


Memo

To: Members, Senate Committee on Environment and Natural Resources
Representative David Brock Smith
Representative Caddy McKeown
Senator Jeff Golden

From: Leah Feldon, Deputy Director, Oregon Department of Environmental Quality


Date: October 7, 2019

Subject: Follow-up from September 16, 2019 Informational Session

Thank you again for the opportunity to speak with you about the Jordan Cove Energy Project and the Department of Environmental Quality's (DEQ) review of a water quality certification for the federal permits sought for the project from the U.S. Army Corps of Engineers (Corps).

During the committee's informational hearing, DEQ was asked about the timing of our May 2019 denial of the certification under section 401 of the federal Clean Water Act. Specifically, we were asked for information on when DEQ began working on a decision for that certification.

DEQ's formal review of a 401 certification for the Corps began on May 22, 2018, when that federal agency determined that the Jordan Cove application to it was complete (Jordan Cove submitted its application to the Corps in September of 2017¹). In July 2018, the Corps approved DEQ's request for up to one year to complete its decision – until May 7, 2019.

The Corps and DEQ held a public comment period for the Jordan Cove applications in the spring and summer of 2018. In September of 2018, DEQ sent its first request for additional information to Jordan Cove. Subsequent requests (four in all) were sent between December of 2018 and March of 2019. Jordan Cove responded to some aspects of the information requests beginning in October of 2018, with responses continuing through April of 2019. During this time, representatives of DEQ and Jordan Cove met several times to discuss the information requests, and the company's responses, including attempts to resolve disagreements about what information was required for DEQ's decision.

¹ Jordan Cove withdrew its application for certification in September 2018 (less than one year after submitting it), and resubmitted the application shortly thereafter. However, for the reason described below, arising from the court decision in *Hoopa Valley*, the effectiveness of that withdrawal and resubmittal became uncertain.

On January 25, 2019, the federal circuit court of appeals for the District of Columbia issued a decision in *Hoopa Valley Tribe v. FERC*. In that decision, the court determined that an agreement between an applicant and other parties whereby the applicant for a FERC hydroelectric license agreed to withdraw and re-file its water-quality certification application required for that license did not stop the one-year maximum time period for state certification under section 401 of the federal Clean Water Act. The court found the states waived authority to certify that project relicensing's compliance with state water quality requirements.

Following that decision, DEQ requested legal advice from the Oregon Department of Justice concerning the potential application of the *Hoopa* decision to the Jordan Cove application to the Corps. In mid-March 2019, DEQ received that advice and began considering its options. In early April 2019, DEQ decided to make its certification decision for the Corps permit before the expiration of the one-year time period from the date the Corps determined that the Jordan Cove application was complete.

DEQ staff began reviewing the record and drafting portions of a proposed decision on April 11, 2019, relying extensively on reviews of the project that began in September 2018. DEQ staff completed an initial draft decision on April 26, 2019. Four days later, on April 30, 2019, Jordan Cove filed multiple responses to DEQ's information requests.

On May 3, 2019, DEQ met with representatives of Jordan Cove to inform the company that it was preparing to issue a decision on May 6, 2019. DEQ issued its decision on that date. DEQ denied certification on substantive grounds, but made its decision without prejudice, meaning that the company had the opportunity, in a new application, to submit materials to address the substantive bases noted in the denial. DEQ also indicated in writing that it would use its best efforts to align the timing of its review of a new application with the timing of federal actions relevant to the project. No application has been filed to date.

DEQ is working with the company to ensure it has a clear understanding of the information that must be provided to allow DEQ to conduct an efficient and complete evaluation of the project activities' impacts on water quality. DEQ remains committed to a transparent, public, and fair process that meets applicable water-quality requirements.