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**Subject:** NEXT - County staff memo  
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**Attachments:** [Staff interpretations and timing 10.25.21.pdf](#)

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Garrett and Brian,

As promised, attached is a memo from staff identifying the critical issues and proposing alternate timelines. We will see you tomorrow at 9 am.

Robin

# Staff Memorandum – NEXT Applications

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## Critical Issues

Columbia County planning staff and consultants have identified major compliance issues with the application as proposed.

- First, we do not agree with the applicant’s contention that the facility and rail connection are “water-dependent” or “water-related” and therefore exempt from the provisions of the WA and RP overlay.
- Second, we do not agree with the applicant’s contention that the private rail connection to the Portland & Western Railroad spur, and associated “rail corridor” on agricultural land qualifies as a “railroad branchline” per OAR 660-012-0060(3)(j) and therefore overrides state and county requirements for a goal exception.

The applicant’s attorney has submitted arguments supporting the proposition that the use is water-dependent and that the proposed rail connection and “rail corridor” qualifies as a branchline per OAR 660-012-0060(3).

### Water-Dependent or Water-Related

We agree that the proposed diesel facility site requires access to the deep water port to operate. The site is located about a mile from the deep water port but has functional access to the loading dock via a dedicated pipeline. This pipeline conveys both raw materials and finished diesel between the site and the deep water port. Both the deep water port and the pipeline qualify as “water dependent” uses because they require a location adjacent to or in the Columbia River. However, we find no support that the diesel facility itself requires a location adjacent to the Columbia River or on a protected wetland to operate.

The applicant argues that because the terms are not defined in the acknowledged comprehensive plan and zoning ordinance, the county is free to interpret these terms, notwithstanding the definitions in

related administrative rules or common usage. The applicant provides no specific case law regarding the proposed interpretation of these terms – other than deference given to local interpretations.

In the applicant's words:

*“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.*

*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.”*

Basically, the argument is that because the use is reliant on being near a deep water port on the Columbia River, that the use is “water dependent”. The applicant also indicates the facility uses Columbia River water for diesel production, though the use does not appear to have or propose direct water draw access to the river.<sup>1</sup>

The applicant provided definitions from Oregon Statewide Planning Goals & Guidelines (DLCD, 2019):

*“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 proposed facility is located over a mile from the docks, and over 1,000 feet (across rail lines, a road, and another tax lot) from the Columbia River at its nearest point. In our experience, this would not be considered “on” or “adjacent to” the water body the use is proposed to be dependent on and related to, so the proposal would not meet the provided definitions or argument.

The use is on, in, and adjacent to delineated wetlands, but the use is not suggested to be dependent on or related to these wetlands in any way.

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<sup>1</sup> The applicant may be referring to the proposed water utility access, which is identified as tapping into the Port's existing 18" water line adjacent to the site, which may ultimately pull water from the Columbia River, but this is unclear. This connection might merit additional exploration.

Digging deeper, the analogous Coastal Shorelands Rules (OAR 660.037.040) provides additional definition language on water dependent use as follows:

*(6) "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. (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. terminal and transfer facilities). \* \* \*(F) "Source of water" means facilities for the appropriation of quantities of water for cooling processing or other integral functions.*

*(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.*

We note that the *Oregon Wetland Guide* (published jointly by DSL and DLCD) suggests that water-dependent uses that should be allowed through the "safe harbor" process include

*"Docks, boat shelters, piers, boat ramps, and similar water dependent uses."*

In short, we do not agree that the proposed diesel facility and accessory rail access and storage are water-related or water-dependent as the terms are used in analogous state rules and common practice in Oregon. The use is not proposed to be "on or adjacent to" the Columbia River – it is proposed to be located on wetlands that are also not "on or adjacent to" the Columbia River. And the use is not proposed to be dependent on or related to the wetlands it is "on or adjacent to". So it clearly doesn't need to be "on or adjacent to" the Columbia River or the wetlands, and doesn't meet the definitions provided by the applicant and DLCD.

If the County were to ignore those definitions and interpret that a use that does not need to be "on or adjacent to" a water body can be considered a "water-dependent" or "water-related" use – because it relies on a nearby port for import and export of products – Columbia County would be the only jurisdiction using this definition that we're aware of.

For the above reasons, we think that Columbia County choosing its own definition of "water-dependent" and "water-related" and defining the proposed industrial use as "water dependent" because it benefits by being near a port and ultimately ships products via water is inconsistent with planning practice in Oregon.

## Railroad Branch Line

In a separate but related application, applicant proposes a railroad “branchline” and “rail corridor” through wetland and riparian areas. Applicant indicates the branchline should also be considered water-dependent or water-related because it exists only to serve the facility:

*“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, 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.”*

Needless to say, if the facility does not meet the definition of “water-related” or “water-dependent”, the proposed rail development would also not meet the definition and would not be allowed through wetland and riparian areas.

The proposed branchline also raises definitional concerns for staff. Given the established purpose and relationship between the proposed rail connection and the facility, staff would normally consider the proposal to be either development accessory to the primary use (i.e., the facility), or an “accessory transportation improvement”<sup>2</sup> permitted under 660-012-0065(3)(a) for:

*“a use that is allowed or conditionally allowed by ORS 215.213, 215.283 or OAR chapter 660, division 6 (Forest Lands)”*

The proposed renewable diesel production facility is not allowed or conditionally allowed on agricultural land, rendering an “accessory use” or “accessory transportation improvement” application unapprovable without a goal exception.

That said, the proposal at hand is presented as a separate application for a railroad branchline, rather than an accessory transportation improvement related to the facility use. Staff agrees that OAR 660-012-0065(3) allows railroad mainlines and branchlines on agricultural land as conditional uses without a goal exception.

This approach leads to some additional questions:

- If not an accessory use or accessory transportation improvement, is a dedicated, single-use, private rail improvement disqualified as a “branchline”?
- Can this proposal be defined as a “branchline”?

## Private, single use issue

Applicant argues that:

*“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.”*

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<sup>2</sup> Per 660-0012-0065(1)(d): “Accessory Transportation Improvements” means transportation improvements that are incidental to a land use to provide safe and efficient access to the use

Staff notes the alternative of defining single-use rail lines as an accessory use or accessory transportation improvement would be a logical contextual differentiation. Staff agrees we have seen no evidence that “branchlines” may not serve single uses or owners.

#### Branchline definition

The application narrative indicates the “Portland & Western Railroad mainline” is adjacent to the east of the site, and the proposal is for a “branchline” extending west from the “mainline” to the site through PA-80 land.<sup>3</sup>

The Port Westward Exception Statement in the Columbia County Comprehensive Plan assigns a different terminology to the rail system serving the Port Westward exception area site:

*“The site is served by a spur track from the Burlington Northern Railroad Astoria-to- Portland branch line.”*

ODOT defines “branch line” and “spur” as:

*“Branch Line: A secondary line of a railway, typically stub-ended”*

*“Spur: 1) (Rail) A stub track diverging from a main or other track.”*

Applicant has provided interpretations (1911 case law and Wikipedia) that there is no distinction between “branchline” and “spur”, and that “spur” is a type of “branchline”. ODOT’s TransGIS railroad mapping<sup>4</sup> does not include any “branchlines” – all railroad elements are defined as “Mainline”, “Siding”, “Spur”, or “Yard”. Staff agrees there is a lack of clarity in rail definitions, that “branchline” may include “spur”, and there may be latitude to classify the proposed rail connection to the site as a branchline.

#### Rail Corridor

The application also includes a “rail corridor” that includes 5 parallel railroad tracks, rail switches, and a gravel access road. This meets ODOT’s definition of a “rail yard”:

*“Rail Yard: A system of tracks within limits provided for switching cars, making up trains, storing cars, and other purposes.”*

Staff considers a rail yard to be a separate use than a mainline or branchline, and not a use defined in OAR 660-012-0065(3) as allowable in agricultural zones without a goal exception.

#### Buffering, Screening & Variance

Relatively minor and easily-resolvable issues include Section 1562 buffering and screening requirements.

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<sup>3</sup> The application also includes a rail corridor extending south and west of the site through PA-80 land, addressed separately below.

<sup>4</sup> <https://gis.odot.state.or.us/transgis/>

Section 1562.B.2 requires buffering to the east and south. Applicant indicates standards are met, while noting standards are not met due to PGE discouraging comments. Applicant should take a variance to buffering standards that are not met.

Section 1562.C.5 requires screening of loading and storage areas from adjacent properties. It does not exempt areas for distance from the property line. Applicant requested a variance to screening standards that could also apply to this standard. Applicant indicates sight lines to the facility are a requirement of DHS but has not provided evidence of sight line requirements.

## Staff Report and Hearing Timing

- ORS 215.427 application force complete July 15, 2021.
- 150-day timeframe ends December 12, 2021
- Option 1 (no extension):
  - Board hearing on Dec. 1
  - Final Decision adopted Dec. 8
- Option 2 (60-day extension):
  - Planning Commission hearing on Dec. 6
  - Board appeal hearing on Jan. 5 (the Board likes to leave the record open for written comment: 7 days new evidence; 7 days rebuttal and 7 days applicant final argument.)
  - Board deliberation on Jan 26 or Feb 2
  - Board adopts final decision on Feb 9