

## FW: Comment on Applications for Permits by NEXT Renewable Fuels Oregon, LLC

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Fri 1/21/2022 1:09 PM

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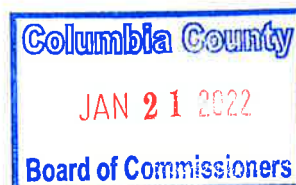
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**From:** Kyle Murai <Kyle.M@gladstoneland.com>

**Sent:** Friday, January 21, 2022 1:00 PM

**To:** ePermits - Planning <planning@columbiacountyor.gov>

**Subject:** Comment on Applications for Permits by NEXT Renewable Fuels Oregon, LLC



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Good Afternoon,

Please see the attached document as a public comment submittal regarding the permit applications submitted by NEXT Renewable Fuels Oregon, LLC.

Thank you,

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## **Applications for Permits by NEXT Renewable Fuels Oregon, LLC**

To Whom it may Concern,

We, the Landowners within the Beaver Drainage Improvement Company (Drainage Company), are writing to you in regards to the request for public comment in the matter of the Applications by NEXT Renewable Fuels Oregon, LLC (NEXT). After extensive review of the proposed Uses, we have the following comments to submit.

### **Background**

Beaver Drainage District was created in 1915 for the express purpose "to reclaim said lands and acreage and protect same by one system of drainage, from the effects of water, for sanitary and agricultural purposes.....and to prevent overflow from flood waters and to regulate the rise of the level of the subsurface waters thereof". The system underwent several upgrades over the decades, with the last being in the late 1970s. In 1994, under authority of ORS 554.375, District landowners voted to dissolve the District and to reorganize as the Beaver Drainage Improvement Company, a public corporation under Oregon law, with authority to carry on the District's flood control, drainage, and irrigation functions in the same manner as permitted drainage districts under ORS Chapter 547. Article IV of the Drainage Company's Articles of Incorporation, filed May 13, 1994, states, "The particular lands to be improved by the works of the corporation are the same lands formerly included within the boundaries of the Beaver Drainage District."

Additionally, the Drainage Company delivers water to landowners for the irrigation of more than 2,700 acres within its service area. Under Certificate 83174 issued to its District predecessor, water is directed southward to Drainage Company lands for use on specified lands lying within Township 8 N., Range 4 W., W.M. Certificate 83174 is an irrigation-only water right; it does *not* expressly allow "wetland enhancement" or specialized purposes of use for which water rights may be authorized under Oregon law. The below-discussed Mitigation Site lies entirely within Certificate 83174's authorized place of use.

Commercial agriculture dominates within the Drainage Company's service area, as it has since its creation in 1915, with approximately 80% being actively managed uses such as mint, berries, hay, hybrid poplars for pulp and rotational livestock grazing. Additionally, there are a handful of commercial/industrial operators.

### **The Mitigation Plan**

The proposed Next Fuels Facility is located within the Drainage Company and entirely inside the dike. As acknowledged in the Application, most of the project site is used by Drainage Company landowners for agriculture and pastureland purposes, with mint fields to the north and west and a tree farm to the south. The Mitigation Plan is tied to the permit applications submitted to the county commissioners as it is intended to mitigate for Facility and Rail impacts on agricultural lands, including the permanent removal of 117.64 acres of wetlands, in the form of claimed "enhancements" to non-jurisdictional "wetlands" and waterways at a mitigation site located approximately one-quarter mile south of the Facility.

The proposed mitigation site comprises approximately 590 acres of Drainage Company lands acquired by an affiliate of NEXT Fuels, within specified portions of Sections 27, 28, 33, and 34, Township 8 N., Range 4 W., MW (the "Mitigation Site"). Under the Application, Next fuels proposes to offset permanent wetlands impacts by fundamentally changing Mitigation Site hydrology and function by, among other measures:

- Filling approximately 26,800 linear ft. of the existing Mitigation Site drainage ditches operated by the Drainage Company.
  
- Creating "dendritic" channels throughout the Mitigation Site, intended to mimic naturally occurring channels found elsewhere in Lower Columbia sloughs.
  
- Digging shallow pools for potential reproductive habitat for amphibians and other aquatic wildlife.
  
- Roughening Mitigation Site surfaces for diversification of surface hydrology and resultant vegetation.

- **Creating upland buffer zones along public access paths between Mitigation site wetlands.**

In order to accomplish the above measures, the Mitigation Plan envisions the overall lowering of Mitigation Site surface levels, together with construction of an extensive network of onsite dendritic channels. Excavation will be as deep as six feet at some locations, with net elevation reduction averaging one and one-half feet across the Mitigation Site. In connection therewith, approximately six to 12 inches of topsoil will be removed sitewide.

### **Comments**

- **The Mitigation Plan is not an agricultural usage per ORS 215.203. The Drainage Company can only provide drainage and irrigation for agricultural and sanitary purposes per its bylaws, articles of incorporation and the specific tenants upon which it was formed. Since the Drainage Company cannot service the land under the Mitigation Plan, the Drainage Company may be unable to assess the per-acre rates necessary for the operation of the drainage, irrigation and levee system. This would severely curtail the ability of the Drainage Company to perform its duties and maintain the system and will force other landowners to bear an unreasonable financial burden to offset the potential 10% loss in assessments.**
- **The Mitigation Plan proposes to fill in 26,800 linear feet of irrigation and drainage ditches within the Drainage Company boundaries. And while the Mitigation Plan asserts that hydraulic capacity will be maintained in at least certain ditches appurtenant to the Mitigation Plan Site, the ultimate consequences of radically restructuring drainage facilities cannot be accurately predicted without a comprehensive study of Mitigation Plan Site hydrology, including particular irrigation and drainage requirements at particular locations throughout. Per ORS 547.305-310 and 547.405, the Drainage Company has the sole authority to alter these works and cannot allow these alterations as they will significantly impact the drainage and irrigation water flows to the agricultural lands within the Drainage Company system.**

- Oregon Division of State Lands(DSL), U.S. Army Corps of Engineers(USACE) and NEXT have all admitted that a mitigation project of this magnitude has never been attempted before in a working irrigation and drainage district, and the impacts to surrounding lands are unknown. Other similar mitigation projects are not comparable due to significant differences in industrial development levels(MCDD), the planned construction techniques and plant types(Midland, Marshland), and the size and operation of the districts within which these other mitigations were constructed. In fact, only the Hermo Road Mitigation site(located within the Drainage Company, adjacent to Port Westward) serves as a valid comparison. The Drainage Company consists primarily of high quality, class 2 agricultural land(including the Mitigation Plan Site) and has been operated as such since its creation in 1915. High-value, historical agricultural lands and levee safety should not be sacrificed for a development project.
- The purpose of the Mitigation Plan is to re-configure internal drainage to impede water movement, and create a series of shallow waterways and shallow ponds for habitat within the Mitigation Plan Site. This stagnation of water will promote disease and bacterial growth which will have significant adverse operational and financial impacts to other agricultural operations(including blueberries and mint, hay and livestock) within the Drainage Company system who must abide by the provisions of the Food Safety Modernization Act.
- The conditions created under the Mitigation Plan will be ideal habitat for many agricultural pests in the area including(but not limited to) cutworm, armyworm, European Winter Cutworm, symphilons, strawberry root-weevil, slugs, rodents and mites. Additionally, the Mitigation Plan Site will also create a huge bank of seeds which will be transported via air, water and animals into neighboring fields. Per DSL regulations, no spraying or control will be allowed on the mitigation site, essentially creating a massive host site for agriculturally damaging weeds and pests. Per NEXT at the October meeting with the Drainage Company: "it is impossible to contain these to the Mitigation Plan Site" and thus agricultural operators would be burdened with significantly increased pest and weed pressures. This will significantly increase control costs and force neighboring operations to drastically alter control methods in order to maintain their viability.
- The Mitigation Plan proposes to remove approximately 750,000 cubic yards of material from the Mitigation Plan Site by reducing the elevation of the land. The Drainage Company has a history of significant boil points and artesian wells within its boundaries, several of which are adjacent to the Mitigation Plan Site. A Periodic Inspection by the USACE in 2016 detailed water seepage locations both

at the Hermo Road Mitigation Site and at a large section near the proposed Mitigation Site. This report was erroneously not provided to the Drainage Company and did not come to light until during the 2021 Periodic Inspection. Excavation of the Hermo Road Mitigation Site was determined to be the cause of the seepage in that location and was identified as a significant danger to the levee system. This information will be reinforced in the upcoming final report from the 2021 Periodic Inspection due around the end of March 2022. The construction of the Plant and Rail Sites, and by extension the Mitigation Plan, have a huge potential to uncover numerous other areas that would compromise the integrity of the Drainage Company levee system, including catastrophically affecting the points adjacent to the proposed Mitigation Site where seepage rated as "Minimally Acceptable" was noted in the 2016 Periodic Inspection Report and confirmed as still present during the 2021 Periodic Inspection. This highlights the risk to levee stability along the Beaver Slough section of the levee and the need for additional documentation and review. Per NEXT during the October meeting with the Drainage Company: "we cannot plan for hitting a boil point and we will just try to deal with them if we do". This is an unacceptable solution and a complete geotechnical investigation must be performed by a third party with a Drainage Company and USACE-approved response plan prior to any consideration of approval of the Mitigation Plan by the Drainage Company.

- The Hermo Road Mitigation Site, an identical, smaller scale mitigation project located in the north-east corner of the Drainage Company boundary highlights these concerns as adjacent operators are now battling increased pests and weeds that were never before encountered, and for which no registered treatment methods exist for the crops being raised. Additionally, after the construction of this mitigation site, significantly increased water flows from that area have been noted by adjacent agricultural operations, Drainage Company personnel and the USACE on multiple occasions. A Periodic Inspection by the USACE in 2016 detailed water seepage locations at the Hermo Road Mitigation Site significant enough to compromise the integrity of the levee. This report was erroneously not provided to the Drainage Company and did not come to light until during the 2021 Periodic Inspection. The seepage concerns were further confirmed by NEXT in the September 30 meeting with the Drainage Company where they acknowledged that Sue Boyle (their specialist periodically monitoring the Hermo Road Mitigation site) had noted increased water flows during her inspection in early 2021. Due to lack of action, the Drainage Company has just engaged with the original permittee of the project that led to the mitigation. Since there was no Drainage Company or USACE Section 408 review of that proposed project, the impacts from that project have undermined the safety of the flood

control works since at least 2016 and will need to be repaired to the satisfaction and standards of the US Army Corps of Engineers. Due to lack of detail in the designs or reports submitted for the proposed project to date, the Drainage Company cannot approve a similar project that could further undermine the safety of another section of the flood control levee.

- The Mitigation Plan Site is currently irrigated under part of a water right held by The Drainage Company covering approximately 2,700+ acres irrigation entitlement under Certificate 83174. Pursuant to ORS 540.610, if the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, such failure creates a rebuttable presumption of forfeiture of all or part of the water right. Since the Drainage Company cannot legally provide service to mitigation, and NEXT intends to relinquish the water rights for the Mitigation Site after 5 years, forfeiture of the entire water right is at risk unless the Drainage Company is able to identify other shareholder acreage within its boundaries that would be willing and able to utilize a transfer of that portion of the water right covering the Mitigation Plan. The risk of crop loss to agricultural operations resulting from the loss of this irrigation water right would be tremendous.
- Levee traffic on the roads servicing both the Plant and the Mitigation Sites are of grave concern due to compaction and resulting height deficiencies to protect from flooding. The 750,000 cubic feet of material proposed to be removed from the Mitigation Plan Site cannot be relocated within the Drainage Company boundaries due to DSL regulations, and thus must be trucked out. Additionally, the Plant Facility modules will be transported across the top of the Kallunki Road levee and weigh approximately 300 tons each. Previous industrial projects and related traffic have significantly lowered the height of the levee structure in multiple locations which poses a grave threat from flood waters overtopping the levee structure and damaging the levee and agricultural operations within the Drainage Company system. The Drainage Company will require a complete 408 review prior to even considering approving the Permit Activities.
- Per DSL and NEXT, there are no other mitigation sites available within the 8th HUC Code and any development done within the Drainage Company boundaries at Port Westward can only be mitigated within the Drainage Company boundaries. Per the Port of Columbia County (the Port), mitigation can only be performed on the private agricultural land within the Drainage Company boundaries. The Port also has plans for developing an additional 800+ acres within the Drainage Company boundaries. The installation of this Mitigation Plan

will create a cumulative domino effect in which the thousands of acres of prime class 2 agricultural land and businesses within the Drainage Company boundaries will be lost to mitigation as the Port continues development.

- Per the USACE Levee Operation and Maintenance Manual, levee systems whose operations are geared towards wetlands and habitat (of which the Mitigation Plan and mitigation in general are part) lose the ability to retain their Accreditations with FEMA and the USACE and will be ineligible for assistance with flood damage and repairs. This would result in the loss of flood protections for thousands of acres of prime class 2 agricultural lands, all industrial operations, and would prevent any future development in this area. Loss of accreditation would mean these lands would suddenly be part of the regulated floodplain and thus any development, whether agricultural or industrial, would also be much more difficult, have a dramatically longer timeline, and be subject to a greater number of appeals due to the additional complex regulatory framework that would apply. Additionally, the Columbia County Comprehensive Plan Port Westward Exemption is dependent on the continued Provisionally Accredited Levee for flood protection. The loss of the accreditation will cost hundreds of jobs, including the very jobs created by this development proposal, and threatens the livelihood and economic viability of the entire region if that accreditation is lost.
- The proposed staging area for construction materials for the Plant Site will potentially require altering Drainage Company infrastructure in order to access the Plant Site. No discussion on this issue has taken place. The Drainage Company cannot approve any alterations without assessing the impacts to the Drainage Company System and surrounding lands.
- The proposed road access and rail system will remove a Drainage Company-owned ditch and relocate it further south by a couple hundred feet. No provision is included in the submitted plans for replacing the 2 irrigation access points and the 8 drainage points. The Drainage Company will not allow alteration to its works without adequate replacement for affected uses.
- The proposed road access and rail system has no provisions for fire control from sparks from traffic. Previous problems have been encountered at adjacent rail sites close to the guard shack with sparks catching neighboring fields on fire and severely damaging pastureland, and threatening Drainage Company infrastructure.



- The adjacent land uses to the Plant Site and the proposed rail spur consist primarily of agriculture (of which livestock is a part) and are likely to be grazed by livestock in the future. The submitted application expressly states that fencing for livestock is not required when in fact that is not true. Adequate fencing must be provided to protect livestock from traffic on the proposed access road and rail.
- The submitted application expressly states that waivers will be provided to adjacent agriculture operators to waive the right of NEXT to pursue compensation for complaints related to normal, lawful agricultural practices. No waivers for normal farm activities have been provided to any adjacent landowners or operators for the plant site, the road and rail access sites or the pipeline route. Additionally, no waivers for normal or emergency Drainage Company maintenance activities on the adjacent waterways have been provided. These waivers must be in place prior to any consideration of approval of this project by the Drainage Company.
- The submitted application states the primary road access to the plant site is private, however it is adjacent to and crosses Drainage Company owned infrastructure. Access easements for the Drainage Company must be in place prior to any consideration of approval of this project by the Drainage Company.
- Significant increased traffic will result from the construction of this plant within the Drainage Company boundaries. Vibrations, noise and increased pollution will impact landowners surrounding or on the route to the site. It will also impact harvest operations and Drainage Company maintenance in numerous locations within the Drainage Company boundaries. No discussion of this has taken place with the Drainage Company.
- Previous landowners of the proposed Mitigation Plan Site adjacent to Hermo Road utilized a portion of the site, a tributary to McClean Slough, as a garbage dump for many years. A complete contamination investigation must be performed and cleanup provided as necessary to prevent damage to surrounding landowners and Drainage Company infrastructure from potentially harmful substances.
- Between 2006 and 2008, approximately 64,530 cubic yards of fill material were placed on the proposed NEXT Plant Site with no records of testing for contaminants or fill permitting from DEQ, DSL, and USACE. This material was excavated from the nearby former U.S. Army base and was adjacent to the storage area for World War 2, Korean and Vietnam rail cars carrying many toxic

chemicals, including agent orange. This area also contains groundwater monitoring and testing wells dating to that period, indicative of concerns of contamination. Contamination testing must be performed by a third party authority as any contamination unearthed has the potential to spread throughout the entire Drainage Company system and into the Columbia River.

- The Port Westward Industrial Park is located within a liquefaction zone with no bedrock existing for stabilizing construction. Previous projects have encountered serious difficulties obtaining stability and meeting foundation load criteria. Furthermore, the Plant Site is located immediately adjacent to some of the deepest peat soils in the Drainage Company boundaries which will make construction of the plant even more difficult. The combination of these issues are of grave concern to the Drainage Company as the Plant Site has a significant chance to become unstable during even a minor earthquake, jeopardizing Drainage Company property and potentially contaminating surrounding agricultural lands. Additionally, primary power generation plants (considered critical infrastructure for the entire west coast) near the Plant Site could be affected as a result of catastrophic failure of the Plant during an earthquake, further jeopardizing the ability of the Drainage Company to operate their pumps and also impacting the entire west coast power grid.
- Oregon has some of the strictest environmental laws in the nation. The entirety of NEXT's project is contingent on exemptions, exceptions and variances granted from the Energy Facility Siting Council, DSL, DEQ, USACE, the County and Land Use Regulations. Bypassing these tried and true methods of local and environmental protection, combined with the regulatory agencies' publicly admitted inexperience on the size and scope of this project, and the sensitive nature of the Columbia River and its estuaries, could prove disastrous and would have far-reaching consequences for local landowners, Drainage Company infrastructure and the environment for generations to come.
- Per the lease between NEXT and the Port: "Lessee's use of the Premises must comply with all applicable laws, ordinances, rules and regulations of the State of Oregon and the United States, and all city, county or other public government authorities or agencies, including, but not limited to, building permit requirements, local fire code, and zoning and occupancy codes." Additionally, NEXT is required to abide by any environmental laws including "any and all federal, State of Oregon, regional and local laws, regulations, rules, permit terms, codes, ordinances and guidance documents now or hereafter in effect, as the same may be amended or recodified from time to time, and applicable decisional law, which

govern materials, substances, regulated wastes, emissions, pollutants, water, storm water, ground water, wellfield and wellhead protection, animals or plants, noise, or products and relate to the protection of health, natural resources, or the environment." No written agreements or solutions to the concerns raised repeatedly by the Drainage Company, many of which pertain to significant risks to levee integrity and are associated with health, water, natural resources and the environment, have been provided to the Drainage Company for review and approval.

- Per ORS chapters 190 and 195, Columbia County and the Columbia County Commissioners are required to coordinate with the Drainage Company on any activities within the Drainage Company's boundaries. No outreach or communication from the County has taken place.
- Per ORS 215.296, the Drainage Company, as the Local Governing Body over the lands within its boundaries, has the ability to deny any land uses which will significantly impact the financial or operational conditions of agricultural operations within its boundaries. The Drainage Company board will not approve the Mitigation Plan, and has concerns about the Plant Site due to the afore-mentioned impacts and therefore the Application for Permits by NEXT is incomplete and should not be approved by the County Commissioners.

## **Conclusion**

In summary, the Landowners of the Beaver Drainage Improvement Company object to NEXT Fuel's Applications – and particularly to the associated Mitigation Plan – on the grounds that wholesale changes to the Drainage Company's essential drainage, flood control, and irrigation infrastructure within the Mitigation Site will adversely impact water resources under the Drainage Company's operational control and violate both the agricultural nature and structural integrity of the system. Additionally, cumulative impacts to the operations within the Drainage Company's boundaries would force significant and costly burdens upon the other shareholders within the system and result in the loss of thousands of acres of prime, class 2 farmland.

Further, NEXT Fuel's proposed Mitigation Site changes are inconsistent with the Drainage Company's power and authority under ORS Chapters 215, 447 and 554, as well as under its charter documents and recorded easements.

Finally, the Mitigation Plan's proposal to "reconvert" currently farmed lands within the Mitigation Site to jurisdictional wetlands is antithetical to the best interests of the Drainage Company, its agricultural landowners, existing industrial operations, and the integrity of the levee system as a whole.

Despite the above-described risks and uncertainties, we would welcome NEXT Energy as a valued industrial partner within the overall Drainage Company operations area. Many of the concerns stated above have been repeatedly raised throughout the yearslong process that this project has undergone, but as of this date no written solutions or agreements have been provided by NEXT for evaluation by the Drainage Company. Unfortunately, unless and until those risks and uncertainties can be alleviated with sufficient certainty, through the appropriate land-use and regulatory review procedures, we cannot support the Applications as presented, and in fact fully intend to protest the Facility Site Plan, Rail Plan and associated Mitigation Plan due to the impacts to Drainage Company infrastructure, surrounding agricultural operations, and risks to life, health and environment from levee system integrity being compromised and the real threat of losing accreditation.

We very much appreciate your consideration of the Landowner's concerns in this case.

Very truly yours,

**Landowners of the Beaver Drainage Improvement Company**



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Date: 1/21/2022