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## **MEMORANDUM: OREGON'S LEGAL AUTHORITY TO CONDITION OR REJECT LNG TERMINALS**

### **I. Oregon Retains Authority to Condition or Reject LNG Terminals**

Oregon retains significant authority to reject the Bradwood Landing LNG ("Bradwood") terminal and pipeline proposal, even after the passage of the Energy Policy Act of 2005. This memorandum will explain how Oregon can utilize its considerable authority to block an undesirable LNG proposal regardless of the Federal Energy Regulatory Commission's ("FERC") actions. On a practical level, it makes perfect sense that Oregon's Governor can reject a gas terminal and pipeline designed to deliver gas to California when the project risks Oregon's economy, safety, and quality of life. This memorandum, however, focuses solely on legal issues; specifically, Oregon's authority to reject the LNG terminal and pipeline under the Clean Water Act, Coastal Zone Management Act, state permits, and state property rights.

### **II. Energy Policy Act of 2005: Federal and State Power**

The Energy Policy Act, which amended the Natural Gas Act, granted FERC the exclusive authority for the siting of LNG terminals. However, the Energy Policy Act does not preempt, but expressly reserves, state powers under the Clean Water Act ("CWA"), the Clean Air Act ("CAA"), and the Coastal Zone Management Act ("CZMA"). Energy Policy Act § 311(c)(2) ("nothing in this Act affects the rights of States" under the CWA, CAA, CZMA).

For this reason, a Washington D.C. law firm that represents the LNG industry summed up state power this way:

"[The Energy Policy Act] has not dramatically changed the balance of power between the federal government and states. . . . [S]tates have effectively blocked several projects. Indeed there is no case to date where a project has been successfully executed in the face of firm state opposition."<sup>1</sup>

Oregon, not FERC, has the sole authority to certify the project as consistent or inconsistent with Oregon's water quality standards and Oregon's Coastal Management Plan, and to deny water and air pollution discharge permits, wetland fill permits and water appropriation permits. FERC itself has made clear that states' authority to issue or deny permits under the

<sup>1</sup> Dweck, Jacob, et. al. LNG litigation after the Energy Policy Act of 2005: State powers in LNG terminal siting, *Energy Law Journal*, 27, 473, 475, 498.

CWA, CAA, and CZMA is not affected by the Energy Policy Act of 2005.<sup>2</sup> Therefore, the Bradwood terminal and pipeline is completely dependent on state permits over which Oregon has significant discretion.

### A. Clean Water Act

Under the CWA, Oregon has two significant mechanisms to block the Bradwood LNG terminal. First, Oregon can determine that the Bradwood's dredging, filling of wetlands, wastewater discharge or pipeline construction will violate Oregon's water quality standards under CWA § 401. 33 U.S.C § 1341. Second, Oregon can strictly condition the wastewater discharge permit at Bradwood Landing under CWA § 402. 33 U.S.C § 1342.

#### 1. Water Quality Standard Certification

Oregon's strongest and most obvious tool is CWA § 401 certification. FERC cannot issue a permit to Bradwood unless Oregon provides a certification ("401 certification") that the project complies with Oregon's water quality standards. Water quality standards consist of designated uses of the waterbody and the water quality criteria necessary to protect those uses. An important designated use of the lower Columbia River is salmon rearing and migration.

Oregon has broad authority to deny a § 401 certification. See *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). Oregon's authority under the CWA is not limited to establishing effluent limitations. The Supreme Court expressly held that states can deny or condition 401 certifications based on harm to designated uses. *Id.* The Supreme Court upheld the State of Washington's 401 certification conditions because "the State determined that construction and operation of the project as planned would be inconsistent with one of the designated uses ... namely, salmonid and other fish migration, rearing, spawning, and harvesting." *Id.* at 714 (internal quotes omitted). Similarly, Oregon can limit the amount of dredging or wetland fill in the Columbia River because this activity harms salmon, a designated use.

In addition, Oregon's evaluation of the impacts of Bradwood must include the entire activity, not just the proposed discharges. See *Id.* at 711-713 (evaluating the water quality impacts of the entire project is proper, not just the actual discharge). Therefore, Oregon can deny the 401 certification if any project component does not comply with water quality standards, including the dredging of 58 acres of salmon habitat, filling of at least 14 acres of wetlands at the terminal, the crossing of at least 66 streams by the pipeline, or the uptake of billions of gallons of ballast water.

Indeed, DEQ has already made clear this project may not comply with water quality standards. For example, DEQ stated that, "[T]he hydrodynamic geomorphic changes in the river ... may contribute to unacceptable levels of erosion . . . , introduction of toxics to the

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<sup>2</sup> 108 FERC 61, 155 at 8-13. ("the CZMA and the [National Gas Act] are laws of equal dignity and should be read to complement rather than preempt one another"); Press Release, FERC Chairman Pat Wood, Apr. 27, 2005, available at <http://www.ferc.gov/press-room/press-releases/archives.asp> (the Energy Policy Act "will not change the states' current role in LNG project applications").

waterway, habitat loss, and wetlands loss – all of which reduce water quality.”<sup>3</sup> In addition, “Potentially debilitating impacts to these [threatened] species include noise, continuous light, suspension of sediment, turbidity, loss of salmonid habitat and ability to rest or avoid predation, and potential attractant for sturgeon to a dangerous construction zone.”<sup>4</sup> Oregon Department of Fish and Wildlife (“ODFW”) agreed, stating, “Significant fish habitat will be lost and mitigation is not adequate.”<sup>5</sup> DEQ expressly noted that the impacts of the pipeline are contrary to state law: “Loss of riparian vegetation in these areas is directly contradictory to the applicable Water Quality Management Plan . . . which requires preservation and restoration of riparian areas in tributaries to address temperature and other water quality parameters.”<sup>6</sup> Oregon’s review of the project indicates that the project does not comply with water quality standards, which means that Oregon not only has the authority to deny the 401 certification, but it has a legal duty to do so.

Specifically, Bradwood may violate the following water quality standards:

- Protection of the designated use of aquatic life, OAR 340-041-0101
  - The LNG terminal fails to protect the designated uses of threatened salmonids and the North American green sturgeon, as described by DEQ and ODFW above.
- Narrative criteria, OAR 340-041-0007 (“the creation of . . . toxic or other conditions that are deleterious to fish or other aquatic life . . . .”)
  - Bradwood’s 58 acres of dredging is clearly a condition deleterious to fish due to permanent loss of habitat. In addition, the United States National Marine Fisheries Service (“NMFS”) and DEQ raised as a major concern that LNG tankers will impinge or entrain juvenile salmon when the tankers take 6 billion gallons of ballast water each year.<sup>7</sup> Additional deleterious conditions include: modification of river flow and hydrology at mouth of Clifton Channel, wake stranding of juvenile fish, discharge of warm engine cooling water, long-term piling driving and dredging, and destruction of riparian and upland habitat along entire pipeline.
- Biocriteria, OAR 340-041-0011
  - Waters of the State must be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities.
  - As analyzed by DEQ, ODFW, and NMFS, the LNG terminal will degrade resident biological communities near the terminal and the pipeline.
- Dissolved Oxygen, OAR 340-041-0016
  - Dredging and lengthy in-water work will reduce the dissolved oxygen below the water quality standard

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<sup>3</sup> State Agency Comments on Bradwood Landing Environmental Impact Statement (hereafter “Agency Comments”), Nov. 7, 2007 at 11. Because the state agency comments are not consecutively paginated, the page numbers cited herein refer to the pdf page number.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at 12

<sup>7</sup> Letter from NMFS to FERC, May 11, 2007.

- Temperature, OAR 340-041-0028
  - Dredging, vegetation clearing, and wastewater discharge will contribute to the exceedance of the temperature water quality standard
- Toxic substances, OAR 340-041-0033
  - Toxic substances may not be introduced above natural background levels in concentrations that may be harmful to aquatic life. Bradwood will discharge chromium, silver, and other toxic pollutants at concentrations harmful to aquatic life. In addition, DEQ and NMFS raised concerns about toxic pollutants, including phytosterols, mobilized from dredging or erosion of former industrial site.
- Turbidity, OAR 340-041-0036
  - The project will violate the standard of no more than a ten percent increase above background levels. The standard has an exception for “limited duration activities necessary to address an emergency or to accommodate essential dredging.” The 24-hour, 7-day dredging over 3 months is not limited in duration and not essential.

Oregon has utilized its authority to deny a 401 certification in the past because dredging violated water quality standards, because of harm to salmon.<sup>8</sup> Oregon’s denial letter, related to channel deepening, describes in detail why the project did not comply with each component of Oregon’s water quality standards: beneficial uses, narrative and numeric water quality criteria, and the antidegradation policy.

## 2. Wastewater Discharge Permit

Bradwood will request from Oregon a National Pollutant Discharge Elimination System (“NPDES”) permit under CWA § 402 to discharge process wastewater containing toxic pollutants into the Columbia River. Oregon cannot issue this permit unless the discharge will comply with water quality standards. Bradwood’s wastewater will contain the toxic pollutant silver at levels 14,900% greater than EPA considers safe for fish. Bradwood will discharge at 0.018 mg/L when the safe level is 0.00012 mg/L.<sup>9</sup> In addition, Bradwood’s discharge of the highly toxic chromium III and chromium VI are 119% and 2,354% greater than Oregon’s chronic water quality criteria, respectively.<sup>10</sup> Bradwood’s solution for their toxic discharges is to create a giant toxic mixing zone, in which the “silver concentrations determine the size of the chronic mixing zone.”<sup>11</sup> This backwards approach – building a big enough toxic mixing zone to accommodate any amount of pollution – is contrary to the CWA. DEQ cannot issue a permit that contains this toxic mixing zone.

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<sup>8</sup> See letter from John Kitzhaber to Colonel Randall J. Butler, USCOE, Sept. 29, 2000 (attached).

<sup>9</sup> Technical Memorandum: Mixing Zone Analysis for Bradwood Landing Point Source Discharges, July 27, 2007 at 3, 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

In addition, the CWA clearly proscribes issuing an NPDES permit to a “new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” 40 C.F.R. § 122.4(i). The Columbia River violates the water quality criterion for temperature in the summer. Any discharge greater than the ambient water temperature will contribute to the violation of water quality standards in violation of 40 C.F.R. § 122.4(i). Bradwood is a new discharger that will frequently contribute to violations of water quality standards. Therefore, DEQ cannot issue the permit.

Further, by discharging warm wastewater and by clearing riparian vegetation, Bradwood’s discharge violates Oregon’s antidegradation requirements. OAR 340-041-0004(7). Oregon rules state that “water quality limited waters may not be further degraded . . .” *Id.* The Columbia River is water quality limited for temperature, dissolved oxygen, and other pollutants. Therefore, Oregon cannot allow Bradwood’s new, additional discharge of these pollutants into the already degraded Columbia River. OAR 340-041-0004(7) says Oregon may grant narrow exceptions, but only if the “benefits of the lowered water quality outweigh the environmental costs of the reduced water quality” and the discharge will not harm endangered species. The narrow exception is not appropriate here. Overall, based on Oregon’s regulations and the CWA, Oregon has great discretion to deny the Bradwood 401 certification and the NPDES pollution permit.

## **B. Coastal Zone Management Act**

Oregon must determine if the LNG terminal and associated tankers are consistent with the Oregon Coastal Management Program (“OCMP”), which is Oregon’s program implementing the federal CZMA. The OCMP requires that all development is consistent with the local land use regulations, Statewide Planning Goals, and all state regulatory permit authority (e.g. DEQ’s water and air permits, DSL’s removal-fill permits, and water rights permits). Bradwood cannot go forward if Oregon determines that the project is inconsistent with the OCMP. FERC cannot preempt Oregon’s decision because the Energy Policy Act of 2005 expressly reserves Oregon’s authority under the CZMA.

### **1. Local land use regulations**

The Bradwood proposal does not comply with the Clatsop County Comprehensive Plan and land use regulations; therefore, Oregon cannot certify the project as consistent with the CZMA. The proposed LNG ship berth and turning basin, which will require dredging 58 acres of prime estuarine salmon habitat, are located in an area designated as Aquatic Conservation. Aquatic Conservation areas must be “managed for the protection and conservation of the natural resources and benefits found in these areas.” Clatsop County Land and Water Development and Use Ordinance (LWDUO) 3.762. In addition, portions of the proposed LNG terminal are located in an area designated as “Natural,” which has even stronger protections than “Conservation.” Bradwood proposes to radically rewrite the County’s Comprehensive Plan to redesignate all areas as “Industrial.” Oregon has an obligation to review the County’s decision on the Comprehensive Plan amendments, and should challenge any County decision that is inconsistent with the law. Without the major amendments, Bradwood cannot move forward.

## 2. Statewide Planning Goals

Bradwood's proposal to redesignate protected Conservation and Natural areas to Industrial areas violates Statewide Planning Goal 16, "Estuarine Resources." OAR 660-015-0010(1). As such, the proposal does not comply with the CZMA.

Goal 16 requires Comprehensive Plans and development to "maintain the diversity of important and unique environmental, economic, and social features in the estuary." OAR 660-015-0010(1). The highest priority for estuarine management is "uses that maintain the integrity of the estuary ecosystem." *Id.* Here, the estuary ecosystem at the Bradwood site is widely recognized as critical salmon habitat. After detailed study by the Columbia River Estuary Study Taskforce, Clatsop County's Comprehensive Plan designated the area as Conservation because:

This is a major migration route for salmon (both adult and juvenile) and steelhead. Also present are shad, smelt, and starry flounder . . . Major gillnet drifts are maintained in this area.

Bradwood Subarea Plan at IV-83

The Bradwood area is also designated as "critical habitat" by the National Marine Fisheries Service for 13 ESUs of threatened or endangered salmon.

The proposal also violates Goal 16 because LNG tankers will adversely affect transportation and fishing on the Columbia River, which harms the economy of the estuary. ODFW stated, "the moving 500-yard safety and security zone around the 125 LNG ships per year (2-3 per week) as the move up the Columbia River will be very disruptive to commercial and recreational fishing boats."<sup>12</sup> Clatsop County failed to analyze any of the safety or economic impacts of the LNG tankers on Clatsop County, thereby failing to protect the "economic and social values of each estuary," as required by Goal 16. The State should challenge the County's failure to uphold the Statewide Planning Goals if Clatsop County approves the Comprehensive Plan amendments.

In addition, Goal 16 prohibits dredging unless "a need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights." First, Oregon Department of Land Conservation and Development ("DLCD") and other agencies have made clear that Bradwood has not demonstrated a need for LNG in Oregon. DLCD stated, "conclusions [about the need for LNG] are based on assumptions that are not supported by evidence or analysis. Provides no rational basis for review."<sup>13</sup> The Department of Energy stated that the applicant "provides no independent assessment of the demand for LNG to justify the need for the proposed project."<sup>14</sup> Even the Department of Economic and Community Development stated, "There is no needs assessment associated with this project."<sup>15</sup> Therefore,

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<sup>12</sup> Agency Comments at 54.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 44.

because the need and substantial benefit to Oregonians is not demonstrated, DLCD cannot certify this project as consistent with the Statewide Planning Goals and, in turn, the CZMA.

Likewise, dredging is not allowed because the applicant has failed to demonstrate that the project will not unreasonably interfere with public trust rights. The project will clearly interrupt the drift rights and recreational anglers by excluding access and, according to ODFW, “be very disruptive to commercial and recreational fishing boats.”<sup>16</sup> For example, the LNG tankers will displace thousands of anglers who traditionally fish at Buoy 10 during the salmon season. The project does not protect the public trust rights of river access and fishing. As such, Goal 16 prohibits the dredging.

Oregon cannot ignore the Statewide Planning Goals, regardless of the decision by the Clatsop County Board of Commissioners. DLCD has an independent obligation under the CZMA to review the County’s action and ensure that the County complies with the Statewide Planning Goals. We urge you to ensure that DLCD protects Oregon’s interests by reviewing and challenging Clatsop County’s Comprehensive Plan amendments as inconsistent with the Statewide Planning Goals.

DLCD’s approach to Bradwood so far has been inconsistent and confusing. In addition to explaining there is no demonstrated need for Bradwood, DLCD stated that Bradwood’s analysis is “currently insufficient to explain why this site represents an appropriate location for this project and is in the public interest.”<sup>17</sup> Despite these serious reservations, DLCD inexplicably deemed Bradwood’s CZMA application as “complete,” even though DLCD called the information “insufficient” because the application is missing components required by the rules.<sup>18</sup> DLCD stated that “we are waiving the completeness requirements” even though “we find that the certification does not include all necessary data and information required by 15 CFR § 930.58(a) ....”<sup>19</sup> Instead of protecting Oregon’s coastal areas as required by law, DLCD has waived the completeness requirements to allow Bradwood to jumpstart the review process. While Oregon has ample authority to deny the CZMA certification, it cannot do so by waiving legal requirements necessary to review this project.

### **III. Additional State Law Authority to Deny or Condition the LNG Application**

In addition to Oregon’s powers under the CWA and CZMA expressly reserved by the Energy Policy Act, Oregon has additional authority to deny removal-fill permits, deny a lease of state land, and deny a water rights permit.

#### **A. Department of State Lands Removal-Fill Permit**

Bradwood requires a DSL removal-fill permit in order to dredge 58 acres of estuary and fill multiples acres for the terminal and pipeline. DSL has authority to deny the permit based upon its discretionary criteria. To issue the permit, the applicant must prove that the LNG

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<sup>16</sup> *Id.* at 54.

<sup>17</sup> *Id.* at 49.

<sup>18</sup> Letter from DLCD to Michael Cambell, Steel Rives, Nov. 21, 2007.

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

activity “will not be inconsistent with the protection, conservation, and best use of the water resources of this state and would not unreasonably interfere with the paramount public policy of this state to preserve the use of its waters for navigation, fishing and public recreation.” OAR 141-085-0029. Further, DSL must consider the “public need for the project.” *Id.*

The large-scale ecological and economic damage of the terminal dredging and pipeline is not consistent with the protection and conservation of the salmon fishery and other uses. DSL has already stated that Bradwood must supply a “more detailed justification on how the proposed project’s purpose and need is the ‘best use of the water resources of this state’ and within the public need.”<sup>20</sup> Likewise, as described above, at least three state agencies recognized there has been no demonstration of a public need. Therefore, Bradwood does not satisfy the DSL’s criteria for conservation of water resources and public need.

In addition, DSL regulations require compensatory mitigation for wetlands and waters of the state. OAR 141-085-0121; -0115; -0126; -0136; -0141; -0151; -0171. Bradwood’s proposed mitigation is insufficient because it proposes to protect already functioning habitat. This does not mitigate habitat loss, as noted by DLCD: “If the Hunt Creek/Clifton Channel [mitigation] site is just going to be preserved, but already functioning, how are the waters impacts being mitigated for?”<sup>21</sup> DSL stated, “there is not a clear compensatory mitigation plan for impact from dredging or wharf construction . . . .”<sup>22</sup> The lack of compensatory mitigation, as required by rule, is yet another reason DSL could deny the removal-fill permit.

## **B. Department of State Land Lease**

Bradwood proposes a large scale industrial operation on State-owned submerged lands. Similar to any property owner, the State has great discretion to refuse to lease the land. The permanent easements required by Bradwood may only be granted by the State Lands Board.

Bradwood would require an easement for use of the ship berth and the turning basin, and to dredge extensively on State-owned land. Bradwood would also require easements for each crossing of State-owned land by outfall and intake pipes and utility lines, and transportation infrastructure.<sup>23</sup> In addition, each pipeline crossing of multiple waterways and wetlands requires a State lease for construction and operation. Bradwood would also require a sand and gravel permit for between 350,000 and 700,000 cubic yards of sand Bradwood proposes to use for fill at the terminal.<sup>24</sup> Oregon has discretionary authority to deny each lease. While there is the possibility that the federal government could exercise eminent domain against the state, this is a highly unlikely intrusion into state autonomy.

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<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* at 34.

<sup>22</sup> *Id.* at 32.

<sup>23</sup> *Id.* at 38

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

### C. Water Resources Department Permits

Bradwood requires permits from the Water Resources Department (WRD) to use surface and groundwater. Oregon law recognizes that the right to control "all water within this state from all sources of water supply belongs to the public." ORS 527.525. In order to protect the public health, safety and welfare, WRD must conduct a "public interest" determination prior to issuing any permit. OAR 690-310-0110; -0130. The public interest determination provides significant discretion for the State to deny a water rights permit.

The public interest determination must evaluate the effects of the use on threatened and endangered species, water quality, fish and wildlife, and recreation. OAR 690-310-0120; -0140. As described above, Bradwood will adversely affect threatened salmonids and other aquatic life and commercial and recreational fishing. In addition, WRD recognized that "pipeline excavation and installation, including horizontal drilling activities may adversely affect shallow wells, springs, and surface water."<sup>25</sup> For these reasons, the water use is contrary to the public interest.

WRD should also require a water appropriation permit for Bradwood to take 6,000,000,000 gallons of water per year taken from the Columbia River at the ship berth. This water would be piped to the ships for use as ballast and engine cooling. This withdrawal constitutes an appropriation and requires a permit because there is a fixed and discrete onshore diversion location and the water is directed through a piping system. See Draft Environmental Impact Statement at 2-6. WRD regulations provide no exemptions for this type of withdrawal.

OAR 690-519-0020 prohibits out-of-state appropriations for the waters of the Columbia River. Bradwood's 6,000,000,000 gallon per year withdrawal is an out-of-state appropriation because the water would be dumped out of state. Further, this large appropriation is contrary to the public interest. See e.g. Agency Comments at 15 ("No analysis is offered as to impacts of reduced water flows for withdrawal of up to 6.3 billion gallons annually of ballast water from the Columbia River at the berthing area.") Therefore, WRD must require, and then deny, the water right for 6,000,000,000 gallons per year.

### IV. Conclusion

In sum, Oregon has abundant authority under the CWA and CZMA to deny certification and permits. This authority is not superseded by the Energy Policy Act, so Oregon's authority operates completely independent of FERC. Oregon should not depend on FERC to protect Oregon's interests. In addition, The Governor has a duty to maintain the public trust rights in the State. As owner of the submerged land necessary for the terminal and pipelines, the State has full authority refuse to lease state lands. Likewise, the state has full authority to deny the water permit. For these reasons, any statement by state officials that Oregon lacks authority to reject the Bradwood LNG terminal is unsupported by the law.

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<sup>25</sup> *Id.* at 78.

