



January 17, 2012

Via Email, Followed by Overnight Mail

Louise C. Solliday, Director
Oregon Department of State Lands
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Salem, OR 97301-1279
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Re: DSL Permit No. 37712-RF: Notice of Appeal and Request for Hearing

Dear Director Solliday:

On behalf of Coos Waterkeeper, Friends of Living Oregon Waters, Climate Solutions, Greenpeace, and the Sierra Club (collectively, “Coos Waterkeeper”), we are writing pursuant to ORS 196.835 and OAR 141-085-0575 to appeal Department of State Lands (“DSL”) Permit No. 37712-RF (“Permit”) granted to the Port of Coos Bay (“Port”). We respectfully request that within 30 days you refer this matter to the Office of Administrative Hearings for a contested case hearing pursuant to the above statutes. This appeal is timely because DSL issued the Permit on December 29, 2011, and Coos Waterkeeper is filing this appeal within 21 days of that date.

Parties to Appeal¹

A. Coos Waterkeeper is a recently-sanctioned chapter of the Waterkeeper Alliance (a national 501(c)(3) nonprofit organization) based in Coos Bay, Oregon. The mission of Coos Waterkeeper is to protect and restore the environment and economy of the Coos watershed. Coos Waterkeeper has standing to request a contested case under ORS 196.835 because it and its grassroots supporters have a legally-protected interest in the protection, conservation, and best use of the waters of Coos Bay, and that interest that will be harmed, degraded, and destroyed by the Permit.

B. Friends of Living Oregon Waters (“FLOW”) is a 501(c)(3) non-profit organization based in Grants Pass, Oregon and incorporated under the laws of Oregon. FLOW

¹ Under Oregon law, only one party needs to have standing in order for the appeal to continue, with all parties included. Waterwatch of Oregon, Inc. v. Water Resources Comm’n, 199 Or. App. 598, 603 (2005); Barton v. City of Lebanon, 193 Or. App. 114, 118 (2004).

was established in 2002 to protect and restore Oregon's waters. The mission of FLOW is to provide public education, field monitoring, and legal oversight to protect Oregon waters from pollution and development. FLOW has standing to request a contested case under ORS 196.835 because it is "aggrieved" within the definition of OAR 141-085-0575(3)(b). On January 3, 2011, January 12, 2011, and February 12, 2011, FLOW submitted written comments to DSL stating a position on the merits of the proposed dredge and fill project, and further requesting extension of the public comment period and asking that a public hearing be held. FLOW board members, members, and volunteers also made multiple calls to DSL personnel regarding the permit application and requesting additional information. FLOW is also "adversely affected" by this Permit because FLOW and its members have a legally-protected interest in the protection, conservation, and best use of the waters of Coos Bay that will be harmed, degraded and destroyed by the activity authorized by this Permit.

C. Climate Solutions is a 501(c)(3) incorporated in Washington that works to accelerate practical and profitable solutions to global warming by galvanizing leadership, growing investment, and bridging divides. Climate Solutions has offices in Portland, Missoula, Olympia, and Seattle, and works toward making the Northwest a clean energy powerhouse. Climate Solutions has standing because it and its members have a legally-protected interest in the prevention of the use of this site for the export of polluting fossil fuels, as intended by the Port.

D. One of 40 national Greenpeace organizations worldwide, Greenpeace, Inc. ("Greenpeace") is a 501(c)(4) non-profit membership organization based in Washington D.C. Greenpeace has an Oregon office in Portland and 25,954 members and supporters living in Oregon. Greenpeace members and supporters rely on Greenpeace to represent their interests in the protection of the environment. Greenpeace uses peaceful protest and creative communication to expose global environmental problems and to promote solutions that are essential to a green and peaceful future. Since 1971, Greenpeace has been a leading voice of the environmental movement in taking a stand against powerful political and corporate interests whose policies put the planet at risk. Greenpeace furthers its mission through research, advocacy, public education, lobbying, and litigation with a staff that includes scientists, lawyers, campaigners, policy experts, and communications specialists. Greenpeace has standing because it and its members have a legally-protected interest in the waters of Coos Bay that will be harmed by the activities approved by this Permit.

E. Sierra Club is a 501(c)(4) nonprofit organization based in San Francisco, California and incorporated under the laws of California with over 600,000 members across the country. Sierra Club has an Oregon chapter office based in Portland, Oregon, and has nearly 16,000 members residing within the state. The Sierra Club's core mission is to explore, enjoy, and protect the wild places of the earth. Sierra Club promotes responsible use of the earth's ecosystems and resources, educates people to protect and restore the quality of the environment, and uses all lawful means to carry out these objectives. The Sierra Club is dedicated to safeguarding air quality and human health in Oregon. Like FLOW, Sierra Club has standing

because it has submitted written comments on the merits of this Permit (dated December 16, 2011) and because it and its members have a legally-protected interest in the waters of Coos Bay that will be harmed by this Permit. Several hundred Sierra Club members also commented to the Department of State Lands regarding the Coos Bay LNG project in January 2011.

Overview of Permit

This Permit authorizes the Port of Coos Bay to conduct activities that have been the subject of considerable controversy and regulatory oversight for many years. The Permit authorizes the Port to remove approximately 1.75 million cubic yards (“mcy”) of material to construct an access channel from the existing navigation channel to a new slip. The area to be dredged includes subtidal (18 acres), mudflats (10.5 acres), and some eelgrass (2.5 acres). The access channel will be around 45 to 47 feet deep. The Permit also governs where the dredge spoils will be placed (which includes both wetlands and upland sites) and how mitigation will occur.

The Port intends to connect this access channel to a planned deepwater slip for ocean-going vessels, labeled the Oregon Gateway Marine Terminal. The Port plans to excavate an additional 3.75 mcy on what it claims will be dry land (about 75 acres), behind a berm. Once this site is excavated and prepared, the berm will be removed so that the deepwater slip is joined to the access channel. Future maintenance dredging of about 350,000 cy every two to four years is anticipated and authorized by the Permit.

Previous iterations of the Permit application placed this removal and fill within the context of the larger project that it seeks to support—specifically, the proposed Jordan Cove Liquefied Natural Gas (“LNG”) terminal which received a certificate of Public Necessity from the Federal Energy Regulatory Commission (“FERC”) in 2009, when the project was proposed as an LNG import facility. Issuance of the FERC Certificate is under appeal. Since then, the Jordan Cove LNG terminal has been beset by delays. The most recent major change in the proposed project—the company’s announcement that it no longer intends to import LNG, but to export it—triggered multiple federal agencies to suspend their evaluation of the project. Public statements and media reports also confirm that the Port of Coos Bay is in discussions with private interests seeking to build a coal export terminal, codenamed “Project Mainstay,” of undetermined size at the Terminal site.

While the Permit identifies both LNG and bulk commodities (which includes coal) as potential tenants at the Terminal, the Permit seeks to make the case that dredging for the access channel should be evaluated as a stand-alone project separate from excavation for the deepwater slip and any future operation of the slip and access channel. Accordingly, the impacts of the operation of the Terminal—including the impacts of operating coal export and LNG facilities on the site and vessel traffic to and from the Terminal—are not identified in the Permit and were not considered in DSL’s issuance of the Permit.

During the public comment process, the agency received 2,600 comments on this application. The vast majority of these comments asked DSL not to issue the Permit until the underlying project was better defined and until the environmental impacts of the operation of the Terminal were adequately assessed. Nonetheless, DSL issued the Permit on December 21, 2011, and modified the Permit on December 29, 2011.

The Permit authorizes the single largest estuarine removal-fill project ever permitted by DSL. The total volume of dredging for the access channel and slip (5.6 million cubic yards) would be enough to completely fill the Rose Bowl 12 times over, and will cost over \$100 million while significantly affecting the condition of navigable waters and commerce that exists in the area. It is imperative that the state provide complete disclosure of the purposes and the potential impacts of this project—which necessarily includes the anticipated operation of the Terminal for export of coal and/or LNG—and that the public be able to weigh in effectively before the Permit is issued.

Appeal Issues

1. **Violation of ORS 196.825 and OAR 141-085-0506 & 0565:** DSL's determination that the Permit meets the governing statutory and regulatory criteria was substantively and procedurally flawed, and not supported by substantial evidence, because it did not consider the construction and future uses of the Terminal, including coal export and LNG and their effects on the relevant statutory criteria. DSL's decision was unlawful for at least the following reasons:

a. The Permit unlawfully segments dredging of the access channel from excavation and construction of the Terminal (creation of the deepwater slip) as well as from the anticipated future uses of the access channel and Terminal, which include the export of coal and LNG.

b. The use of the Terminal to export coal or LNG will have a wide array of adverse impacts to the "protection, conservation and best use of the water resources of the state," and will unreasonably interfere with the state's "paramount policy ... to preserve the use of its waters for navigation, fishing and public recreation." ORS 196.825(1)(a), (b). However, DSL neither disclosed nor considered any of these impacts in making its Permit decision.

c. Operation of the Terminal to export coal and LNG will have at least the following impacts to the waters of Coos Bay that Oregon's statutes seek to protect: impacts to water resources and aquatic biota from coal dust and other emissions; stormwater discharges from coal stockpiles and contaminated areas; ballast water discharges containing pollution and exotic species; wake strandings; vessel strikes of

marine mammals; elevated tsunami risk; risks to recreational boaters, fishers and other waterway users from heavy vessel use of Coos Bay; noise; loss of riparian vegetation; increased turbidity; risk of fire/explosion or spills from either coal or LNG; impacts to recreation and fishing from 3,000 meter security zone around LNG vessels; propeller wash from coal and LNG vessels; take of threatened and/or endangered species; entrainment of fish and other aquatic species in intake structures; potential for spills of toxic or harmful substances; and the impacts of the underwater portion of the LNG pipeline. This list is illustrative, not exhaustive. None of the impacts of the operation of the Terminal for coal export and LNG were disclosed or considered by DSL in reaching its decision to grant the Permit.

d. DSL erroneously determined that the access channel and Terminal have “independent utility” within the meaning of OAR 141-085-0565(3)(a) even when disconnected from the future uses of the Terminal, including export of coal and LNG.

e. DSL failed to consider alternatives to the use of the Terminal to export coal or LNG, including use of different port sites currently being considered for such uses, use of the Terminal to export and import other products besides dangerous and polluting fossil fuels, and construction of a single berth site.

f. For the reasons discussed above, DSL also unlawfully failed to consider the impacts of Terminal operations in making its findings under OAR 141-085-0565(4).

g. Despite ignoring the broad array of harmful impacts to water resources and water users associated with the export of coal and LNG, DSL affirmatively considered the benefits of these operations in reaching its decision, resulting in a one-sided and arbitrary balancing.

2. **Violation of ORS 196.825 and OAR 141-085-0565:** DSL’s determination that this Permit application meets the governing statutory and regulatory criteria was substantively and procedurally flawed, and not supported by substantial evidence, because the 1.75 million cubic yards of removal and fill will have a number of serious, adverse impacts to state waters and the public’s interests therein that were either ignored, inadequately assessed, or unlawfully discounted. DSL’s decision was unlawful for at least the following reasons:

a. Dredging the access channel will destroy important habitat for numerous species, including species protected under federal endangered species statutes and their prey species.

b. Dredging will re-suspend contaminated sediments into the water column, harming aquatic and marine mammal species and impacting commercial fishing, shellfish and other users of Coos Bay.

c. Dredging will result in an extended period of turbidity, likely in violation of state water quality standards, that will be highly harmful to aquatic species and commercial uses of Coos Bay.

d. DSL failed to consider the cumulative effects of this dredging alongside other activities in Coos Bay adversely affecting state waters, including planned dredging of the federal navigation channel, the interaction of the construction and operation of the connected deepwater slip, and other projects in and around Coos Bay affecting aquatic resources.

e. DSL failed to conduct a sufficiently thorough investigation of the impacts of such dredging to water quality and aquatic resources in order to make an adequate determination that the dredging meets the statutory criteria.

f. DSL failed to give adequate consideration to highly critical comments that have been submitted related to this dredging that undercut its conclusion that this project will not have harmful effects on water quality and aquatic resources, including comments from the National Marine Fisheries Service, Oregon Department of Fish and Wildlife, U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and the U.S. Fish and Wildlife Service, among others.

g. Mitigation activities are insufficiently defined and are not adequate to compensate for the environmental harm caused by the dredging, nor are there sufficient assurances in the Permit to ensure that mitigation is funded, completed, and its effectiveness monitored over the long term.

3. **Violation of ORS 196.800 and OAR 141-085-0515:** DSL's determination that the 3.75 million cubic yards of dredging conducted behind a berm—labeled in the Permit as the “freshwater phase”—was not within DSL's jurisdiction as a “water of the state” was erroneous, unlawful, and not supported by substantial evidence. The “freshwater phase” of the project is within the state's jurisdiction and should have been evaluated for compliance with the removal-fill statute for at least the following reasons:

a. Digging out 3.75 million cubic yards from a site immediately adjacent to Coos Bay to a depth of 45 or more feet will create an artificial wetland or pond within the meaning of OAR 141-085-0515(6), and/or will occur below the high water mark or in jurisdictional wetlands, all of which are waters of the state subject to DSL jurisdiction.

b. Construction of this component of the Terminal will result in impacts to the waters of the state via subsurface and surface exchange of water. Moreover, removal

of the berm after excavation and construction is complete will permanently alter the shoreline of Coos Bay in ways that significantly impact the state's water resources.

c. Once the berm is removed and the slip is connected to the bay, the Port of Coos Bay intends to conduct dredging, install pilings, and complete in-water riprap and bulkhead work in newly-created waters of the state. The Permit nonetheless arbitrarily finds such work to not be in a water of the state subject to regulation and evaluation.

4. **Violation of ORS 196.825 and OAR 141-085-0555 & 0560:** DSL did not follow regulatory requirements for the acceptance, consideration, public review, and processing of permits. These procedural flaws include at least the following:

a. DSL processed the Permit without a complete application as required by OAR 141-085-0550 that provided a complete definition of the project, including demonstration of independent utility and an adequate description of the purpose and need for the permit, and all other factually necessary information in the detail required to render a lawful decision.

b. DSL processed the Permit without a complete application that included the impacts resulting from the creation of the deepwater slip site and removal of the berm separating the site from Coos Bay.

c. DSL processed the Permit without a complete application that included a description of the existing biological and physical characteristics of the water resources, identification of adverse impacts, or a description of navigation, fishing, and public recreation uses in the area of the Permit, and other information required by law.

d. DSL processed the Permit without a complete application because it included a jurisdictional determination improperly concluding that the Terminal site was not within a water of the state.

e. DSL processed the Permit without a complete application that included a complete and adequate alternatives analysis as required by law.

f. DSL processed the Permit without a complete application because it did not contain a legally-adequate coastal zone certification and other certifications of compliance with local and state requirements. While the applicant included these certifications, they were simply borrowed from previous permit applications for the Jordan Cove LNG facility, not the putatively distinct project that is the subject of this Permit. Moreover, the coastal zone certification for Coos County is not currently valid as it has been remanded to the County by Oregon's Land Use Board of Appeals ("LUBA") because of multiple deficiencies.

g. DSL did not comply with other process requirements for review of removal-fill permits, including completeness review, adequate notice to the public, public hearing, and full consideration of public comments.

h. DSL has at various times made available, and then removed, differing versions of the application and the draft Permit that have made it difficult or impossible for the public to provide meaningful comment and/or evaluate the proposal.

i. In making its decision, DSL unlawfully relied on information and data (including material compiled as part of the Federal Energy Regulatory Commission environmental evaluation) that is plainly out of date, inaccurate, incomplete, or otherwise inappropriate for consideration in a permit decision.

5. **Violation of ORS 196.825 and OAR 141-085-0506 & 0565:** In addition to authorizing the construction of the access channel, DSL unlawfully granted the Port authority to conduct future maintenance dredging up to five years into the future without any analysis of the adverse impacts to the “protection, conservation and best use of the water resources of the state,” or potential interference with the state’s “paramount policy ... to preserve the use of its waters for navigation, fishing and public recreation.” ORS 196.825(1)(a),(b). The Permit also authorizes disposal of maintenance dredge spoils at an in-water site that may or may not be available (due to other likely disposal at that site) and without analysis of the environmental impacts of such disposal as required by law.

6. **Violation of OAR 141-085-0680 & 685:** DSL approved this Permit even though the compensatory mitigation proposal does not meet the requirements of the law, including at least the following:

a. The mitigation will not replace the functions and values of the removal area; there is no mitigation for impacts caused by the creation of the deepwater slip site behind the berm; mitigation relies too heavily on compensation rather than avoidance.

b. DSL granted the permit without a legally-adequate functions and values assessment required by law.

c. The mitigation component of the Permit does not meet state requirements for mitigation ratios, long-term monitoring, or temporal loss of function.

d. The mitigation component of the Permit does not include adequate financial security requirements to ensure that the mitigation will be constructed, monitored, and maintained in perpetuity as required by law.

7. **Other Violations of State Law and Regulation:** Coos Waterkeeper has attempted in good faith to identify all violations of state law and regulation within the 21-day permit appeal period provided by law. Should additional violations that were not reasonably apparent become evident once Coos Waterkeeper undertakes discovery, Coos Waterkeeper reserves the right to request permission to broaden the scope of this appeal.

For the reasons discussed above, Coos Waterkeeper respectfully requests a contested case hearing on all issues, as required by law. Without waiving its entitlement to a contested case hearing, Coos Waterkeeper is willing to discuss its concerns and potential non-litigation alternatives to resolving these concerns directly with DSL.

Respectfully submitted,



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