

August 27, 2019

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VIA EMAIL ONLY

Mayor Joe Benetti
City of Coos Bay City Council
Coos Bay City Hall
500 Central Avenue
Coos Bay, OR 97420

Re: City of Coos Bay Land Use Application #187-18-000153
Jordan Cove Energy Project - Navigation Reliability Improvements
Applicant's Review of Proposed Conditions of Approval

Dear Mayor Benetti and fellow Councilors:

This office represents Jordan Cove Energy Project, L.P. ("JCEP") with regard to City of Coos Bay Land Use Application #187-18-000153 – Jordan Cove Energy Project - Navigation Reliability Improvements. As you are aware, this application involves a request for City land use authorizations to allow modifications to the Federal navigation by widening the channel at approximate river mile 7 in the City, which is one of four locations proposed for such modification. The Planning Commission has reviewed and recommended approval of these proposed authorizations including recommended conditions of approval. The purpose of this submittal is to request Council consideration of modification to the recommended condition of approval to improve clarity and to provide a more objective understanding of the requirements for demonstrating compliance prior to commencement of proposed activities. Below, we have cited the proposed Condition of Approval, provide a JCEP response, and then attach revised Proposed Conditions of Approval (as Attachment A, hereto). Please consider the following:

The Planning Commission recommendation to the Council includes 14 recommended conditions of approval. As noted, we propose modifications to specific provisions of 6 of these conditions, for the reasons described below. For the Council's reference, the current proposed condition language is set forth below followed by a discussion of our

reasoning for the requested modification, and the proposed language for each of these conditions is depicted in red-lined format on the attached Attachment A.

Condition of Approval #1: Prior to the commencement of any dredging activities, JCEP shall provide the City of Coos Bay Community Development Administrator evidence of an approved Section 401 Water Quality Certification permit and evidence that the dredging complies with FEIS requirements and all other state and federal requirements.

Our primary concerns with this proposed condition language is that it is not feasible to “comply” with a Final Environmental Impact Statement (“FEIS”) issued under NEPA, and the documentation of “. . . all other state and federal requirements” is unclear and highly subjective. First, the FEIS represents the documentation of the potential impacts associated with a project subject to federal compliance, and this information is considered by the federal agency in its issuance of the associated federal permit, which must be the subject of full compliance over time. The Commission recommends in condition #13 that documentation of an approved FEIS shall be provided, and conditions #4, together with modifications to this proposed condition, requires documented receipt by the City of the specific federal and state authorization. Finally, we have modified this condition to require evidence of an approved FERC certificate as the remaining primary federal authorization.

Condition of Approval #2: JCEP shall receive written authorization to perform the proposed dredging from the National Marine and Fisheries Service in accordance with NMFS agency requirements. Proof of such authorization shall be submitted to the Coos Bay Community Development Administrator prior to the commencement of dredging activities.

While we fully accept the recommended condition requiring 404 authorization by the USACE and have proposed modified language to require such authorization be provided, we do not believe that it is feasible to “receive written authorization from NMFS” for the proposed activities since NMFS is not a permitting agency. Instead, such compliance with Section 7 of the Endangered Species Act is determined by the USCOE, based upon extensive coordination with NMFS. Our proposed revised language requires both the controlling 404 authorization, which includes the associated ESA Section compliance analysis.

Condition of Approval #3: Prior to the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities permit, JCEP shall comply with the requirements of the enclosed MOA, CRPA, and UDP as agreed upon and signed by JCEP and the Confederated Tribes of Coos, Lower, Umpqua, and Siuslaw Indians, as well as consistency with any other provisions of Policy #18 of the CBEMP.

While JCEP continues to support the imposition of condition #3 requiring on-going compliance with the MOA, CRPA and VDP executed by JCEP and the CTCLUSI, it would be difficult to demonstrate such compliance in advance of project commencement, and particularly since the unanticipated discovery plan will be implemented during the authorized activities. For this reason, we propose that this condition be modified to require on-going compliance throughout the course of the authorized activities with these agreements.

Condition of Approval #5: As a general condition, and in the event that additional analysis or circumstance reveals relevant and previously unknown or unmapped shoreland resources, all dredging activity must remain consistent with CBEMP Policy #17 - Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands.

JCEP supports this recommended condition for purposes of requiring on-going compliance with CBEMP Policy #17 but only to the extent of resources included on the current acknowledged Goal 17 inventories. It is well settled law in Oregon that compliance is required only for current acknowledged resource inventories, and newly discovered resources are not subject to compliance with implementing policies or regulations until such additional resources are included on a revised and acknowledged inventory.

Condition of Approval #7: Prior to the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities Permit, JCEP shall submit for review and approval by the City of Coos Bay Planning Department, the Best Management Practices, and compliance with CBMC Chapter 9.20 to minimize impacts.

- A. Minimizing Adverse Impacts (CBEMP Policy #5).

The proposed *Condition of Approval #7* does not reference any specific approval criteria under the CBMP related to the *Applications*. To the extent *Condition of Approval #7* is intended to address minimizing “adverse impacts” as that term is used in CBEMP Policy #5, and specifically CBEMP Policy #5.D, which states:

“Estuarine Fill and Removal Dredging and/or filling shall be allowed only: ... D. *If adverse impacts are minimized...*”

JCEP believes that the current public record contains substantial evidence which demonstrates compliance with this policy condition, and that the determination of such compliance is as an element of the Council’s final decision at the close of this review proceeding.

Regarding the available evidence of environmental impact minimization, *Applicant’s Final Written Argument* has numerous citations to the record, including various *Technical Memoranda* prepared by subject-matter experts, confirming that potential “adverse impacts” are either not anticipated or will be minimized through compliance with required state and federal laws/permits and/or Best Management Practices (“BMPs”). Specifically, the record addresses minimizing impacts to multiple receptors including eelgrass, crustaceans/shellfish, fish, marine mammals, birds, the benthic community, habitat, water quality, and recreation.¹ Further, compliance with other state, federal and regional laws are outlined in Exhibit D, Dredge Materials Management Plan at pages 3457 to 3460. Dredging BMPs for dredging NRI #4 are identified in Exhibit BB (Dredging Pollution Control Plan). These documents collectively demonstrate how adverse impacts will be minimized in the current record. Accordingly, *Condition of*

¹ See *Applications*, Exhibit 5; **Comment 39**, Exhibit AA (2018 Eelgrass and Bathymetry Surveys Coos Bay); Exhibit EE (Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation); Exhibit FF (Technical Memorandum, Fish Baseline Information, Potential Impacts and Mitigation); Exhibit GG (Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation); Exhibit II (Technical Memorandum, Marine Mammals Baseline Information, Potential Impacts and Mitigation); Exhibit JJ (Technical Memorandum, Birds (e.g., Snowy Plover, Blue Heron, Marbled Murrelet, Diving Waterfowl) Baseline Information, Potential Impacts and Mitigation); Exhibit BB (Dredging Pollution Control Plan); Exhibit D (Dredge Materials Management Plan @ 3391 through 3625); Exhibit PP (Response to Removal-Fill Comments); and as further discussed in *Applicant’s Final Written Argument*, Section III, concerning potential “effects” on the aquatic community, recreation, and water quality.

Approval #7 is not required and the determination of CBEMP compliance will be addressed in the Council's final discussion.

B. CBMC Chapter 9.20 "Offenses Against Public Peace" Ordinance.

Condition of Approval #7 further requires JCEP to "submit for review and approval...compliance with CBMC Chapter 9.20" which is the City's ordinance regulating noise and other "offenses against public peace." First, JCEP notes that compliance with CBMC Chapter 9.20 is not an approval criterion for the *Applications*, on this basis alone, the condition should be deleted. Moreover, there is no apparent way to demonstrate prospective compliance with Chapter 9.20 because each of the provisions in 9.20.010 through 050² prohibit actions or conduct *prospectively*, and most adopted provisions are applicable to the proposed activities. Stated another way, JCEP's *Applications* for dredging NRI #4 are not subject to a determination of compliance with Chapter 9.20 *unless and until* prohibited noise or conduct occurs, at which time the City enjoys full enforcement authority. Accordingly, it is not necessary to include a *Condition of Approval* for the City to exercise full authority under Chapter 9.20 in the future against JCEP (or any other person inside the City limits).

This said, however, JCEP notes that the record for the *Applications* contains substantial documentation of efforts by JCEP to analyze and mitigate noise for a number of

² CBMC Chapter 9.20 prohibited actions include: "unreasonable noise" (9.20.010), "discharge of weapons" (9.20.020), offenses related to "lodging" (9.20.030), "obstructing passageways" (9.20.040), and "fireworks" (9.20.050).

receptors including recreation³, wildlife (marine mammals/fish/birds)⁴, and Noise Sensitive Receptors (“NSAs”) under various applicable laws.⁵

Condition of Approval #8: Prior to the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities Permit, JCEP shall submit for review and approval by the City of Coos Bay Planning Department Best Management Practices that will be employed should turbidity levels remain above ambient background levels greater than 200 feet from dredging operations.

Proposed *Condition of Approval #8* addresses BMPs to control turbidity during dredging of NRI #4. While JCEP is committed to controlling turbidity, the condition (as drafted) creates an additional City approval process via the requirement to “*submit for review and approval*” BMPs if turbidity levels are above ambient background more than 200 feet from dredging. There are two significant concerns with *Condition of Approval #8*, as drafted. First, procedurally, the proposed language would require an additional City review proceeding with public notice and comment obligations, notwithstanding that

³ See **Comment 39**, JCEP Exhibit A.3, *Resource Report No. 1 - Appendix B.1 - Jordan Cove Energy Project (Sept. 2017)* which notes at p. 55 (Section 3.11.3 – Noise mitigation).

⁴ See **Comment 39**, JCEP Exhibit A.5, *Resource Report No. 3 - Fish, Wildlife and Vegetation - Jordan Cove Energy Project (Sept. 2017)* – which addresses noise modelling impacts on marine mammals at page 125. See also JCEP Exhibit A.11, *Resource Report No. 9 - Air and Noise Quality - Jordan Cove Energy Project (Sept. 2017)*, which confirms that noise will not create significant impacts on marine mammals (pp. 506-511). See also JCEP Exhibit B, *Biological Assessment*, which notes that NRI noise impacts will not disturb snowy plovers (p. 225); noise mitigation for fish (pp. 678-680, 980-981). See also, JCEP Exhibit II. *Technical Memorandum, Marine Mammals Baseline Information, Potential Impacts and Mitigation: Navigation Reliability Improvements*; JCEP Exhibit FF, *Technical Memorandum, Fish (e.g., Salmon, Sturgeon, Herring, Candlefish) Baseline Information, Potential Impacts and Mitigation: Navigation Reliability Improvements* regarding noise impacts and mitigation. See also JCEP Exhibit DD, *Application for Incidental Harassment Authorization for the Taking of Marine Mammals Under Section 101 (a)(5)(A) of the Marine Mammal Protection Act by the Jordan Cove Energy Project (April 2019)*, which notes at pp. 19-20 that pile driving will be done via vibratory hammer where feasible to reduce noise; pp. 81-82 noting mitigation and noise levels in-water and in air modelled at below NMFS regulatory action levels for marine mammals.

⁵ See **Comment 39**, JCEP Exhibit A.10, *Resource Report No. 8 - Land Use, Recreation and Aesthetics - Jordan Cove Energy Project (Sept. 2017)*, which notes (p. 37) that actual continuous operational noise levels do not exceed approximately 48 dBA at any pre-existing Noise Sensitive Area (“NSA”), such as a residence, school, campground, or hospital per FERC regulatory limits. See also, JCEP Exhibit A.11, *Resource Report No. 9 - Air and Noise Quality - Jordan Cove Energy Project (Sept. 2017)*, Section 9.4.1.3 (distances between the Federal Navigation Channel and the closest NSAs are large enough that noise due to dredging in the channel is not a significant impact at the closest residences).

the information being requested is available in the current record for Council review and decision.

Second, there are no specific BMP requirements in the CBMC for turbidity, and the condition does not otherwise identify any approval criteria for the *Applications*. To the extent *Condition of Approval #8* is intended to also address minimizing “adverse impacts” as that term is used in CBEMP Policy #5.D, JCEP believes that the public record robustly addresses turbidity impacts from various dredging methods, includes turbidity modelling and plume analysis,⁶ and identifies measures to reduce impacts. See JCEP **Comment 39**, Exhibit A.4 (*Resource Report No. 2 - Water Use and Quality*); Exhibit D (*Dredged Materials Management Plan @ 3391*); Exhibit H (*Turbidity Analysis Memo*); Exhibit J (*Technical Memorandum, Water Quality Considerations*); Exhibit BB (*Dredging Pollution Control Plan*). As cited in these exhibits, JCEP will use various dredging methods and BMPs at NRI #4 to minimize the effects of turbidity, and JCEP expects any increased water turbidity to be temporary and limited to the immediate vicinity of dredging operations. The primary document that identifies the relevant BMPs for NRI #4 is the 2019 *Dredging Pollution Control Plan* (Exhibit BB) or “DPCP.”

For these reasons, we suggest consideration of the attached revised condition language requiring on-going compliance with all Best Management Practices included in the Dredged Material Disposal Plan and the Erosion and Pollution Control Plan submitted for the record JCEP.

Condition of Approval #13: Prior to the issuance of an Estuarine and Coastal Shoreline Uses and Activity Permit, JCEP shall provide the City of Coos Bay Community Development Administrator evidence of an approved FEIS.

As noted above, the FEIS will be completed as a condition of issuance of the necessary federal authorization for the requested activities. As such, no activity subject to their authorization can or will occur prior to the FEIS, and JCEP can provide the FEIS prior to any commencement of activity.

⁶ See, e.g., **Comment 39**, JCEP Exhibit BB at page 18 regarding turbidity plume dispersion modeling associated with dredging of the NRIs. “The results of the modeling at the NRIs show that both dredge methods produce a similar turbidity plume that moves with the direction of the current (upstream or downstream). All plumes are localized to the point of dredging and disperse relatively quickly.”

However, the current proposed language requires the provision of the FEIS prior to Estuarine permit “issuance.” However, the issue of permit issuance will be the subject of the Council’s final decision. There is no apparent reason to delay this decision until issuance of the FEIS, particularly given the impositions of separate conditions requiring issuance of the necessary federal authorizations. Consequently, we suggest that the FEIS be provided to the City prior to commencement of the authorized activities.

Condition of Approval #14: The City of Coos Bay Public Works has identified an existing utility that is installed under the Bay in the vicinity of the proposed navigational reliability improvements. Prior to the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities permit, JCEP shall provide evidence to the Coos Bay Community Development Director, that the proposed dredging activity shall not impact this existing utility.

The current proposed condition would require a new review proceeding before the Community Development Director addressing potential impacts to the City’s existing utility line, which could include required public notice and hearing opportunities. Instead, JCEP will present testimony and evidence during the Council’s review proceeding addressing this issue for purposes of a final decision at the close of this review proceeding. Consequently, we propose modification of this condition to simply impose an enforceable requirement that no such impacts occur, and that JCEP perform all impact avoidance measures offered during testimony before the Council.

Thank you for the opportunity to present these requested clarifying modifications to the Commission’s recommended conditions of approval, and we remain available to address any questions you may have .

Mayor Benetti
August 27, 2019
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Sincerely,



Steven L. Pfeiffer

SLP:rsr

cc: Carolyn Johnson (via email) (w/encls.)
Henry Hearley (via email) (w/encls.)
Jake Callister (via email) (w/encls.)
Client (via email) (w/encls.)

ATTACHMENT A

Proposed Modified Conditions of Approval

Condition of Approval #1: Prior to the commencement of any dredging activities, JCEP shall provide the City of Coos Bay Community Development Administrator evidence of an approved Section 401 Water Quality Certification permit and evidence ~~that the of dredging complies with FEIS approved Federal Energy Regulatory Commission (FERC) certificate. requirements and all other state and federal requirements.~~

Condition of Approval #2: ~~Prior to the commencement of any dredging activities,~~ JCEP shall receive written ~~404~~ authorization ~~including ESA Section 7 compliance~~ to perform the proposed dredging from the ~~National Marine and Fisheries Service U.S. Army Corp of Engineers~~ in accordance with ~~NMFS applicable~~ agency requirements. Proof of such authorization shall be submitted to the Coos Bay Community Development Administrator prior to the commencement of dredging activities.

Condition of Approval #3: ~~Prior to the commencement of any dredging associated with an~~ During the conduct of all activities authorized under the Estuarine and Coastal Shoreline Uses and Activities permit, JCEP shall comply with the requirements of the ~~enclosed~~ MOA, CRPA, and UDP as agreed upon and signed by JCEP and the Confederated Tribes of Coos, Lower, Umpqua, and Siuslaw Indians, as well as consistency with any other applicable provisions of Policy #18 of the CBEMP.

Condition of Approval #5: As a general condition, ~~and in the event that additional analysis or circumstance reveals relevant and previously unknown or unmapped shoreland resources,~~ all dredging activity must remain consistent with CBEMP Policy #17 - Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands.

Condition of Approval #8: ~~Prior to the commencement of any dredging associated with an~~ During the conduct of all activities authorized under the Estuarine and Coastal Shoreline Uses and Activities Permit, JCEP shall ~~submit for review and approval by the City of Coos Bay Planning Department~~ comply with all applicable Best Management Practices included in the Dredging Pollution Control Plan (Navigation Reliability Improvements, Kentuck, APCO) (April 8, 2019), and particularly such BMPs related to turbidity, and with BMPs set forth in the Technical Memoranda submitted by the applicant Material Disposal Plan and the Erosion and Pollution Control Plan submitted by JCEP that will be employed should turbidity levels remain above ambient background levels greater than 200 feet from dredging operations.

Condition of Approval #13: Prior to the commencement of any activity authorized under the issuance of an Estuarine and Coastal Shoreline Uses and Activity Permit, JCEP shall provide the City of Coos Bay Community Development Administrator evidence of an approved Final EIS.

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