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By Electronic Mail Only

Attn: CENWP-OP-GP (Mr. McMillan)
US Army Corps of Engineers
P.O. Box 2946
Portland, OR 97208-2946

**Re: Port of Newport - Terminal Expansion
CWA 404 & § 10 RHA Application
Corps Action ID #: NWP-2007-832**

Dear Mr. McMillan:

These comments are submitted on behalf of Oregon Coast Alliance (ORCA). These comments are on the Joint Permit Application (JPA) filed by the Port of Newport (Port) for what is referred to now as the Terminal Reconstruction Project. The Corps is required to evaluate this project under the substantive provisions of §404 of the Clean Water Act (CWA) and §10 of the Rivers & Harbors Act (RHA).

ORCA is a non-profit conservation group dedicated to protection of the Oregon coast. ORCA acts through advocacy for conservation and restoration of coastal natural resources, as well as providing education and advocacy on land use issues and working with coastal residents for sustainable communities. ORCA has members who use and enjoy the Yaquina Estuary, including both the Bay and the Yaquina River.

We incorporate by reference the comments concurrently filed on the same project with the Oregon Department of Environmental Quality (DEQ), the Oregon Department of Land Conservation and Development (DLCD), and also the comments previously filed on the same project with Oregon Department of State Lands (DSL).

In light of its potential to provide significant environmental benefits to the Yaquina Estuary, ORCA supports the Port's proposed plan to remove the Pasley and remediate the Hennebique. However, despite a significantly-improved plan and a significantly-expanded amount of information and analysis, the Port and the Corps must still comply will all applicable federal law pertaining to the issuance of the permit. Simply because a proposal may have a goal that is a desirable outcome, does not mean that legal requirements can be ignored or by passed.

The Corps Notice Did Not Match The JPA

Having reviewed the fully JPA as part of filing comments with the DSL, ORCA found parts of the Corps Notice of chance to comment a bit confusing. It appears that Corps tried to summarize parts of the JPA. While this was laudable, it would have been even more helpful to have the section that was a summary specifically identified as such and the JPA provided as a purely separate document.

The Port Must Submit More Information To Comply With NEPA

The Corps is also required to evaluate this project under the procedural requirements of the National Environmental Policy Act (NEPA).

"NEPA is our basic national charter for protection of the environment." 40 C.F.R. §1500.1(a). NEPA is designed to force "...coherent and comprehensive **up front** environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'"

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (emphasis added) quoting *Marsh v. ONRC*, 109 S.Ct. 1851, 1858 (1989). The basic purpose of NEPA is to "ensure that environmental information is available to public officials and citizens **before** actions are taken." 40 C.F.R. § 1500.1(b)(emphasis added). See also, *Dubois v. U.S. Department of Agriculture*, 102 F.3d. 1273,1294, (1st Cir. 1996), *cert. den.* 138 L.Ed.2d. 1013 (1997) and *Kleppy v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976).

To complete its NEPA obligations on this project the Corps must issue an Environmental Assessment (an EA) or an Environmental Impact Statement (an EIS). The Port was well aware of this long mandated requirement. Unfortunately, to our knowledge the Port has not submitted a draft EA or a sufficiently thorough environmental analysis that could be immediately used to produce an EA. This is too bad, as it will potentially delay the ultimate Corps decision while drafting from scratch is done.

To be acceptable, an EA or EIS must provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). NEPA documents must "go beyond mere assertions and indicate its basis for them" when discussing expected consequences. *Silva v. Lynn*, 482 F.2d 1282, 1287 (1st Cir. 1973). An agency must "explicate fully its course of inquiry, its analysis and its reasoning." *Id.* at 1284-85.

As noted in ORCA's 7-30-10 comments to DSL, there still needs to be a detailed discussion of potential impacts of several aspects of its plan. Specifically, there still needs to be analysis of the potential environmental consequences stemming from at least the following:

- Dredge spoil disposal at McLean Point;
- The dredge spoil pipeline;
- Disposal of dredge spoils from the Eelgrass Mitigation area;
- Transport and disposal of contaminated dredge spoils;
- Project created potential noise impacts; and
- On going deterioration of concrete hull of the Hennebique.

The Corps needs to complete (or insist that the Port complete) an analysis of the potential impacts that these activities may have on the estuary.

Cumulative Impact Analysis

In addition to direct impacts, a NEPA analysis of a project must take into account all reasonable anticipated cumulative impacts. Such impacts include **both** the incremental impact of the proposed action itself **and** the added effect of that action plus ". . . other past, present, and reasonably foreseeable future actions, regardless of what agency (federal or non-federal) or person undertakes such other actions." 40 C.F.R. §1508.7. See also, *Earth Island Institute, supra.* and *Kern v. U.S. B.L.M.*, 284 F.3d 1066, 1075 (9th Cir. 2002).

NEPA requires that where several actions have a cumulative or synergistic effect, the agency must consider the consequences in the NEPA analysis. *City of Carmel-By-The-Sea, supra.*; 40 C.F.R. § 1502.16. A NEPA analysis "...must at a minimum provide a "catalog of past projects" and a "discussion of how those projects (and differences between the projects) have harmed the environment." *NRDC v. USFS*, 421 F.3d 797, 814-15 (9th Cir. 2005) quoting *Lands Council v. Forester of Region One USFS*, 395 F.3d 1019, 1027 (9th Cir. 2005).

To be legally adequate, and NEPA document must do more than just list or describe past or known future projects in the area with generalities - as doing so is insufficient to permit adequate review of their cumulative impact. See *Natural Resources Defense Council, Inc. (NRDC) v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) ("These perfunctory references do not constitute analysis useful to a decision maker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts.") See also, *Carmel-by-the-sea, supra.* 123 F.3d at 1160 (quoting same language).

In *City of Carmel-by-the-Sea*, the Ninth Circuit explained that a NEPA analysis must include a "useful analysis of the cumulative impacts of past, present and future projects." *Id.* This requires: "Discussion of how [future] projects together with the proposed . . . project will affect [the environment]." *Id.* The NEPA analysis must also analyze the combined effects of the actions in sufficient detail to be "useful to the decision maker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Id.* at 1160 (internal citations omitted).

Detail is therefore required in describing the cumulative effects of a proposed action with other proposed actions. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998; *Kern v. US BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002). "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mtn.* 137 F.3d at 1380. Without satisfying these requirements, "neither the courts nor the public, in reviewing the [agency]'s decision[], can be assured that the [agency] provided the hard look it is required to provide." *Id.*

Where an agency fails to assess cumulative impacts, "[s]uch a restricted analysis would impermissibly subject the decision making process contemplated by NEPA to 'the tyranny of small decisions.'" *Kern, supra.*, 284 F.3d at 1078 (quoting CEQ publication, *Considering Cumulative Effects Under the National Environmental Policy Act*, p.1 (1997)).

Unfortunately, the materials noticed for comment do not appear to include a complete cumulative impact analysis. The Corps needs to create (or insist that the Port create) a more

thorough cumulative impact analysis. Failure to do so might well leave this project subject to a NEPA challenge by a group or person who did not happen to support the current proposal.

Impacts To The Human Environment

As noted in ORCA's recent comments to DSL, in various places in the JPA there are comments about the possibility of future deep water international cargo shipping at this facility and some alleged "benefits" of such shipping. If the Port (or the Corps) intends to rely on such purely hypothetical "benefits," then there will need to be further analysis done of the potential effects (long and short term) on the human environment.

That will need to include (but not be limited to) analysis of: (i) the increased truck traffic (both at the Port, in Newport, and on the roads leading from Newport to the other main Cities up and down the coast and in the Willamette Valley) that would result from such shipping; (ii) the increased noise (both on land and underwater) of such shipping; (iii) the increased risk of accidental fuel spill from such shipping; (iv) the increased risk of the discharge of contaminated ballast water; and (v) the increased risk of the discharge of or the inadvertent release of exotic invasive species as a result of such shipping. In short, if deep water cargo shipping is truly a component of this project, then the impacts to the human environment (both positive and negative) from the proposed International Terminal Expansion have not been fully discussed. That discussion would be necessary, to comply with NEPA.

Other NEPA, CWA & Rivers & Harbors Act Considerations

The Corps must consider both the long and short-term effects of this proposal. That is the case under NEPA, and under the CWA §404 regulations - 33 C.F.R 320.4(a). Under the latter regulations, the Corps is required to consider an extensive list of factors prior to issuing a permit. The Corps is required to review:

"All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, . . . considerations of property ownership and, in general, the needs and welfare of the people." 33 C.F.R. 320.4(a)(1).

The same is true under the regulations issued pursuant to Section 10 of the Rivers & Harbors Act. See *e.g.*, 33 C.F.R. § 322.5(c)(1)(requiring non-federal dredging projects to be evaluated on the basis of "public interest" with conditions addressing "turbidity, water quality, containment of material, nature and location of approved spoil dredge areas, . . . extent and period of dredging, and other factors relating to protection of environmental and ecological values.").

Here again, if the Port really wants the Corps to rely on or have the Corps approve the use of the rebuilt Terminal for deep water international shipping, then there is considerable additional analysis needed. The Corps would, in that event, need an analysis that considers

both the short and the long-term impacts on the Port of having container ships docking at a newly expanded terminal.¹

Potential Affects on ESA Listed Species

The ESA is intended to conserve threatened and endangered species and the critical habitat the species need to survive. 16 U.S.C. §§ 1531(b) and 1533(a)(3). The Oregon Coast Coho Salmon, the Southern DPS of the North American Green Sturgeon, and the Southern DPS of the Eulachon are all listed as threatened species under the ESA. Both the Coho and the Sturgeon have designated critical habitat in the Yaquina Bay estuary. See, Draft BA, p.67.

The Corps initiated a formal ESA § 7 consultation with NOAA Fisheries (aka the Nat'l Marine Fisheries Service or NMFS) on June 30, 2010. Given that the draft BA anticipates at least some incidental take of listed species the project may not proceed until the consultation process is complete and (if necessary) an Incidental Take Statement (ITP) is provided.

Federal Consistency

Before the Corps can approve a project there must be a determination that the project is consistent with the objectives and purposes of the Coastal Zone Management Act (CZMA).

Water Quality Certification

Before the Corps can approve a project there must be a determination that the project will not violate state Water Quality Standards (WQS) and other applicable state laws, pursuant to §401 of the CWA. As outlined in the concurrently filed comments to DEQ, the JPA does not (so far) adequately address whether or not the project will comply with WQS and therefore qualify for 401 Certification.

Conclusion

The materials currently submitted, while a significant improvement over those submitted with the original proposal, are not yet sufficient to show that this project will meet all the applicable requirements of law. The Corps should complete (or insist that the Port complete) the remaining analysis before the Corps issues permits for this project.

Thank you for your attention to this matter. I trust you will find these comments helpful. If you have any questions please do not hesitate to contact me.

Sincerely,

Karl G. Anuta

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¹ The material provided so far by the Port does not provide sufficient information on which the Corps can base such an analysis. Among other things, the materials do not provide any detailed analysis any of the many likely impacts from such a shipping expansion, including but not limited to: (i) potential effects on sediment contaminant levels in the Bay, (ii) potential effects on fishing craft, (iii) potential effects on noise levels if the Terminal is expanded and shipping actually appears, (iv) the potential for ballast water pollution if international ships dock, (v) the potential increase in exhaust fumes (from both ship engines and truck engines), (vi) the potential impacts on water contact recreation, and (vii) potential effects on other biological diversity values.

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