural gas pipeline to serve the LNG import terminal. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011). Various components and iterations of the project have over the years generated a number of permits and decisions from several bodies, including proceedings before the Federal Energy Regulatory Commission (FERC).

1 gas via pipeline, liquify the gas to produce approximately 6.8 million metric  
2 tons of LNG, and load the LNG on tanker ships for export to international or  
3 domestic markets in the non-contiguous United States.

4 The LNG facility consists of a number of components, including (1) the  
5 LNG export terminal, (2) a marine slip and access channel, (3) a barge berth,  
6 (4) a gas processing center, and (5) a fire station and emergency training center,  
7 along with associated roads and utilities. The project would also require  
8 significant dredging, dredge disposal, shoreline stabilization, and wetland  
9 impact mitigation.

10 The terminal, gas processing facility, and fire station and emergency  
11 training center will be located on upland areas zoned for industrial uses. Much  
12 of the port facilities (slip, barge berth, tugboat dock, etc.) will be located in  
13 coastal shoreland areas, which are generally zoned to allow for water-  
14 dependent uses. The marine slip and access channel will require dredging in  
15 Jordan Cove, designated a natural estuary, and Henderson Marsh, a Statewide  
16 Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open  
17 Spaces) inventoried wetland.

18 The county hearings officer held a hearing on December 18, 2015, and  
19 held the record open thereafter for additional testimony and rebuttal. On May  
20 2, 2016, the hearings officer issued a decision with recommendations to  
21 approve the applications. On August 16, 2016, the county board of  
22 commissioners held a public meeting to deliberate on the recommendations,

1 and voted to adopt the hearings officer's findings as the county's decision, with  
2 minor modifications. The county's final decision was issued on August 30,  
3 2016. This appeal followed.

#### 4 **FIRST ASSIGNMENT OF ERROR (OREGON SHORES)**

5 The Coos Bay Estuary Management Plan (CBEMP) governs the use of  
6 the Coos Bay estuary and adjacent shorelands, implementing Statewide  
7 Planning Goal 16 (Estuarine Resources). The CBEMP designates a number of  
8 estuarine resources in the Jordan Cove area. Some are designated as  
9 "Development" zones, others as "Natural" zones in which development,  
10 including dredging and filling, is limited or prohibited.

11 Under the first assignment of error, petitioner Oregon Shores  
12 Conservation Coalition (Oregon Shores) cites to testimony that development of  
13 the gas processing facility will involve placement of fill in the 7-NA (Natural  
14 Aquatic) zoning district, a zone that comprises much of Jordan Cove, in which  
15 placing fill is prohibited. According to Oregon Shores, the county adopted no  
16 findings addressing the proposal to place fill in the 7-NA zone to support the  
17 gas processing facility.

18 Intervenor-respondent JCEP (JCEP) responds that the application did not  
19 propose placing fill anywhere in the 7-NA zone. JCEP also notes that the  
20 county rejected testimony that the application proposes to place fill in the 7-NA  
21 zone. Record 197 (findings discussing an opponents' letter "arguing,  
22 incorrectly, that the applicant's map on page 407 shows that the applicant

1 intends to place fill in the 7-NA aquatic zone.”). As far as we can tell, JCEP is  
2 correct that the application did not propose, and the decision does not approve,  
3 the placement of fill in the 7-NA zone.

4 The first assignment of error (Oregon Shores) is denied.

5 **SECOND ASSIGNMENT OF ERROR (OREGON SHORES)**  
6 **THIRD ASSIGNMENT OF ERROR (ROGUE INTERVENORS)<sup>2</sup>**

7 The application proposes dredging within areas zoned 5-DA and 6-DA  
8 (Development Aquatic Management Units), to construct an access channel  
9 from the navigation channel to the marine slip. Such dredging is subject to  
10 CBEMP Policy 5(I),<sup>3</sup> which implements Goal 16, Implementation Requirement

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<sup>2</sup> We follow the parties in referring to intervenors-petitioners Deb Evans, Ron Schaaf, Rogue Climate, and Hannah Sohl as “Rogue Intervenors.”

<sup>3</sup> CBEMP Policy 5(I) (Estuarine Fill and Removal) provides, in relevant part:

“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 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

1 2 (Goal 16 IR2).<sup>4</sup> Under CBEMP Policy 5(I), dredging is allowed in the  
2 estuary only if, in relevant part, (1) it is “required for navigation or other water-  
3 dependent use that requires an estuarine location,” and (2) a “need (i.e., a  
4 substantial public benefit) is demonstrated and the use or alteration does not  
5 unreasonably interfere with public trust rights.”

6 In two sub-assignments under the second assignment of error, Oregon  
7 Shores challenges the county’s findings that JCEP has demonstrated that  
8 dredging required for the marine slip and access channel will (1) provide a  
9 substantial public benefit, and (2) not unreasonably interfere with public trust  
10 rights. In their third assignment of error, intervenors-petitioners Rogue  
11 Intervenors advance additional arguments under both the “substantial public  
12 benefit” and “interference with public trust rights” standards.

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“d. Adverse impacts are minimized.”

<sup>4</sup> Goal 16, Implementation Requirement 2 provides, as relevant:

“Dredging and/or filling shall be allowed only:

“a. If required for navigation or other water-dependent uses that require an estuarine location or if specifically allowed by the applicable management unit requirements of this goal; and,

“b. If a need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights; and

“c. If no feasible alternative upland locations exist; and,

“d. If adverse impacts are minimized.”

1           **A. Need/Substantial Public Benefit**

2           Under CBEMP Policy 5(I)(a), the county found that the proposed  
3 dredging is required for a “water-dependent use that requires an estuarine  
4 location[,]” the water-dependent use being components of the LNG terminal.  
5 The Statewide Planning Goals define “water-dependent” in relevant part as “[a]  
6 use or activity which can be carried out only on, in, or adjacent to water areas  
7 because the use requires access to the water body for water-borne  
8 transportation, recreation, energy production, or source of water.” *See* full  
9 quote at n 26, below. Oregon Shores does not challenge the county’s finding  
10 that the LNG terminal is a “water-dependent” use for purposes of CBEMP  
11 Policy 5(I)(a) or Goal 16.<sup>5</sup>

12           With respect to CBEMP Policy 5(I)(b), Oregon Shores argues that the  
13 county misconstrued the need/substantial public benefit standard in three  
14 ways.<sup>6</sup> First, Oregon Shores argues that the county erred in interpreting  
15 CBEMP Policy 5(I)(b) to require evaluation only of the public benefits of the

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<sup>5</sup> However, as discussed below, intervenors-petitioners Rogue Intervenors challenges the conclusion that an LNG *export* terminal qualifies as a “water-dependent use” for purposes of Goal 16 and CBEMP Policy 5(I)(a).

<sup>6</sup> Because CBEMP Policy 5 implements Goal 16, on review the county’s interpretations of the policy are not entitled to deference under ORS 197.829(1) or *Siporen v City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).



1 dredging activity itself, divorced from the public benefits of the land-based use  
2 that the dredging serves.<sup>7</sup>

3 We agree with Oregon Shores. If the “substantial public benefit”  
4 analysis is limited to evaluation of the public benefits of the dredge or fill  
5 activity itself, then the standard would never be met, as it is difficult to  
6 conceive of any public benefit from dredging or filling that is distinct from the  
7 use that dredging or filling serves. While the text of CBEMP Policy 5(I)(b)  
8 and Goal 16 IR2 is not entirely clear on this point, the context indicates that the  
9 four standards do not apply only to the proposed dredging or fill. We note that  
10 Goal 16 IR2(c) requires a finding that “no feasible alternative upland locations  
11 exist,” which clearly contemplates evaluation of the proposed land use, not  
12 proposed dredging, since dredging does not generally take place on upland  
13 locations. We conclude that, contrary to the county’s finding, CBEMP Policy  
14 5(I)(b) requires the county to evaluate the substantiality of the public benefits  
15 provided by the use that the proposed dredging serves, in this case the LNG

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<sup>7</sup> The county’s findings state on this point:

“The Board concludes that the term ‘need (substantial public benefit)’ used in Goal 16 and CBEMP Policy #5 refers to a public benefit *for the dredging activity*, and does not require the applicant to prove that there is a public need or benefit for the underlying proposed land use (*i.e.*, a marine slip and ship terminal, or more generally, an LNG export facility).” Record 86 (emphasis in original).

1 terminal, or at least those components of the terminal that are properly viewed  
2 as water-dependent uses.

3 Next, Oregon Shores argues that the county erred in interpreting CBEMP  
4 Policy 5(I)(b) to require evaluation only of the public benefits, and not to  
5 require any consideration of detriments or adverse impacts.<sup>8</sup> The county's  
6 interpretation of Policy 5(I)(b) is based on the observation that the adjoining  
7 Policy, CBEMP Policy 5(I)(a), expressly requires that the proponent of a non-  
8 water-dependent use demonstrate that there is a need for the use that  
9 "outweighs harm to navigation, fishing and recreation[.]" See n 3. As the  
10 findings note, this expressly required balancing test implements a statute. The  
11 county inferred that because CBEMP Policy 5(I)(b) does not expressly require  
12 a similar balancing test, the drafters of CBEMP Policy 5(I)(b) did not intend  
13 the county to engage in a similar balancing of benefits and detriments.

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<sup>8</sup> The county's findings state, in relevant part:

"[T]he Board specifically rejects the argument that the [']public need/benefit' standard requires the County to balance need/benefit with (and weigh against) public detriments. In the previous sentence of Policy 5, the drafters required that an applicant for a non-water-dependent use to demonstrate that dredging and fill 'is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing and recreation.' That specific language did not come out of Goal 16, but rather is taken from ORS 196.825(4). Had the drafters of the CBEMP intended to impose a similar balancing test requirement on to the 'public need/benefit' standard, they could [] easily have done so (as they expressly did in the prior sentence), but they chose not to do so." Record 88.

1           As Oregon Shores argues, the question is not what the drafters of  
2 CBEMP Policy 5 intended, but what the drafters of Goal 16 IR2 intended,  
3 which CBEMP Policy 5(I)(b) implements almost verbatim. The text of Goal 16  
4 IR2(b) does not expressly require balancing or weighing of benefits against  
5 detriments, but requires only a demonstration of a “substantial public benefit.”  
6 That could be understood to represent a “net” public benefit, after  
7 consideration of both benefits and detriments. However, the fact that another  
8 implementation requirement, Goal 16 IR2(d), requires that “adverse impacts  
9 are minimized” suggests that potential adverse consequences of the proposed  
10 use are evaluated under a different standard. Given the absence of an express  
11 or a fairly implied requirement to balance or weigh benefits against adverse  
12 consequences under Goal 16 IR2(b), and the fact that adverse consequences are  
13 expressly addressed under a different standard, we decline to read Goal 16  
14 IR(2)(b) to include an implicit requirement to balance or weigh public benefits  
15 of the proposed use against adverse consequences.

16           Finally, Oregon Shores challenges the county’s view that the  
17 “need/substantial public benefit” standard is satisfied if the dredging activity is  
18 needed to construct a permitted or conditional use allowed on the nearby  
19 coastal shorelands or upland areas.<sup>9</sup> Oregon Shores argues that this

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<sup>9</sup> The county’s findings state, in relevant part:

“The Board believes that the ‘need/substantial benefit’ standard is met if the applicant demonstrates that the dredging or fill activity

1 interpretation conflates CBEMP Policy 5(I)(a) with 5(I)(b), and Goal 16 IR2(a)  
2 with IR2(b). According to Oregon Shores, the fact a water-dependent use is  
3 allowed on coastal shorelands under the county's zoning code does not  
4 automatically demonstrate that there is a "substantial public benefit" for  
5 purposes of CBEMP Policy 5(I)(b) and Goal 16 IR2(b).

6 We agree with Oregon Shores. CBEMP Policy 5(I)(a) and Goal 16  
7 IR2(a) in relevant part require that the proposed dredging serve a water-  
8 dependent use allowed under the county's code. The county's view that the  
9 "need/substantial public benefit" standard in CBEMP Policy 5(I)(b) and Goal  
10 16 IR2(b) is met simply by the fact that the proposed dredging serves a use  
11 allowed under the county's code, conflates CBEMP Policy 5(I)(a) and (b) and  
12 gives no independent effect to the latter. Even if the proposed dredging serves  
13 a water-dependent use allowed under the county's code, the county can allow

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is needed to enable [construction of] a permitted or condition[al]  
use allowed in the neighboring coastal shoreland zone and related  
upland zones. In other words, Coos County has, via its enactment  
of the CBEMP (aka: Zoning Ordinance), set forth the panoply of  
uses that the County believes would serve a need and/or a  
substantial public benefit in each particular zone (*i.e.*, it has  
established a list of uses that are deemed to be appropriate in each  
zone in question.). If the applicant is proposing one of those  
favored uses, and there is a need to conduct fill or dredging  
activity in order to facilitate that favored use, then there is, *ipso  
facto*, a substantial benefit to allowing the applicant to conduct  
that fill/removal so that it can construct and operate the use."  
Record 88 (emphasis in original).

1 the dredging only if it also finds that the use provides a substantial public  
2 benefit.

3 **B. Interference with Public Trust Rights**

4 CBEMP Policy 5(I)(b) and Goal 16 IR2(b) also require that the proposed  
5 dredging does not unreasonably interfere with public trust rights. The public  
6 trust doctrine protects public access to and use of navigable waters and  
7 submerged lands, for navigation, fishing and commercial uses. *See, e.g., Weise*  
8 *v. Smith*, 3 Or 445, 450 (1869) (stating that navigable waters are “public  
9 highways” that each person has an “undoubted right to use \* \* \* for all  
10 legitimate purposes of trade and transportation.”).

11 **1. Navigable Water**

12 Oregon Shores first argues that the county erred by limiting the scope of  
13 public trust assets to submerged lands, and failing to include the waters  
14 overlaying those lands. JCEP responds that, while the findings cite to a circuit  
15 court case stating that the public trust doctrine protects only submerged lands,  
16 the findings in fact evaluate impacts on navigation and fishing and other uses  
17 of the navigable waters overlaying submerged lands. As discussed below,  
18 JCEP is correct that the county in fact evaluated impacts on navigation, fishing  
19 and other uses of navigable water, and did not limit its analysis to impacts on  
20 submerged lands.

1                   **2. Security Zone**

2           Oregon Shores next challenges the county’s findings regarding the  
3 impact of security zones around LNG tankers on commercial and recreational  
4 boat movements in the estuary. The application proposes that approximately  
5 100 LNG tankers will traverse the Coos Bay Estuary to and from the LNG  
6 terminal per year. For each passage, the Coast Guard will impose a security  
7 zone extending 500 yards from the tanker in all directions, in which all other  
8 vessel movements are restricted. Oregon Shores argues that, because portions  
9 of the estuary are less than 1,000 yards wide, each tanker passage will  
10 completely halt navigation, fishing and commercial use of those portions of the  
11 estuary until the LNG tanker passes. Oregon Shores contends that the county’s  
12 conclusion that the proposed security zone provisions will not unreasonably  
13 interfere with public trust rights relies on an inference from testimony in the  
14 record that is not supported by substantial evidence.

15           The record includes a statement from the Coast Guard that it will “allow  
16 vessels to transit the Safety/Security zone based on a case-by-case assessment  
17 conducted on scene.” Record 3033. JCEP’s consultant, Amergent Techs,  
18 interpreted this statement to mean that the Coast Guard would allow some  
19 boats to transit the security zone with minimal delay. Record 1817. In its  
20 findings, the county understood Amergent’s testimony to be that all “known”  
21 boats would be allowed to transit the security zone without delay, presumably  
22 meaning only unknown boats will be delayed. Based on that understanding,

1 the county concluded that tanker passage would not unreasonably interfere  
2 with navigation or public trust access to the estuary.<sup>10</sup>

3 Nothing in the record cited to us explains the distinction between a  
4 “known” and “unknown” boat. That problem aside, as Oregon Shores argues,  
5 the county’s understanding that all “known” boats would be able to transit the  
6 security zone with minimal delay is not supported by the Amergent Techs  
7 memo, much less by the Coast Guard statements in the record. Neither the  
8 Amergent Techs memo nor the Coast Guard statements suggest that the Coast  
9 Guard’s case-by-case evaluation would rely on a distinction between “known”  
10 and “unknown” boats, and allow the former passage through the security zone

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<sup>10</sup> The county’s findings state, in relevant part:

“The testimony from Amergent Techs provides clarifications regarding the limited impacts caused by LNG vessel passage and docking in Coos Bay. Importantly, the memo clarifies that the Safety/Security zones are not ‘exclusion zones.’ Rather, they are regulated navigation areas. Essentially, that means that the Coast Guard will control traffic near the LNG ships but will still allow boat pilots [to] transit the zone on a case-by-case basis. The Board’s understanding of this explanation is that the Coast Guard will let known vessels pass but can forcibly exclude vessels or delay [vessels] that it does not recognize. As a practical matter, local commercial fishermen operating known vessels should experience no significant delays as they will receive permission from the COTP [Captain of the Port] to proceed. Less frequent users of the bay, such as recreational boaters, may experience some delay as the COTP makes efforts to identify them and conduct a threat assessment. Given that clarification, the Board believes that there will be no unreasonable interference with public trust rights. \* \* \*” Record 100-01.

1 without delay, although that may well be the case. The county’s findings rely  
2 on its understanding of the Amergent Techs testimony as the primary basis for  
3 its conclusion that the transit of approximately 100 LNG tankers per year  
4 through the narrow estuary will not unreasonably interfere with navigation or  
5 public trust access to the estuary. JCEP argues that there is other evidence in  
6 the record that could support that conclusion, noting testimony that delay  
7 caused to recreational or fishing vessels by an LNG vessel would last only 20-  
8 30 minutes, and that the LNG transit times would be announced in advance, so  
9 local vessels could make plans to avoid the narrow portions of the estuary at  
10 those times. Record 3764. While that evidence could lend support to a finding  
11 that LNG tanker transit will not unreasonably interfere with public trust rights,  
12 the findings do not cite that evidence, and JCEP does not argue that that  
13 evidence is sufficient, in itself, to “clearly support[]” the county’s decision on  
14 this point, in the absence of adequate findings. ORS 197.835(11)(b).<sup>11</sup> We

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<sup>11</sup> ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”



1 agree with Oregon Shores that remand is necessary for the county to adopt  
2 more adequate findings, supported by substantial evidence, on this point.

### 3 **3. Adverse Impacts of Climate Change**

4 Rogue Intervenors argue in their third assignment of error that the county  
5 erred in failing to consider the adverse impacts of climate change created by  
6 LNG shipped via the LNG terminal, in evaluating whether the proposed  
7 dredging serves a use that provides “substantial public benefits” and does not  
8 unreasonably interfere with public trust rights. Rogue Intervenors contend that  
9 in evaluating both standards the county must consider the impact of greenhouse  
10 gas emissions on ocean acidification, sea level rise and other climatic changes.

11 We disagree with Rogue Intervenors. As discussed above, the  
12 “substantial public benefits” standard does not include an implicit requirement  
13 to balance the public benefits of the proposed LNG terminal against detriments  
14 or adverse impacts of that use, much less consider the adverse effects of  
15 greenhouse gases on climate that could be attributed to the eventual  
16 consumption of the natural gas that is shipped to markets around the world via  
17 the LNG facility. Nor have Rogue Intervenors established that the public trust  
18 doctrine requires evaluation of the contributions of greenhouse gases  
19 attributable to consumption of natural gas shipped via the terminal.

20 The second assignment of error (Oregon Shores) is sustained, in part.

21 The third assignment of error (Rogue Intervenors) is denied.

1 **THIRD ASSIGNMENT OF ERROR (OREGON SHORES)**

2 As noted above, CBEMP Policy 5(I)(d) allows dredging in development  
3 aquatic management units (5-DA and 6-DA) only if “[a]dverse impacts are  
4 minimized.” CBEMP Policy 5(II) provides that “[i]dentification and  
5 minimization of adverse impacts as required in [Policy 5(I)(d)] shall follow the  
6 procedure set forth in Policy 4.” CBEMP Policy 4(I)(d) provides in relevant  
7 part that dredging and fill in development aquatic units must be supported by  
8 findings demonstrating “the public’s need and gain which would warrant any  
9 modification or loss to the estuarine system, based upon a clear presentation of  
10 the impacts of the proposed alteration, as implemented in Policy #4a.”<sup>12</sup>  
11 CBEMP Policy 4(II) sets out standards for an impact assessment.<sup>13</sup> CBEMP

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<sup>12</sup> CBEMP Policy 4(I)(d) provides, in part”

“Where the impact assessment requirement (of Goal #16 Implementation Requirements #1) has not been satisfied in this Plan for certain uses or activities [as identified in Policy #4] then such uses or activities shall not be permitted until findings demonstrate the public’s need and gain which would warrant any modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a.”

<sup>13</sup> CBEMP Policy 4(II) provides, in relevant part:

“An impact assessment need not be lengthy or complex, but it should give reviewers an overview of the impacts to be expected. It may include information on:

“a. the type and extent of alterations expected;

1 Policy 4a includes additional requirements and procedures for the impact  
2 assessment.

3 Oregon Shores argues that the county failed to adopt any findings  
4 addressing CBEMP Policy 4 or 4a, or provide a “clear presentation of the  
5 impacts of the proposed alteration[.]” Oregon Shores notes that the record  
6 includes an analysis of the impacts of proposed dredging, prepared by David  
7 Evans & Associates (DEA), at Record 1900-03. However, Oregon Shores  
8 argues that the county did not adopt the DEA analysis as part of its findings,  
9 and further that the DEA analysis did not follow the procedure set out in  
10 CBEMP Policy 4a.

11 JCEP concedes that the county did not adopt findings directly addressing  
12 CBEMP Policy 4 or 4a, but argues that the record includes evidence that  
13 “clearly supports” a finding of compliance with those policies, and therefore  
14 the decision may be affirmed on this point notwithstanding inadequate  
15 findings, pursuant to ORS 197.835(11)(b). *See* n 11. JCEP argues that the  
16 record includes ample evidence that the “public’s need and gain” would

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“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.”

1 warrant any modification or loss to the estuarine system, in the forms of  
2 economic gains from the proposed terminal. CBEMP Policy 4(I)(d). JCEP  
3 contends that the DEA analysis at Record 1900-03 provides the “clear  
4 presentation of the impacts” of the proposed dredging that CBEMP Policy 4  
5 requires, and LUBA should rely on the DEA analysis to conclude that CBEMP  
6 Policy 4 is met.

7       The “clearly supports” standard of review at ORS 197.835(11)(b) allows  
8 LUBA to overlook nonexistent or inadequate findings only if compliance with  
9 the applicable approval standard is “obvious” or “inevitable.” *Marcott*  
10 *Holdings v. City of Tigard*, 30 Or LUBA 101 (1995). CBEMP Policy 4  
11 requires the county to exercise considerable subjective judgment, including  
12 identifying “the public’s need and gain,” and determining whether that need or  
13 gain warrants modification or loss to the estuarine system, and to ensure that  
14 impacts of the proposed alteration are minimized or mitigated. ORS  
15 197.835(11)(b) does not authorize LUBA to affirm decisions based on LUBA’s  
16 evaluation of evidence under standards such as CBEMP Policy 4, which  
17 require the exercise of significant subjective judgment. Accordingly, we agree  
18 with Oregon Shores that remand is necessary for the county to adopt findings  
19 addressing compliance with CBEMP Policy 4 and 4a.

20       The third assignment of error (Oregon Shores) is sustained.

1 **FOURTH ASSIGNMENT OF ERROR (OREGON SHORES)**

2 Proposed development in coastal shorelands, in the 6-WD (Water-  
3 Dependent Development Shorelands) and 7-D (Development Shorelands)  
4 zones, is subject to compliance with CBEMP Policy 30, which requires in  
5 relevant part that the county justify development in these areas “only upon the  
6 establishment of findings that shall include at least \* \* \* [m]ethods for  
7 protecting the surrounding area from any adverse effects of the development[.]”  
8 CBEMP Policy 30(I)(c).<sup>14</sup> This language implements Statewide Planning Goal  
9 18 (Beaches and Dunes), Implementation Requirement 1(c) (Goal 18 IR1(c)).

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<sup>14</sup> CBEMP Policy 30(I) provides:

“Coos County shall permit development within areas designated as ‘Beach and Dune Areas with Limited Development Suitability’ on the Coos Bay Estuary Special Considerations Map only upon the establishment of findings that shall include at least:

- “a. The type of use proposed and the adverse effects it might have on the site and adjacent areas;
- “b. Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;
- “c. Methods for protecting the surrounding area from any adverse effects of the development; and
- “d. Hazards to life, public and private property, and the natural environment which may be caused by the proposed use; and

1 JCEP's consultant prepared a site investigation report addressing  
2 CBEMP Policy 30(I), which identified "erosion and migration of disturbed  
3 dune sands from the site" as an adverse effect of development for purposes of  
4 CBEMP Policy 30(I)(c). To identify "methods for protecting" the surrounding  
5 beach and dune areas from those adverse impacts, the report relied on "State  
6 DEQ and FERC permits that require mitigation of erosion, re-vegetation, and  
7 monitoring of permanent stabilization measures." Record 9801.

8 Oregon Shores argues that the report fails to identify methods for  
9 "protecting" surrounding beaches and dunes from the identified adverse  
10 impacts. According to Oregon Shores, the term "protect[]" as used in CBEMP  
11 Policy 30(I)(c) and Goal 18 IR1(c) has the same meaning as the term "protect"  
12 as defined in the statewide planning goals, *i.e.*, "[s]ave or shield from loss,  
13 destruction, or injury for future intended use." Oregon Shores notes that  
14 LUBA has interpreted the term "protect" as used in the context of Goal 16 to  
15 require measures that will reduce the adverse impacts of development to a *de*  
16 *minimis* or insignificant level. *Columbia Riverkeeper v. Clatsop County*, 61 Or  
17 LUBA 96, 111, *aff'd* 238 Or App 439, 464-65, 243 P3d 82 (2010). Oregon

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"e. Whether drawdown of groundwater would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of saltwater into water supplies.

"Implementation shall occur through an administrative conditional use process which shall include submission of a site investigation report by the developer that addresses the five considerations above."

1 Shores contends that mitigation and monitoring do nothing to reduce impacts to  
2 a *de minimis* level.

3 JCEP responds that the report describes more than mitigation and  
4 monitoring, but also prescribes re-vegetation and stabilization measures to  
5 reduce erosion and migration of disturbed sand. Record 9800-01. Oregon  
6 Shores does not present any argument regarding why the proposed re-  
7 vegetation and stabilization of soils are insufficient to ensure compliance with  
8 CBEMP Policy 30(I)(c). Absent a more developed argument, we agree with  
9 JCEP that Oregon Shores fails to explain why re-vegetation and stabilization  
10 measures are insufficient to satisfy CBEMP Policy 30(I)(c).

11 Oregon Shores also argues that the county erred in dismissing concerns  
12 raised by Oregon Shores and the State of Oregon regarding potential  
13 subsidence from dewatering activities during construction of the tank/slip  
14 facilities within the 6-WD zone. Record 7751, 8178. The county concluded  
15 that subsidence or site stability due to dewatering is not an issue that is within  
16 the scope of the only provision of the policy that explicitly addresses impacts  
17 on groundwater, CBEMP Policy 30(I)(e). *See* n 14; record 135. Oregon  
18 Shores argues, however, that subsidence due to dewatering is a potential issue  
19 under CBEMP Policy 30(I)(c), because it could constitute an “adverse effect[]  
20 of the development” on the surrounding area within the meaning of subsection  
21 (c).

1 JCEP responds that the county adopted an alternative finding that the  
2 proposed groundwater dewatering is “within historic levels that did not lead to  
3 the loss of stabilizing vegetation,” and that Oregon Shores failed to challenge  
4 that alternative finding. Record 135. However, the quoted finding addresses  
5 “loss of stabilizing vegetation,” which is an issue addressed under CBEMP  
6 Policy 30(I)(e). *See* n 14. Oregon Shores’ argument is based on the language  
7 of CBEMP Policy 30(I)(c). If there are findings concluding that subsidence  
8 from proposed dewatering is not a potential issue under CBEMP Policy  
9 30(I)(c), JCEP does not cite them. We conclude that remand is necessary to  
10 address whether subsidence is a potential issue under CBEMP Policy 30(I)(c)  
11 and, if so, adopt findings resolving that issue.

12 Finally, Oregon Shores argues that the finding of compliance with  
13 CBEMP Policy 30(I)(c) relies on the applicant obtaining FERC permits, but  
14 notes that FERC has denied JCEP the permits for the proposed LNG terminal.  
15 This issue is raised under the sixth assignment of error, and we address it there.

16 The fourth assignment of error is sustained in part.

17 **FIFTH ASSIGNMENT OF ERROR (OREGON SHORES)**

18 The county approved placing fill in the 7-D (Development Shorelands)  
19 zone, which is subject to “special conditions” at Coos County Land  
20 Development Ordinance (LDO) 3.2.286. Special Condition 5 states that “[t]he  
21 wetland in the southeast portion of this district can be filled for a development  
22 project contingent upon satisfaction of the prescribed mitigation described in



1 Shoreland District #5.” The county’s finding of compliance with Special  
2 Condition 5 states:

3 “The Board finds that the application proposes fill in the southeast  
4 portion of this district for a development project and will mitigate  
5 in accordance with all prescribed mitigation. Therefore, the Board  
6 finds that the proposed fill is consistent with Special Condition 5.”  
7 Record 70.

8 Oregon Shores argues that the foregoing finding is inadequate and not  
9 supported by substantial evidence, because the county failed to identify the  
10 proposed mitigation, or explain how the proposed mitigation satisfies the  
11 “prescribed mitigation described in Shoreland District #5.”

12 JCEP does not dispute that the above-quoted finding is inadequate, but  
13 argues that no party raised any issue under Special Condition 5 during the  
14 proceedings below, and thus no party can challenge on appeal whether the  
15 county’s finding of compliance with Special Condition 5 is adequate, pursuant  
16 to ORS 197.763(1).

17 Oregon Shores replies that a participant submitted testimony below that  
18 at one point quotes Special Condition 5 and at another point raises objections  
19 to proposed mitigation at the West Jordan Cove Mitigation Site, which is  
20 apparently where the application proposed to conduct mitigation. Record  
21 5984. While that testimony does not advance any specific issues under Special  
22 Condition 5, it is sufficient to allow Oregon Shores to challenge the adequacy  
23 of the county’s findings addressing Special Condition 5. *Lucier v. City of*  
24 *Medford*, 26 Or LUBA 213, 216 (1993).

1 On the merits, we agree with Oregon Shores that the county's only  
2 finding of compliance with Special Condition 5 is conclusory and inadequate.  
3 The findings do not identify the proposed mitigation for fill in the wetland in  
4 the southeast portion of the 7-D district, or relate it in any way to "the  
5 prescribed mitigation described in Shoreland District #5." Remand is  
6 necessary for the county to adopt more adequate findings on this point.

7 The fifth assignment of error (Oregon Shores) is sustained.

8 **SIXTH ASSIGNMENT OF ERROR (OREGON SHORES)**

9 Oregon Shores argues that the county found compliance with CBEMP  
10 Policies 5, 8 and 30 based in part on the condition that JCEP obtain and comply  
11 with state and federal permits, including FERC permits.<sup>15</sup> However, Oregon  
12 Shores cites testimony that on March 11, 2016, during the proceedings before  
13 the hearings officer, FERC denied JCEP's application for a permit for the  
14 proposed LNG terminal. Because the required FERC permits have been  
15 denied, Oregon Shores argues, the county erred in relying on FERC permits to  
16 demonstrate compliance with applicable approval criteria. *See Bouman v.*  
17 *Jackson County*, 23 Or LUBA 626, 647 (1992) (where a local government

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<sup>15</sup> Oregon Shores advances a similar challenge to the county's findings of compliance with CBEMP Policy 17. However, in response to intervenor's waiver challenge Oregon Shores concedes that no issues were raised below under CBEMP Policy 17. Intervenor also argues that no issues were raised below under CBEMP Policy 30, but in its reply brief Oregon Shores cites to locations in the record where issues of compliance with Policy 30 were raised.

1 relies on the applicant obtaining state agency permits, the record must include  
2 substantial evidence that the applicant is not precluded as a matter of law from  
3 obtaining the state agency permits).

4 JCEP responds that at the time of the county's decision JCEP's request  
5 for FERC to reconsider its denial was still pending, and thus the record at that  
6 time included substantial evidence that JCEP was not precluded as a matter of  
7 law from obtaining the required FERC permits. JCEP acknowledges that FERC  
8 later denied its request for reconsideration, but argues the decision denying  
9 reconsideration post-dates the county's decision and thus is not in the  
10 evidentiary record (although LUBA has taken official notice of the decision  
11 denying reconsideration). JCEP also notes that LUBA has taken official notice  
12 of the fact that JCEP has initiated a pre-filing with FERC, which is a necessary  
13 step to filing a new application for a FERC permit. Thus, JCEP argues that  
14 even if LUBA looks beyond the evidentiary record there is no reason to  
15 conclude that JCEP is precluded, as a matter of law, from obtaining FERC  
16 permits for the LNG terminal.

17 The county's findings observe that "[i]f it stands" FERC's March 11,  
18 2016 permit denial decision "may very well kill the entire project, at least for  
19 the time being." Record 83. The findings note, however, that the primary basis  
20 for denial (lack of LNG contracts) could potentially be remedied, and further  
21 noted that JCEP had appealed the March 11, 2016 denial. *Id.* However, the  
22 findings do not appear to address whether or not the March 11, 2016 denial

1 means that JCEP is precluded, as a matter of law, from obtaining FERC permits  
2 for the LNG terminal. As noted, with respect to several policies the findings  
3 expressly rely on JCEP obtaining FERC permits in order to satisfy applicable  
4 county criteria. In our view, given that the required FERC permit had, in fact,  
5 been denied during the proceeding before the county, the county erred in  
6 adopting findings of compliance with local approval standards that are  
7 unconditionally predicated on the applicant obtaining a FERC permit, without  
8 first addressing whether the denial means that JCEP is precluded, as a matter of  
9 law, from obtaining the FERC permit. Remand is necessary for the county to  
10 consider that question, and on remand the county may consider the FERC  
11 decisions or applications that post-date the county's decision in this appeal.

12 The sixth assignment of error (Oregon Shores) is sustained.

13 **SEVENTH ASSIGNMENT OF ERROR (OREGON SHORES)**

14 JCEP proposes to construct the Southwest Oregon Regional Safety  
15 Center (SORSC) on a parcel zoned for industrial and water-dependent uses.<sup>16</sup>  
16 The SORSC is a large “multiorganizational office complex” on eight acres that  
17 includes a fire station as one component. Record 143-44. A fire station is a  
18 permitted use in the industrial zone. Record 143. The proposed fire station  
19 would have a daily staff of four persons. Record 9826. The SORSC also

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<sup>16</sup> Apparently, the SORSC facility is intended to meet the requirements of a 2014 Memorandum of Understanding entered into between intervenor and the State of Oregon.

1 includes a number of other components, including (1) offices for the Coos  
2 County sheriff, Coast Guard, and Port of Coos Bay, (2) a security center, (3) a  
3 personal safety access point (apparently a type of emergency call center), and  
4 (4) a training center for the sheriff and Southwestern Oregon Community  
5 College. Record 144. These uses would have a daily staff of approximately 12  
6 persons. The training center includes classrooms to train up to 100 persons.  
7 Record 9826. All the latter components of the SORSC are not allowed uses in  
8 the industrial zone. However, the county approved them as “accessory uses” to  
9 the fire station.

10 According to the county’s decision, LDO 2.1.200 defines “accessory  
11 uses” as uses that (1) are subordinate to and serve a principal use; (2)  
12 subordinate in area or purpose to that principal use; (3) contribute to the  
13 comfort, convenience, or necessity of occupants of the principal use; and (4)  
14 are located on the same unit of land as the principal use. Record 144.<sup>17</sup> The

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<sup>17</sup> The version of the LDO 2.1.200 definition of “accessory use” available on the county’s website is different than the version paraphrased in the decision, perhaps reflecting an inaccurate paraphrase, or more recent amendments. The website version states:

“ACCESSORY USE: A use, building or structure that is (1) customarily incidental and subordinate to the principal use, main building or structure, and (2) subordinate in extent, area and purpose to the principal use. A use that constitutes, in effect, conversion to a use not permitted in the district is not an accessory use.”

1 county rejected arguments that the various SORSC components are not  
2 “subordinate” to the fire station:

3 “The SORSC serves, and is subordinate in purpose to, the Fire  
4 Station because the SORSC is a training center for firefighters  
5 who will work at the Fire Station. The SORSC contributes to the  
6 comfort and convenience of the firemen who utilize the Fire  
7 Station because the SORSC offers training to current and future  
8 firefighters. \* \* \*

9 “\* \* \* \* \*

10 “\* \* \* Although the SORSC will house government offices for the  
11 Coos County Sheriff, the Coast Guard, and the Port, these ‘offices’  
12 are permitted in conjunction with a permitted or conditionally  
13 permitted use. [LDO] 4.4.200(26). In this regard, this is no  
14 different than a fast food restaurant that has a manager’s office—  
15 the office is not a separate land use from a restaurant but is rather  
16 an inherent part of the restaurant. In this case, the offices will  
17 occur in conjunction with the Fire Station, which is a permitted  
18 use under [LDO 4.4.200(20). \* \* \*” Record 144.

19 Oregon Shores argues that the county’s finding that the SORSC is  
20 “subordinate” to the fire station misconstrues the applicable law and is not  
21 supported by substantial evidence. According to Oregon Shores, no reasonable  
22 person could conclude that the various government office and educational  
23 components that make up the bulk of the SORSC, including a regional training  
24 facility for up to 100 persons, are “subordinate” to a local fire station staffed by  
25 four firefighters.

26 JCEP responds that the county’s interpretation of the code term  
27 “accessory use” is not inconsistent with the express language of that term, as  
28 defined, and must be affirmed under the deferential standard of review that

1 LUBA must apply to a governing body's code interpretations, under ORS  
2 197.829(1) and *Siporen*, 349 Or at 259.<sup>18</sup> JCEP argues that the county viewed  
3 the SORSC office components to be an enhancement to the fire station, finding  
4 that "offices for public safety and security entities \* \* \* will have a role in  
5 responding to fire and other natural events as service providers." Record 144.  
6 With respect to the training center, JCEP does not dispute that it will function  
7 as a training center for fire fighters and other emergency responders from  
8 around the region, not limited to training staff at the fire station, but argues that

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<sup>18</sup> ORS 197.829 provides:

- "1. [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
  - "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
  - "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
  - "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
  - "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
- "2. If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

1 the LDC definition of “Accessory Uses” does not require that an accessory use  
2 serve *only* the principal use.

3 The county’s “interpretation” is conclusory, and largely inadequate for  
4 review. The findings do not attempt to explain the meaning of “subordinate”  
5 and the other key terms in the LDO 2.1.200 definition of “accessory use,” and  
6 the rationales offered for the county’s conclusion are strained at best. The  
7 findings analogize the proposed government offices (sheriff, port, coast guard)  
8 to the offices for a primary business use, providing the example of an office for  
9 a restaurant. The flaw in that analogy is that the proposed government offices  
10 are not “offices” for the fire station. It may be true that staff in the government  
11 offices will occasionally provide support for the fire station, during an  
12 emergency, for example. But that is not the *function* of those government  
13 offices; any support the offices might provide to the fire station in an  
14 emergency would be, at best, ancillary to the offices’ main function. Even if,  
15 as JCEP argues, the LDO 2.1.200 definition of “accessory use” does not limit  
16 an accessory use to serving *only* the primary use, it is difficult to understand  
17 how a use can be viewed as “accessory” to the primary use when any support or  
18 service it provides to the primary use is ancillary, and the purported  
19 “accessory” use has a main function that has nothing to do with the primary  
20 use.

21 Similarly, with respect to the regional training center, the fact that the  
22 four firefighters staffing the fire station may take classes at the 100-seat



1 training center does little to demonstrate that the training center is  
2 “subordinate” to the fire station, under any conceivable interpretation of that  
3 term. LDO 2.1.200 requires that the accessory use be “subordinate in area or  
4 purpose to that principal use[.]” However, the findings do not discuss whether  
5 any of the SORSC components are subordinate in “area” or “purpose” to the  
6 fire station. The findings do not describe how much area is occupied by the fire  
7 station, versus the area occupied by other SORSC components, or discuss the  
8 purpose of those components, and to what extent those components “serve” the  
9 fire station, as opposed to serving other purposes.<sup>19</sup>

10 Because the findings are conclusory and do not address key language  
11 and considerations in the code definition of “accessory use,” it is hard to say  
12 whether the county’s conclusion that the SORSC components are accessory to  
13 the fire station embodies an interpretation of LDO 2.1.200 that is inadequate  
14 for review, or an interpretation that is simply implausible, *i.e.*, inconsistent with  
15 the express language, purpose and policy underlying LDO 2.1.200. To the  
16 extent the county’s decision interprets LDO 2.1.200 to the effect that a use is  
17 “subordinate” to a primary use as long as it provides some support to the  
18 primary use, regardless of how minimal and tangential that support is compared

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<sup>19</sup> As far as we can tell, the findings do not discuss the proposed security center, or the personal safety access point (which we understand to be a type of emergency call center). It is possible that these uses are allowed in the industrial zone under the category of “emergency services,” a permitted use that includes the proposed fire station. LDO 4.4.210(4). However, without findings about the nature of these uses, it is hard to tell.

1 to the putative accessory use’s purpose and function, we reject the  
2 interpretation as implausible.

3 We do not intend to foreclose the possibility that the board of  
4 commissioners can adopt an interpretation of LDO 2.1.200 that is sustainable  
5 under the deferential standard of review we apply under ORS 197.829(1)(a),  
6 supporting a conclusion that some or all of the SORSC components are  
7 “accessory” to the fire station, as defined at LDO 2.1.200. However, the  
8 present decision includes no such interpretation. Further, any sustainable  
9 interpretation of LDO 2.1.200 must give effect to all of its applicable terms.  
10 The findings do not include an interpretation, at least one adequate for review,  
11 explaining why the proposed SORSC components are subordinate to and serve  
12 a principal use, and subordinate in area or purpose to that principal use. Or, in  
13 the words of the version of LDO 2.1.200 on the county’s website, whether the  
14 SORSC uses are “customarily incidental and subordinate to the principal use,”  
15 and “subordinate in extent, area and purpose to the principal use.” *See* n 17.  
16 Because it may be possible on remand for the county to adopt a more  
17 sustainable interpretation under which at least some components of the SORSC  
18 can be viewed as subordinate to the fire station use, we conclude that it is  
19 appropriate to remand this issue to the county for further proceedings.

20 The seventh assignment of error (Oregon Shores) is sustained.

1 **FIRST ASSIGNMENT OF ERROR (McCAFFREE)**

2 Intervenor-petitioner Jody McCaffree (McCaffree) argues that (1) the  
3 county commission chair, Sweet, was biased in favor of the proposed LNG  
4 terminal and (2) the county commissioners failed to declare *ex parte*  
5 communications.

6 **A. Bias**

7 McCaffree alleges that Chair Sweet was biased in favor of the proposed  
8 LNG terminal. According to McCaffree, on April 22, 2016, Chair Sweet sent a  
9 letter, on county letterhead, to FERC expressing support for the Jordan Cove  
10 LNG terminal and Pacific Connector Pipeline Project applications then pending  
11 before FERC. Supplemental Record 527. In addition, McCaffree quotes Chair  
12 Sweet as making public statements in support of the Jordan Cove project. *Id.* at  
13 529-30. McCaffree contends that the letter and statements demonstrate that  
14 Chair Sweet was incapable of deciding the land use application pending before  
15 the county with the requisite impartiality.

16 In order to succeed in a bias claim, the petitioner must first establish that  
17 the evidence of bias offered by petitioner relates to the “matter” before the  
18 tribunal. *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 608-10,  
19 341 P3d 790 (2014). The “matter” is “precisely and narrowly defined,” as the  
20 individual land use decision that the county board of commissioners considered  
21 and decided in the local proceeding. *Id.* at 608.

1           Second, in order to disqualify a decision-maker from participating, a  
2 party must meet the “high bar for disqualification,” demonstrating that “actual  
3 bias” has occurred, not simply an “appearance of bias.” *Columbia Riverkeeper*,  
4 267 Or App at 610; cf. *Friends of Jacksonville v. City of Jacksonville*, 42 Or  
5 LUBA 137 (2002) (finding actual disqualifying bias occurred when a city  
6 council member stated during his election campaign that he could not be  
7 objective in reviewing a pending application were he to be elected).

8           Finally, to demonstrate actual bias, the petitioner must establish that “the  
9 decision maker has so prejudged the particular matter as to be incapable of  
10 determining its merits on the basis of the evidence and arguments presented.”  
11 *Columbia Riverkeeper*, 267 Or App at 602. To demonstrate actual bias,  
12 petitioner must identify “explicit statements, pledges, or commitments that the  
13 elected local official has prejudged the specific matter before the tribunal.” *Id.*  
14 at 609-10.

15           We disagree with McCaffree that Chair Sweet’s April 11, 2016 letter, or  
16 his public statements, demonstrate that Chair Sweet was incapable of  
17 determining the merits of the land use application based on the evidence and  
18 arguments presented. As the Court of Appeals recently explained in *Columbia*  
19 *Riverkeeper*, 267 Or App at 599:

20           “A judge is expected to be detached, independent and nonpolitical.  
21 A county commissioner, on the other hand, is expected to be  
22 intensely involved in the affairs of the community. He is elected  
23 because of his political predisposition, not despite it, and he is  
24 expected to act with awareness of the needs of all elements of the

1 county, including all government agencies charged with doing the  
2 business of the people.

3 “\* \* \* \* \*

4 “The goal of [the *Fasano v. Washington County Commission*, 264  
5 Or 574, 588, 507 P2d 23 (1973) impartiality requirements] is that  
6 land-use decisions should be made fairly. \* \* \* *Fasano* cannot be  
7 applied so literally that the decision-making system is aborted  
8 because an official charged with the public duty of adjudication  
9 fears that his motivation might possibly be suspect.” (Internal  
10 citations and quotation marks omitted).

11 As far as McCaffree has established, Chair Sweet’s statements of support  
12 of the LNG terminal represent no more than the general appreciation of the  
13 benefits of local economic development that is common among local  
14 government elected officials. Those statements fall far short of demonstrating  
15 that Chair Sweet was not able to make a decision on the land use application  
16 based on the evidence and arguments of the parties.

17 **B. *Ex Parte* Communications**

18 McCaffree also argues that the commission erred by failing to disclose  
19 the contents of Chair Sweet’s April 11, 2016 letter to FERC during the  
20 proceedings below, and by failing to disclose that Chair Sweet attended a  
21 luncheon in 2014 at which JCEP’s representative offered a presentation about  
22 the proposed LNG terminal. Another commissioner, Main, also attended the  
23 luncheon, and disclosed that he had attended the luncheon and heard the  
24 presentation, which he characterized as general in nature.

25 ORS 215.422(3) provides:

1 “No decision or action of a planning commission or county  
2 governing body shall be invalid due to *ex parte* contact or bias  
3 resulting from *ex parte* contact with a member of the decision-  
4 making body, if the member of the decision-making body  
5 receiving the contact:

6 “(a) Places on the record the substance of any written or oral *ex*  
7 *parte* communications concerning the decision or action;  
8 and

9 “(b) Has a public announcement of the content of the  
10 communication and of the parties’ right to rebut the  
11 substance of the communication made at the first hearing  
12 following the communication where action will be  
13 considered or taken on the subject to which the  
14 communication related.”

15 In response, JCEP argues, and we agree, that the letter from Chair Sweet  
16 to FERC does not qualify as *ex parte* contact for two reasons. First, the letter  
17 from Chair Sweet to FERC is not “*ex parte* contact” because it does not  
18 “concern[] the decision or action” made by the county commission as required  
19 by ORS 215.422(3)(a), but rather it concerns a separate decision or action by  
20 FERC. Second, the letter from Chair Sweet does not qualify as an “*ex parte*  
21 contact” because the letter was *from* Chair Sweet *to* FERC. As the text of ORS  
22 215.422(3) indicates, the statute only governs required disclosures when the  
23 decision-maker “receiv[es] the contact.” As a result, no disclosure of the April  
24 11, 2016 letter was required pursuant to the statute.

25 With respect to Chair Sweet’s attendance at a 2014 luncheon  
26 presentation by JCEP on the LNG project, intervenor does not dispute that  
27 Sweet failed to disclose the content of the presentation, which the other

1 attending commissioner, Main, treated as an *ex parte* communication. It may  
2 be that the presentation does not qualify as an *ex parte* communication, or if so  
3 that Main's disclosure was sufficient for both commissioners. However,  
4 because the county's decision must be remanded for other reasons, it is  
5 appropriate to remand also to allow Chair Sweet to disclose the substance of  
6 any *ex parte* communications that occurred at the presentation.

7 The first assignment of error (McCaffree) is sustained, in part.

8 **SECOND ASSIGNMENT OF ERROR (McCAFFREE)**

9 In her second assignment of error, McCaffree argues that in the  
10 proceedings below, the county hearings officer misapplied applicable law and  
11 prejudiced McCaffree's rights due to bias against unrepresented parties. Citing  
12 to various statements by the hearings officer, McCaffree argues that the  
13 statements demonstrate a bias in favor of testimony coming from attorneys for  
14 the project applicant, over testimony from unrepresented project opponents.  
15 According to McCaffree, the hearings officer's bias against unrepresented  
16 opponents violated Statewide Planning Goal 1 (Citizen Involvement).

17 JCEP responds that McCaffree failed to preserve the issue by objecting  
18 before the local decision-maker. Even if the issue is preserved, JCEP argues  
19 that McCaffree has failed to demonstrate that the hearings officer was biased,  
20 or that any bias prejudiced McCaffree's procedural rights. Further, JCEP  
21 argues that McCaffree has failed to establish that any error committed by the  
22 hearings officer tainted the county commission's consideration and final

1 decision. Finally, JCEP argues that Goal 1 is not directly applicable to the  
2 proposed permit applications.

3 It is not clear to us that a decision-maker's bias is properly viewed as a  
4 *procedural* error, even if evidence of the alleged bias stems from comments  
5 made by the decision-maker during a hearing. McCaffree does not identify any  
6 *procedure* that the hearings officer failed to follow. In any case, as we  
7 understand, some of the unrepresented parties below objected to the hearings  
8 officer's apparent preference for argument from represented parties.<sup>20</sup> To the  
9 extent preservation principles require lodging an objection to the alleged bias  
10 of the hearings officer against unrepresented parties, an objection was made.

11 On the merits, we have no trouble agreeing with McCaffree that the  
12 hearings officer's comments regarding the testimony were unnecessary and  
13 unfortunate. Nonetheless, we do not believe that those comments are sufficient  
14 to demonstrate that the hearings officer was biased in the sense that the  
15 hearings officer was unable to make a decision based on the arguments and  
16 evidence presented. Moreover, even if we concluded that the hearings officer  
17 was biased, JCEP is correct that the hearings officer was not the final county  
18 decision-maker. McCaffree offers no argument as to why the hearings officer's  
19 alleged bias tainted the proceedings before, or the decision of, the board of

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<sup>20</sup> After the hearings officer expressed a preference for hearing testimony from represented parties, one participant stated: "I'm not going to waste my time [testifying before the hearings officer]. I am not an attorney and you ain't going to listen to me anyway[.]" McCaffree Petition for Review 18.



1 commissioners, the final decision-maker. Accordingly, McCaffree's arguments  
2 under this assignment of error do not provide a basis for reversal or remand.

3 The second assignment of error (McCaffree) is denied.

4 **THIRD ASSIGNMENT OF ERROR (McCAFFREE)**

5 In her third assignment of error, McCaffree argues that the findings  
6 adopted by the county commissioners demonstrate bias in favor of the  
7 application, because the findings generally cite and rely on evidence submitted  
8 by proponents, and ignore or erroneously discredit opposing evidence.

9 As an example, McCaffree argues that the county chose to rely on a  
10 report from one of JCEP's experts (Sullivan) regarding sedimentation from  
11 dredging, notwithstanding that Sullivan is a landscape architect and not an  
12 engineer, while rejecting the opponent's expert testimony (Ravens) from a  
13 licensed engineer. The Ravens testimony had been submitted in an earlier  
14 proceeding related to the LNG pipeline, but the county chose not to rely upon it  
15 in that proceeding. McCaffree submitted the Ravens testimony again in this  
16 present proceeding on the LNG terminal. According to McCaffree, the  
17 county's rejection of the Ravens testimony and reliance on a report filed by a  
18 landscape architect indicates that county decision-makers were biased in favor  
19 of the applicant.

20 JCEP responds that the Sullivan report was prepared by multiple authors  
21 including an environmental specialist, and a biologist. Record 1907-08.  
22 Further, JCEP argues that, while the county chided McCaffree for

1 mischaracterizing the testimony of the opponents' engineer regarding  
2 sedimentation, the county in fact accepted and considered that testimony, and  
3 did not reject it.<sup>21</sup> JCEP argues that simply because the commissioners did not  
4 find the Ravens testimony persuasive does not mean that the commissioners  
5 were biased or that the Ravens testimony does not constitute substantial  
6 evidence.

7 Although couched as an argument regarding "bias," McCaffree's  
8 arguments can be more accurately described as a substantial evidence  
9 challenge. JCEP argues, and we agree, that McCaffree's arguments regarding  
10 how the county weighed the evidence regarding sedimentation does not  
11 demonstrate that the county was "biased" in favor of the application or, more  
12 accurately, that the county's findings regarding sedimentation are not  
13 supported by substantial evidence.

14 The third assignment of error (McCaffree) is denied.

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<sup>21</sup> The county's findings state, in relevant part:

"On page 23 of her letter dated January 12, 2016, Ms. McCaffree cites to previously submitted testimony from Dr. Tom Ravens, and states that '[o]ur sedimentation expert actually proved [Pacific Connector] to be wrong on this issue \* \* \*.' This statement is demonstrably false. In fact, the hearings officer [in a different decision] previously rejected Dr. Ravens' analysis. *See* Hearings Officer Recommendation HBCU 10-01 (Remand) at pp. 40-57, which is incorporated herein by reference." Record 107 (emphasis added).

1 **ASSIGNMENT OF ERROR (THE TRIBES)**

2 Intervenor-petitioner The Confederated Tribes of the Coos, Lower  
3 Umpqua & Siuslaw Indians (the Tribes) advance four sub-assignments of error,  
4 each essentially arguing that the county failed to properly apply CBEMP Policy  
5 18, Protection of Historical, Cultural and Archaeological Sites.

6 CBEMP Policy 18 provides in relevant part that a development proposal  
7 involving a cultural, archeological or historical site shall include a site plan  
8 application showing all areas proposed for excavation, clearing, and  
9 construction, and submit that site plan to the Tribes for a 30-day review  
10 period.<sup>22</sup> The county must then conduct a review of the site plan and approve

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<sup>22</sup> CBEMP Policy 18 provides, in relevant part:

“Local government shall provide protection to historical, cultural and archaeological sites and shall continue to refrain from widespread dissemination of site specific information about identified archaeological sites.

“I. This strategy shall be implemented by requiring review of all development proposals involving a cultural, archaeological, or historical site to determine whether the project as proposed would protect the cultural, archaeological, and historical values of the site.

“II. The development proposal, when submitted, shall include a Site Plan Application, showing, at a minimum, all areas proposed for excavation, clearing, and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify [the Tribes] in writing, together with a copy of the Site Plan Application. [The Tribes] shall have the right to submit a written

1 or deny based in part on whether the Tribes and the applicant have agreed on  
2 “appropriate measures” to protect cultural, archeological or historical  
3 resources.<sup>23</sup>

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statement to the local government within thirty (30) days of receipt of such notification, stating whether the project as proposed 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. [giving examples of appropriate measures].”

<sup>23</sup> CBEMP Policy 18 continues:

“III. Upon receipt of the statement by [the Tribes], or upon expiration of [the Tribes’] thirty day response period, the local government shall conduct an administrative review of the Site Plan Application and shall:

“a. Approve the development proposal if no adverse impacts have been identified, as long as consistent with other portions of this plan, or

“b. Approve the development proposal subject to appropriate measures agreed upon by the landowner and [the Tribes], as well as any additional measures deemed necessary by the local government to protect the cultural, historical, and archaeological values of the site. If the property owner and [the Tribes] cannot agree on the appropriate measures, then the governing body shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall 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.”

1           Initially, the county failed to provide notice and a 30-day comment  
2 period to the Tribes as required by CBEMP Policy 18(II). On December 18,  
3 2015, the Tribes submitted an initial set of testimony that included information  
4 on archeological sites in the area, and noting that the Tribes had earlier  
5 designated the entirety of Jordan Cove as a site of archeological significance.  
6 The Tribes also took the position that the project would not protect the cultural  
7 and archeological values of the site, and objected that the applicant had not  
8 provided the site plan as required by CBEMP Policy 18(II), which limited the  
9 Tribes' ability to provide focused objections. The county corrected its notice  
10 error and gave the Tribe 30 days to submit additional testimony, and the Tribes  
11 submitted a second set of testimony on January 12, 2016. However, the county  
12 did not initiate the administrative review process set out in CBEMP Policy  
13 18(III), but instead apparently chose to consider the Tribes' testimony within  
14 the ongoing conditional use permit proceeding.

15           As noted, the county hearings officer held the only public hearing on  
16 December 18, 2015, and issued his recommendations on May 4, 2016. In his  
17 findings, later adopted by the commissioners, the hearings officer expressed  
18 skepticism about the Tribes' claim that the entirety of Jordan Cove has been  
19 designated as an archeological site, and criticized the Tribes for failing to  
20 provide site-specific objections and for failing to take a clear position on  
21 whether the proposal would protect the cultural, historical, and archaeological  
22 values of the site. With respect to the site plan required by CBEMP Policy

1 18(II), the hearings officer speculated that a plot plan found in the application  
2 was intended to be that site plan. Ultimately, however, the hearings officer  
3 made no findings of compliance with CBEMP Policy 18, but instead accepted  
4 JCEP's request to impose a condition of conditional use permit approval,  
5 deferring entirely consideration of CBEMP Policy 18 to a subsequent  
6 proceeding.<sup>24</sup> Accordingly, the county imposed Condition E.1., which provides,  
7 in its entirety:

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<sup>24</sup> Intervenor requested the following condition of approval:

“Upon receipt of the statement from the Tribe(s) under CBEMP Policy 18.II, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archeological resources on the site have been identified, the County shall find that the Applications are consistent with CBEMP Policy 18; (2) if the Tribe(s) and the applicant reach agreement regarding the measures needed to protect the identified resources, the County shall find that the Applications are consistent with CBEMP Policy 18, subject to any additional measures the County believes are necessary to protect those resources; or (3) if the County finds that there will be adverse impacts to identified CBEMP Policy 18 resources on the site and the applicant and the Tribe(s) have not reached agreement regarding protection of such resources, then the Board of County Commissioners shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by [a] preponderance of the 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 archeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of [LDO 5.7.300] with the Board of Commissioners serving as the

1 “The Board shall hold a quasi-judicial hearing to determine  
2 compliance with CBEMP Policy 18. The hearing shall be a public  
3 hearing at which the governing body shall determine by  
4 preponderance of the evidence whether the development project  
5 may be allowed to proceed, subject to any modifications deemed  
6 necessary by the governing body to protect the cultural, historical,  
7 and archaeological values of the site. For purposes of this  
8 condition, the public hearing shall be subject to the provisions of  
9 section 5.7.300 of the CCZLDO with the Board of Commissioners  
10 serving as the Hearings Body. The Board’s decision in that matter  
11 shall constitute the Board’s decision regarding the Applications’  
12 consistency with CBEMP Policy 18.” Record 216.

13 **A. Subassignments of Error A, C, and D**

14 In these subassignments of error, the Tribes allege the county erred by  
15 deferring its CBEMP Policy 18 project review obligations by: (1) refusing to  
16 recognize and consider the Tribe’s testimony regarding identified  
17 archaeological sites and districts within the project area and significant adverse  
18 impacts from the project; (2) approving the LNG Terminal without requiring  
19 the applicant to submit the site plan required by CBEMP Policy 18(II); and (3)  
20 deferring CBEMP Policy 18 determinations for an undetermined amount of  
21 time.

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Hearings Body. The Board’s decision in that matter shall constitute the Board’s decision regarding the Applications’ consistency with CBEMP Policy 18.” Record 126.

1                   **1. Deferral**

2                   Because subassignments of error A, C, and D rest upon the petitioners’  
3 challenge to the county’s decision to defer its CBEMP Policy 18 obligations,  
4 we begin with that issue.

5                   The Tribes contend that, as a matter of law, the county cannot defer the  
6 procedures and determination of compliance with CBEMP Policy 18. To the  
7 extent deferral of compliance with CBEMP Policy 18 is permissible in some  
8 cases, the Tribes argue that it is not permissible in the present case.

9                   In response, JCEP cites *Rhyne v. Multnomah County*, 23 Or LUBA 442,  
10 447-48 (1992), for the proposition that local governments are permitted to  
11 defer a determination of compliance with a permit approval standard until a  
12 second stage in the approval process, as long as the second stage approval  
13 process provides the same notice and hearing as the initial stage:

14                   “Where the evidence presented during the first stage approval  
15 proceedings raises questions concerning whether a particular  
16 approval criterion is satisfied, a local government essentially has  
17 three options potentially available. First, it may find that although  
18 the evidence is conflicting, the evidence nevertheless is sufficient  
19 to support a finding that the standard is satisfied or that feasible  
20 solutions to identified problems exist, and impose conditions if  
21 necessary. Second, if the local government determines there is  
22 insufficient evidence to determine the feasibility of compliance  
23 with the standard, it could on that basis deny the application.  
24 Third, if the local government determines that there is insufficient  
25 evidence to determine the feasibility of compliance with the  
26 standard, instead of finding the standard is not met, it may defer a  
27 determination concerning compliance with the standard to the  
28 second stage. In selecting this third option, the local government  
29 is not finding all applicable approval standards are complied with,



1 or that it is feasible to do so, as part of the first stage approval (as  
2 it does under the first option described above). Therefore, the  
3 local government must assure that the second stage approval  
4 process to which the decision is making is deferred provides the  
5 statutorily required notice and hearing, even though the local code  
6 may not require such notice and hearing for second stage decisions  
7 in other circumstances. *Holland v. Lane County*, 16 Or LUBA  
8 583, 596-97 (1998).” *Id.* (Footnotes omitted).

9 There are several problems with JCEP’s reliance on *Rhyne*. First, *Rhyne*  
10 contemplates a multi-stage approval process, where consideration of criteria  
11 that apply at the first stage can be safely deferred to the second stage, if the  
12 requisite determinations and assurances are made, because no development is  
13 possible until the final, second stage approval is obtained. However, the permit  
14 applications in the present case do not involve a multi-stage approval process.  
15 The county has, in effect, created an *ad hoc* multi-stage conditional use permit  
16 approval process, where compliance with most standards are finally determined  
17 in the first stage, leaving only compliance with one standard (CBEMP Policy  
18 18) to be resolved at a second stage solely devoted to that purpose. That *ad*  
19 *hoc* approach might be permissible in some cases, with respect to some kinds  
20 of approval standards, but it requires basic assurances that Condition E.1 lacks.

21 Notably, nothing in Condition E.1 requires that the second stage  
22 approval be obtained prior to development, or indeed provides any assurances  
23 that there will be a second stage approval process at all. Condition E.1 is silent  
24 regarding the timing and initiation of the second stage. JCEP’s request  
25 suggested that the second stage process would be initiated only when the

1 Tribes submitted the statement described in CBEMP Policy 18(II). *See* n 23  
2 (“Upon receipt of the statement from the Tribe(s) \* \* \*.”). But that is not  
3 consistent with CBEMP Policy 18, which contemplates that the CBEMP Policy  
4 18 process is initiated by the applicant filing the development application with  
5 the required site plan. The Tribes took the position that JCEP has not yet  
6 submitted the required site plan to the county, and that its efforts to provide a  
7 response to the application were hampered by the lack of the site plan. In his  
8 findings, the hearings officer identified a “plot plan” that he believed was  
9 intended to represent the site plan required by CBEMP Policy 18(II), but that  
10 issue was never resolved. Absent an adequate condition of approval that  
11 specifies how and when the CBEMP Policy 18 review process will be initiated,  
12 there is no assurance that it will ever be initiated and completed prior to  
13 development.

14 In addition, as a predicate to the deferral option, *Rhyme* requires that the  
15 local government determine that there is insufficient evidence to determine  
16 compliance or the feasibility of compliance with the applicable standard. *See*  
17 *also Gould v. Deschutes County*, 227 Or App 601, 611-12, 206 P3d 1106  
18 (2009) (to defer a finding of compliance with first stage approval criteria to a  
19 second stage approval process, the county must find that eventual compliance  
20 with the applicable approval standards is “feasible” in the sense that the county  
21 can rule out denial as the outcome required by the hearing record). The county  
22 made none of the determinations required by either *Rhyme* or *Gould*, but simply

1 stated that intervenor's request to defer consideration of Policy 18 "seemed  
2 reasonable." Record 126.

3 More fundamentally, we question whether CBEMP Policy 18 is the  
4 kind of approval standard that can be deferred. CBEMP Policy 18 is more than  
5 an approval standard, it also invokes a particular process. That process is  
6 explicitly linked to the initial development application. *See* ns 22 and 23  
7 (requiring the county to notify the Tribes within three days of receiving the  
8 application, and providing 30 days for the Tribes to respond). CBEMP Policy  
9 18 clearly contemplates that resolution of issues raised by the Tribes, which  
10 may change the scope, scale and footprint of the development proposal  
11 considerably, or even cause it to be denied outright, will be completed before  
12 the development is approved.

13 Moreover, it is important to note that CBEMP Policy 18 requires  
14 coordination with and the resolution of disputes raised by a *sovereign*  
15 government. Under CBEMP Policy 18, the Tribes are not merely another  
16 participant in the proceedings. The Tribes are entitled under CBEMP Policy 18  
17 to special notification and consideration of issues raised, as well as the power  
18 to compel the applicant into negotiations to resolve those issues, and to compel  
19 county resolution of unsuccessfully negotiated issues. That power is  
20 considerably vitiated if the applicant can first obtain county approval of the  
21 proposed development, and only then sit down with the Tribes to negotiate  
22 changes to the approved development. Given the inertia of an existing

1 conditional use permit approval, the county is less likely in a deferred CBEMP  
2 Policy 18 proceeding to force the applicant to accept changes to a development  
3 proposal that the county has already considered and approved. It is even less  
4 likely in such a deferred proceeding that the county would take seriously  
5 arguments that the application cannot comply with CBEMP Policy 18 and must  
6 be (retroactively) denied.

7 The county's findings include no interpretation of CBEMP Policy 18  
8 explaining why it believes compliance with the policy can be deferred to a  
9 second stage proceeding, other than deferral "seemed reasonable." Record 126.  
10 It is not clear to us if the question of whether compliance with CBEMP Policy  
11 18 can be deferred to a second stage proceeding is a matter of local or state  
12 law. Even if it is purely a matter of local law, in the absence of an adequate  
13 local interpretation, for the reasons set out above we conclude under ORS  
14 197.829(2) that the county erred in deferring compliance with CBEMP Policy  
15 18 to a second stage proceeding.

16 **B. Subassignment of Error B**

17 In this subassignment of error, the Tribes argue the county erred to the  
18 extent it rejected the Tribes' claim that the entirety of Jordan Cove is a cultural  
19 and archeological site for purposes of CBEMP Policy 18. That claim is based

1 in part on the fact that in 2015 the Tribes designated Jordan Cove as a  
2 “significant” archaeological site under ORS 358.905(1)(b)(B).<sup>25</sup>

3 JCEP responds that the skepticism expressed in the hearings officer’s  
4 findings that the entirety of Jordan Cove is a cultural or archeological site for  
5 purposes of CBEMP Policy 18 was merely nonbinding *dicta*, which would  
6 have no preclusive effect on any future proceeding to consider compliance with  
7 CBEMP Policy 18. We agree with JCEP that the challenged findings are *dicta*,  
8 given that the county completely deferred consideration of compliance with the  
9 policy to a second stage proceeding. As explained above, that deferral was  
10 erroneous, and remand is necessary for the county to conduct the proceedings  
11 required by CBEMP Policy 18, before approving the conditional use permit  
12 application. On remand, questions regarding the location and scope of  
13 archeological sites affected by the development remain issues to be resolved.

14 The first assignment of error (The Tribes) is sustained, in part.

15 **FIRST ASSIGNMENT OF ERROR (ROGUE INTERVENORS)**

16 As noted, the application proposes development in areas designated as  
17 coastal shorelands under Statewide Planning Goal 17. OAR chapter 660,  
18 division 037 implements Goal 17 and the state policy to generally limit  
19 development of coastal shorelands to uses that are “water-dependent.” The

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<sup>25</sup> ORS 358.905(1)(b)(B) provides that a “Site of archaeological significance” means “Any archaeological site that has been determined significant in writing by an Indian tribe.”

1 Goals define “water-dependent” to mean “[a] use or activity which can be  
2 carried out only on, in, or adjacent to water areas because the use requires  
3 access to the water body for water-borne transportation, recreation, energy  
4 production, or source of water.” Statewide Planning Goals, Definitions 8.

5 OAR 660-037-0040(6) provides additional definitions for purposes of  
6 the rule, which the county has implemented verbatim in LDO 2.1.200. In  
7 relevant part, OAR 660-037-0040(6)(C) defines “water-borne transportation”  
8 to mean uses of water access that fit into one of three subcategories, uses which  
9 are themselves transportation, uses which “require the receipt of shipment of  
10 goods by water,” or uses which are themselves not water-borne transportation,  
11 but that are “necessary to support water-borne transportation,” with the  
12 example provided of “terminal and transfer facilities.”<sup>26</sup>

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<sup>26</sup> OAR 660-037-0040(6) provides, in relevant part:

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

1           The county concluded that the components of the LNG facility located  
2 on coastal shorelands are “water-dependent uses” as defined at LDO 2.1.200

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“(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.[, and] *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.)

1 and OAR 660-037-0040(6), because the facility involves “water-borne  
2 transportation” and is also a “terminal and support.” Record 44.

3 On appeal, Rogue Intervenors argue that the county erred in concluding  
4 that the facility constitutes “water-borne transportation,” to the extent it relied  
5 upon OAR 660-037-0040(6)(a)(C)(ii), for uses of water access “[w]hich  
6 require the receipt of shipment of goods by water[.]” Rogue Intervenors argue  
7 that “water-borne transportation” under subcategory (ii) is limited to uses  
8 related to the *import* of goods, and therefore does not include a facility  
9 dedicated to exporting LNG.

10 JCEP responds that Rogue Intervenors do not challenge the county’s  
11 alternative conclusion that the facility is a “terminal,” and therefore an express  
12 example of a water-dependent industrial use. JCEP is correct. OAR 660-037-  
13 0040(6)(a)(C)(ii) is one of three separate subcategories of uses of water access  
14 that concern “water-borne transportation.” The third, OAR 660-037-  
15 0040(6)(a)(C)(iii), expressly includes “terminals and transfer facilities.” *See*  
16 *also* OAR 660-037-0040(6)(b) (citing “terminals” as a typical example of an  
17 industrial water-dependent use). Even if the OAR 660-037-0040(6)(a)(C)(ii)  
18 subcategory is limited to import facilities, as Rogue Intervenors argue, there  
19 can be no possible dispute that a facility that loads goods onto cargo ships is a  
20 “terminal” for purposes of OAR 660-037-0040(6)(a)(C)(iii) and thus properly  
21 viewed as “water-borne transportation” for purposes of the definition of  
22 “water-dependent use.”



1 The first assignment of error (Rogue Intervenors) is denied.

2 **SECOND ASSIGNMENT OF ERROR (ROGUE INTERVENORS)**

3 The proposed LNG facility includes a 20-acre gas-processing facility,  
4 located on an industrially zoned portion of the site. The gas-processing facility  
5 first refines natural gas arriving by pipeline to remove water and carbon  
6 dioxide.<sup>27</sup> The refined gas is then sent through a multi-stage liquefaction  
7 process to cool and liquefy the gas. Record 18. The resulting product, LNG, is  
8 stored at a temperature of -260 degrees in large storage tanks and eventually  
9 transferred to LNG tankers via a cryogenic line. When the LNG reaches its  
10 ultimate destination, it is unloaded and converted back into gaseous form.

11 The industrial zone allows the processing of mineral resources as an  
12 allowed use. LDO 2.1.200 defines “Mineral Resources—Processing” as “[t]he  
13 act of refining, perfecting, or converting a natural mineral into a useful

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<sup>27</sup> The county’s decision describes the refinement process:

“\* \* \* Once natural gas is transferred to the Applicant through the metering station, the gas would go through a processing plant. The processing facility would consist of two feed gas pre-treatment trains, each containing two systems in the series: a CO2 removal process which utilizes a primary amine to absorb CO2, followed by a dehydration system which uses two solid absorbents to remove water and mercury from the feed gas. The gas processing units would remove substances that would freeze during the liquefaction process, namely CO2 and water. Mercury would also be removed to prevent corrosion to downstream equipment. Trace amounts of hydrogen sulfide (H2S) would be removed as well. \* \* \*” Record 22.

1 product.” In this assignment of error, Rogue Intervenors argue that the county  
2 misconstrued LDO 2.1.200 in concluding that the gas-processing facility  
3 processes a mineral resource. According to Rogue Intervenors, the gas-  
4 processing facility does not convert natural gas into a “useful product,” but  
5 instead takes natural gas that is of household quality, and converts it for  
6 transportation purposes only into LNG, which is not itself a “useful product.”  
7 Rogue Intervenors argue that, as a matter of law, transforming a useful product  
8 into a non-useful product for transportation does not fit within the definition of  
9 “Mineral Resources—Processing” at LDO 2.1.200.

10 The county board of commissioners rejected that argument below:

11 “\* \* \* In its gaseous form, natural gas on the mainland of the U.S.  
12 is not a useful product for consumers living in Hawaii, for  
13 example, because there is no way to get it to that market in an  
14 unrefined form. The natural gas is refined and then converted into  
15 a liquid form so that it may be transported and used as a ‘useful  
16 product’ throughout the Pacific Rim.” Record 141.

17 The county concluded that “[i]f a mineral needs to be further processed or  
18 ‘perfected’ to make transportation economically viable, then it follows that  
19 further processing is required to make the mineral a ‘useful product’ for the  
20 intended market.” *Id.*

21 JCEP argues, and we agree, that the commissioners’ interpretation of  
22 LDO 2.1.200—that processing a natural mineral into a form that allows it to be  
23 transported to markets renders that natural mineral a “useful product” for that  
24 purpose—is consistent with the express language of LDO 2.1.200’s definition

1 and accordingly must be affirmed. That the natural gas arriving at the gas-  
2 processing facility is of “household quality” and is already one form of useful  
3 product does not mean that it cannot be further processed into a different, but  
4 still useful, product, even if the usefulness of that product is to allow  
5 transportation to markets where the product will be processed further to return  
6 it to a gaseous and more useful form.

7 The second assignment of error (Rogue Intervenors) is denied.

8 **FOURTH ASSIGNMENT OF ERROR (ROGUE INTERVENORS)**

9 Rogue Intervenors argue that the county erred in failing to impose a  
10 condition making the conditional use permit approval effective only when and  
11 if JCEP obtains all required state and federal approvals for the proposed LNG  
12 terminal, including FERC approval. In addition, Rogue Intervenors note that  
13 the gas processing facility will require a new electrical power plant, for which  
14 JCEP has not yet filed applications. Rogue Intervenors argue that the county  
15 should have made its permit decision effective only when and if the county  
16 approves the application for the new power plant.

17 The county’s decision requires JCEP to obtain all required state and  
18 federal permits (which are required in any event by state and federal law), but  
19 does not delay the effective date of the conditional use permit approval until all  
20 required permits and approvals are obtained. JCEP responds, and we agree,  
21 that Rogue Intervenors have not identified any law that requires the county to  
22 impose a condition delaying the effectiveness of its permit approval until all

1 other permits and approvals have been obtained. Absent a more developed  
2 argument, Rogue Intervenors' fourth assignment of error provides no basis for  
3 reversal or remand.

4 The fourth assignment of error (Rogue Intervenors) is denied.

5 **FIRST ASSIGNMENT OF ERROR (CLARKE)**

6 The proposed gas processing facility includes two "amine contactor"  
7 towers, or thermal oxidizers, that will vent heated gas into the atmosphere. The  
8 facility is located across the estuary from the Southwest Oregon Regional  
9 Airport. A portion of the LNG terminal site is within the approach surface of  
10 Runway 13, but as proposed the gas processing facility is not within the  
11 approach surface or the associated flight path.

12 In three sub-assignments of error, intervenor-petitioner John Clarke  
13 (Clarke) challenges the county's findings regarding compliance with LDO  
14 4.11.445(4), which provides:

15 "Industrial Emissions. No new industrial, mining or similar use  
16 \* \* \* shall, as part of its regular operation, cause emissions of  
17 \* \* \* steam that could obscure visibility within airport approach  
18 surfaces, except upon demonstration, supported by substantial  
19 evidence, that mitigation measures imposed as approval conditions  
20 will reduce the potential for safety risk or incompatibility with  
21 airport operations to an insignificant level. The review authority  
22 shall impose such conditions as necessary to ensure that the use  
23 does not obscure visibility."

24 JCEP submitted a "thermal plume" study to demonstrate compliance  
25 with LDO 4.11.445(4). The study evaluated the plumes generated by the gas  
26 processing facility, as well as the electrical power plant that is not part of this

1 application. According to the study, the thermal oxidizers will generate only  
2 four percent of the heat plumes from both sources, and the plumes from all  
3 sources will meet applicable aviation standards. Clarke objected during the  
4 proceedings below that the thermal oxidizers will produce steam, which will  
5 obscure visibility within the airport approach surface, stating that “[b]asic  
6 physics tell you that heated air released into cool, damp air will produce  
7 steam.” Record 7158. JCEP responded with a letter from Himes, a registered  
8 engineer with 46 years of experience including 10 years designing LNG  
9 facilities, who testified in relevant part that “[t]here are no visible or steam  
10 plumes from the facility.” Record 3757. The county found that Himes’  
11 testimony constitutes substantial evidence and is more credible than any  
12 evidence to the contrary. Record 172.

13         Clarke argues that (1) Himes’ statement that the thermal oxidizers will  
14 not produce visible steam plumes is not substantial evidence, given the  
15 “common knowledge” that heated air released into a cool atmosphere will  
16 produce steam; (2) although the gas processing facility is proposed to be  
17 located outside of Runway 13’s surface approach area, the applicant did not  
18 seek, and the county did not approve, site plan approval, and it is possible that  
19 the gas processing facility could be moved to a location within the surface  
20 approach area; and (3) the county failed to adopt any “mitigation measures” to  
21 ensure that steam plumes will not obscure visibility within the airport surface  
22 approach area.

1 JCEP responds, and we agree, that Clarke’s arguments do not provide a  
2 basis for reversal or remand. Himes’ expert testimony is substantial evidence  
3 that the thermal oxidizers will not produce visible plumes of steam, and that  
4 testimony is not undermined by Clarke’s statement, based on “common  
5 knowledge,” that heated air released into cool air produces steam. In any case,  
6 LDO 4.11.445(4) is concerned only with obscured visibility within the surface  
7 approach area. Clarke’s speculation that the gas processing facility could be  
8 moved from its proposed and approved location into the surface approach area  
9 is just that—speculation. JCEP proposed a specific location for the gas  
10 processing facility, and justified that facility’s compliance with LDO  
11 4.11.445(4) based in part on that proposed location, outside the surface  
12 approach area. Clarke does not explain how the gas processing facility could  
13 be relocated from that approved location west to a site within the surface  
14 approach area without modifying the conditional use permit or otherwise  
15 triggering evaluation under LDO 4.11.445(4)

16 The first assignment of error (Clarke) is denied.

17 The county’s decision is remanded.