



February 21, 2024

**Garrett H. Stephenson**  
Admitted in Oregon  
D: 503-796-2893  
gstephenson@schwabe.com

VIA E-MAIL

Columbia County Board of Commissioners  
230 Strand St.  
County Courthouse Room 338  
St. Helens, OR 97501

RE: Applicant's Final Written Argument; Columbia County Board of Commissioners, DR 21-03 MOD, CU 23-11 (NEXT Renewables Fuels Inc.)

Dear Chair Garrett, Commissioner Magruder, and Commissioner Smith:

This office represents NEXT Renewable Fuels Oregon, LLC ("**NEXT**" or the "**Applicant**"). On January 10, 2024, Columbia County held a hearing on the above-referenced Applications. NEXT testified orally during the hearing. At the conclusion of that hearing, the Board closed the record to further oral testimony but allowed the written record to remain open for the following purposes and on the following schedule:

1. Until 5:00 PM on January 24th for any party to submit any evidence or testimony.
2. Until 5:00 PM on February 7th for any party to submit evidence or testimony in response to testimony submitted during the first open record period.
3. Until February 21st for Applicant's final written argument.

This letter constitutes NEXT's final written argument in this matter, and is intended to respond to written comments submitted shortly before and the day of the hearing, and written comments submitted during the first and second open record periods. The letter is respectfully submitted prior to the end of the final written argument period at 5:00 p.m. on Wednesday, February 21, 2024.

## **I. INTRODUCTION AND OVERVIEW**

NEXT proposes to develop a renewable diesel production facility at Port Westward (the "**Facility**"), with related Columbia River dock and rail connections (collectively, the "**Project**").

February 21, 2024

The Project consists of two land use applications (the “**Applications**”) that are separate but related – a Site Design Review Modification<sup>1</sup> and a Conditional Use Permit.<sup>2</sup>

The Site Design Review Modification would amend the existing Site Design Review permit for the Facility, which was approved by the Columbia County Board of County Commissioners (the “**Board**”) in March 2022 under Site Design Review DR 21-03 and Variance 21-05, as a “Use Permitted under Prescribed Conditions” in the Resource Industrial – Planned Development (RIPD) zone.<sup>3</sup> A Conditional Use Permit (CU 21-04) for a rail branchline within the Primary Agriculture (PA-80) zone was also initially granted<sup>4</sup> but later overturned by the Oregon Land Use Board of Appeals (“**LUBA**”).<sup>5</sup>

The Applications solely address the location of the rail facilities approved by the Board in 2022. As noted above, the Facility was approved as a “Use Permitted under Prescribed Conditions,” which evaluated the impacts of the proposed Project, including its rail component, on surrounding lands. This is reflected in the following excerpts from the unchallenged Facility findings adopted as part of Final Order No. 12-2022:

“CCZO 681.3 states the purpose of the RIPD zone is for an industry that “require[s] a rural location to take advantage of rail. . . and/or deep water port access.” [...] the Facility is designed and intended to receive 100 percent of its feedstocks via marine transportation and to export 100 percent of its products the same way. The only material that is required to be imported by rail is clay, which is necessary for renewable diesel processing and amounts to a single 20-car train per week.

“The import/export capacity for the rail branchline serves a contingency role for times when river transportation is disrupted or otherwise unavailable. This allows the Facility to keep operating and keep its employees working. Applicant explained that the trains are anticipated to have a maximum length of 6,630 feet. The maximum single length of track within the proposed branchline is roughly

---

<sup>1</sup> DR 21-03 MOD.

<sup>2</sup> CU 23-11.

<sup>3</sup> *Final Order No. 12-2022*, COLUMBIA COUNTY (Mar. 23, 2022).

<sup>4</sup> *Final Order No. 13-2022*, COLUMBIA COUNTY (Mar. 23, 2022).

<sup>5</sup> *1000 Friends v. Columbia County*, \_\_\_ OR LUBA \_\_\_ (LUBA No. 2022-039, slip op, Oct. 27, 2022).

February 21, 2024

7,500 feet, more than enough storage to accommodate the largest train without requiring backing movements or crossing delays.

“[...] the Board evaluated any effects that may be caused by trains arriving to and departing from Applicant's Facility. The Board will impose two conditions of approval to address rail transport and ensure the addition of the rail branchline to the Facility does not impede access:

“6) Transport of feedstock and/or fuel products to and from the facility shall be by water, or as a contingency, by rail. Transport of feedstock and/or fuel products to and from the facility by more than twenty (20) truck trips per day shall require an amendment to the Site Design Review and the approval of a revised Traffic Impact Study.

“7) Rail transport to and from the site shall be limited to no more than 318 rail cars per week, excluding return cars. Trains serving the site shall be no more than 100 attached cars in length. A manifest documenting rail transport to and from the site shall be maintained, and shall be provided to the County within seven (7) days of written request from the County.

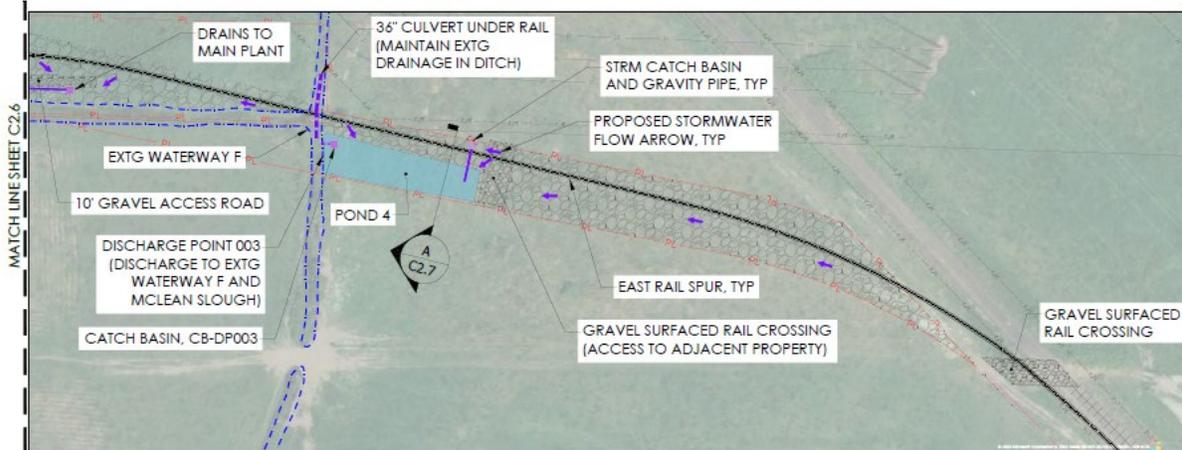
“The Board finds that the use of rail to serve the Facility is consistent with the goals in CCZO section 680 and the Comprehensive Plan, as discussed extensively in Section IV.A., because the Facility takes advantage of existing rail and is similar in nature and will complement existing industrial development at Port Westward that is serviced by rail.”<sup>6</sup>

The Applications propose the same scope and frequency of rail service already approved for the Facility, but eliminate all siding (storage) tracks originally approved in the PA-80 zone by relocating virtually all rail facilities to the RIPD zone, where they are allowed by right as an accessory to the approved Facility. The original approvals allowed five siding tracks within the RIPD zone and five siding tracks south of the Facility, in the PA-80 zone. In response to LUBA's ruling, the current Conditional Use application proposes a single, approximately 1,250-foot track between the Facility and the existing Portland & Western (“P&W”) Railroad line, as shown on Sheet C 2.7 of NEXT’s design submittal:

---

<sup>6</sup> *Final Order No. 12-2022*, Ex. A, at 42-44.

February 21, 2024



This single track is the sole rail improvement proposed within the PA-80 zone. When compared with the original approvals,<sup>7</sup> the proposed rail configuration has a substantially smaller footprint in the PA-80 zone.

The Site Design Review Modification proposes to relocate rail tracks, a tree buffer, and storm facilities northward to the RIPD zone. Within the fence line of the Facility, the approved siding tracks remain essentially the same as in the original approved site plan. Critically, these modifications do not significantly alter any other component of the Facility as it was approved in DR 21-03, and the rail unloading stations are not proposed to be altered.

As it was when the County approved it in 2022, the Project is entirely consistent with the intended uses of Port Westward. The Project is dependent on its Columbia River location to take advantage of efficiencies made possible by Port Westward's deep-water dock, an asset Columbia County invested in specifically to attract development like the Project. The vast majority of the Project is located entirely within the RIPD zone, which is intended to accommodate both rural and natural resource related industries like NEXT's Project. Only a small portion of the proposed rail branchline will touch land zoned differently, but in a manner well within established approval criteria.

<sup>7</sup> The County's findings for Site Design Review DR 21-03, Variance 21-05, CU 21-04, were submitted into the record in this case by NEXT during the first open record period.

February 21, 2024

As before, the Applications enjoy a broad base of community support. Port of Columbia County Executive Director Sean Clark summarized the benefits of the Project as follows:

“The benefits the NEXT project will have on Columbia County’s economy cannot be understated. The project will create more than 3,500 construction jobs and more than 240 permanent, family-wage jobs in an industry anticipated to operate in Columbia County for the next 80 years or more. With an over \$2 billion investment, NEXT will be one of the highest taxpayers in the County, increasing much-needed funding to our local schools, roads, and public services. In addition, by bringing this new, green energy to our region, Columbia County will be a leader in the clean fuels industry, and this new industry will lead to job training in clean fuels to attract related industries to our region.”

Parties who testified in support of the project include, but are not limited to:

- The Columbia Economic Team
- The Oregon Coastal Caucus (including state Rep. David Goldberg, Sen. Dick Anderson, Sen. David Brock Smith, Sen. Suzanne Weber, Rep. Boomer Wright, Rep. Cyrus Javadi, and Rep. Court Boice)
- Clatskanie Chamber of Commerce
- Clatskanie School Board Members and Superintendent Dr. Danille Hudson
- Clatskanie City Manager Greg Hinkleman
- Mayor Jerry Cole of the City of Rainier
- Rainier Chamber of Commerce
- Longview/Kelso Building Trades Council

In addition, a number of residents and representatives of local labor organizations testified in favor of the Project.

Most importantly, though, and as described in the Staff Report, the Applications satisfy the approval criteria and should be approved on that basis.

February 21, 2024

## **II. THE APPLICATIONS ARE CONSISTENT WITH THE APPLICABLE ZONING, APPROVAL CRITERIA, AND COMPREHENSIVE PLAN POLICIES FOR PORT WESTWARD**

During the 2022 application process, the Board found that the Project is consistent with the uses intended for its location – this has not changed. As in the original application, the particular use category proposed in the Site Design Review Modification remains “production, processing, assembling, packaging, or treatment of materials; research and development laboratories; and storage and distribution of services and facilities,” which are allowed in the RIPD zone under CCZO 683.1. Because Port Westward is one of only five Oregon deep-water ports, the Port Westward Exception Area (as adopted in the County’s Comprehensive Plan) was specifically intended to facilitate heavy industry that relies on marine transportation.<sup>8</sup> The Board’s prior findings on this issue, adopted as Final Order No. 12-2022, are instructive:

“The Port Westward Exception Area, which encompasses the land on which the Facility is proposed, is intended to provide an industrial activity or an energy facility with a comparative advantage due to its location with access to the Columbia River, the existing dock facilities, railroad and urban services, and PGE’s Beaver Power Plant. The County’s Comprehensive Plan has already determined that the Port Westward Exception Area is suitable for uses such as “a 200-acre oil refinery, a 150-200-acre coal port, an 80-acre petrochemical tank farm, and a 230-acre coal gasification plant.”

“Second, there are also already substantial existing industrial developments in the area. The PGE Port Westward Generating Plant, the PGE Beaver Generating Plant Tank Farm, the Columbia Pacific Bio-Refinery, and the Clatskanie People’s Utility District substation are currently existing industrial developments operating on land in the vicinity of the proposed Facility. The existing industrial activities at Port Westward demonstrate how industrial uses “complement the character and development of the surrounding rural area” and demonstrate how industrial and rural uses can coexist. The Board finds the Facility is consistent with these types of industrial developments that are already existing, will complement these existing facilities that are already in the area, and that the Facility will be compatible with nearby agricultural uses in ways similar to these existing industrial uses. This because, like these existing industrial uses, the Facility is anticipated to be serviced nearly entirely by river and rail transportation, not via

---

<sup>8</sup> See Comp. Plan, Pt. XII (Port Westward Exception Statement) § VII.1.b (pg. 124) (describing Port Westward as a unique economic asset to encourage Columbia County industrial development).

February 21, 2024

truck and trailer, and because there is no substantial evidence in the record that the renewable diesel processing activity will itself adversely impact surrounding agricultural operations or residences.”<sup>9</sup>

Indeed, the Comprehensive Plan has always considered rail service and the expansion thereof as part of the uses intended for Port Westward, as noted in the Port Westward Exception Statement: “Probable uses would likely be related to the existing services, including the railroad, the dock, and the tank farm.”<sup>10</sup> When justifying the current size of the Port Westward Exception Area, the Comprehensive Plan observed that “[t]he Port Westward site is also large enough to accommodate loop rail systems that could handle 100-car unit trains.”<sup>11</sup>

The Port Westward Exception Area is implemented by the standards of the RIPD zone, which were examined in detail when the Facility was approved in 2022. Now, except for a small portion of the proposed rail branchline, the Project is located entirely within the RIPD zone. The Project relies on the Port Westward dock for access to marine transportation and the river itself for industrial process water. Thus, the Project is entirely consistent with the legislative purposes underpinning Port Westward, and with its RIPD zoning.

As explained in the Applications and Staff Report, the rail branchline section within the PA-80 zone is permissible under OAR 660-012-0065 “Transportation Improvements on Rural Lands” without a Statewide Planning Goal Exception, because it falls within the category of “railroad mainlines and branchlines.” In 2022, LUBA concluded that the prior branchline design, which had several siding tracks railcar storage in the PA-80 zone, was a “rail yard,” because it included “multiple parallel tracks and includes siding tracks for train car storage and maintenance.” The single, 1,250-foot track now proposed to connect the Facility with P&W’s existing line would meet LUBA’s definition of a “rail branchline” as “a secondary line of a railway, typically stub-ended” or, as defined in *Union P. R. Co. v. Anderson*, 167 Or 687, 712, 120 P2d 578, 588 18 (1941), “nothing more or less than an offshoot from the mainline or stem.”<sup>12</sup>

---

<sup>9</sup> *Final Order No. 12-20222*, at 4.

<sup>10</sup> Comp. Plan, Pt. XII (Port Westward Exception Statement) § V.

<sup>11</sup> *Id.* at § VII.A.1.b.

<sup>12</sup> *1000 Friends of Oregon v. Columbia County*, \_\_\_ OR LUBA, at 21–22.

February 21, 2024

### III. THE APPLICATION SATISFIES ALL APPLICABLE APPROVAL CRITERIA AND SHOULD BE APPROVED WITH CONDITIONS

The Applications included two detailed narrative explanations of how they meet the approval criteria, both for the Site Design Review Modification in the RIPD zone and for the rail branchline within the PA-80 zone. County planning staff prepared a detailed staff report that evaluated all applicable criteria and concluded that the Applications meet the criteria. NEXT accepts those conclusions and the Board can find that they demonstrate how and why the Applications have carried their burden of proof. Critically, the Facility was approved in 2022, *was not appealed*, and is final.<sup>13</sup> This approval included code interpretations by the Board within Final Order No. 13-2022. As such, NEXT’s arguments below are, where possible, discussed in relation to the County Board’s legal interpretations made in approving DR 21-03.

NEXT also concurs with Staff’s recommended conditions of approval, which are largely a carry-over from the conditions imposed as part of the prior approvals. *See Staff Report at 46–47.* In addition to these conditions, NEXT proposes the following additional conditions:

- The Applicant shall implement the rail mitigation measures recommended in paragraph 10 of the memorandum prepared by Brian Heikkila of Crosstown Consulting, dated Jan. 23, 2024 (the “**Crosstown Memo**”), which proposes mitigation measures that shall be effective between June 1 and October 31 of each year.
- During construction, the Applicant shall maintain an inadvertent discovery plan (“**IDP**”) to address any archaeological discovery consistent with the Oregon State Parks and Recreation Department Historic Preservation Office’s IDP template.

While NEXT does not believe the above conditions are necessary to satisfy the approval criteria, these conditions are offered should the Board wish to impose conditions addressing mint harvesting and the recent inadvertent archaeological discovery by Warren Seely, discussed during the first and second open record periods.

### IV. RESPONSE TO OPPONENT ARGUMENTS REGARDING THE APPLICATIONS

In reviewing the Applications before the Board, it is important to keep in mind that despite the sincere and genuine emotions surrounding NEXT’s project, the Applications are quasi-judicial in nature. As such, they should be approved or denied based on evidence in the record that

---

<sup>13</sup> *See* DR-21-03.

February 21, 2024

addresses applicable approval criteria,<sup>14</sup> and evidence should be weighed reasonably. This is important when considering much of the opponent testimony in the record, which in many cases does not address the approval criteria for *these* applications.

Specifically, many opponent comments address aspects of the County’s unchallenged 2022 approval of the renewable diesel Facility, or address other approvals that NEXT has received from other regulators, including the Oregon Department of State Lands (“**DSL**”), United States Army Corps of Engineers (“**USACE**”) and Oregon Department of Environmental Quality (“**DEQ**”). Regardless of the urgency with which they are made, such comments should be rejected because they do not address the applicable criteria.

**a. Response to Columbia Riverkeeper’s Comments**

Many of Columbia Riverkeeper’s (“**Riverkeeper**”) comments are directed at hypothetical impacts to the Beaver Drainage District, or raise issues that are not subject to the County’s land use review authority. Riverkeeper’s comments regarding NEXT’s DSL permit are outside the scope of review for the subject Applications, as are Riverkeeper’s comments pertaining to FEMA floodway inspections, levy certification within the Beaver Drainage District, the national price of feedstocks, and NEXT’s corporate governance and finances. The following sections respond to various arguments that Riverkeeper has raised during the application process and open record period for this Project.

i. The rail facility is a branchline allowed within the PA-80 Zone.

The proposed rail connection between the Facility and the P&W Railroad is classified as a "branchline" per OAR 660-012-0065. OAR 660-012-0065(3) allows a variety of transportation improvements within an agricultural zone that may be related to or serve uses that are not allowed or conditionally allowed by ORS 215.283.<sup>15</sup> In the LUBA proceeding that precipitated the Applications, LUBA adopted ODOT’s definition of branchline as “a secondary line of a railway, typically stub-ended.”<sup>16</sup> NEXT’s proposed branchline features a single, 1,250-foot track that connects the Project to the existing P&W track, traversing a small section of PA-80 zoned land before entering Port of Columbia County property zoned RIPD.

Riverkeeper raises two contrary arguments, both of which should be rejected. First, Riverkeeper argues that NEXT’s branchline is actually a “rail facility” because “[n]othing significant has

---

<sup>14</sup> ORS 215.427(3).

<sup>15</sup> *1000 Friends of Oregon v. Columbia County*, \_\_\_ Or LUBA, at 15.

<sup>16</sup> *Id.*, at 21–22.

February 21, 2024

changed about the scope and design” of the railroad on the parcels zoned PA-80.<sup>17</sup> Riverkeeper’s position is directly contradicted by the application materials in the record, including Applicant’s site plans for the PA-80 rail branchline, which depict a significantly reduced branchline (compared to that previously approved by Conditional Use Permit CU 21-04).<sup>18</sup> The evidence in the record is unambiguous – the portion of the tracks that remain on the PA-80 zoned parcels are not designed to receive, store, sort, and unload trains.<sup>19</sup> As detailed at length within the project narrative, and depicted within the application materials, the rail infrastructure crossing PA-80 zoned land is a branchline, consistent with OAR 660-012-0065 and LUBA’s decision in *1000 Friends of Oregon v. Columbia County*, \_\_ Or LUBA \_\_ (LUBA No. 2022-039). Riverkeeper’s argument that nothing has changed in NEXT’s design of the railroad branchline crossing PA-80 zoned is simply wrong and must be disregarded.

Second, Riverkeeper argues that the Project has already been rejected by LUBA, arguing that if a transportation improvement listed at OAR 660-012-0065(3) (here, a branchline) is incidental to another land use, then that related land use must be allowed or conditionally allowed by ORS 215.283. Put simply, Riverkeeper is arguing that the proposed branchline cannot be permitted because it terminates at the rail yard proposed on the RIPD zoned parcels. But LUBA concluded precisely the opposite:

“As we understand [Riverkeeper’s] view, the limitation in OAR 660-012-0065(3)(a) means that, if a transportation improvement listed at OAR 660-012-0065(3) is incidental to another land use, then that related land use must be allowed or conditionally allowed by ORS 215.283, or the transportation improvement requires a Goal 3 exception. We do not agree with that reading. OAR 660-012-0065(3) allows a variety of transportation improvements within an agricultural zone that may be related to or serve uses that are not allowed or conditionally allowed by ORS 215.283.”<sup>20</sup>

Thus, even if the Board or LUBA concluded that the rail facility within the RIPD constitutes a “railyard,” it does not follow that the proposed branchline is a “railyard” for purposes of OAR 660-012-0065(3). Riverkeeper’s contrary argument plainly ignores LUBA’s rejection of the same argument in 2022.

---

<sup>17</sup> Riverkeeper Comment, at 6-8 (Jan. 9, 2024).

<sup>18</sup> CU 23-11 Application Materials, Exhibit 3.

<sup>19</sup> *Id.*

<sup>20</sup> *1000 Friends of Oregon*, \_\_ Or LUBA, at 15 (emphasis added).

February 21, 2024

- ii. CCZO 683 is not applicable to NEXT's application for a modification of a prior approval.

CCZO 683 permits facilities within the RIPD zone, contingent on the facility's compliance with certain standards. These standards primarily evaluate the particular suitability of site for a given use based on its impacts to surrounding uses and development, not the particular layout of the facility itself, which is specifically governed by the Site Design Review standards in CCZO 1150. The Board concluded that the Facility complies with the standards within CCZO 683, and the Board's findings concerned the scope and potential impacts of the use itself, including rail service.<sup>21</sup>

Riverkeeper argues that the County must undertake a *second* detailed analysis under CCZO 683 because NEXT is seeking to modify DR 21-03 to relocate certain portions of its rail infrastructure onto the RIPD zoned portion of the subject property.<sup>22</sup> This argument is simply wrong because the findings and record in DR 21-03 demonstrate that the scope and frequency of NEXT's rail service, including its crossing points and impacts on surrounding uses, was evaluated for compliance with CCZO 683, even though many of the tracks themselves were not located in the RIPD zone.

Specifically, "the Board evaluated any effects that may be caused by trains arriving to and departing from Applicant's Facility" and imposed conditions of approval to address rail transport associated with the Facility.<sup>23</sup> The Board's analysis is excerpted in Section I above, and included a review of the import and export capacity of the project, conditioned the number of rail cars allowed at the Facility, and analyzed the potential impact of train crossings in the area surrounding the Project. Notably, DR 21-03 placed an outside limit on the number of rail cars that could service the Facility per week (318). NEXT's proposed design review modification does not propose to change the overall use of the Facility or the approved scope of the rail service originally approved in DR 21-03.<sup>24</sup> Rather, the sole change to the Facility is moving all rail loading and unloading areas into the RIPD zone. As the Applications do not propose a change in the scope of the rail use contemplated in the "use approved under prescribed

---

<sup>21</sup> *Final Order No. 12-2022*, Ex. A, at 42-44.

<sup>22</sup> Note that standards within CCZO 683 did not directly apply to NEXT's original proposed branchline on the PA-80 zoned portion of the subject property, as CCZO 683 only applies to uses permitted under prescribed conditions within the RIPD zone. However, as discussed above, the Board evaluated the impacts of the rail as part of its approval of the use as a whole in DR 21-03.

<sup>23</sup> *Final Order No. 12-2022*, Ex. A, 43-44.

<sup>24</sup> *Id.*

February 21, 2024

conditions” approved by the Board in 2022, Staff correctly advised NEXT that the unappealed decision did not need to be revisited. Riverkeeper’s argument to the contrary is nothing more than an attempt to re-litigate the County’s approval of the Project.

iii. CCZO 1562 is met.

Riverkeeper alleges that the Design Review Modification does not comply with landscaping, buffering, and screening requirements detailed in CCZO 1562.A.1, B.1, and B.3. Riverkeeper’s argument ignores the application materials, which Riverkeeper did not appear to review. Additionally, the Applicant’s consultant, Mackenzie, addressed Riverkeeper’s concerns within its January 24 technical memorandum, finding that the Project’s site design complies with CCZO 1562.<sup>25</sup>

CCZO 1562.A.1 requires “existing plant materials on a site shall be protected to prevent erosion.” Riverkeeper does not specify why it believes the Project does not comply with CCZO 1562.A.1, other than alleging that the Applicant must enter an agreement with the Beaver Drainage Improvement Company, Inc. (“**BDIC**”). The Applications are not subject to any such approval criteria, and Riverkeeper’s argument should be dismissed.

Regarding erosion control, the County has already approved the erosion control measures for the entire Facility within DR 21-03, and the approved erosion control measures for the entire Facility will be implemented as depicted in Site Design Review Exhibit 3, Sheets EC1.10-EC5.10, while the erosion control plans associated with the proposed modifications are included as Exhibit 4, Sheets C3.0-C3.7.

Second, the proposed Site Design Review Modification does not affect the majority of the buffering approved within DR 21-03, including the buffering plan for the north and western portion of the subject property. The buffering for this portion of the subject property will remain the same, as it was approved within DR 21-03. The modification will alter the location of the buffering to the south, as depicted on Site Design Review Exhibit 4, Sheets C2.0-C2.2 and C2.5-C2.6. The alteration in buffering to the south is necessary to accommodate the modified site design, but will still ensure that impacts are reduced on adjacent uses to the south of the subject property, thus demonstrating compliance with criterion CCZO 1562.B.1.

Third, the site plans contained within the application materials demonstrate that the Project complies with the buffering standard in CCZO 1562.B.3 that prevents roads from being located in buffer areas. Riverkeeper’s argument that “[t]he application does not provide for a 10-foot

---

<sup>25</sup> Mackenzie Supplemental Evidence Submittal (Jan. 24, 2024).

February 21, 2024

buffer between the access road and the land to the north” presumably relates to the area where NEXT has relocated its rail infrastructure onto the RIPD land. However, Site Design Review Exhibit 4, Sheets C2.0-C2.2 and C2.5-C2.6 clearly depict a 10-foot buffer between the access road and “land to the north.” Riverkeeper’s ambiguous argument on this point is simply wrong.

iv. An exception to the Oregon Statewide Planning Goals is not required.

Riverkeeper also advances an argument that a new Goal 2 exception is required for the proposed modification to the Facility.<sup>26</sup> But, the County has already taken a Goal 2 exception for the Port Westward Exception Area (as adopted in the County’s Comprehensive Plan), the Facility is located within the Port Westward Exception Area, and does not propose to expand that area. Once again, the Board’s prior findings on this issue are instructive:

“The Port Westward Exception Area, which encompasses the land on which the Facility is proposed, is intended to provide an industrial activity or an energy facility with a comparative advantage due to its location with access to the Columbia River, the existing dock facilities, railroad and urban services, and PGE’s Beaver Power Plant. The County’s Comprehensive Plan has already determined that the Port Westward Exception Area is suitable for uses such as “a 200-acre oil refinery, a 150-200-acre coal port, an 80-acre petrochemical tank farm, and a 230-acre coal gasification plant.”<sup>27</sup>

Furthermore, rail service and the expansion thereof were always contemplated as part of the uses intended for Port Westward. “Probable uses would likely be related to the existing services, including the railroad, the dock, and the tank farm.”<sup>28</sup> When justifying the current size of the Port Westward Exception Area, the Comprehensive Plan observed that “[t]he Port Westward site is also large enough to accommodate loop rail systems that could handle 100-car unit trains.”<sup>29</sup>

Therefore, the fact that NEXT proposes to relocate its rail infrastructure is irrelevant to whether a new Goal 2 exception is required, because the Facility is *already located* in the Port Westward Exception Area and the County’s exception statement (incorporated in the Comprehensive Plan) anticipated future rail-dependent development within the exception area. Moreover, DR 21-03 and the Site Design Review Modification application now before you demonstrate that the

---

<sup>26</sup> Riverkeeper Comment, at 8-10 (Jan. 9, 2024).

<sup>27</sup> Final Order No. 12-20222, at 4 (Mar. 23, 2022).

<sup>28</sup> Port Westward Exception Statement § V.

<sup>29</sup> Id. at § VII.A.1.b.

February 21, 2024

Project as a whole is consistent with the RIPD-zone standards, which implement the Port Westward exception.

Riverkeeper would have the Board neuter the RIPD zone because its argument stands for the proposition that virtually any new use that would change the landscape of Port Westward would require an amendment to the adopted exception. However, any of the large-scale industrial uses specifically allowed in the RIPD zone will have that effect to some degree, if for no other reason that there would be more industrial activity than there was before. However, there is no evidence that the mere increase in industrial activity within in an industrial zone will catalyze the further conversion of resource-zoned land to industrial uses. Presumably, a proposal for a new industrial facility on PA-80 zoned land would require such an amendment. But that is not what is before the Board: the Applications do not propose to modify the RIPD zone language or its extent, the Port Westward exception, or any other component of the Comprehensive Plan. Thus, Goal 2 does not directly apply to this decision at all. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429, *aff'd* 137 Or App 554 (1995).

For these reasons, the Board should find that a new Goal 2 Exception is not required to approve the Applications.

- v. The proposed rail branchline satisfies the “farm impacts test” criteria of ORS 215.296 and CCZO 307.1.A-B

Finally, Riverkeeper argues that NEXT has not demonstrated compliance with the farm impacts test under ORS 215.296 and CCZO 307.1. As required by CCZO 307.1 and ORS 215.296, the Board must determine that a proposed use in the Primary Agriculture Zone “will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use” and “will not significantly increase the cost of accepted farm or forest practices on land devoted to farm or forest use.” CCZO 307.1.A-B; ORS 215.296.

It is important to remember that when NEXT sought conditional use permit approval for its original rail branchline on PA-80 land, the Board previously found compliance with the farm impacts test.<sup>30</sup> Although NEXT’s original conditional use permit approval was overturned by LUBA on other grounds, the fact remains that the Board has already approved a farm impacts test for a far larger impact within the PA-80 zone than what NEXT is currently proposing. Notwithstanding the reduced scope and impact of the currently proposed rail branchline, NEXT has developed a new and more detailed farm-by-farm analysis that identifies potential rail

---

<sup>30</sup> *Supplemental Findings of Fact and Conclusions of Law for Final Order No. 13-2022*, at 6.

February 21, 2024

crossings, analyzes the potential for rail impacts on crops, and have engaged a rail expert to develop a rail mitigation plan.<sup>31</sup>

In *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 459 (2019), the Oregon Supreme Court explained the significant change/significant cost test in ORS 215.296(1–2) as follows:

“To summarize, when the parties dispute whether a nonfarm use will force a significant change to a particular accepted farm practice or significantly increase the cost of that practice, the farm impacts test in *ORS 215.296(1)* requires an applicant to prove that the proposed nonfarm use (1) will not force a significant change in the accepted farm practice *and* (2) will not significantly increase the cost of that practice. A “significant” change or increase in cost is one that will have an important influence or effect on the farm. For each relevant accepted farm practice, if the applicant cannot prove both of those elements without conditions of approval, the local government must consider whether, with conditions of approval, the applicant will meet the farm impacts test.”

However, in identifying accepted farm practices, an applicant is not required to be omniscient in its understanding of the peculiarities of each farm practice, and when analyzing the potential impacts of a non-farm use on surrounding farmlands a local government “is not required to perform the impossible task of proving a negative.” *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

Consistent with the Oregon Supreme Court’s ruling in *Stop the Dump Coalition v. Yamhill County*, NEXT’s application provides a farm-by-farm analysis for the farm impacts test utilizing the Supreme Court’s definition that “A ‘significant’ change or increase in cost is one that will have an important influence or effect on the farm.” This examination identifies the impact area associated with the branchline (which extends from the Portland & Western Railroad mainline to the proposed renewable diesel production facility). The analysis then characterizes existing agricultural practices in the impact area and demonstrates that the proposed railroad branchline does not violate either of the approval criteria within CCZO 307.1.<sup>32</sup>

On this basis, Staff correctly concluded that the Project will have minimal impact on farm practices for hay production and row crops because hay and row crops are fairly resilient and are not sensitive to the sound or vibration associated with rail traffic, as evidenced by the proximity

---

<sup>31</sup> See CU 23-11, Application Narrative; Crosstown Memo.

<sup>32</sup> CU 23-11, Application Narrative, at 11-14.

February 21, 2024

of these crops to the existing rail mainline.<sup>33</sup> The proposed rail branchline also will not result in the removal or impact to any existing irrigation and drainage ditches.<sup>34</sup> NEXT has also submitted a technical memorandum from Maul Foster & Alongi, Inc. (“MFA”) that analyzes the effect of rail emissions on nearby organic farms (the “MFA Emissions Memo”). The MFA Emissions Memo concludes that “particulate emissions estimate from the trains servicing the facility indicates that potential impacts from deposition to surrounding farmlands will be very low relative to the deposition standards set by the State of Oregon” and that there will be no observable impact from train emissions on surrounding farmland.<sup>35</sup>

Furthermore, the risk of conflict between farm equipment and trains on the branchline is low because the trains will be infrequent and moving slowly as they accelerate and decelerate due to proximity to the end of the line.<sup>36</sup> Regardless, NEXT submitted further analysis from Crosstown evaluating railroad operations proposed for the Project and offering mitigation recommendations to minimize the potential impact on farming practices within the impact area. Crosstown provided a detailed analysis of potential impacts to farming within the impact area resulting from train movements and crossing occupancy.<sup>37</sup> The Crosstown Memo proposes *nine* mitigation measures to minimize any potential impacts caused by crossing occupancy, and has tailored those mitigation measures to specifically address any potential impact to Seely Mint’s farming operation.<sup>38</sup> The Crosstown Memo also responds to specific concerns raised by Mr. Mike Seely’s January 10, 2024 written comments, and offers further solutions to minimize any impact to Seely’s harvest vehicles.<sup>39</sup>

Importantly, an applicant for a use allowed under ORS 215.213 or 215.283 may demonstrate that standards for approval in ORS 215.296(1) may be met through the imposition of clear and objective conditions. As outlined in Section IV(a)(i), the rail branch line is a use allowed under ORS 215.283 because railroad branch lines are transportation facilities that may be permitted on rural lands and DLCD’s rules have found branch lines are consistent with Statewide Goals 3, 4, 11, and 14.<sup>40</sup> To the extent the County believes that NEXT has not provided sufficient evidence demonstrating that the proposed railroad branchline satisfies the criteria in Section 307.1 without

---

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> MFA Emissions Memo, at 4 (Feb. 7, 2024).

<sup>36</sup> CU 23-11, Application Narrative, at 13.

<sup>37</sup> Crosstown Memo, at 3-7 (Jan. 23, 2024).

<sup>38</sup> *Id.*, at 5-6.

<sup>39</sup> *Id.*, at 6.

<sup>40</sup> *See 1000 Friends*, \_\_\_ Or LUBA, at 9.

February 21, 2024

requiring additional conditions of approval, NEXT proposes to incorporate the mitigation recommendations within the Crosstown Memo as conditions of approval. Incorporating the clear and objective mitigation measures detailed in the Crosstown Memo as conditions of approval will ensure the Project's conformance to applicable standards of the proposed PA-80 use. CCZO 307.2.

Lastly, Riverkeeper's argument that NEXT has not provided a detailed analysis of the impacts to the Beaver Drainage District, or those who use the BDIC system for drainage and irrigation misconstrues the applicability of the farm impacts test under ORS 215.296 and CCZO 307.1.<sup>41</sup> Drainage districts are not farms, nor do the services provided by drainage districts constitute an "accepted farm practice" as defined in ORS 215.203(c). ORS 215.203(c) defines an "accepted farm practice" as "a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use." The purpose and intent of the Beaver Drainage District is to provide flood control, and although the District may provide a benefit to farms within the District's boundaries, the Beaver Drainage District is not itself a farming activity intended to obtain a profit in money. *See* ORS 215.203(c). As such, any impact the Project *may* have on the Beaver Drainage District is not subject to the farm impacts test under ORS 215.296 and CCZO 307.1. The Board should decline to entertain Riverkeeper's attempt unduly expand the farm impacts test.

Even assuming that impacts to the BDIC's system are relevant to the farm impacts test, the Board can find that there is substantial evidence in the record that the Applications will not impact BDIC's system in such a way as to "force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use" or "significantly increase the cost of accepted farm or forest practices on land devoted to farm or forest use." As explained during the hearing, the Application does not propose relocation of an existing BDIC drainage ditch within the site area,<sup>42</sup> but does propose the addition of new culverts to allow for crossings of

---

<sup>41</sup> *See* Riverkeeper Comment, at 14 (Jan. 9, 2024).

<sup>42</sup> Note that one small waterway, noted as "Waterway E," is located within the RIPD zone and must be filled to accommodate construction of the Facility. This was part of the original Site Design Review approval and is not proposed to be changed. This waterway will not be impacted by the rail branchline and is therefore outside of the reasonable scope of the "farm impacts analysis."

February 21, 2024

those ditches. The BDIC raised four principle concerns with respect to the physical impacts of the facility: culvert sizing, tree buffering, and potential groundwater contamination.<sup>43</sup>

With respect to culvert sizing, the BDIC argued that 48” culverts should be installed rather than 36” culverts. A memorandum from MFA was submitted on January 24, 2024, which explained the following:

“As stated in the Post-Construction Stormwater Management Plan<sup>1</sup>, the conveyance structures were sized using an accepted hydrologic model and available survey data. Based on the results of this modeling, the 36” diameter culverts were determined to be adequate to convey the design storm, consistent with the relevant design guidance. If, during final design, additional information indicates that these conveyance structures are insufficient, larger culverts may be proposed. NEXT Renewables will coordinate with the BDIC as needed to ensure the culverts are sized appropriately to convey expected flows; however, it is not anticipated that additional field fit modifications by the BDIC will be necessary after final design.”

This is substantial evidence that the proposed culverts will be sufficient to accommodate the BDIC’s current flow levels.

In response to the BDIC’s concerns regarding the proposed vegetated buffer along the south side of the Facility, MFA explained as follows:

“Following substantial completion of construction and termination of the Construction Stormwater Discharge Permit No. 1200-C, NEXT Renewables will remove the sediment fencing, ensuring access to the waterways for maintenance.

“Installation of the proposed tree buffer is a County requirement for development of the project site. Routine maintenance of the tree buffer will reduce the likelihood of debris and blockages in the adjacent waterways. The waterways will remain accessible for maintenance from the south. NEXT Renewables will coordinate with the BDIC to ensure ongoing access to the waterways from the north, as needed.

---

<sup>43</sup> It is worth noting the conflict between Riverkeeper’s argument that the proposed buffers are insufficient and BDIC’s argument that the buffers should not be allowed.

February 21, 2024

“No development is proposed south of the tree buffer along the boundaries of waterways G and F. These waterways will remain accessible for maintenance from the south. NEXT Renewables will coordinate with the BDIC to ensure ongoing access to the waterways from the north, as needed.”

Based on this expert analysis, the County can find that the proposed vegetated buffer will not significantly impact the BDIC’s ditch system and that such a buffer is required by the County, in any event.

With regard to groundwater impacts and spill response, there is ample evidence in the record to demonstrate the following:

- Adequate spill control is proposed around all tanks containing oil and equipment pads.<sup>44</sup>
- The proposed stormwater ponds have been sized to adequately detain and treat all stormwater generated on the site and in so doing, will prevent groundwater contamination.<sup>45</sup> In particular, MFA observed as follows:

“The presence of high groundwater, as identified in the groundwater evaluation, is expected to limit the infiltration capacity of the site and the proposed stormwater facilities were designed with the assumption that infiltration is negligible. The proposed ponds were designed with a shallow depth to avoid the need for a liner and minimize groundwater intrusion into the ponds. If additional groundwater evaluations determine that groundwater intrusion will negatively impact the ponds or that the ponds will significantly alter the existing drainage conditions, including groundwater levels and surface water availability, modifications to the design may be made during the final design phase.”<sup>46</sup>

- GSI Water Solutions prepared a memorandum prepared by a Registered Geologist, dated Jan. 25, 2022, which describes the groundwater protective measures NEXT must take to comply with applicable state and federal water quality standards. These include the following:

---

<sup>44</sup> See Jan. 24 MFA memo at 3.

<sup>45</sup> See Jan. 24 MFA Memo at 4, MFA Post-Construction Stormwater Plan at 9.

<sup>46</sup> Jan. 24 MFA Memo at 4.

February 21, 2024

- Compliance with DEQ’s Oil and Hazardous Materials Emergency Response Requirements;
- Satisfaction of Oregon DEQ 1200-C (construction) and 1200-Z (industrial operations) permit requirements;
- Avoidance of stormwater infiltration and instead using pollution elimination and reduction control measures to protect groundwater quality; and
- Treatment of all stormwater that may accumulate oils due to contact with oil-handling equipment.

In closing, the overwhelming weight of the substantial evidence in the record supports the conclusion of both NEXT and County Staff that the proposed rail development will not force a significant change in farm or forest practices within the impact area, or significantly increase the cost of accepted farm and forest practices.

**b. Response to Beaver Drainage Improvement Company, Inc. comments.**

BDIC’s comments primarily address aspects of NEXT’s wetland mitigation plan, which is not before the Board. As explained above, NEXT’s wetland mitigation proposal is part of its DSL/USACE Joint Permit. Moreover, the vast majority of BDIC’s February 6<sup>th</sup>, 2024 public comment does not appear to be responsive to any argument or evidence submitted during the first open record period because BDIC’s comment focuses on NEXT’s Joint Permit and BDIC’s own purported authority to regulate land use actions within the Beaver Drainage District. Only BDIC comment #5 within its February 6 submittal is responsive to evidence submitted during the second open record period. As such, all but comment #5 within BDIC’s February 6 testimony should be excluded from the record for this application.

BDIC’s February 6 public comment also does not address any approval criteria. Instead, BDIC’s comment focuses on NEXT’s DSL permit renewal, as well as other themes that are not within the ambit of Columbia County’s land use review for the Project. As stated above, NEXT is not seeking a DSL permit from the County, and the County does not administer Oregon’s removal-fill program. To the extent that BDIC has independent authority to approve or not approve aspects of the Project – which NEXT strongly disputes – BDIC’s authority is not relevant to the authority of the County to approve the Project as a zoning matter. Just as the County need not decide issues governed in other regulatory programs or by other jurisdictions, the County is not required to evaluate BDIC’s authority to allow or not allow modification of its drainage system, as that is governed by BDIC’s easement rights and is fundamentally a real estate matter that the

February 21, 2024

County is not empowered to decide.<sup>47</sup> Regardless, BDIC's arguments in this vein do not explain how their right to approve or deny improvements to the ditches prevents the Applications from meeting the criteria.

BDIC comment #5 within its February 6 testimony addresses the MFA and GSI's groundwater reports, submitted during the first open record period. Specifically, BDIC takes issue with the Applicant's stormwater management design, arguing that "lived experience" shows that the Applicant's design will not be sufficient to manage stormwater. In response, the Applicant reminds the Board that NEXT was required under the National Marine Fisheries Service ("NMFS") SLOPES V regulations to develop its stormwater management plan<sup>48</sup> and stormwater management facilities to ensure that discharge rates match pre-development discharge rates (i.e., the discharge rate of the site based on its natural groundcover and grade before any development occurred).<sup>49</sup> This fact is especially relevant to, and addresses, BDIC's unsupported concerns regarding the Project's flood risks and stormwater management. MFA's stormwater management plan was designed consistent with the SLOPES V regulations and represents substantial evidence that the Project's stormwater management controls meet all relevant approval criteria and will not result in adverse impacts to the Beaver Drainage District or existing wetlands.

Regarding BDIC's concerns about the rail transport aspect of the Project, NEXT has also developed plans for its proposed railroad branchline to achieve a limited rail connection between the Facility and the existing Portland & Western Railroad Tracks. NEXT has analyzed the potential impacts of rail transport along the branchline within its application materials, and has submitted the Crosstown Memo that evaluates railroad operations proposed for the Project and offers mitigation recommendations to minimize the potential impact on farming practices within the impact area of the branchline.<sup>50</sup>

---

<sup>47</sup> "Generally, a final and authoritative determination regarding the intent and scope of deeds, easements and similar real estate documents can be obtained only in circuit court, based on application of real estate law. *See Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 328, 334-35 (2017) (interpreting deeds under real estate law is a function within the particular competence of the circuit court, and is a function that local governments and LUBA, in the exercise of land use approval and review, should avoid if possible)." *McNichols v. City of Canby*, 80 Or LUBA 139, 146, *aff'd w/o op*, 297 Or App 582 (2019).

<sup>48</sup> CUP 23-11, Exhibit 18.

<sup>49</sup> SLOPES V Regulations, at 26 (Mar. 14, 2014) (submitted prior to close of January 24, 2024 open record period).

<sup>50</sup> Crosstown Memo.

February 21, 2024

The issue of flood risk – as it relates to the Project – has been addressed in NEXT’s prior record submittals. To reiterate, CCZO 1104.2.A states that “[t]he special flood hazard areas identified by the Federal Insurance Administrator in a scientific and engineering report entitled The Flood Insurance Study (FIS) for Columbia County, Oregon and Incorporated Areas, dated November 26, 2010, with accompanying Flood Insurance Rate Maps (FIRMs) hereby adopted by reference and declared to be a part of this ordinance.” NEXT submitted an updated FIRM during the second open record period, which shows this area as "Zone X" (Area with Reduced Flood Risk due to Levee).<sup>51</sup> This is in addition the same map scaled as a “FIRMette” already in the record. As this is the map adopted by the County as the basis for its Flood Hazard Overlay (the Flood Insurance Rate Study dated Nov. 26.2010), the Property is not located within a Special Flood Hazard Area. CCZO 1104.2.A.

Within the Staff Report, County Staff also states that “[a]ccording to the Federal Emergency Management Agency’s (FEMA) Flood Insurance Rate Map 41009C0050D, dated November 26, 2010, the site is in shaded Zone X, which is outside the Special Flood Hazard Area (see Site Design Review Exhibit 5) Therefore, Staff finds that this criteria does not apply.”<sup>52</sup>

For the reasons above, the Property is not a Flood Hazard Area regulated by the County and the standards in that section do not apply. While BDIC may be understandably focused on recertification of the levy system near Port Westward, their efforts in that regard do not related to the approval criteria, nor do they allow the County to rely on something other than the Nov. 26, 2010 FEMA Flood Insurance Rate map.

For the above reasons, the Board should reject BDIC’s comments.

### **c. Response to Mike Seely Comments**

Mike Seely’s comments submitted February 7, 2024 can be reduced to two themes – concerns regarding rail impacts to Seely Mint’s summer harvest season, and potential stormwater impacts. NEXT has addressed both of these concerns detail through its application materials and open record submittals. NEXT has thoughtfully designed the limited branchline connection across the PA-80 zoned land within the Project area, and has developed a comprehensive rail mitigation plan that addresses potential conflicts between harvest vehicles and trains at the Kallunki Road crossing.<sup>53</sup> As represented previously, NEXT is willing to incorporate the mitigation measures proposed in the Crosstown Memo as conditions of approval to address any potential crossing

---

<sup>51</sup> Applicant’s Second Open Record Submittal (Feb. 7, 2024).

<sup>52</sup> Staff Report, at 19.

<sup>53</sup> See Crosstown Memo (Jan. 23, 2024).

February 21, 2024

impacts on Seely Mint’s harvest vehicles. However, although NEXT has addressed the Kallunki Road crossing Mr. Seely has not offered any evidence that the Kallunki Crossing is necessarily critical to his farming operation; rather, his comments appear to raise general concerns with delays at rail crossings without explaining whether a particular crossing is essential to his operations. NEXT has also submitted a detailed stormwater management plan that address Mr. Seely’s concerns regarding the Project’s proposed stormwater management system.<sup>54</sup>

Critically, Mr. Seely has not identified any relevant approval criteria that the Applications fail to meet, nor has Mr. Seely submitted any evidence challenging the conclusions of the Applicant’s evidence and experts. As such, Mr. Seely’s comments should not be considered relevant to whether the Board can approve the subject Applications.

For the above reasons, the Board can reject Mr. Seely’s arguments.

**d. Response to Warren Seely Comments**

Warren Seely has submitted a variety of comments, both in his capacity as an individual<sup>55</sup> and on behalf of the BDIC. NEXT has responded to Mr. Seely’s comments within its response to the BDIC, above. *See* Section IV(b).

**e. The Application satisfies the farm impacts test.**

NEXT has comprehensively addressed the Applications alleged noncompliance with the farm impact test under ORS 215.296 and CCZO 307.1. *See* Section IV(a)(v). As stated above, NEXT’s Application contains a detailed farm-by-farm analysis for the farm impacts test, which has been incorporated in the Staff Report for this matter.<sup>56</sup> NEXT has also submitted several technical reports from its consulting team addressing various potential farm impacts that may result from the Project, as well as offering mitigation measures.<sup>57</sup>

Conversely, opposition commenters – including Mike and Warren Seely – have offered no substantial evidence that the Project will result in adverse impacts to farming. The opposition testimony relies on conjecture and hypotheticals, rather than science and engineering. Because there is no substantial evidence in the record that the Project will force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use” or “will not

---

<sup>54</sup> *See* Jan. 24 MFA Memo.

<sup>55</sup> Warren Seely Comment (Jan. 10, 2024).

<sup>56</sup> Staff Report, at 28-31; CU 23-11, Application Narrative, at 11-14.

<sup>57</sup> *See* MFA Emissions Memo; GSI Water Solutions; Crosstown Memo.

February 21, 2024

significantly increase the cost of accepted farm or forest practices on land devoted to farm or forest use,”<sup>58</sup> the Board should find that the Applications comply with the farm impacts test. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

**f. Response to other themes raised throughout the public comment process**

**i. Suitability**

As described above, the Project includes two applications, one Site Design Review Modification for the Facility and one for the rail branch line. These applications are separate but related. Few project opponents have argued that Facility itself should be denied or fails to meet the approval criteria. The sole argument that appears to have been raised is a general statement that the Project does not “compliment the character of the surrounding rural area,” as provided in the purpose statement of the RIPD zone (CCZO 681).

As an initial matter, the Board’s previous approval of DR 21-03 determined that the renewable diesel production facility falls within the category noted above and authorized the use based on demonstration of compliance with the Prescribed Conditions. In the previous approval, the Board found that the proposed use was consistent with all applicable Goals and Policies of the Comprehensive Plan in Part X Economy, Part XII Industrial Siting, Industrial Lands Exceptions, Port Westward Exception Statement, and Part XIV Public Facilities and Services.<sup>59</sup> The result of the current Applications is a rail facility that fits within the parameters of the rail service approved as part of DR 21-03. The scope of the use approved in DR 21-03 is not changing as a result of this modified design application, and the fact that more of this operation is being relocated to the RIPD zone from a PA-80 zone only serves to reduce its impacts on surrounding farmlands. Regardless, these standards do not apply to this application for a modification of a prior approval.<sup>60</sup>

Additionally, even if CCZO 681 were applicable to the subject Applications, CCZO 681 is a purpose statement and not an approval criterion. *Ellison v. Clackamas County*, 28 Or LUBA 521, 525 (1995). The Rural Industrial goal and policies include a related provision to which the Application must conform as a general matter. However, that specific policy is that the Project “complement the character and development of the surrounding area,” not the surrounding “rural” area. Regardless, the Board can find that the Project compliments the character of the

---

<sup>58</sup> ORS 215.296; CCZO 307.1.

<sup>59</sup> Final Order No. 12-2022, at 2-4.

<sup>60</sup> *See also*, Staff Report, at 11.

February 21, 2024

surrounding area and surrounding rural area because it is consistent with the stated purpose of the Port Westward Exception Area and RIPD zone.

The Project is intended to provide both an industrial activity and energy facility with its comparative advantage due to its access to the Columbia River, existing dock facilities, rail and urban services, and PGE's Beaver Power Plant. Second, there are also already substantial existing industrial developments in the area. The PGE Port Westward Generating Plant, the PGE Beaver Generating Plant Tank Farm, the Columbia Pacific Bio-Refinery, and the Clatskanie People's Utility District substation are currently existing industrial developments operating on land in the vicinity of the proposed Facility. The existing industrial activities at Port Westward demonstrate how industrial uses "complement the character and development of the surrounding *rural area*" and demonstrate how industrial and rural uses can coexist. The Facility is consistent with these types of industrial developments that are already existing, will complement these existing facilities that are already in the area, and that the Facility will be compatible with nearby agricultural uses in ways similar to these existing industrial uses. Finally, the use of multimodal transportation, including river and rail transportation, will prevent adverse impacts on the surrounding area.

To the extent that the suitability purpose statement of CCZO 681 – or any other suitability criteria – are applicable to the Project, the Applications fully satisfy these criteria.

ii. The Project is designed to minimize risks to water quality

Some public comments raised concerns about how the Project may impact general water quality. These concerns were largely addressed above in response to Riverkeeper's comments. *See* Section IV(a)(v). Moreover, NEXT has submitted voluminous technical analysis that addresses stormwater management and potential groundwater impacts.<sup>61</sup> In sum, the Project will involve DEQ permits to protect groundwater quality during construction and operation, and NEXT will implement robust water quality practices with a firm intention to minimize any risk to water quality.

iii. The Project incorporates waste and spill measures that meet or exceed state and federal standards.

Some commenters raised concerns about waste and spill measures. These are also addressed above in Section IV(a)(v). Importantly, NEXT intends to incorporate and adopt waste and spill

---

<sup>61</sup> *See* Jan. 24 MFA Memo.

February 21, 2024

measures that meet or exceed state and federal standards.<sup>62</sup> Although commenters concerned with this aspect of the Project have not cited to any relevant approval criteria, the record reflects that NEXT has appropriately addressed all waste and spill concerns.

iv. Acoustical impacts have been fully addressed.

Some opponents raised concerns about potential acoustical impacts from the approved Facility. The CCZO does not impose a specific numerical limit on noise sources in terms of decibels. Rather, a Site Design Review application is required to identify “[n]oise sources, with estimated hours of operation and decibel levels at the property boundaries.”<sup>63</sup> NEXT did so, and Staff found as follows: “Noise sources for the approved facility will utilize applicable mechanisms to limit volumes to no more than 85 decibels at the property line.”<sup>64</sup> The Applicant has therefore satisfied its burden to identify the likely levels of noise generated at the Property Line, and no opponent has argued or submitted any evidence that the Application will violate any applicable noise standard.

v. Wildlife

The Staff Report found that the Project is not located in any adopted wildlife overlay zone, including the County’s Riparian Corridors, Wetlands, Water Quality, and Fish and Wildlife Habitat Protection Overlay Zone, Big Game Habitat Area, Wildlife Game Habitat Mapping.<sup>65</sup> NEXT concurs with Staff’s finding on this point and has submitted multiple maps confirming that the Project is not located in any identified wildlife overlay zone.<sup>66</sup>

The Applications are not subject to any wildlife or habitat zone regulations, and therefore has met any applicable criteria.

vi. Air pollution

In the second open record period, NEXT submitted a technical memorandum from MFA responding to air quality concerns, specifically related to emissions from the rail branchline.<sup>67</sup> The MFA air quality memo explains that the railcars themselves will not generate emissions

---

<sup>62</sup> *Id.*, at 3.

<sup>63</sup> CCZO 1561.A.15.

<sup>64</sup> Staff Report at 16.

<sup>65</sup> *See generally*, Staff Report.

<sup>66</sup> Applicant Site Design Review Submission Package September 18, 2023, Ex. 6-7.

<sup>67</sup> Applicant’s Second Open Record Submittal, Exhibit 1.

February 21, 2024

because their cargos will be covered, and that brake and locomotive emissions will be far below levels considered unsafe.

NEXT's second open record submittal also encloses excerpts potentially relevant sections of 7 CFR Part 205 (National Organic Program) concerning organic crop certification to demonstrate that incidental diesel air pollutants are not among the substances prohibited.<sup>68</sup> That is, environmental diesel pollutants do not constitute, either individually or collectively "a substance the use of which in any aspect of organic production or handling is prohibited or not provided for in the Act or the regulations of this part," because they are not "used" as an input in organic crop production.

The MFA Emissions Memo concludes that "particulate emissions estimate from the trains servicing the facility indicates that potential impacts from deposition to surrounding farmlands will be very low relative to the deposition standards set by the State of Oregon" and that there will be no observable impact from train emissions on surrounding farmland.<sup>69</sup> Moreover, the memo also concludes that "emissions from rail operations at the facility will also not result in any prohibited substances that affect organic certification."<sup>70</sup>

Although opponent comments do not point to any relevant approval criteria regarding air emissions, NEXT has diligently analyzed and responded to all concerns raised.

#### vii. Traffic

NEXT's traffic engineer, Mackenzie, has provided a project TIA that addresses those items identified in the scoping letter approved by County and ODOT staff to ensure compliance with approval standards.<sup>71</sup> Mackenzie has also provided a supplemental letter regarding the continuing applicability of the TIA.<sup>72</sup> No commenter has submitted evidence into the record rebutting the conclusions made in the Mackenzie TIA. Therefore, the Board can consider the TIA substantial evidence demonstrating the Project's compliance with all traffic-related approval criteria. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

Moreover, the proposed railroad branchline capitalizes on the proximity of the existing rail line and will allow movement of materials that would otherwise be shipped by truck to the proposed

---

<sup>68</sup> *Id.*, Exhibit 2.

<sup>69</sup> *Id.*, at 4.

<sup>70</sup> *Id.*

<sup>71</sup> Site Design Review Exhibit 20.

<sup>72</sup> Site Design Review Exhibit 21.

February 21, 2024

renewable diesel production facility. The Board can find that the railroad branchline will reduce traffic on area roadways, reserving roadway capacity for all users and modes.<sup>73</sup> NEXT has analyzed the potential impact of train crossings on roadway traffic within the application materials and supplemental Crosstown Memo.

Finally, DR 21-03 approved a driveway to Hermo Road, with secondary access to Kallunki Road for emergency vehicles and for equipment to access barges. No changes to site access are proposed as part of this application.<sup>74</sup>

The evidence in the record demonstrates that the subject Applications meet all applicable transportation-related approval criteria.

## V. CONCLUSION

The Applications satisfy all applicable criteria and enjoy support from Columbia County residents who recognize the Project's positive impact on the local economy and environment, as well as its pronounced importance in combatting global climate change. NEXT concurs with County staff's recommendation of approval. As such, NEXT respectfully requests that the Board County staff recommends approving the Applications.

Sincerely,



Garrett H. Stephenson

GST:kob

CC: Mr. Chris Efir  
Mr. Gene Cotton  
Ms. Laurie Parry  
Mr. Michael Hinrichs  
Mr. Brian Varricchione  
Mr. Brien Flanagan  
Mr. Kennan Ordon-Bakalian

---

<sup>73</sup> Staff Report, at 38.

<sup>74</sup> See Site Design Review, Exhibit 4.