



AGENDA ITEM SUMMARY

Date: October 22, 2019

To: City of Coos Bay Planning Commission

From: Lane Council Governments (LCOG) Contact:

Henry Hearley, Assistant Planner, 541-682-3089, hhearley@lcog.org

RE: **Land Use Application #187-19-000035 – PLNG – City of Coos Bay Estuarine Permit Application Eelgrass Mitigation in Coos Bay Estuary Management Plan (CBEMP) Aquatic Unit 52-NA.**

The referenced Land Use application analysis is summarized herein. All exhibit and attachment notations refer to those provided in the October 22, 2019 Planning Commission staff report.

BACKGROUND/CONTEXT

This application proposes to conduct mitigation in the Natural Aquatic unit, in which mitigation is an allowed activity. As part of the Compensatory Wetland Mitigation Plan (CWMP) associated with the overall Jordan Cove project, the applicants are required to do mitigation in the estuary to offset impacts at the terminal. The proposed eelgrass mitigation is one of two projects proposed in the CWMP.

Re-contouring of the eelgrass mitigation site is necessary to achieve optimal elevations for a successful transplantation and natural colonization of eelgrass (from an existing elevation of approximately +3 MLLW to a proposed elevation of -1.3 feet MLLW).

The City of Coos Bay Planning Commission held a public hearing on September 24th, 2019. The Planning Commission heard testimony from both proponents and opponents of the application as well as from the applicant. The hearing was closed on the 24th of September, but the record remained open for three discrete periods to allow new testimony, rebuttals and final argument from the applicant.

On October 22nd, 2019, the Coos Bay Planning Commission meets again to review a revised staff report, new evidence and to deliberate on the application.

APPLICANT'S REQUEST

JCEP is requesting approval of an Estuarine Permit from the City of Coos Bay to conduct eelgrass mitigation as an allowed activity within the Coos Bay Estuary Management Plan (CBEMP) Aquatic Unit 52-NA.

Project components include re-contouring an existing un-vegetated sandbar to create an area of optimal habitat, and then transporting eelgrass from a nearby donor site (see Exhibit B, Figure E-4, in Attachment A) into the mitigation area. The proposed eelgrass mitigation site is an un-

vegetated intertidal shoal comprised of medium to coarse sand, located due south of the airport. The proposed mitigation project will reduce and re-contour a boundary area of approximately 9.34 acres to establish approximately 6.78 acres of new habitat that will support a minimum of 2.7 acres of established clustered eelgrass beds (see Exhibit B, Figure E-1, in Attachment A).

The re-contouring process for the Eelgrass Mitigation Site is designed to create optimal depth habitat for eelgrass in the sandy shoal of the mitigation area, which is currently too shallow in areas to support eelgrass. The proposed method of re-contouring is via a shallow-water hydraulic dredge that will excavate the upper/shallow areas of the shoal to create more uniform depth for ideal eelgrass habitat.

ANALYSIS & STAFF REPORT

LCOG has revised the staff report to include new testimony, and to evaluate new evidence relevant to the approval criteria. The application does not have many approval criteria. Most of the relevant language is found in CBEMP definitions. Many public comments address technical aspects of the proposal. The applicant provides a response to these (and other) comments in Attachment E. Staff have evaluated comments addressing approval criteria. Staff reference federal and state permitting requirements throughout the document and incorporate them as Condition of Approval #1. LCOG's analysis and recommendation are intended to provide guidance in making findings and conclusions for the application. Decisions and conclusions on the application ultimately lie with the Planning Commission.

The complete staff report evaluates ALL applicable criteria. Staff has identified key developments to criteria and other considerations for the Planning Commission in their deliberation on the Eelgrass Mitigation proposal.

- 1. Project In-Water Work Window (IWWW)**
- 2. Should all of the proposed activities (including the re-contouring) be captured under a single definition "enhancement."? In other words, if dredging to re-contour the site is part and parcel of the "improvement of conditions" associated with an "enhancement" at the site, is it appropriate to analyze the dredging as a separate activity?**

Following is a summary of staff's current conclusions relative to the key questions listed above:

1. Condition of Approval #3 in the staff report deals with the ODFW approved IWWW, which for the Coos Bay Estuary is October 1 to February 15. Staff received comment from ODFW on September 24, outlining the CTCLUSI's request to truncate the ODFW approved IWWW to end on February 1, to reduce the potential for impacts to herring spawn/egg masses, which typically occur from mid-February to mid-March.

During the second open record period, ODFW submitted a response to staff's recommended truncation of the IWWW. ODFW expressed interest in holding a discussion with the applicant regarding the IWWW period. ODFW was not, however, available to discuss the matter soon enough to include it as new evidence (by October 7th). The applicant submitted their final argument on October 10th. That document contained information supporting the applicant's argument against the truncated IWWW. The

argument relied upon and cited ODFW's "Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources (June 2018)". See Page 6 and n. 4. The Guidance, although referred to throughout the process, was never introduced into the record. It is new evidence, which cannot be submitted during the final rebuttal period; accordingly, the Planning Commission should not consider that evidence its determination regarding the IWWW. The issue of the IWWW has been an issue since before the Planning Commission public hearing. The applicant relied on it to propose the IWWW timeframe in its application. However, the actual guidance was not submitted into the record until the applicant's final rebuttal.

Based on the evidence in the record, staff believes the evidence supports following the ODFW guidance regarding the IWWW. The ODFW guidance limits the in-water work to the time between October 1 to February 15. Staff finds that the evidence submitted by the ODFW and CTCLUSIs is not sufficient to overcome the ODFW IWWW guidance for the Coos Bay Estuary, which was based on neutral observations and studies by ODFW fish biologists outside the permitting process. Consequently accordingly, staff recommends retaining Condition of Approval #3 the condition of approval is recommended implementing the that implements the ODFW IWWW guidance allowing in-water work until February 15th.

2. Staff conclude that the "improvement of conditions" required for mitigation "enhancement" cannot occur without completing the re-contouring. Staff have no evidence that the "improvement of conditions" can occur at the sandbar without the re-contouring (or that similar eelgrass mitigation can occur without some degree of re-contouring). Staff conclude that because the re-contouring is part of the "enhancement," it does not qualify as prohibited "dredging." Put another way, re-contouring for enhancement of an estuarine area for purposes of allowed mitigation activities is an implicit exception to the definition of "dredging" and is therefore not prohibited in the 52-NA unit.

RECOMMENDED CONDITIONS OF APPROVAL

The following conditions are currently proposed by staff for the applications:

Condition of Approval #1: Prior to commencement of any dredging activities associated with eelgrass mitigation to create suitable conditions, JCEP shall provide the City of Coos Bay Community Development Administrator evidence of an approved DSL and US Army Corps of Engineers removal-fill permit, and all authorized mitigation activities shall comply with and otherwise be consistent with such agency authorizations.

Condition of Approval #2: As a general condition, JCEP shall ensure all floating and submerged dredging equipment, and equipment related to mitigation efforts, operating in the Bay shall be clearly marked with day signals and light signals at night in accordance with the US Inland Rules of the Road.

Condition of Approval #3: As a general condition, installation, operation and removal of the dredge line shall only occur during the ODFW approved in-water work window (IWWW) which occurs between October 1 and February 15. This condition shall remain in effect for all

subsequent installation and operations of the dredge line associated with mitigation efforts that may span multiple years and multiple IWWWs.

Condition of Approval #4: *During the conduct of all activities authorized under the Estuarine Permit authorizing eelgrass mitigation efforts, JCEP shall comply with the requirements of the MOA, CRPA, and UDP as agreed upon and signed by JCEP and the CTCLUSI, as well consistency with any other applicable provisions of Policy #18 of the CBEMP.*

Condition of Approval #5: *As a general condition of approval, approval of an estuarine permit to conduct eelgrass mitigation as an allowed activity in the 52-NA zone, shall expire two (2) years after the effective date of the decision unless, within that time, the applicant or a successor in interest files an application for extension pursuant to CBMC 17.130.140 (2) & (3).*

STAFF RECOMMENDATION

Staff recommends that the Planning Commission carefully review the application itself (attached to the staff report), the application criteria, public comments, and the responses contained within the staff report. Based on the evidence in the record, it is staff's recommendation that the *Land Use Application #187-19-000035 – PLNG – City of Coos Bay Estuarine Permit Application for Eelgrass Mitigation in Coos Bay Estuary Management Plan (CBEMP) Aquatic Unit 52-NA*, be **approved with the proposed conditions.**

The Commission has other options:

- 1) Motion to approve the application with additional conditions (and additional associated findings)
- 2) Motion to deny the application (with additional associated findings)
- 3) Motion to continue deliberations to another date.



CITY OF COOS BAY
Public Works/Community Development Department

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STAFF REPORT

Type III – Land Use Process
Jordan Cove Energy Project – Eelgrass Mitigation

STAFF: Henry Hearley, Assistant Planner, Lane Council of Governments (LCOG)
Carolyn Johnson, Community Development Administrator, City of Coos Bay

REVIEW BODY: Planning Commission

MEETING: Tuesday, October 22, 2019 at 6:00 p.m.

LOCATION: Coos Bay City Council Chambers, 500 Central Avenue, Coos Bay, Oregon

APPLICANT/OWNER: Jordan Cove Energy Project L.P. (JCEP)
Attention: Meagan Masten, 111 SW 5th Avenue, Suite 100, Portland, OR, 97204

APPLICANT'S REPRESENTATIVE: Perkins Coie LLP, 1120 NW Couch Street, Tenth Floor, Portland, OR 97209
Attention: Steven Pfeiffer

SUBJECT PROPERTY: City of Coos Bay, OR, 97420 (County Tax Lot Map #25-13-8)

SUBJECT: LAND USE APPLICATION #187-19-000035-PLNG – City of Coos Bay Estuarine Permit Application Eelgrass Mitigation in Coos Bay Estuary Management Plan (CBEMP) Aquatic Unit 52-NA Initial Filing from Jordan Cove Energy Project L.P.

PROPOSED PROJECT: Re-contouring an existing un-vegetated sandbar to create an area of optimal habitat, and then transporting eelgrass from a nearby donor site (see Exhibit B, Figure E-4, in Attachment A) into the mitigation area.

STAFF RECOMMENDATION: Approve Land Use application #187-19-000035-PLNG with the findings and conditions outlined herein and further described in this October 22, 2019 staff report.

I. BACKGROUND/CONTEXT

Process Timeline

- May 21, 2019 – Land use application package received.
- June 12, 2019 – Application deemed incomplete. A request for additional information was sent to applicant.
- July 26, 2019 – Applicant provided additional information. Application complete.
- September 20, 2019 – City receives a timeline extension to December 15, 2019.
- September 24, 2019 – City held first evidentiary hearing in front of Planning Commission. The hearing was closed, and record left open.
- September 25 to October 1, 2019 – First open record period (nine comments received).
- October 2 to October 7, 2019 – Second open record period (five comments received)
- October 22, 2019 – Planning Commission deliberations and possible decision
- December 15, 2019 – City must take final action on request.

Required Mitigation

As described in the Compensatory Wetland Mitigation Plan (CWM) mitigation is proposed at the eelgrass mitigation site that provides for the required minimum mitigation acreage/credits necessary to meet regulatory requirements. The proposed eelgrass mitigation site is intended to offset impacts to eelgrass habitat resulting from the LNG terminal. Achievement of agency required performance criteria is necessary for release from compensatory mitigation requirements.

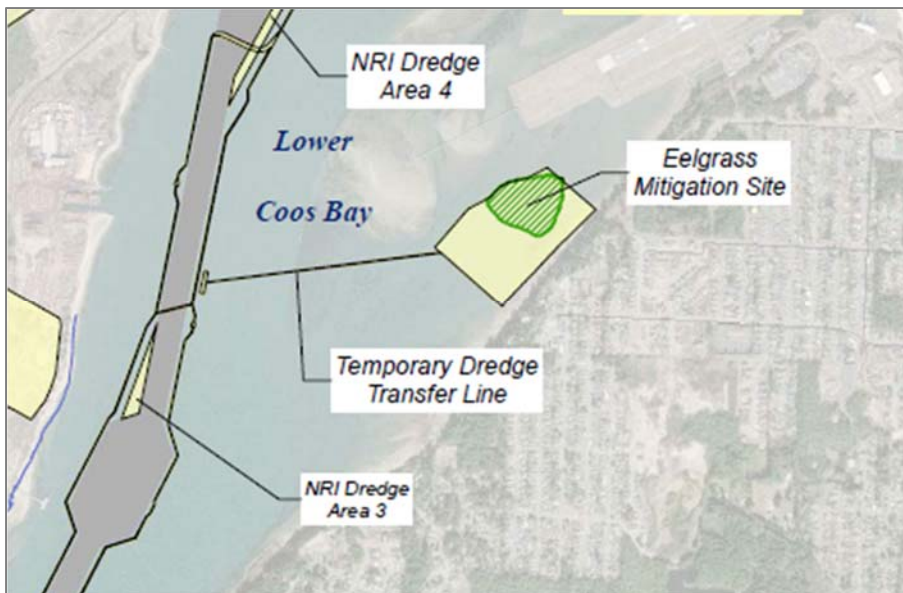
The Coos Bay Estuary Management Plan (CBEMP)

To comply with Statewide Planning Goal 16 Estuarine Resources, Coos County, City of Coos Bay and City of North Bend developed the CBEMP. It was adopted and acknowledged in 1984. There are three “aquatic” management units in the CBEMP: Natural Aquatic (NA), Conservation Aquatic (CA) and Development Aquatic (DA). This application proposes to conduct mitigation in the Natural Aquatic unit, in which mitigation is an allowed activity.

According to the CBEMP, Natural Aquatic areas are managed for resource protection, preservation and restoration. There are severe restrictions on the intensity and types of uses and activities allowed within these areas. Natural Aquatic areas include tidal marshes, mud-sand flats, seagrass and algae beds that, because of a combination of factors such as size, biological productivity and habitat value, play a major role in the functioning of the estuarine ecosystem. Natural Aquatic areas also include ecologically important subtidal areas.

Temporary dredge transfer line as it relates to eelgrass mitigation

The temporary dredge transfer line will be used to remove sediment extracted through hydraulic dredging from the existing elevated, un-vegetated eelgrass mitigation site. Re-contouring is necessary to achieve optimal elevations for a successful transplantation and natural colonization of eelgrass (from an existing elevation of approximately +3 MLLW to a proposed elevation of -1.3 feet MLLW).



Installation of the temporary dredge line will occur during the Oregon Department of Fish and Wildlife (ODFW) approved In Water Work Window (IWWW) from October 1 to February 15. **(Condition of Approval #3)** Under its authority to manage fish and wildlife resources, ODFW created guidelines for timing of in-water work to assist the public in planning projects that minimize potential impacts to important fish, wildlife and habitat resources. The applicant states this window corresponds to the period when eelgrass shoots are naturally dying back and the entire eelgrass bed contracts. Installation, operation, and removal of the dredge line will, therefore, occur during the most optimal period to reduce impacts to existing eelgrass beds. The dredging will be completed within one fall/winter season and the temporary dredge line will be removed prior to the spring and summer eelgrass growth cycle.

Up to two proposed booster pumps will be utilized to facilitate movement of dredged material through the temporary dredge line. The booster pumps will be installed in a manner to avoid existing eelgrass beds. The booster pumps will also act as an anchor to the dredge line to minimize movement of the dredge line when placed at the bottom of the Bay. The temporary dredge line alignment will be situated in a manner that there is no potential interference with existing airport runway operations, landings or takeoffs of aircraft.

No removal of sediments can occur without the applicant first obtaining an approved joint removal-fill permit from DSL, and US Army Corps of Engineers. The applicant's removal fill application is currently under technical review, and as a result, a condition of approval is proposed **(Condition of Approval #1)** requiring the applicant to secure an approved removal-fill permit prior to the removal of any sediment associated with the proposed eelgrass mitigation.

Potential impacts to eelgrass from the temporary dredge transfer line

The applicant asserts that potential impacts to eelgrass will be temporary, involving the physical covering of existing blades of eelgrass by the temporary dredge line. The temporary dredge line will be removed by February 15 at the end of the IWWW. The project engineers and consultants indicate a survey will be conducted in the area during the following summer to determine and/or confirm whether eelgrass has recolonized where the dredge line was temporarily located. If eelgrass has not reoccupied the area covered by the temporary dredge transfer line, the area impacted by the temporary dredge transfer line will be added to the total JCEP eelgrass mitigation project. The

applicant's proposed Compensatory Mitigation Plan outlines the proposed approach to eelgrass mitigation. The proposed mitigation cannot occur first without approval by ODSL and the USACE. Staff have addressed the need for the applicant to obtain state and federal level permits to conduct the proposed migration by implementing Condition of Approval #1. The applicant asserts that potential impacts to eelgrass beds are expected to be minimal because there are not substantial amounts of eelgrass proximal to the proposed eelgrass mitigation site. Fringe eelgrass has been documented in 2016 along the east and south boundary of the site, but a resurvey of this area in 2017 and 2018 showed the area void of eelgrass. If eelgrass is present during dredging, the amount of eelgrass lost will be quantified by JCEP Project Engineers and Ecologists, consistent with ODSL and USACE mitigation requirements, and added to the total JCEP eelgrass mitigation requirement. The applicant's consultant states, the principle manner in which eelgrass beds may be adversely impacted by excavation and grading would be from the resultant turbidity generated by the hydraulic dredge. Turbidity modeling conducted by JCEP indicates that turbidity will be minor, temporary and localized to the immediate area of the eelgrass mitigation site. Implementation of Best Management Practices (BMPs) will allow for no more than a 10 percent increase in project-caused turbidity background levels. For further details related to potential adverse impacts please refer to the applicant's technical memorandum dated July 22, from Project Engineer, Derek Vowels, contained in Attachment A, Exhibit B of this staff report.

Selection of eelgrass mitigation site

The proposed eelgrass mitigation site was selected after a review of ten potential sites by David Evans and Associates. The review assessed ten sites throughout the Bay and evaluated each based on ecological conditions suitable for eelgrass growth. The conditions evaluated included: salinity concentrations, moderate flow/circulation, appropriate depths, distance from potential pollution sources, stability and longevity of the eelgrass bed, and the presence of other nearby eelgrass beds. Please refer to Exhibit B, Compensatory Wetland Mitigation Plan, as listed in Attachment A, for details and the criteria that were used to select the proposed eelgrass mitigation site.

Performance measures

At the proposed eelgrass mitigation site, JCEP seeks to establish a stable population of eelgrass beds at an area of 1.2 times or greater the area (and equivalent densities) as the impact site. The stability of the population size and density will be compared to surrounding beds and overall natural fluctuation of eelgrass populations within the Bay. If performance standards are not being met or are on a path not to be met by the end of monitoring period, then contingency measures will be required. Contingencies measure include, but are not limited to, additional transplanting, monitoring the donor site and a reference site to determine potential course of action, and if not rectifiable, JCEP would then consult with state agencies to then discuss alternative mitigation strategies. Please refer to Exhibit B, Compensatory Wetland Mitigation Plan, as listed in Attachment A, for details and a further explanation.

Monitoring

In order to assess the likelihood of meeting the goals, objectives, and performance standards of the proposed mitigation, the applicant will need to implement guidelines for monitoring. Monitoring methods are detailed in the Compensatory Wetland Mitigation Plan and included as part of this staff report as Attachment A. Pre-construction and post-construction monitoring will occur following the guidelines established by the USACE and utilize in-situ monitoring using divers or waders. Monitoring will be conducted to assess percent survival of transplanted shoots, and shoot density of eelgrass in the transplanted beds, both of which are essential components of eelgrass mitigation. The applicant's monitoring plan of the proposed mitigation site will include monitoring

reports provided to ODSL and the USACE. With respect to long-term monitoring and maintenance of the Site, JCEP anticipates endowing the Site to a local non-profit that meets the requirements of ORS 271.715(3)(b) to provide near-term and long-term management and maintenance of the Site. Further, JCEP anticipates this entity would hold a conservation easement from the State of Oregon for the Site. Clauses necessary to protect the Site will be written in the conservation easement.

II. APPLICANT'S REQUEST

JCEP is requesting approval of an Estuarine Permit from the City of Coos Bay to conduct eelgrass mitigation as an allowed activity within the Coos Bay Estuary Management Plan (CBEMP) Aquatic Unit 52-NA.

Project components include re-contouring an existing un-vegetated sandbar to create an area of optimal habitat, and then transporting eelgrass from a nearby donor site (see Exhibit B, Figure E-4, in Attachment A) into the mitigation area. The proposed eelgrass mitigation site is an un-vegetated intertidal shoal comprised of medium to coarse sand, located due south of the airport. In 2018, the applicant's consultant, David Evans and Associates, conducted eelgrass investigations at the proposed mitigation site and confirmed that the area has no eelgrass or only stray (possibly transient) eelgrass present. The project is intended to offset anticipated impacts to at least 2.3 acres of eelgrass habitat in the Coos Bay estuary from the Jordan Cove LNG Project. The proposed LNG pipeline does not impact eelgrass habitat. To achieve this, the proposed mitigation project will reduce and re-contour a boundary area of approximately 9.34 acres to establish approximately 6.78 acres of new habitat that will support a minimum of 2.7 acres of established clustered eelgrass beds (see Exhibit B, Figure E-1, in Attachment A).

The re-contouring process for the Eelgrass Mitigation Site is designed to create optimal depth habitat for eelgrass (-1.0 to -2.0 ft NAVD 88) in the sandy shoal of the mitigation area, which is currently too shallow in areas to support eelgrass. The proposed method of re-contouring is via a shallow-water hydraulic dredge that will excavate the upper/shallow areas of the shoal to create more uniform depth for ideal eelgrass habitat.

The applicant notes that a dredge designed to access and work in shallow water sensitive habitats such as marshes and nearshore areas would be utilized. The dredge would be equipped with a hydraulic dredge pump system mounted on an excavator arm. Dredges of this type are typically relatively small in footprint (14 foot by 48-foot range) and portable/truckable. They can often self-launch from a shallow bank without the assistance of a crane or other equipment. They are equipped with a spud system for positioning and holding the dredge in place, and some may be equipped with hydraulic pontoons or legs to enhance operations in shallow, soft bottom locations. The dredge may also be equipped with low impact self-propulsion systems. Pump sizes can vary, but a range of, 10 to 16-inch diameter discharge line, is typical. Considering the distance, the dredge material will need to be pumped and potential site conditions, a 14-inch diameter discharge line is considered for planning. An example of the type of hydraulic dredge being discussed is shown in Figure 3. The contractor will need to take into consideration the impacts from potential wind waves and vessel wakes at the site, during all water levels, when selecting equipment and planning work.

The proposed mitigation work has been designed to avoid and minimize impacts to nearby eelgrass beds or temporary impacts to stray eelgrass that may occur in the grading footprint. Any

temporary impacts that are unavoidable, based on the preconstruction survey, will be accounted for in the final planting plan.

The donor site is located approximately 1,500 feet southwest of the eelgrass mitigation site and occupies approximately 18.6 acres of relatively continuous and dense eelgrass beds. The mean eelgrass density within the donor site was calculated at 53.5 shoots per meter squared. US Army Corps guidelines suggest that harvesting 10 percent of shoots from an existing eelgrass bed will not harm the donor bed habitat. The methodology for transplanting eelgrass will follow best practices as demonstrated by prior Coos Bay eelgrass mitigation projects (the applicant specifically calls out previous eelgrass mitigation efforts undertaken with the airport extension project). The methodology is provided for in Exhibit B of the applicant's initial application (included as Attachment A to this staff report).

III. NOTICES AND REFERRALS

Notice:

On August 30, 2019 notice of the public hearing was mailed to surrounding property owners along the shoreline adjacent to the proposed mitigation site. The CBMC doesn't outline specific noticing requirements for a subject property located in a body of water. City staff mirrored the notice approach recently used by the City for the Navigational Reliability Improvements application, mailing notice to bayfront properties adjacent to the proposal and within City Limits. Notice was also published in "The World", on September 7, 2019.

Referrals:

On August 30, and September 3, 2019, referral notice was sent to the following governmental/utility/tribal agencies for a request for comment on the application: Department of Land Conservation and Development (DLCD), Department of State Lands (DSL), Oregon Department of Fish and Wildlife (ODFW), Coos Bay North Bend Water Board, US Army Corps of Engineers, NW Natural, Pacific Corp, Coos County, City of Coos Bay, Oregon International Port of Coos Bay, and Confederated Tribes of Coos, Lower, Umpqua and Siuslaw Indians and Coquille Indians. (CTCLUSI)

ODFW issued comment on September 24, fully recognizing the CTCLUSI's concern for conservation of ecological function of Coos Bay aquatic habitats. In their comments, ODFW recommended the IWWW period be truncated in the same manner as was proposed in a separate land use application currently under review by the City of Coos Bay (File No. 187-18-000153), and stated the comments provided on land use application File No. 187-18-000153 are considered directly relevant to the eelgrass mitigation application. As a result of ODFW's comment regarding truncation of the IWWW period, Condition of Approval #3 was developed to reflect the truncation and presented this condition of approval reflecting the truncation during the public hearing. This issue is further addressed in Section VI under CBMC *17.352.050 Conditions*.

IV. PUBLIC COMMENTS AND TESTIMONY

A number of public comments were received addressing the application. Attachment C is a matrix summarizing the comments (please refer to the City's website at <http://coosbay.org/departments/community-development-department> to view all public comments in their entirety). The applicant has provided responses to the public comments received, please see Attachment E. In cases where public comments addressed approval criteria,

staff have included a discussion of the comments as part of the review of the applicable criteria. See below for a thematic summary of public comments received.

Design and placement of the eelgrass mitigation site

Excavation will create a “sump.” As a result, when the tide level leaves water in the excavated area, the remaining water will warm and have a reduced oxygen content. Many studies have shown that low oxygen and high temperatures have negative impacts on eelgrass photosynthesis and growth. These negative impacts are most notable with increasing temperature. Small elevation in temperature over a short period, has resulted in a serious decline in eelgrass cover

Because the applicant has selected a site situated in the middle of a broad, gently sloping intertidal flat, as the tide falls organisms may become stranded in the “sump” including some endangered species.

The proposed compensatory mitigation site holds significant potential to create an eelgrass habitat that lacks important attributes of the habitat to be destroyed.

Success in establishing a new eelgrass bed will be difficult and is dependent on multiple factors. High water column inorganic nitrogen concentrations can promote algae blooms that smother the eelgrass. This additional stressor is of concern as the eelgrass mitigation site is close to the North Bend waste water treatment plant outfall.

The long-term maintenance of the dredged eelgrass mitigation site and the stability of the eelgrass bed after construction is unclear. The proposed permit should be denied on the basis of inadequate design.

Long term maintenance

The application implies that the Sediment Transport Analysis in Appendix I conducted by Moffatt & Nichol (M&N) includes information about the stability of the eelgrass mitigation site after construction. Appendix I is not about the eelgrass mitigation site. It is about what will happen to the Federal Navigation Channel (FNC) as a result of the dredging.

There is not an analysis of any sediment changes as a direct result of the implementation of the eelgrass mitigation site. Appendix I does not address any short- or long-term changes to the sediment characteristics of the site as a result of creation of the “sump” or tidal currents.

Although models can provide information on potential outcomes of the proposed mitigation under “normal” conditions they do not take into account effects of unusual, rare, but impactful events. There are many examples of these over the years in Coos Bay.

Because the non-cohesive sand and silty sand sediments in the area are relatively mobile, and because the proposed mitigation site is a “sump” situated in the middle of a large, low-gradient intertidal flat rich in mobile sediments, it is not likely that the excavated sediment surface elevations in the proposed mitigation site will persist on a permanent basis. It is reasonable to anticipate that the dredged area will gradually shallow until it matches or approximates the elevation of the sediments of the surrounding tide flats and become unsuitable for the transplanted eelgrass.

Dredging is not allowed in 52 – Natural Aquatic

The applicant's response correctly identifies that planting eelgrass is consistent with the management objective, however the plans to dredge 9.3 acres of the 52-NA area are not consistent with the management objective.

The current and 2007 applications are not the same in that the 2007 application was to shave down the end of two islands to the south and southwest of the airport runway (PDF page 34 and graphic on page 39). It did not involve dredging in the intertidal, a prohibited activity in 52-NA.

The absence of information about the current conditions, functions and values of the existing wetland make it impossible to determine if construction of an eelgrass bed at this location will result in a net increase or decrease in the functions and values of the wetlands at this location.

Donor and reference site

A reference site for the comparison of any mitigation actions should be located somewhere where no disturbance actions are undertaken. The donor site is inappropriate.

Alternative sites for mitigation

The consideration of alternative sites for the eelgrass mitigation in this application is weak. The applicant's criteria could easily have been expanded to consider other attributes that would have made some of the alternatives more likely to be considered. Dredging upland areas of the dredge islands to appropriate eelgrass depths in the regions adjacent to eelgrass would increase the area of eelgrass in the bay without having to dredge an already productive 52-NA area.

Salvage of eelgrass from the access channel

Other related permits suggest that the eelgrass planted in the Jordan Cove temporary site will be dug up after one or two seasons and then relocated to the eelgrass mitigation site adjacent to the airport. If this is the case, and the applicant is planning to use the transplanted eelgrass as part of the donor stock for the eelgrass mitigation site the Coos Bay city permit should reflect this action. It is quite likely that the eelgrass will experience significant shock from being dug up, transplanted for one to two years, dug up again and transplanted to a new site.

Airport Approval

The permit application states that "coordination and clearances from the airport may be needed," but does not provide anything further about what is included in such coordination and clearances. This vagueness does not support permit approval. Staff sent referral notice to the Southwest Oregon Regional Airport for comment on this applicant, and to-date have not received any comment.

Special Conditions or Policies of the CBEMP

Several comments were received that called out certain policies contained in the CBEMP that the applicant should be required to comply with.

Performance Measures/Standards

At the hearing on September 24, 2019, commenters brought up the issue that the performance standards as outlined in the CWMP should be adopted by the City as conditions of approval.

V. APPROVAL CRITERIA

Coos Bay Municipal Code (CBMC)

17.352 Estuarine and Coastal Shoreland Uses and Activities

17.130.140 Expiration and Extension of Decisions

Coos Bay Estuary Management Plan (CBEMP)

Management Classification for NA-52 (CBEMP 3-142)

Management Objective of Natural Aquatic Unit (Segment 52-NA)

Activities

VI. EVALUATION OF APPROVAL CRITERIA FOR ESTUARINE AND COASTAL SHORELAND USES AND ACTIVITIES PERMIT

COOS BAY MUNICIPAL CODE (CBMC)

CBMC 17.130.140 EXPIRATION AND EXTENSION OF DECISIONS

(1) Except as otherwise expressly provided by the Coos Bay Development Code or the decision in question, decisions made pursuant to this chapter expire two years after the effective date of the decision unless, within that time, the applicant or a successor in interest files an application for an extension of the decision or submits an application for project review or a building permit, or undertakes substantial development of the use authorized by the decision. Approval of a preliminary subdivision or partition shall expire within five years from the date of approval.

(2) An application for extension of a decision is subject to a Type I process. An applicant for an extension shall submit the requisite fee, a completed application review form provided for that purpose by the city, and text describing how the application complies with the approval criteria for an extension, and basic facts and other substantial evidence to support the text.

(3) The director may approve a single one-year extension of a decision if he or she finds that the relevant facts and the law have not changed substantially since the original approval, or that the application can comply with the law in effect on the date the application for the extension was filed by complying with applicable additional and/or modified conditions of approval, and those additional conditions and/or modifications are adopted. [Ord. 503 § 1 (Exh. B), 2018; Ord. 473 § 3 (Exh. A), 2016].

Staff Response: Consistent with the section cited above, approval of an estuarine permit shall expire two (2) years after the effective date of the decision unless, within that time, the applicant or a successor in interest files an application for an extension pursuant to subsection (2) and (3), cited above. See Condition of Approval #5.

CBMC 17.352 ESTUARINE AND COASTAL SHORELAND USES AND ACTIVITIES PERMIT

17.352.010 General.

Uses and activities permitted by the Coos Bay estuary management plan are subject to general and special conditions and policies to comply with statewide planning goals and the Coos Bay Estuary Plan as adopted by the City of Coos Bay. Compliance with these conditions and policies must be verified; therefore, all uses and activities under jurisdiction of the Coos Bay Estuary Management Plan must be reviewed. [Ord. 503 § 1 (Exh. B), 2018; Ord. 473 § 3 (Exh. A), 2016. Formerly 17.370.010].

Staff Response: The City of Coos Bay has set a previous precedent that any land use proposals involving Jordan Cove Energy Project would be handled in the public setting so that the public would have an opportunity to provide comment on the application in the form of a public hearing in front of the appropriate decision making body. Staff and the City of Coos Bay elevated this proposal from a Type II process to a Type III to include a public hearing in front of the Planning Commission.

The CBEMP has been acknowledged by the State of Oregon to be consistent with the Oregon Statewide Planning Goals, including Goal 16 Estuarine Resources. The CBEMP lists mitigation as an approved activity for the 52-NA aquatic zone, and not subject to general or specific conditions. The CBEMP also lists dredging as restricted activity in the 52-NA aquatic zone. Mitigation and dredging are discussed in further detail under Section VII.

17.352.020 Initiation.

A request to permit these uses and activities may be initiated by a property owner or authorized agent through a Type I review process and application to the community development department.

Staff Response: As part of the completeness review, staff requested a signed authorization from the underlying property owner of the Bay, the Oregon Department of State Lands (DSL). Accordingly, the applicant included a signed DSL authorization form to file this land use application. As previously referenced, given the high level of public interest with projects involving the Jordan Cove Energy Project and the anticipated requirements from other agencies, staff and the City elevated this application from a Type II to a Type III process. Staff find the applicant has followed the appropriate steps in obtaining authorization for filing this land use application.

17.352.030 Application.

An application may include any or all of the following items at the discretion of the director. The applicant shall provide three copies of the required information.

(1) A general location map of the property and a detailed parcel map of the property, each on approximately eight-inch-by-11-inch paper.

(2) Address and legal description of the property.

(3) Detailed description of the proposed use or activity.

Staff Response: Staff find the applicant has provided a detailed description of the proposed use or activity.

(4) Statement explaining how the proposed use and/or activity complies with the applicable management plan and title provisions. [Ord. 503 § 1 (Exh. B), 2018; Ord. 473 § 3 (Exh. A), 2016. Formerly 17.370.030].

Staff Response: Staff find the applicant's submittal and completeness items requested adequately address section 17.352.030.

17.352.050 Conditions. The city may impose conditions if it finds that a use or activity may have an adverse impact on the site itself or nearby property. Conditions of approval, including those identified in Chapter 17.347 CBDC, Conditional Uses, shall be stated in terms that are specific and measurable so that the applicant is fully aware of the intent and justification of the condition and how and when to implement them. [Ord. 503 § 1 (Exh. B), 2018; Ord. 473 § 3 (Exh. A), 2016. Formerly 17.370.050].

Staff Response: Should the City find certain conditions to attach to a recommendation that have the ability to minimize the adverse impacts of the proposed use in the 52-NA zone, the City has the authority to impose conditions of approval pursuant to Section 17.352.050. Any conditions should be clearly identified in this staff report and any subsequent findings of fact, and or resolution. In response to this requirement, a discussion of Conditions of Approval #1 and #3 are provided.

In their final written arguments, the applicant's representative argues that it's important to note the specific nature and design of the proposed mitigation will be determined by ODSL and the USACE as part of their review, which is currently underway, subject to first securing city authorization, if granted. It is possible the respective state and federal agencies may impose modifications to the current JCEP proposal, including, for example, increased planting densities, revised best management practices, or monitoring requirements. Because of this, the applicant's representative asks that any City authorization incorporate and otherwise require consistency with these underlying state and federal agency requirements. As such, the applicant's representative has proposed a revised Condition of Approval #1 to include the language *"and all authorized mitigation activities shall comply with and otherwise be consistent with such agency authorizations."* Staff has no objections to the proposed revision and has incorporated it into the staff report.

Condition of Approval #3 deals with the ODFW approved IWWW, which for the Coos Bay Estuary is October 1 to February 15. As noted earlier, Staff received comment from ODFW on September 24, (just hours prior to the Planning Commission public hearing) outlining CTCLUSI's request to truncate the ODFW approved IWWW to end on February 1, because the truncated IWWW would reduce the potential for dredge impacts and siltation to the herring spawn/egg masses, which typically occurs from mid-February to mid-March.

During the second open record period, Staff received communication from ODFW regarding the applicant's response to their recommended truncation of the IWWW. ODFW expressed interest in holding a discussion with the applicant regarding the IWWW period. However, ODFW was(is) not available to discuss the matter while the record is open to new evidence.

With respect to this issue, staff lays out the following arguments:

In their final written arguments, the applicant's representative argues that the City does not have authority to set periods for in-water work. Staff's response to this argument is two-fold. First, it was the applicant that initially raised the IWWW in its application and proposed to abide by those limitations. The applicant cannot now credibly argue the City is not authorized to set in water work time limitations. Second, staff believes the City code provides a basis for the City to prescribe in-water work windows in CBMC 17.352.050 Conditions which provides that the City may impose conditions if it finds a use or activity may have an adverse impact on the site itself or nearby properties. This provision provides the authority to impose a condition of approval with respect to the IWWW.

Finally, based on the evidence in the record, staff believes the evidence supports following the ODFW guidance regarding the IWWW . The ODFW guidance limits the in-water work to the time between October 1 to February 15. The applicant’s proposal indicated that that window would be complied with. During the open record period, opponents submitted comments from ODFW staff and CTCLUSI that supported opponents’ position to shorten the window two weeks-to February 1st. The opponents submitted photographic evidence of herring spawning by Fossil Point, and testimony that CTCLUSI Natural Resource Department and Biology staff routinely observe herring spawning in the Bay throughout February. In response, the applicant argues that the proposed eelgrass mitigation site is located four miles downstream from where the CTCLUSI claim that herring spawning has occurred in the month of February. The applicant points out that the current IWWW period is a result of multiple reviews by ODFW fish biologist. It asserts that the ODFW comment contains no factual support for truncating the IWWW period for this project.

Staff finds that the evidence submitted by the ODFW and CTCLUSI is not sufficient to overcome the ODFW IWWW guidance for the Coos Bay Estuary, which was based on neutral observations and studies by ODFW fish biologists outside the permitting process. Consequently, Condition of Approval #3 is recommended implementing the ODFW IWWW guidance allowing in-water work until February 15th.

VII. EVALUATION OF CBEMP WITH RESPECT TO PROPOSAL.

COOS BAY ESTUARINE MANAGEMENT PLAN, SECTION 5.

DESIGNATION OF SITE-SPECIFIC MANAGEMENT SEGMENTS, USES AND ACTIVITIES

The CBEMP lists uses and activities that are allowed in the 52-NA unit. “Mitigation” is listed and denoted with an “A” under the 52-NA unit list of activities. Section 3.8 of the CBEMP notes that “A” means the use or activity is allowed “as of right, subject only to Bay-wide Policies and Management Objectives.” The Bay-wide policies are policies that special and general conditions point directly to for specific uses and activities. Mitigation, as a listed allowed activity does not have any special or general conditions associated with it.

Dredging is listed as an activity in the 52-NA unit. Only certain kinds of dredging are explicitly allowed. For example, new dredging (2a) is only allowed in an identified area, which does not include the proposed mitigation site.

The parties make different arguments about whether the proposed activity qualifies as allowed “mitigation” or prohibited “dredging.” Much of that discussion turns on the definitions of those and other terms in the CBEMP as noted in the definition section of this report.

52-NA Unit- Activities

...

5. Mitigation

...

Staff Response: “Mitigation” is listed and denoted with an “A” under the 52-NA unit list of activities. Section 3.8 of the CBEMP notes that “A” means the use or activity is allowed “as of right, subject only to Bay-wide Policies and Management Objectives.” The Bay-wide policies are policies that special and general conditions point directly to for specific uses and activities. Mitigation, as a listed allowed activity does not have any special or general conditions associated with it. Staff concludes that mitigation is an allowed use and that no bay-wide policies are applicable as identified by special or general condition.

...

2. Dredging

...

Staff Response: Dredging is listed as an activity in the 52-NA unit. Only certain kinds of dredging are explicitly allowed. For example, new dredging (2a) is only allowed in an explicit area; an area which does not include the proposed mitigation site. A number of public comments characterize the applicant’s proposal as conducting new dredging. As such, they contend that the proposed activities are highly restricted and only allowed subject to special conditions. Specifically, new dredging *“shall be allowed only to dredge a small channel on the north side of the proposed airport fill as necessary to maintain tidal currents.”* In addition, this activity is only allowed subject to a finding that adverse impacts have been minimized in accordance with CBEMP Policy #5. As such, opponents allege, the applicant’s proposal to dredge for the purpose of constructing an eelgrass mitigation site constitutes new dredging and is therefore inconsistent.

The proposed mitigation necessarily utilizes hydraulic dredging to reduce the elevation of the site. Staff is compelled by the argument that any meaningful mitigation in pursuit of the management objectives of the 52-NA unit, would require “dredging” as defined in the CBEMP. Mitigation will generally necessitate the “removal of sediment” from the estuary.

The applicant emphasizes the distinction between dredging in pursuit of re-contouring and “enhancement” and dredging as a prohibited activity in the 52-NA unit. The applicant argues that “improvement of conditions” pursuant to enhancement, cannot occur without completing the re-contouring. The applicant argues that because the re-contouring is already part of “enhancement,” it cannot also be “dredging.” Enhancement is a type of mitigation which is permitted in the 52-NA zone. The proposal is distinguishable from the “dredging” in the nearby NRI proposal, in that all of the proposed activities from the eelgrass mitigation (including the re-contouring) are captured under a single definition “enhancement.”

Staff concludes that the proposed re-contouring is part of an “enhancement” in support of mitigation.

COOS BAY ESTUARINE MANAGEMENT PLAN, SECTION 3.2 POLICY DEFINITIONS

The following definitions are relevant:

MITIGATION: The creation, restoration, or enhancement of an estuarine area to maintain the functional characteristics and processes of the estuary, such as its natural biological productivity, habitats, and species diversity, unique features and water quality (ORS 541.626).

Staff Response: As noted, staff agrees with the applicant's statement that the CBEMP management classification for the 52-NA expressly designates "mitigation" as an allowed activity. The applicant asserts that their proposal qualifies as mitigation under this definition, in part because it enhances the estuarine area in the ways required under the definition. The applicant states in Attachment A, Exhibit B:

"the proposed mitigation will result in a net increase of impacted habitats and, because mitigation habitats will function in a manner equivalent to or better than those habitats being impacted, it is anticipated there would be a net gain in overall functions and values."

Further as explained by the applicant's consultant, David Evans and Associates, in the Compensatory Wetland Mitigation Plan (Attachment A, Exhibit B), *"the proposed mitigation effort is considered to be an enhancement because it improves the functionality of the existing estuarine habitat."*

ENHANCEMENT: The improvement of conditions in an area which remains under estuarine influence but had experienced past degradation or reduction in productivity due to obstruction of flow, sedimentation, log debris, etc.

The applicant asserts that the re-contouring is part and parcel of the improvement of conditions" at the sandbar and is correctly characterized as "enhancement."

Staff Response: The applicant proposes to convert an existing un-vegetated sandbar into a functioning eelgrass habitat. The sandbar has "experienced past degradation," which occurred when spoils associated with dredging for the Federal Navigation Channel between 1948 and 1951 were placed in the Bay and altered channel flows. The applicant notes that the enhancement process will involve re-contouring the sandbar to match the depth of adjacent areas where eelgrass beds occur. The re-contouring is necessary because the principal limiting factor for eelgrass in the general vicinity of the sandbar is elevation. Without re-contouring the sandbar to a lower elevation, eelgrass mitigation will not be successful there, i.e., there will not be "improvement of conditions" as contemplated by the definition of "enhancement."

Opponents argue that the earth moving activities qualify as "dredging" and are prohibited activities in the 52-NA unit. The following is the definition of "dredging."

DREDGING: The removal of sediment or other material from a stream, river, estuary or other aquatic area. Maintenance Dredging refers to dredging necessary to maintain functional depths in maintained channels, or adjacent to existing docks and related facilities; New Dredging refers to deepening either an existing authorized navigation channel or deepening a natural channel, or to create a marina or other dock facilities; Dredging to Maintain Dikes and Tide gates Refers to dredging necessary to provide material for existing dikes and tide gates; Minor Dredging refers to small amounts of removal as necessary, for instance, for a boat ramp. Minor dredging may exceed 50 cubic yards, and therefore, require a permit

Staff Response: The CBEMP definition for “dredging” is broad. It identifies the removal of sediment or other materials from the estuary as “dredging.” However, there is support in the CBEMP for instances in which this broad reading of the term “dredging” was not meant to prohibit earth moving such as is proposed in this application. As an example, temporary alteration is allowed in the 52-NA unit, and anticipates the need for dredging or fill, or other estuarine alterations over a short period of time to facilitate an allowed use. This definition specifically calls out alterations necessary to establish mitigation sites:

TEMPORARY ALTERATION: Dredging, filling, or another estuarine alteration occurring over a specified short period of time which is needed to facilitate a use allowed by an acknowledged plan. Temporary alterations may not be for more than three years and the affected area must be restored to its previous condition. Temporary alterations include: (1) alterations necessary for federally authorized navigation projects (e.g., access to dredged material disposal sites by barge or pipeline and staging areas or dredging for jetty maintenance), (2) alterations to establish mitigation sites, alterations for bridge construction or repair and for drilling or other exploratory operations, and (3) minor structures (such as blinds) necessary for research and educational observation.

Staff Response: Staff is not applying the definition of “Temporary Alteration” to the application but introduces the definition to provide an example of how the CBEMP contemplates the relationship between mitigation and activities like dredging, filling and other estuarine alterations. The temporary alteration provision recognizes that alterations can be necessary for enhancement as a form of mitigation.

52-NA Unit – Management Objective.

MANAGEMENT OBJECTIVE: This aquatic unit contains extensive eelgrass beds with associated fish and waterfowl habitat and shall accordingly be managed to maintain these resources in their natural condition in order to protect their productivity.

Dredging of a small channel on the north side of the proposed airport fill shall be necessary as a form of mitigation to maintain tidal currents.

Maintenance only of the existing sewage treatment plant outfall shall be permitted.

Staff Response: The management objective of the 52-NA zone does explicitly call out “eelgrass beds” and that the aquatic unit shall be managed to maintain these resources in their natural condition. The proposal will establish new eelgrass beds in an area of the Bay that has, in recent history been unable to support establishment of eelgrass naturally due to shoaling from dredge spoils, which prevent optimal depth for eelgrass habitat. Accordingly, the applicant is proposing to establish new eelgrass habitat within the 52-NA aquatic zone to ensure productivity of “eelgrass beds with associated fish and waterfowl habitat” which aligns with the management objective.

Staff point out the language of the management objective which states “*maintain these resources in their natural condition in order.*” As noted, one of the allowed activities in 52-NA is “mitigation” which does not have any general or special conditions attached to it. Staff conclude that the proposal is consistent with management objectives.

VIII. CONDITIONS OF APPROVAL

Approval of the Land Use application #187-19-000035-PLNG should include the following conditions:

Condition of Approval #1: Prior to commencement of any dredging activities associated with eelgrass mitigation to create suitable conditions, JCEP shall provide the City of Coos Bay Community Development Administrator evidence of an approved DSL and US Army Corps of Engineers removal-fill permit, and all authorized mitigation activities shall comply with and otherwise be consistent with such agency authorizations.

Condition of Approval #2: As a general condition, JCEP shall ensure all floating and submerged dredging equipment, and equipment related to mitigation efforts, operating in the Bay shall be clearly marked with day signals and light signals at night in accordance with the US Inland Rules of the Road.

Condition of Approval #3: As a general condition, installation, operation and removal of the dredge line shall only occur during the ODFW approved in-water work window (IWWW) which occurs between October 1 and February 15. This condition shall remain in effect for all subsequent installation and operations of the dredge line associated with mitigation efforts that may span multiple years and multiple IWWWs.

Condition of Approval #4: During the conduct of all activities authorized under the Estuarine Permit authorizing eelgrass mitigation efforts, JCEP shall comply with the requirements of the MOA, CRPA, and UDP as agreed upon and signed by JCEP and the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, as well consistency with any other applicable provisions of Policy #18 of the CBEMP.

Condition of Approval #5: As a general condition of approval, approval of an estuarine permit to conduct eelgrass mitigation as an allowed activity in the 52-NA zone, shall expire two (2) years after the effective date of the decision unless, within that time, the applicant or a successor in interest files an application for extension pursuant to CBMC 17.130.140 (2) & (3).

IX. CONCLUSION

Based on the evidence in the record, LCOG recommends approval, as conditioned, of an estuarine permit to conduct eelgrass mitigation in the 52-NA aquatic zone.

X. ATTACHMENTS AND EXHIBITS (all attachments are listed on the City's website)

Attachment A: Initial application submittal

Attachment B: Supplemental materials submitted as part of completeness review

Attachment C : Public Comments Matrix

Attachment D : Applicant Correspondance

Attachment E : Applicant Response to Public Comments