Memorandum

VIA E-MAIL

To: Robert Wheeldon
Jesse Winterowd

From: Garrett H. Stephenson

Date: September 30, 2021

Subject: **Interpretation of CCZO 1175.B, CCZO 1184.E, and OAR 660-012-0065 for the NEXT Renewable Diesel Project.**

You asked this office to provide additional clarity on two questions, which are set forth below:

1. Provide additional explanation of how the Project is a "water-related" or "water-dependent use" for purposes of CCZO 1175.B and CCZO 1184.E.2.e.

2. Explain how the proposed rail connection to the Portland & Western Railroad is a railroad "mainline" or "branchline" for purposes of OAR 660-012-0065.

Our answers are provided below. Please note that the following memorandum addresses the structure and function of certain components of the CCZO and Oregon Administrative Rules. It is not intended to examine which of these rules apply (or how) to components of the renewable diesel project. Therefore, NEXT Renewable Fuels (NEXT) specifically takes no position as to applicability of rules or ordinances in the following discussion that is inconsistent with that stated in the Applications.[1]

1. As explained in the Applications, the Renewable Diesel Facility, including its rail component, is a "water-dependent" use.

Columbia County Zoning Ordinance (CCZO) Section 1180 Wetland Area Overlay governs allowable activities within regulated wetlands. As a baseline, there are several prohibitions on activities and encroachments within regulated wetlands, including CCZO 1183, 1184.A.5, and 1184.C. However, recognizing that there are situations in which wetland impacts are acceptable, CCZO 1184.E carves out several exceptions to otherwise-prohibited activities. Significantly, among these exceptions are water-related and water-dependent uses (with no restrictions on location of such uses). Since the project as a whole (the renewable diesel production facility and the proposed rail branchline) is a water-dependent and water-related use due to the facility's reliance upon the Port Westward dock as well as Columbia River water necessary for renewable

[1] Note that, in the applications, NEXT has identified potential project impacts to wetlands, but not riparian areas, for the renewable diesel plant within the RIPD zone.

diesel processing, the baseline prohibition on wetland impacts is not applicable in this instance and the exception explicitly allows the proposed activities.

To ensure that wetland activities allowed via the stated exceptions conform to state and Federal regulations, CCZO 1184.G requires that "all applicable permits from state and federal agencies" be obtained prior to commencing the use within wetland areas. NEXT is seeking approval from both the U.S. Army Corps of Engineers (the "Corps") and the Oregon Department of State Lands ("DSL") for wetland alterations and will mitigate wetland impacts as required by the Corps and DSL.

Similarly, CCZO Section 1170 governs allowable activities within regulated riparian corridors (*e.g.*, McLean Slough). CCZO 1173 prohibits riparian impacts but CCZO 1175.B allows an exception for water-related and water-dependent uses. CCZO 1177 requires that "all applicable permits from state and federal agencies" be obtained prior to commencing the use within riparian corridors. As noted above, the applicant is seeking approval from both the Corps and DSL for wetland impacts and will mitigate wetland impacts as required by the Corps and DSL.

Neither the CCZO nor the Columbia County Comprehensive Plan ("Plan") define the terms "water-related" or "water-dependent." The County's riparian area and wetland regulations are a component of the County's Statewide Planning Goal 5 program, which adopts a "safe harbor" approach. *See* Article X of the Plan. However, the Plan's Goals and Policies do not categorically intend to prohibit uses conflicting with riparian areas or wetlands; rather, the Plan's stated intent is to protect such areas from "nonwater-dependent uses." *See, e.g.* Article X.E, Policy 9.[2]

The Goal 5 safe harbor process essentially requires local governments to directly implement certain Goal 5 rules in OAR 660 Division 23.[3] Consequently, the County's riparian and wetland regulations roughly resemble the riparian rules in OAR 660-023-0090 and -0100. These sections allow development of "water-dependent or water-related uses" within riparian areas and wetlands and allow removal of riparian vegetation "as necessary for development of water-related or water-dependent uses." The OARs require less strict riparian protections in farm and forest zones: OAR 660-023-0090(8)(c) provides that "(c) Notwithstanding subsection (b) [regulating removal of riparian vegetation] of this section, the ordinance need not regulate the removal of vegetation in areas zoned for farm or forest uses pursuant to statewide Goals 3 or 4."

Given that the County purported to adopt a safe-harbor approach, the definition of "water-dependent" and "water-related" in the Statewide Planning Goals may be helpful (but not

[2] The Plan is not directly applicable to the applications with respect to wetland or riparian impacts, but provides some historical context.
[3] This section is not directly applicable to the applications, but also provides historical context.

necessarily dispositive[4]) in interpreting those terms in the CCZO. In the current version of the Statewide Planning Goals, those terms are defined as follows:

> "WATER-DEPENDENT. A use or activity which can be carried out only on, in, or adjacent to water areas because the use requires access to the water body for water-borne transportation, recreation, energy production, or source of water."

> "WATER-RELATED. Uses which are not directly dependent upon access to a water body, but which provide goods or services that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered. Except as necessary for water-dependent or water-related uses or facilities, residences, parking lots, spoil and dump sites, roads and highways, restaurants, businesses, factories, and trailer parks are not generally considered dependent on or related to water location needs."

The County can find that the proposed renewable diesel production plant within the existing RIPD zone is "water-dependent" because the renewable diesel product and renewable diesel feedstocks are proposed to be imported and exported by water-borne vessels on the Columbia River, including ships and barges. Also, the facility relies on Columbia River water as part of the renewable diesel production process – namely for steam production, cooling tower process water, and fire water reserve. The facility is proposed at Port Westward entirely due to its location at one of Oregon's few deep-water ports capable of being served by cargo ships.[5] Therefore, the County can find that the renewable diesel facility within the existing RIPD zone "can be carried out only […] adjacent to water areas because the use requires access to the water body for water-borne transportation" and as a "source of water."

For the same reasons, the County can find that the proposed rail branchline located on PA-80 lands is also "water-dependent." The purpose of the proposed rail branchline is to deliver renewable diesel feedstocks to the renewable diesel production plant for conversion into renewable diesel, to export such renewable diesel,[6] and to remove waste products from the facility. As the branchline exists only to serve the renewable diesel production plant and is part of the overall project, it is just as river-dependent as the production plant itself. Put another way, the branchline is water-dependent because, like the renewable diesel production plant, it relies on river transportation as the other end of the renewable diesel supply/production chain. The export of waste products also makes the rail line a necessary component of the overall water-dependent use.

Although requested in a separate application, the proposed rail branchline is exclusively associated with, part of, and entirely dependent on the renewable diesel plant. It was proposed in

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[4] The OARs are not directly applicable to the applications because the County's Plan has presumably been acknowledged.
[5] The only others are the Ports of Coos Bay, Astoria, Newport, and Portland.
[6] The rail connection will also be capable of exporting finished product.

a separate application for the simple reason that the rail branchline is to be located just outside of the existing Port Westward Exception Area and within an exclusive farm use zone, and is therefore subject to different criteria.

If the County does not find that the rail branchline is "water-dependent," the County can nonetheless find that the proposed rail branchline is "water-related." This is because it is intended to provide "goods […] that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered." There can be no doubt that the rail branchline is intended to provide "goods" (in this case, renewable diesel feedstocks) to a "water-dependent land use" (the renewable diesel production plant). It also serves to export goods in the form of finished renewable diesel from the same renewable diesel plant, as well as certain waste products. As explained above, the renewable diesel facility must be located near the water because the use *itself* depends on river water and transportation, and would not be viable without a water-adjacent location. Put in terms of the above definition, without a water-adjacent location, the facility would "result in a public loss of quality in the goods or services offered" because it could not offer the goods or services proposed due to its dependency on river transportation. Similarly, if the branchline is not located adjacent to the renewable diesel production plant, the efficiency of the renewable diesel use would suffer substantially because feedstocks, renewable diesel, and waste product otherwise moved by rail would be moved by truck, which could have increased public impacts through increased truck traffic.

2. The proposed rail connection between the renewable diesel facility and the Portland & Western Railroad is a "branch line" for purposes of OAR 660-012-0065.

OAR 660-012-0065 "Transportation Improvement on Rural Lands" allows "(j) Railroad mainlines and branchlines" subject to the conditional use criteria in ORS 215.296. There is no stated limitation in the rule that such "mainlines" or "branchlines" may not serve single uses or owners, and nothing in the context of the rule that would support such a narrow interpretation. There is no definition of railroad "mainlines" or "branchlines" in OAR 660 division 12, and we were unable to find a definition of these terms elsewhere in state law or regulation.

Most of the Oregon cases interpreting rail terminology are from the pre-war period, but given the importance of rail transportation at that time, they are worth considering for guidance. The only case that appears to interpret these terms is *Union Pacific Railroad Company v. Anderson*, 167 Or 687 (1941). It described them as follows:

> "The commonly understood meaning of the words "main line" of a railroad is the principal line, and the branches are the feeder lines like the tributaries of a river. The court so stated in the O., C. & E. case, quoting dictionary definitions to that effect. It also quoted from 22 R.C.L. 744 the following:
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> > "A 'trunk railway' is a commercial railway connecting towns, cities, counties or other points within the state or in different states, which has the legal capacity, under its charter or the general law,

> > of constructing, purchasing and operating branch lines or feeders connecting with its main stem or trunk, the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river to its tributaries."
>
> "To the same effect is *Baltimore & Ohio R. Co. v. Waters,* 105 Md. 396, 66 Atl. 685, 12 L.R.A. (N.S.) 326, where the court said that a "lateral road" (which was treated as synonymous with a "branch line") was "nothing more nor less than an offshoot from the main line or stem", and approved the following definition from *State v. United New Jersey R. and Canal Co.,* 43 N.J.L. 110:
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> > "It denotes a road connected, indeed, with the main line, but not a mere incident of it, not constructed simply to facilitate the business of the chief railway, but designed to have a business of its own, for the transportation of persons or property to and from places not reached by the principal route."

Id. at 711–712. What is apparent in the above analysis is that a "mainline" or "trunkline" can be analogized to a river or tree trunk while a "branchline" can be analogized to a tributary or branch. We were unable to find any definition of a "spur" line that suggests that a "spur" line is not within the broader category of "branchlines."

There is Oregon legal precedent demonstrating that the terms "spur" and "branchline" are synonymous. For example, the factual recitation by the Oregon Supreme Court in *Corvallis & A. A. R. Co. v. Portland, E. & E. Ry. Co.*, 84 Or 524 (1917) uses the two terms interchangeably:

> "Plaintiff alleges in effect that on April 17, 1911, and for some time prior thereto, it owned and operated a railroad line from Corvallis to Monroe, and also owned certain railway equipment, rolling stock, real and personal property, rights of way, contracts, and franchises; that among the contracts was one made during the year 1909 between the plaintiff and the Corvallis Lumber Manufacturing Company, hereafter to be designated as the Lumber Company, by the terms of which <u>plaintiff agreed to construct a branch line</u> from its main track on or before May 15, 1910, extending into section 16, and <u>also to extend that spur</u> to a point within the boundary lines of the northwest quarter of section 20 on or before June 1, 1911, the Lumber Company to furnish logs from said timber for transportation to Corvallis over the branch line when constructed […]." (Emphasis added.)

The above passage illustrates two concepts. First, there is no principled difference as far as the Court was concerned between the term "spur" and "branchline." Second, it demonstrates that a rail connection requested by a single company (in this case, the Corvallis Lumber Manufacturing Company) is still a "branchline" even though it serves a single use.

In modern usage, the terms “branchline” and “spur” appear to be just as interchangeable as they were in 1917. For instance, the Wikipedia entry for “branchline” describes it as follows: “A branch line is a secondary railway line which branches off a more important through route, usually a main line. A very short branch line may be called a spur line.” See https://en.wikipedia.org/wiki/Branch_line.

Based on the above, the County can find that a “spur” line is a certain kind of “branchline” or that the two terms are synonymous. Consequently, the County can find that NEXT’s proposed rail connection is permissible on PA-80 land pursuant to OAR 660-012-0065. There is no express or implied basis in that rule to conclude that “branchline” serving a single proposed use is not allowable under that rule, and pursuant to ORS 174.010,[7] the County should not impute such a legislative intent where it is not apparent on the face of the rule.

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[7] “In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” (Emphasis added.)