BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

IN THE MATTER OF CONSOLIDATED CONDITIONAL USE APPLICATIONS HBCU-10-01 SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE FINIAL DECISION AND ORDER NO. 10-08-045PL

WHEREAS, on Pacific Connector Gas Pipeline filed consolidated permit applications to develop 49.72 miles of gas pipeline and associated facilities on property described in Exhibit "B" of this Order; and

WHEREAS, on March 2, 2010, pursuant to its authority under CCZLDO §5.0.600, the Board of Commissioners (Board) voted to: (1) call up the applications; and (2) appoint a Hearings Officer to conduct the initial public hearing for the applications and then make a recommendation to the Board. On April 5, 2010, the Board appointed Andrew H. Stamp to serve as the Hearings Officer.

WHEREAS, on May 20, 2010, Hearings Officer Stamp conducted a public hearing on this matter and at the conclusion of the hearing the record was held open for 21 days to accept additional written evidence to rebut evidence presented at the hearing, followed by a 7-day period for accepting surrebuttal testimony, followed by a 7-day period for the applicant to submit final written argument.

WHEREAS, on July 16, 2010, Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board to approve the applications subject to the imposition of conditions.

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Exhibit: 5
Date: 7/14/10
WHEREAS, on August 3, 2010, at 1:30 p.m., the Board met to deliberate on the matter and made a tentative decision to accept the Hearings Officer’s recommended approval subject to amended findings and conditions.

NOW, THEREFORE, the Board adopts the Findings of Fact; Conclusions of Law and Final Decision attached hereto labeled Exhibit "A" and incorporated into this order herein.

ADOPTED this 8th day of September 2010.

BOARD OF COMMISSIONERS

[Signatures]

COMMISSIONER

[Signatures]

COMMISSIONER

[Signatures]

COMMISSIONER

ATTEST: 
Bobby Brooks
Recording Secretary

APPROVED AS TO FORM:
[Signature]
Office of Legal Counsel

Order 10-08-045PL
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
COOS COUNTY, OREGON

FILE NO. HBCU-10-01
SEPTEMBER 8, 2010
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I. SUMMARY OF PROPOSAL AND PROCESS

A. Summary of Proposal.

This consolidated application is made by Pacific Connector Gas Pipeline Company, LP ("Pacific Connector" or "applicant") with respect to the Coos County segment of its proposed interstate natural gas pipeline known as the Pacific Connector Gas Pipeline ("PCGP" or "pipeline"). This is the fifth in a series of interrelated land use applications for the development of the Oregon International Port of Coos Bay's multi-berth Oregon Gateway Marine Terminal, a deep-draft moorage facility on the North Spit of Coos Bay, and Jordan Cove Energy Project's ("JCEP") associated Upland LNG Terminal. Both were previously approved by Coos County and have now received Federal Energy Regulatory Commission ("FERC") approval.\(^1\)

The applicant seeks land use approval from Coos County ("County") for the 49.72-mile segment of the PCGP located within Coos County. The County alignment runs from JCEP's LNG Terminal upland from the Port's Marine Terminal to the alignment segment in adjacent Douglas County (mileposts [MPs] 0.00 to 45.70).

Pacific Connector has received authorization from FERC under Section 7c of the Natural Gas Act ("NGA") to construct, install, own, operate, and maintain an interstate natural gas pipeline, the PCGP, that will transport gasified natural gas from the Jordan Cove LNG terminal in Coos Bay to existing interstate natural gas transmission pipelines near Malin, Oregon and points in between. The 36-inch diameter pipeline will be a total of 234 miles and will provide natural gas to markets throughout the region.\(^2\)

Within the applicable 49.72-mile segment of the PCGP that will be located within the County, the PCGP will cross through five Coos County zoning designations: Forest (F), Exclusive Farm Use (EFU), Rural Residential 2 (RR-2), Rural Residential 5 (RR-5), and Industrial (IND). Additionally, the PCGP will cross 14 Coos Bay Estuary Management Plan (CBEMP) zoning districts: Water Dependent Development Shorelands (6-WD), Development Shorelands (7-D, 19-D), Water Dependent Development Shorelands (8-WD), Conservation Aquatic (8CA, 20CA, 21CA), Natural Aquatic (13A-NA, 11-NA), Rural Shorelands (11-RS, 18-RS, 20-RS, 21-RS), and Development Aquatic (19B-DA) (see Tables 1 and 2).

Within the forest (F) zone, the pipeline use is characterized as a new gas distribution line with no greater than a 50 foot right of way. Within the agricultural (EFU) zone, the pipeline use

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\(^1\) The County previously approved JCEP's LNG Terminal (Case File No. HBCU-07-03), the Port's Marine Terminal and Access Waterway (Case File No. HBCU-07-04) and the related Port applications for Sand Storage and Sorting Yard (Case File Nos. ACU-08-10 and CL-08-01) and Kentuck Mitigation Site (Case File Nos. AM-09-03/RZ-09-02/HBCU-09-01).

\(^2\) The route mileposts no longer reflect the actual length of the PCGP because based on FERC's National Environmental Policy Act (NEPA) process, which resulted in a Final Environmental Impact Statement, Pacific Connector incorporated an alternative within Coos County into the original route. The environmental analysis was tied to the original mileposts, and the mileposts remain unchanged from the route filed with FERC in September 2007. Therefore, MP 11.36 R (revised) merges with the 2007-filed route at MP 7.67.

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is characterized as a utility facility necessary for public service. Within the RR and IND zones, the pipeline use is characterized as a utility facility not including power for public sale. Finally, within the CDEMP, the pipeline use is characterized in the respective management units as a low-intensity utility.

The project consists of two distinct sets of components, the first permanent and the second temporary: (1) the pipeline itself, including its permanent 50-foot right-of-way, block valve assemblies, and two access roads; and (2) the temporary construction areas necessary to construct the pipeline. The pipeline consists of the 36 inch subsurface gas pipeline, four mainline block valves and associated facilities. The temporary construction areas (construction areas) include: the 95-foot temporary construction easement, temporary extra work areas, uncleared storage areas, two temporary access roads, and temporary construction storage yards. Environmental alignment sheets, which have been provided with the application as Exhibit 1, depict the pipeline alignment overlaid on a 2006 aerial photograph. The environmental alignment sheets provide land ownership and parcel information along the pipeline route. While the alignment sheets generally depict the FERC-authorized route, the applicant has stated that “there may be minor changes in the alignment within a given property boundary to accommodate a landowner request or to avoid specific construction obstacles.” See Application Narrative, at p. 3.

As discussed above, Pacific Connector proposes the construction and operation of a 49.72-mile segment of the PCGP within the County. The pipeline would originate at milepost (MP) 0.0 at the Jordan Cove Receipt Meter Station located within the Jordan Cove LNG terminal site, on the North Spit of Coos Bay. The pipeline would extend east from the LNG terminal, passing through the Weyerhaeuser Linerboard site, and entering Haynes Inlet at about MP 1.7. The pipeline would be installed for about 2.4 miles in Coos Bay, exiting to the north of the Glasgow peninsula at about MP 4.1. It would then turn southeast to cross Kentuck Slough at about MP 6.3, and proceeding to Graveyard Point. The pipeline would cross under the Coos River at about MP 8.1 and then will cross Catching Slough at MP 11.11. Between about MPs 12.8 and 26.1, the pipeline would generally follow the existing Bonneville Power Administration (BPA) powerline. The pipeline would then proceed in a southeasterly direction and follow existing logging roads, where feasible. The pipeline would exit the County at MP 45.7. As noted, where feasible, the PCGP alignment is co-located with existing rights-of-ways and corridors to limit the areas of new disturbance.

As a result of the subsurface nature of the pipeline, the majority of the impacts from the pipeline will occur during the construction process. Generally throughout the project, Pacific Connector proposes to utilize a 95-foot wide temporary construction easement and associated temporary extra work areas and uncleared storage areas, with a 50-foot permanent right-of-way. The temporary construction easement configuration is required to accommodate the necessary clearing and grading activities to prepare for construction, temporarily store spoil materials for construction, and to provide a passing lane during construction for movement up and down the construction area. The temporary extra work areas and uncleared storage areas are needed because of site-specific characteristics of the construction easement. Pacific Connector has limited the width of the temporary construction easement and the size of the temporary extra work areas and uncleared storage areas to the greatest extent practicable.

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There are two locations within the County where it will be necessary to create temporary access roads in order to construct a portion of the pipeline. These two temporary access roads will be located south of the Coos River in the 20RS zoning district, and will be restored to preconstruction conditions following completion of construction.

Pacific Connector will also need to create two permanent access roads providing access to the above-ground block valve facilities. These will be graveled private roads that are necessary for the operation and maintenance of the pipeline. Pacific Connector has located the final placement of the block valves adjacent to existing roads to minimize the need for creating new access roads and the length of the two new permanent access roads.

The pipeline is allowed as a hearings body conditional use within the EFU, RR-2, and RR-5 zones, an administrative conditional use within the F zone, and a use permitted outright in the IND zone. The pipeline is also allowed in the 15 zones that it crosses within the CBEMP as a permitted use, subject only to consistency with various general conditions.

**B. Process**

**1. Summary**

The review timeline for this application is as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb. 12, 2010</td>
<td>Application submitted and accepted.</td>
</tr>
<tr>
<td>March 12, 2010</td>
<td>Application deemed incomplete.</td>
</tr>
<tr>
<td>April 19, 2010</td>
<td>Application deemed complete.</td>
</tr>
<tr>
<td>April 30, 2010</td>
<td>County mailed public notice.</td>
</tr>
<tr>
<td>May_13_, 2010</td>
<td>County Planning Department issued Staff Report.</td>
</tr>
<tr>
<td>May 20, 2010</td>
<td>Public Hearing before Hearings Officer</td>
</tr>
<tr>
<td>June 10, 2010</td>
<td>First Open Record Period Closed (rebuttal testimony only).</td>
</tr>
<tr>
<td>June 17, 2010</td>
<td>Second Open Record Period Closed (for surrebuttal testimony only)</td>
</tr>
<tr>
<td>June 24, 2010</td>
<td>Applicant’s Final Argument</td>
</tr>
<tr>
<td>July 8, 2010</td>
<td>County Planning Staff issued Supplemental Staff Report.</td>
</tr>
<tr>
<td>July 16, 2010</td>
<td>Hearings Officer’s Recommendation.</td>
</tr>
<tr>
<td>Aug. 3, 2010</td>
<td>Deliberations and Decision by Board of Commissioners</td>
</tr>
<tr>
<td>September 8, 2010</td>
<td>Adoption of Final Decision by Board of Commissioners</td>
</tr>
<tr>
<td>September 25, 2010</td>
<td>150 Day Deadline.</td>
</tr>
</tbody>
</table>

**2. Board Call-Up and Delegation to Hearings Officer**

On March 2, 2010, pursuant to its authority under CCZLDO 5.0.600, the Board voted to: (1) call up the applications; and (2) appoint a Hearings Officer to conduct the initial public hearing for the applications and then make a recommendation to the Board. On April 5, 2010, the Board appointed Andrew Stamp to serve as the Hearings Officer.
3. Public Hearing and Open Record Periods

On May 20, 2010, Andrew H. Stamp, Hearings Officer, held a public hearing on this matter. At the commencement of the hearing, he stated he did not have any bias, conflicts of interest, or ex parte contacts to disclose. He asked whether anyone wanted to challenge his impartiality. One member of the public inquired who was paying for his services. Mr. Stamp responded, he was being paid directly by the County pursuant to a contract. Further questions ensued regarding whether the applicant was paying Mr. Stamp. Planning Director Patty Everden clarified the Hearings Officer was under contract with the County and the applicant was reimbursing the County for the administrative cost of reviewing the application, including the expense of retaining the Hearings Officer. Mr. Stamp advised this was a typical arrangement for local jurisdictions. Ultimately, no one formally challenged the Hearings Officer’s impartiality to conduct the hearing and issue a recommendation on the application.

Mr. Stamp read the required notices of ORS 197.763 into the record and gave detailed instructions regarding presentation of testimony. He then called for the staff report. The Planning Director summarized the proposed development and staff report. After this presentation, the applicant and its representatives presented testimony, and members of the public (some in favor, some in opposition, and some who were neutral) presented testimony. At the conclusion of public testimony, the applicant presented rebuttal testimony to respond to various questions and issues raised by the public. At the conclusion of all oral testimony, the Hearings Officer left the record open for 21 days for the submission of additional written evidence to address testimony presented at the hearing, followed by a 7-day period for surrebuttal testimony, and a final 7-day period for the applicant to submit its final written argument.

Several parties submitted additional arguments and evidence into the record during the open record period. On July 16, 2010, the Hearings Officer delivered his opinions and recommendations to the County Board of Commissioners in a document entitled Coos County Hearings Officer Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners. Therein, the Hearings Officer recommended the Board approve the application, subject to proposed conditions.

4. Board of Commissioners’ Deliberations

On August 3, 2010, at 1:30 p.m., the Board convened a public meeting to discuss the Hearings Officer’s recommendation and deliberate on the application. Commissioners Kevin Stufflebean, Bob Main, and Nikki Whitty were present. The Board opted to act, pursuant to its authority under CCZLDO 5.0.600.C, to review only the evidence, data, and testimony submitted prior to the close of the record by the Hearings Officer. The Board did not accept new evidence or allow additional public comment. At the commencement of the meeting, Assistant County Counsel Oubonh White inquired whether any members of the Board had any conflicts of interest or ex parte communications to disclose since the time the applications were filed. Commissioner Whitty disclosed she had a short conversation with Will Wright at the fair. When she realized he wanted to discuss the applications, she responded the issues were part of this proceeding and ended the conversation. All three Commissioners disclosed they attended the May 20, 2010
public hearing on this matter to observe. No other disclosures were made. No member of the public challenged the ex parte disclosures or the participation of any member of the Board in this matter.

Commissioner Stufflebean then called for the staff presentation. The Planning Director summarized the proposal and process to date. At the conclusion of this presentation, the Board discussed the application and the Hearings Officer's recommendation. These discussions included various questions to and responses from Planning staff. At the conclusion of these discussions, Commissioner Whitty made a motion, seconded by Commissioner Main, to tentatively approve the applications based upon the evidence in the record and to direct staff to work with the applicant to prepare findings of fact, conclusions of law, and conditions of approval consistent with the Board's discussion, for the Board's consideration at a later date. The Board approved the motion, 3-0.

C. Record and Scope of Review

1. Record Before the Board

The record before the Board consisted of the Coos County Hearings Officer Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners for HBCU-10-01 dated July 16, 2010; the written and oral testimony presented by the applicant, including the application materials; the written and oral testimony presented by other parties to the Hearings Officer, except where such testimony was specifically rejected by the Hearings Officer at the hearing as irrelevant; the various staff reports prepared by County Planning Department dated May 13, 2010, July 8, 2010, and July 28, 2010; and the entire Planning Department file, which was physically before and not rejected by the Board.

2. Scope of Review

When addressing the criteria and considering evidence in the record, the Board used the standard of review required for land use decisions. The applicant must provide substantial evidence in the whole record to demonstrate that all approval standards are met. When evidence conflicted, the Board reviewed the entire record to see if the undermining evidence outweighed the applicant's evidence. In addition, where the ordinance provisions were ambiguous, the Board applied the PGE v. BOLI methodology, discussed infra and as modified by State v. Gaines, 346 Or 160, 206 P3d 1042 (2009), to arrive at what it finds to be the correct construction. In so doing, the Board attempted to rely, as much as possible, on past interpretations adopted by the Board, while still making sure that the interpretation is affimrable.

The Board believes that the conclusions made herein would be affimred if appealed. The Board has fairly wide latitude under state law to draw its own conclusion about the evidence. In addition, with regard to issues of local code interpretation, state law establishes a very deferential standard of review, ORS 197.829(1). Compare Clark v. Jackson County, 313 Or 508 (1992); Church v. Grant County, 187 Or App 518, 69 P3d 759 (2003); Siporen v. Medford, 231 Or App 585, 220 P3d 427 (2009), rev allowed 348 Or 19 (2010).

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II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Process-Related Issues and Issues Related to Multiple Approval Standards.

1. The Opponents' "Alternative Route" Arguments Must Fail Because Only FERC has Jurisdiction to Regulate the Route of a Gas Pipeline or to Control Safety Standards Related to Gas Pipelines.

As the Board is aware, the Federal Energy Regulatory Commission ("FERC") is the lead federal agency that regulates the siting of interstate energy facilities. FERC is in the process of reviewing the proposed LNG terminal and associated pipeline facilities as part of its responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq. ("NEPA"). Many of the opponents have attempted to use this County proceeding as opportunity to collaterally attack the NEPA process, particularly with regard to the alternative "Blue Ridge Route." This is perhaps understandable, given that the jurisdictional relationship of the various regulatory agencies is complex, to say the least.

Nonetheless, the Board finds that any local land use process that would seek to determine the route of the pipeline or otherwise purport to take action inconsistent with FERC's determination in the "Certificate of Public Convenience and Necessity" would likely be preempted by federal law. A discussion of this issue is included in Appendix A. For purposes of this application, however, the Board may only approve or deny the application that the applicant has submitted. The Board does not have the ability to propose major changes to the route, although minor detours (<400 feet off centerline) are possible. In any event, the Board finds that there is no substantial evidence in the record to support any significant changes to the alignment that has been carefully analyzed and approved through the FERC process.

2. Landowner Consent.

There was considerable discussion concerning the applicant's ability to submit a land use application for a pipeline that will cross private property, when the landowner does not give consent to the application. The only applicable code section requiring landowner consent is

3 The preemption doctrine is rooted in the Supremacy Clause of the Constitution, Article VI, clause 2, which states, "[T]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Preemption doctrine consists of four different types: (1) "express preemption," resulting from an express Congressional directive ousting state law (Morales v. Trans World Airlines, Inc., 504 U.S.374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)); (2) "implied preemption," resulting from an inference that Congress intended to oust state law in order to achieve its objective (Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)); (3) "conflict preemption," resulting from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it (Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963)); and (4) "field preemption," resulting from a determination that Congress intended to remove an entire area from state regulatory authority (Fidelity Fed. Savs. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)). See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04, 103 S.Ct. 1713, 1721-22, 75 L.Ed.2d 752 (1983). The present case involves express and field preemption.
CCZLDO §5.0.150. The requirement that a property owner or contract purchaser sign the
application is a mandatory prerequisite to a properly filed application. However, as discussed
below, it is procedural requirement that can be deferred to a later stage in the approval process.

At the onset, the Board notes that other local governments' codes have adopted specific
exceptions to the general requirement that an owner must sign the land use application. For
example, in Cyrus v. Deschutes County, 46 Or LUBA 703 (2004), LUBA addressed a code
provision that contained a specific exception to the signature requirement aimed at
"[a]pplications submitted by or on behalf of a public entity or public utility having the power of
eminent domain with respect to the property subject to the Application." See also Kurihashi
Partners v. City of Beaverton, 46 Or LUBA 791 (2004) (noting similar provision contained in
the City of Beaverton Code). However, the CCZLDO contains no similar type of exception.

In a sense, the owner signature requirement may be viewed as a "completeness" issue,
insomuch as an application may not be "complete" until the required signatures are present. In
this case, staff had already deemed the application complete. Staff defends its decision to accept

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\[4\] SECTION 5.0.150 is entitled “APPLICATION REQUIREMENTS” and provides, in relevant part:

"(Article 5.6 of this ordinance Site Plan Review Requirements and Chapter 6
Land Divisions have additional submittal requirements)

Applications for development or land use action shall be filed on forms
prescribed by the County and shall include sufficient information and evidence
necessary to demonstrate compliance with the applicable criteria and standards
of this Ordinance and be accompanied by the appropriate fee. An application
shall not be considered to have been filed until all application fees have been
paid. All applications shall include the following:

Applications shall be submitted by the property owner or a purchaser under a
recorded land sale contract. "Property owner" means the owner of record
including a contract purchaser. The application shall include the signature of all
owners of the property. A legal representative may sign on behalf of an owner
upon providing evidence of formal legal authority to sign. ** **. (Emphasis
Added).

\[5\] Deschutes County Code ("DCC") 22.08.010 provides, in relevant part:

"A. For the purposes of DCC 22.08.010, the term 'property owners' shall mean
the owner of record or the contract purchaser and does not include a person or
organization that holds a security interest.
"B. Applications for development or land use actions shall:
"1. Be submitted by the property owner or a person who has written
authorization from the property owner as defined herein to make the application;
"C. The following applications are not subject to the ownership requirement set
forth in DCC 22.08.010(B)(1):
"1. Applications submitted by or on behalf of a public entity or public utility
having the power of eminent domain with respect to the property subject to the
Application[.]

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the applications, despite the lack of an owner’s signature, based on precedent set in earlier cases. As stated in the Supplemental Staff Report dated June 10, 2010:

The County treated the PCGP consolidated applications in the same manner as the County’s prior pipeline applications (2002 and 2003) which were also submitted without owner signatures. The County determined the LDO’s application signature provision was not intended to address applications for linear utility facilities involving numerous ownerships where the utility company has the right of condemnation and where obtaining all of the property owner signatures would be virtually impossible.

At that time, the Board of Commissioners decided not to require the utility provider to initiate condemnation litigation against its citizens within the proposed pipeline alignment in order to submit a land use application.

The prior approvals reflect the County’s interpretation of its code to accept land use applications for pipelines in Coos County without the signatures of all landowners, as long as the applicant has condemnation authority and a condition is imposed that the land use approval would not take effect until the applicant acquires the necessary property. The precedent created in the prior County decisions was followed in this application.

The County’s interpretation is supported by the language in the code. LDO Section 5.0.150 addresses requirements for an application submittal. The first paragraph requires an application to be submitted on forms provided by the county and that the submitted application must be accompanied by the appropriate fee. This paragraph specifically states that “An application shall not be considered to have been filed until all application fees have been paid.”

It is the County’s position that the signature requirement in the second paragraph is merely procedural rather than jurisdictional. The language in the first paragraph expressly creates a jurisdictional requirement: “An application shall not be considered to have been filed until all application fees have been paid.” This same requirement is not applicable to the signature provisions of this Section. Therefore, the signature requirement is procedural, while the fee payment requirement is jurisdictional.

Processing the consolidated applications without the property owners’ signatures will not be prejudicial to the rights of any of the property owners if the applications are approved subject to a
condition that the approvals shall not become effective until PCGP
acquires the interest in the subject properties necessary to precede
with the project. This is essentially the same condition that the
county used to approve its own pipeline application in 2002.


For its part, the applicant does not argue that it is a “property owner” within the meaning
of the Code. Rather, the applicant appears to be arguing, in part, that it does not need to obtain
the consent of the property owner because it has a statutory power of condemnation.

The applicant cites ORS 772.510(3) and 15 USC § 717 in support of this argument.
ORS 772.510 provides:

772.510. Pipeline companies, right of entry and condemnation

(1) Any pipeline company⁶ that is a common carrier⁷ and that is
regulated as to its rates or practices⁸ by the United States or any
agency thereof, may enter in the manner provided by ORS 35.220
upon lands within this state outside the boundaries of incorporated
cities.⁹

(2) This right may be exercised for the purpose of examining,
 surveying and locating a route for any pipeline, but it shall not be
done so as to create unnecessary damage.

⁶ Under ORS 772.505(2), the term “pipeline company” includes “any corporation, partnership or limited
partnership, transporting, selling or distributing fluids, including petroleum products, or natural gases and those
organized for constructing, laying, maintaining or operating pipelines, which are engaged, or which propose to
engage in, the transportation of such fluids or natural gases.”

⁷ Determining whether an interstate natural pipeline company has proven to be a more difficult question than
anticipated. The Hearings Officer requested briefing on the issue, but only directly responded. Since interstate
gas companies derive eminent domain authority from the federal Natural Gas Act (specifically 15 U.S.C. 717(h)), it
may not matter whether similar authority is granted under state law. In any event, it does appear that interstate
natural gas pipelines are common carriers due to the passage of FERC Order No. 636. A concise history of the
subject is set forth in General Motors Corp. v. Tracy, 519 U.S. 278, 283-4, 117 S. Ct. 811 (1997). See also United
the Commission began the transition toward removing pipelines from the gas-sales business and confining them to a
more limited role as gas transporters. ** In effect, the Commission for the first time imposed the duties of
common carriers upon interstate pipelines.”).

⁸ The term “practices” is very broad, and therefore there can be little doubt that the “practices” of Pacific Connector
Gas Pipeline LP are regulated by a federal agency.

⁹ In looking at the maps provided by the applicant, it appears that no part of the proposed gas pipeline traverses a
city located in Coos County. Presumably, if the pipeline did traverse a City boundary, that City would be the land
use approval authority for that portion of the pipeline.

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(3) These pipeline companies may appropriate and condemn such lands, or easements thereon or thereover, in such width as is reasonably necessary to accomplish their pipeline company purposes, by proceedings for condemnation as prescribed by ORS chapter 35. (Second Emphasis added).

It seems that federal law may provide additional statutory authority for the use of eminent domain in this case. 15 U.S.C. 717(f)(2)(h) provides:

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. (Underlined emphasis added).

Based on ORS 772.510(3) and 15 U.S.C. 717f, it appears that Pacific Connector does have the right of condemnation. The initial question is whether that right of condemnation itself provides an implicit exception to the Code’s definition of “property owner.” It does not.

The Board has reviewed the hearings officer’s decision in the Pipeline Solutions Case (County File No. HBCU-02-04). In that case, the applicants argued that “[i]n cases such as this, where the application is for a public utility[,] an applicant, as a County with eminent domain powers, the applicant need not obtain signatures or consents from the property owners before obtaining land use permits.”10 The opponents cited CCZLDO §5.2.200 as an approval criterion requiring consent of property owners. The hearings officer found that CCZLDO §5.2.200 was a “procedural requirement” and not an approval criterion.

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10 The hearings officer in that case did not say whether the applicant provided authority to support that assertion.

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The hearings officer in HBCU-02-04 went on to find the following:

It would be reasonable for Coos County to have accepted the Application as complete without the consent of all affected property owners following the rationale of Schrock Farms vs Linn County. The Application is for a public utility and the Applicant is Coos County, which has eminent domain powers. Therefore written consent would not be necessary from the affected property owners before filing this Application.

See Hearings Officer Decision, HBCU-02-04, at p. 4. The hearings officer in that prior case seemed to rely on Schrock Farms Inc. v Linn County, 31 Or LUBA 57 (1996) for his ruling.

In Schrock Farms, ODOT was the applicant for a PAPA. The Code allowed only property owners to file an application for a PAPA. The petitioner argued that ODOT was not a “property owner” within the meaning of the code. ODOT argued that it was a property owner because it had initiated condemnation proceedings on the subject property prior to the application being deemed complete on April 6, 1994. Petitioners countered that the condemnation proceedings had been dismissed by the Court on October 31, 1994, and therefore ODOT was no longer a property owner. LUBA disagreed with the petitioner regarding the legal import of the dismissal, noting that the “dismissal became effective after the application was deemed complete.” Thus, LUBA apparently viewed the completeness date as having legal relevance to the issue.

Schrock Farms does not stand for the broader proposition that any entity with condemnation authority automatically has “property owner” status simply by virtue of a statutory grant of condemnation authority such as ORS 772.510(3). For this reason, Schrock Farms is not direct authority for this case, since no condemnation proceedings had been filed by the time the application was deemed complete back in April of 2010. However, as discussed in more detail below, Schrock Farms does suggest that one possible method for a common carrier pipeline company to gain “property owner” status is to do exactly what ODOT did in that case: initiate condemnation proceedings on the subject properties.

Staff and the applicant both state that most of the requirements set forth in CCZLDO §5.0.150 are not "jurisdictional" despite being worded in a mandatory fashion. Their argument is that some requirements may be merely "procedural" in nature, as opposed to being "jurisdictional." In this manner, a jurisdictional requirement is one that must be completed or met at the time the application is submitted. In that event, the County cannot process the application unless the requirement is completed. On the other hand, under their analysis, a procedural act – even one worded in mandatory terms – is one that may be met at some future point in time. For its part, Western Environmental Law Center (“WELC”) states that the procedural versus jurisdiction issue is a “difference without distinction.” See Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1.

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The applicant cites *Simonson v. Marion County*, 21 Or LUBA 313 (1991). In *Simonson*, LUBA addressed whether the county hearings officer correctly rejected an application because it had not been signed by the "legal owner" at the time it was filed. LUBA reversed the hearings officer, holding that:

"A zoning ordinance requirement may be jurisdictional, in the sense that failure to comply with the requirement may not be waived by the local government or cured by later performance of the requirement. *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 690, 692-93 (1988); *Beaverton v. Washington County*, 7 Or LUBA 121, 127 (1983). However, the code language must clearly express that the requirement is jurisdictional. See *Rustrum v. Clackamas County*, 16 Or LUBA 369, 372 (1988); *Beaverton v. Washington County*, supra."

In *Simonson*, the “agent” of the landowner filed the land use application in Marion County on May 2, 1990. The application was defective when submitted because it did not meet the requirement that the property owner submit in writing a document that confirms that the agent is “duly authorized” to submit the application on the owner’s behalf. The applicant cured that defect on August 14, 1990 by submitting the required documentation. The County held its first hearing on the application on September 12, 1990, but ultimately denied the application on the basis that, on the day the application was submitted, the application did not contain the required documentation from the owner. LUBA held that this was in error, because the applicant had eventually submitted the required letter, and the requirement was not jurisdictional. Thus, *Simonson* makes clear that the application could be accepted and processed before compliance with the signature requirement is established. Had the issue been “jurisdictional,” the application could not have accepted and processed.

The case of *Base Enterprises, Inc. v. Clackamas County*, 38 Or LUBA 614 (2000) also discusses the distinction between jurisdictional requirements and non-jurisdictional requirements, as follows:

According to petitioner the requirement at ZDO 1301.03(A) that the application be submitted by “the owner, contract purchaser, option holder, or agent of the owner, of the property in question” is a jurisdictional requirement.

* * * * *.

Petitioner assumes, but does not establish, that the ZDO 1301.03(A) limitation on persons who may submit an application for an administrative action is a “jurisdictional” requirement. It may be that if ZDO 1301.03(A) expressly stated that its limitations are “jurisdictional” we would be required to treat it as a jurisdictional requirement. See *Breivogel v. Washington County*, 114 Or App 55, 58-59, 834 P2d 473 (1992) (county code made signature on local appeal

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document a jurisdictional requirement). However, unlike the code language at issue in *Breivogel*, ZDO 1301.03(A) does not state that its limitations on who may submit an application are "jurisdictional." ZDO 1301.03(A) does not state that the county lacks authority to consider an application for an administrative action that is submitted by someone who does not prove he or she is among the persons listed in ZDO 1301.03(A).

The first hearings officer presumably could have terminated his review, and determined that the first application should be dismissed, once he determined that Zamani was not among those authorized to submit the application under ZDO 1301.03(A). However, that does not mean the hearings officer was legally compelled to do so. We do not agree with petitioner that the county lacked jurisdiction to deny the first application or that it erred by denying the second application because it is substantially similar to the first application.

Similarly, in *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994), LUBA held that where a local code provision does not explicitly state that the elements of a complete development application are "jurisdictional" (specifically, a signature requirement), the local government's interpretation of the code provision as imposing a "procedural" requirements must be affirmed under ORS 197.829.

Thus, *Simonson, Base Enterprises, BCT Partnership* and similar cases11 make clear that application signature requirements are not "jurisdictional" unless the code specifically makes them so. Simply because the signature requirement is worded in mandatory terms does not make the requirement "jurisdictional." Rather, to be jurisdictional, the Code must state something along the lines that "the county lacks authority to consider an application for an administrative action that is submitted by someone meeting the definition of owner." Under *BCT Partnership, Womble*, and *Bridges*, an application submittal requirement that is not jurisdictional is "procedural" in nature. Once it has been determined that an application submittal requirement is procedural, then an opponent challenging compliance with the requirement must demonstrate prejudice to his or her substantial rights. *See generally Burdhardt v. City of Molalla*, 25 Or LUBA 43, 51 (1993).

In the present case, the signature requirement under CCZLDO 5.0.150 is not presented as a jurisdictional element of an application. Although it does state a requirement that the application shall be signed by all property owners, it does not expressly make such signatures a jurisdictional requirement, and therefore it must be treated as procedural under the case law discussed above.

11 *See also Womble v. Wasco County*, 54 Or LUBA 68 (2007) (petitioner failed to provide basis for reversal or remand when, although land use application was not authorized by the property owners under local code, petitioner did not establish that the code requirements in question were "jurisdictional" in nature); *Bridges v. City of Salem*, 19 Or LUBA 373 (1990) (same).

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This conclusion is directly support by the text and context of the CCZLDO itself. As staff notes, CCZLDO 5.0.150 also includes the following statement, which clearly creates the type of "jurisdictional" requirement contemplated in the LUBA cases cited above: "An application shall not be considered to have been filed until all application fees have been paid." Thus, the County has expressly created a jurisdictional requirement that an application cannot be considered without payment of the fee. However, there is no similar jurisdictional language associated with the property owner signature requirement.

However, just because something is not jurisdictional does not mean that it is not a mandatory requirement that can simply be ignored. WELC correctly asserts that the County cannot "waive" the requirement even if it is procedural. See Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. In this regard, the case of Baker v. Washington County, 46 Or LUBA 591 (2004) is instructive. In Baker, the intervenors were applicants seeking to partition their property into two parcels. Intervenor took access to the parcels via a driveway easement that crosses the petitioner’s land. Petitioners objected to the use of the easement for access for the two parcels, arguing that, as the underlying fee owners of the easement, Washington County Community Development Code (CDC) 203.1.1 required that the petitioners sign the application. In this regard, the code provision at issue stated:

CDC 203.1.1. “Type I, II and III development actions may be initiated only by: Application by all the owners of the subject property, or any person authorized in writing to act as agent of the owners or contract purchasers. (Emphasis added).

The code did not make the signature a “jurisdictional” defect. Nonetheless, LUBA held that the County erred in concluding that the disputed application could be processed without petitioners' joining in the application, because the petitioners are “owners” of the property within the meaning of the code.

As if this were not complicated enough, Caster v. City of Silverton, 54 Or LUBA 441 (2007) throws another wrinkle into the mix. Pacific Connector argues, the County cannot deny the application for failure to obtain signatures of all owners, on account of the fact that staff issued a completeness letter. The applicant states:

The signature requirement goes to completeness, not approvability or jurisdiction, and the county may not deem an application complete and then subsequently deny the application based upon noncompliance with a procedural factor that goes to the completeness of the applications. In Caster v. City of Silverton, 54 Or LUBA 441 (2007), the applicant failed to provide information requested by the city for completeness under ORS 227.178(2). LUBA held that the city could not deem an application complete but then subsequently deny the application based on noncompliance with a factor that goes to completeness of the applications:
"Finally, even if petitioner in this case failed to provide the notice required by ORS 227.178(2)(b), the city elected to proceed with review of the permit application rather than treat the permit application as void under ORS 227.178(4). In that circumstance, the city may not thereafter simply cite an alleged failure on petitioner's part to provide requested information as a basis for denying a permit application. Having elected to proceed with the application notwithstanding petitioner's failure or refusal to provide the requested information, the city owes petitioner at least some explanation for why it believes petitioner's evidentiary submittal falls short of demonstrating the proposal complies with the relevant approval criteria." Caster, 54 Or LUBA at 451-52.

See Applicant's Final Argument dated June 24, 2010, at p. 2. However, the last sentence of the above-cited quote demonstrates that LUBA's point is rather nuanced. What LUBA is saying is that once a completeness letter is issued, the application cannot be denied due to a failure to provide the requested information. Rather, to the extent the local government wishes to deny the applicant, it may then only do so on the basis that the lack of the requested information causes there to be insufficient evidence to meet the requirements set forth in applicable approval standards. The Board finds that CCZLDO §5.0.150 is a mandatory approval standard because it could form the basis of denial of the application. See Baker, supra.

Notwithstanding the various cases in the field, the Board agrees with the applicant that "[i]t does not make practical sense for Pacific Connector to condemn the property required for construction of the pipeline until the necessary final approvals from the county and FERC have been obtained and any appeals are exhausted." See Applicant's Final Argument dated June 24, 2010, at p. 2.

Because the defect is not jurisdictional, it does not appear that the County is required to reject or deny the application, and the Board does not read Baker to establish an absolute rule to the contrary. Compare Bridges, City of Salem, 19 Or LUBA 373 (1990) (failure to provide proof of agency until after the application is filed does not warrant denial of application, where petitioners were not able to show prejudice). Rather, the County has some flexibility to allow the applicant to submit the required documentation at a later date. In this regard, Simonson is instructive:

Where a local government imposes standards that must be met to obtain approval of permits, the local government must find that those standards are met before granting approval. If the permit applicant fails to demonstrate that applicable approval standards are met, the local government must deny the application. Of course, a local government also may, in an appropriate circumstance, impose conditions and rely on those conditions in determining that the application, as conditioned, meets the applicable approval.
Continuing in a footnote, LUBA stated:

In *Holland v. Lane County*, 16 Or LUBA 583, 596 (1988), we explained that a local government may be able to defer a determination of compliance with a discretionary approval standard to a later stage of the development process, where the code does not prohibit such deferral and the requisite notice and public hearing or notice and opportunity for an appeal is provided. *Compare Storey v. City of Stayton*, 15 Or LUBA 165, 184 (1986); *Spalding v. Josephine County*, 14 Or LUBA 143, 147 (1985).

*Id.* at 325, n 11. Before a condition can be imposed, the County has to make a determination of feasibility. The concept of “feasibility” findings is well established in Oregon. In *Meyer v. City of Portland*, 67 Or App 274, 280 n.3, 678 P2d 741 (1984), the Court of Appeals explained that the required finding of “feasibility” for the first stage approval requires “more than feasibility from a technical engineering perspective.” *Id.* at 280, n3. The Court explained that “[i]t means that substantial evidence supports findings that solutions to certain problems *** posed by a project are possible, likely and reasonably certain to succeed.” *Id.* A feasibility finding that is equivocal or wavering is not sufficient. *Griffith v. City of Corvallis*, 16 Or LUBA 64 (1987); *Doughterty v. Tillamook County*, 12 Or LUBA 20, 31 (1984).12

The core goal of a typical two-stage approval process is to give the applicant certainty over the more discretionary, big picture issues, while allowing the resolution of more technical, non-discretionary issues to be deferred to a later stage in an approval process. Often, these non-discretionary issues are expensive and time consuming to resolve, and therefore it makes practical sense to get the “big-picture” discretionary issues out of the way first. The risk, of course, is that the decision-maker will improperly allow the applicant to defer discretionary decision-making to a later stage in the approval process where the public has no opportunity to participate. The local government can avoid this problem by agreeing to hold further public hearings on the deferred issue in the future. *Turner v. Washington County*, 8 Or LUBA 234 (1983); *Rhine v. Multnomah County*, 23 Or LUBA 442 (2000); *Stockwell v. Benton County*, 38 Or LUBA 621, 629 (2000).

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12 Provided this required “feasibility” determination is made when first stage approval is granted, precise solutions for problems posed by a land use decision and other detail technical matters may “be worked out between the applicant and city’s experts during the second stage approval process for the final plan.” *Id.* at 282 n.6. Resolution of precise solutions and technical matters and final approval of the subdivision need not include public hearings. *Id.* *See also Golf Holding Co. v. McEachron*, 39 Or App 675, 593 P2d 1202, *rev den*, 287 Or 477 (1979); *Meyer v. City of Portland*, 7 Or LUBA 184, 196 (1983), *aff’d*, 67 Or App 274, 687 P2d 741 (1984); *Rhine v. Multnomah County*, 23 Or LUBA 42, 46-47 (1992).
LUBA recognized in *Schrock Farms* that initiation of a condemnation proceeding was sufficient to qualify an entity as an "owner" for purposes of a local code provision requiring a land use application be submitted by an owner of the property. In this case, the Board concludes the applicant has condemnation powers pursuant to ORS 772.510(3) and 15 USC § 717, at least to the extent that the FERC Certificate is not rescinded on appeal or via a reconsideration process. Therefore, the Board finds it is feasible for Pacific Connector to become a property owner for purposes of the signature requirement through the initiation of condemnation proceedings, and Pacific Connector may become an ‘owner’ for application purposes before actually obtaining the final judgment in the condemnation proceedings in the individual properties at issue. The Board also finds that it is feasible for Pacific Connector to obtain signatures of affected property owners indicating their consent to the application, either through negotiations with individual property owners or through the condemnation process.

WELC takes issue with this conclusion, and states that "there is no currently valid [FERC] authorization of condemnation power available to the applicant to exercise, let alone upon which to rely to evade the landowner consent requirements." See Letter from WELC Staff attorney Jan Wilson, dated June 8, 2010, at p. 2. The applicant responds to this argument as follows:

Western Environmental Law Center (WELC) and other opponents argue that the FERC Order dated December 17, 2009 approving the project is not currently effective due to a subsequent Order Granting Rehearing for Further Reconsideration dated February 16, 2010. Therefore, opponents claim, Pacific Connector has no current authorization of condemnation authority and the FEIS is not currently valid. WELC goes to some length to quote from the Natural Gas Act, but chooses to ignore the provisions of the Act that require "stays" of FERC Orders, and require that "the filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section [appeal to U.S. Court of Appeals] shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." 15 USC § 717r(c).

The FERC Order is still effective upon request for rehearing, and is still effective upon appeal to the Ninth Circuit Court of Appeals, unless a stay of that Order is obtained by opponents. In other words, a FERC Order is similar to a local land use decision in Oregon, which remains effective upon appeal unless and until a stay is obtained from LUBA.

The issuance by FERC of the "Order Granting Rehearing for Further Consideration" dated February 16, 2010 does not stay the effectiveness of the Order. In fact, as explained in the attached excerpt from the American Bar Association's "FERC Basic
Practice Series" * * *, such orders are commonly issued by FERC as a "tolling" mechanism, which allows the Commission to avoid the otherwise strict deadline for ruling on rehearing requests. As explained by the ABA materials:

"Because the Commission rarely has time to issue an order on rehearing within 30 days after receiving requests for rehearing, it usually issues 'tolling' orders, granting the request for rehearing solely for purposes of further consideration. The effect of these tolling orders is to avoid the automatic denial that results from Commission inaction. FERC then proceeds to issue the real order on rehearing at its own pace."

In the absence of a stay, the FERC Order dated December 17, 2009 is still valid and effective. Attached as Exhibit 2 to this letter is the relevant portion of an Order on Rehearing issued by FERC in January 2003, denying requests for rehearing of its original September 2002 order issuing a Certificate of Public Convenience and Necessity to Islander East (authorizing construction of the Islander East pipeline).

The discussion of the request for the stay begins at paragraph 20. The Connecticut Attorney General's request for stay was based partly on Islander East's announced intention to utilize eminent domain authority granted by the original order to access certain properties on its authorized right of way (¶ 21, see also ¶ 24). Islander East responded by asserting that "it needs the September 19 order to obtain access to the few remaining properties where access has been denied so that it can complete the surveys and reports." (¶ 27-28).

Paragraphs 31 et seq. set forth the standards the Commission applies when determining whether to grant a stay. In this case it found that the Connecticut AG had not shown irreparable injury, while granting a stay might harm Islander East:

"Easement agreements negotiations and condemnation proceedings are lengthy procedures. One of the reasons the Commission issued the September 19 order was to give Islander East sufficient time to conduct preconstruction activities, including acquiring the necessary easements. Staying Islander East's right to eminent domain while it resolves preconstruction environmental conditions would needlessly delay the project." (¶ 34).
The attached FERC Order makes clear that (a) the original order conveys the right of eminent domain (b) which, absent a stay explicitly granted by the Commission, is not affected by the rehearing (or appeal) process.

See letter from Mark Whitlow, dated June 17, 2010. WELC disagrees with the applicant's legal conclusions, but does little to press its case. See Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. The Board concludes the original FERC order conveys the right of eminent domain when no stay of such order was obtained or explicitly granted by FERC.

WELC raises another issue in its letter dated June 8, 2010. It notes that CCZLDO §5.0.150 requires "all owners of the property" to sign the application. See Letter from WELC Staff attorney Jan Wilson, dated June 8, 2010, at p. 2, n2. In this regard, the code is worded in a manner similar to the provision at issue in Baker v. Washington County, 46 Or LUBA 591 (2004). WELC argues that even if Pacific Connector condemns an easement, that it will still have to obtain the signature of the owner of the fee interest due to the use of the phrase "all of the owners of property." The Board finds that it is feasible for Pacific Connector to obtain signatures of affected property owners indicating their consent to the application, either through negotiations with individual property owners or through the condemnation process and resulting court order condemning the necessary property.13 As discussed elsewhere in these findings, the Board also finds that the property owner signature requirement is an element of local procedure that was not intended to apply to this type of application, and could be preempted by federal law, which does not contemplate that a property owner whose property interests are subject to condemnation pursuant to FERC order would still need to sign a consent form.

The County can ensure there will be no prejudice to the rights of any affected property owner through the imposition of a condition of approval requiring the applicant to acquire an ownership interest in the property and/or to obtain signed consents from property owners prior to the actual construction of the pipeline. The Board further finds the act of verifying the signatures will be ministerial in nature, because ownership can be verified without exercising discretionary decision-making.14 County staff can simply verify the signatures received for a certain property against the County's ownership records for that property. The records will either match or not; there will not be a need or opportunity to exercise judgment in this process. As a result, the County will not need to conduct an additional quasi-judicial land use hearing to verify ownership.

In summary, the Board adopts the interpretation and legislative history of CCZLDO §5.0.150 contained in the Supplemental Staff Report dated June 10, 2010. Because the property

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13 These alternative findings are effectuated by the Board through the adoption of two alternative versions of Condition 20 regarding landowner consent. The first condition 20(a) allows that a court order condemning property for the pipeline could also convey the corresponding consent of the property owners or otherwise obviate the need for their signatures. In the alternative, if that condition is deemed invalid or insufficient on appeal, the Board finds that alternative condition 20(b) ensures compliance with CCZLDO 4.0.150.

14 A determination is discretionary if it "requires the application of judgment or some form of evaluation." Buckman Community Ass'n v. City of Portland, 168 Or App 243, 245 n1 (2000). A standard that is subjective, discretionary, or requires factual, legal, or policy judgment is also not clear and objective. Hiebenthal v. Polk County, 41 Or LUBA 316 (2002).
owner signature requirement is procedural rather than jurisdictional and it is feasible for the applicant to initiate condemnation proceedings in the future; the County may approve this application subject to a condition requiring that the land use approval will not take effect until the applicant acquires an ownership interest in the necessary property and/or acquires the signed consent of the property owners.

One final note is worth mentioning. WELC states that “even if the condition of approval requiring landowner consent somewhere down the road” is added to the decision, the landowners will still be prejudiced because “it puts an immediate cloud over the property, such that selling it becomes difficult and burdensome.” *See Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. Regardless of whether a condition of approval is added or the land use application is denied, this land use process will not cause further damage beyond what is going to occur as a result of the FERC process. In other words, the real battle is at FERC and this application is a mere sideshow. If the opponents somehow convince FERC to rescind the Certificate, or if they successfully overturn the FERC Certificate at the Ninth Circuit, then this land use approval is worthless to the applicant. On the other hand, if the FERC Certificate is ultimately affirmed, then whatever ill-effects stem from the “cloud” created by a condition of approval mandated here will be indistinguishable from the “cloud” created by the FERC Certificate itself.*

3. Potential for Mega Disasters (Tsunamis, Earthquakes, etc.)

One common theme throughout much of the testimony stems from the concern that a gas pipeline would create secondary problems such as explosions and fire if the County is hit by a tsunami or earthquake. Since there are any number of Code criteria under which this concern could potentially be relevant, and because the conclusion is the same no matter the specific criterion at issue, the issue is addressed here.

As an initial matter, the Board finds that tsunamis are not much of an issue considering the pipe will be a thicker grade of steel and it will buried in 5-8 feet of sediment and encased in four inches of concrete. Although it is not clear whether a natural gas pipeline is one of the types of facilities regulated in a tsunami zone under ORS 445.447,16 the FEIS makes clear that the risk

15 WELC further states that the condition of approval would “in effect, * * * authorize a taking of the landowner’s rights to freely transfer their property.” *See Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. As an initial matter, the irony of having an environmental group raising a pro-property rights “takings” argument is duly noted. But regardless of that hypocrisy, there is no “taking” caused by a pipeline because there will still be economically viable uses of the landowner’s property. As Measure 37 claimants know all too well, a taking only occurs if there is a virtual wipeout of all economically viable uses of the land. Moreover, planning a future condemnation alone is not enough to constitute a taking for condemnation blight. *Clarke v. Port of Portland, 23 Or App 730, 543 P2d 1099 (1975).* Regardless, protection of property value is not an approval standard for this case. Therefore, the opponent’s comments on this issue provide no basis for denial. *Teucher v. Douglas County, 28 Or LUBA 134 (1994); Sunburst II Homeowners Ass’n v. City of West Linn, 17 Or LUBA 401 (1989).*

16 ORS 455.447 Regulation of certain structures vulnerable to earthquakes and tsunamis; rules. (1) As used in this section, unless the context requires otherwise:
(a) “Essential facility” means:
(A) Hospitals and other medical facilities having surgery and emergency treatment areas;

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of a tsunami has been studied and planned for. See FEIS 5.1.1, at p. 5-2. The applicant's geotechnical engineers studied the potential effect of a "design tsunami event," which is apparently a 565 year return period. See Geologic Hazard's Report dated October 30, 2009, by Geo-Engineers at p. 26-27. The modeled event predicted three feet of temporary scouring. Since the pipe will be buried at a depth of five feet, no harm is anticipated to occur to the pipe as a result of a design tsunami event. The opponents have not presented credible evidence that suggests that

(B) Fire and police stations;
(C) Tanks or other structures containing, housing or supporting water or fire-suppression materials or equipment required for the protection of essential or hazardous facilities or special occupancy structures;
(D) Emergency vehicle shelters and garages;
(E) Structures and equipment in emergency-preparedness centers;
(F) Standby power generating equipment for essential facilities; and
(G) Structures and equipment in government communication centers and other facilities required for emergency response.

(b) "Hazardous facility" means structures housing, supporting or containing sufficient quantities of toxic or explosive substances to be of danger to the safety of the public if released.

(c) "Major structure" means a building over six stories in height with an aggregate floor area of 60,000 square feet or more, every building over 10 stories in height and parking structures as determined by Department of Consumer and Business Services rule.

(d) "Seismic hazard" means a geologic condition that is a potential danger to life and property that includes but is not limited to earthquake, landslide, liquefaction, tsunami inundation, fault displacement, and subsidence.

(e) "Special occupancy structure" means:

(A) Covered structures whose primary occupancy is public assembly with a capacity greater than 300 persons;
(B) Buildings with a capacity greater than 250 individuals for every public, private or parochial school through secondary level or child care centers;
(C) Buildings for colleges or adult education schools with a capacity greater than 500 persons;
(D) Medical facilities with 50 or more resident, incapacitated patients not included in subparagraphs (A) to (C) of this paragraph;
(E) Jails and detention facilities; and
(F) All structures and occupancies with a capacity greater than 5,000 persons.

(2) The Department of Consumer and Business Services shall consult with the Seismic Safety Policy Advisory Commission and the State Department of Geology and Mineral Industries prior to adopting rules. Thereafter, the Department of Consumer and Business Services may adopt rules as set forth in ORS 183.325 to 183.410 to amend the state building code to:

(a) Require new building sites for essential facilities, hazardous facilities, major structures and special occupancy structures to be evaluated on a site specific basis for vulnerability to seismic geologic hazards.
(b) Require a program for the installation of strong motions accelerographs in or near selected major buildings.
(c) Provide for the review of geologic and engineering reports for seismic design of new buildings of large size, high occupancy or critical use.
(d) Provide for filing of noninterpretable seismic data from site evaluation in a manner accessible to the public.
(3) For the purpose of defraying the cost of applying the regulations in subsection (2) of this section, there is hereby imposed a surcharge in the amount of one percent of the total fees collected under the structural and mechanical specialty codes for essential facilities, hazardous facilities, major structures and special occupancy structures, which fees shall be retained by the jurisdiction enforcing the particular specialty code as provided in ORS 455.150 or enforcing a building inspection program under ORS 455.148.

(4) Developers of new essential facilities, hazardous facilities and major structures described in subsection (1)(a)(F), (b) and (c) of this section and new special occupancy structures described in subsection (1)(e)(A), (D) and (F) of this section that are located in an identified tsunami inundation zone shall consult with the State Department of Geology and Mineral Industries for assistance in determining the impact of possible tsunamis on the proposed development and for assistance in preparing methods to mitigate risk at the site of a potential tsunami. Consultation shall take place prior to submittal of design plans to the building official for final approval. [1991 c.956 §12; 1995 c.79 §229; 1995 c.617 §1; 2001 c.573 §12] (Emphasis added).
the measures proposed in the FEIS would be insufficient to prevent the pipe from getting scoured out by a tsunami. In any event, the Board has already granted land use approval for the LNG terminal, which presumably would be at much greater risk in a tsunami event.

Moreover, if a tsunami that has the power to uproot a steel pipe buried in five to eight feet of sediment\(^{17}\) and encased in four inches of concrete hits Coos Bay, then Keith Comstock is correct when he states that the “LNG facility will be the least of your worries.”

FLOW claims that Pacific Connector “failed to provide adequate information regarding the geologic hazards for the pipeline” and cites the State of Oregon’s comments to the FERC FEIS. Attached to the State of Oregon’s comment letter are the DOGAMI comments and recommendations made to the project’s Draft EIS (Attachment 1, page 3) recommending additional work to be completed and included in the Final EIS. Pacific Connector responded to questions and comments raised by DOGAMI in the updates noted in the FEIS.

Also, FLOW incorrectly attributes comments made by DOGAMI in Section 4.1.2.3 to Pacific Connector. In fact, Section 4.1.2 of both the FERC DEIS and FERC FEIS are specific to the geo-hazard analysis of the Jordan Cove LNG Terminal. Geo-hazard evaluations and recommendations for the Pacific Connector Gas Pipeline are found in Section 4.1.3 in both documents.

Pacific Connector evaluates, analyzes and mitigates the effects of earth movement potential in all phases of the project: pipeline routing, detailed engineering design, facility construction, and ongoing operations and monitoring of the in-service pipeline facilities. As part of the Coos County public record, Pacific Connector submitted the Coos County Geologic Hazards Report prepared by GeoEngineers for Pacific Connector. This report is an excerpt from the 2007 FERC Certificate application and provides the geotechnical and geohazard information along the pipeline route within Coos County. The report constitutes substantial evidence, and there is no scientifically-based evidence to the contrary.

The issue of earthquakes has also been considered. Earthquakes have the ability to impact the pipeline by causing earth movement and thus displacing the pipeline from its original location. This displacement can be caused from crossing an earthquake fault or secondary impacts from an earthquake such as liquefaction, lateral spreading, or landslides. In addition to earth movement, river and stream scour potential was analyzed at each river crossing within the report.

Regarding earthquakes, Section 3.3 Seismic Settings (of the GeoEngineers report), states “Geologic maps of the project area show the many faults that cross the pipeline alignment or that are located in proximity to the pipeline corridor (Walker and MacLeod, 1991). With the exception of the Klamath Falls area, these mapped surface faults are not considered active and are not believed to be capable of renewed movement of earthquake generation (United States Geological Survey [USGS], 2002 interactive fault website).

\(^{17}\) The top of the pipe will be covered by 5 feet of sediment. See FEIS at p. 2-98.
Regarding the other forms of earth movement that may cause displacement to the pipeline, Pacific Connector chose avoidance as the mitigation priority when routing the pipeline. Appendix A and Appendix B in the Coos County Geologic Hazards Report identify the locations along the pipeline alignment where a geohazard exists, what risk level the hazard presents to the pipeline, and if mitigation measures will be required at those locations (where avoidance was not possible). Pacific Connector will further analyze all locations where mitigation measures were recommended by GeoEngineers to engineer the best type of mitigation to protect the public, the environment, and the integrity of the system. In addition, FERC Environmental Condition #14 requires Jordan Cove and Pacific Connector to hire a board of third-party consultants to review and approve both projects’ final design as it relates specifically to their geotechnical evaluation and mitigation measures.

Next, the issue of landslide risks in riparian reserves is considered. FLOW asserts that the pipeline will increase the risk of landslides due to the removal of vegetation on steep slopes. Pacific Connector has included in its FERC application, and federal and state water quality permit applications, an Erosion Control and Revegetation Plan (ECRP) which outlines the Best Management Practices (BMPs) the project will use for temporary and permanent erosion control along the project right-of-way to prevent land movement. The ECRP is attached under the tab labeled "Erosion Plan" as an exhibit to the Applicant's May 12, 2010 Pre-Hearing Evidentiary Submittal. The ECRP has been reviewed by various federal and state agencies (including the Forest Service and BLM) during the FERC pre-filing process, the FERC Certificate application process, and the Plan of Development process, and their review comments have been incorporated into the plan. The noted temporary and permanent BMPs have been approved by these agencies for use on private and federal lands. Mitigation measures specific to steep slope construction are discussed in Section 11.0 and the related appendices in the Pacific Connector ECRP. In summary these measures include:

- routing the pipeline to ensure safety and integrity of the pipeline;
- identifying adequate work areas to safely construct the pipeline;
- utilizing appropriate construction techniques to minimize disturbance and to provide a safe working plane during construction (i.e., two-tone construction; see Drawing 3430.34-X-0019 in Attachment C to Welling letter dated June 17, 2010);
- Spoil storage during trench operations on steep slopes (greater than the angle of repose) will be completed using appropriate BMPs to minimize loss of material outside the construction right-of-way and temporary extra work areas. Examples of BMPs that may be used include the use of temporary cribbing to store material on the slope or temporarily end-hauling the material to a stable upslope area and then hauling and replacing the material during backfilling;
- optimizing construction during the dry season, as much as practicable;

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• utilizing temporary erosion control measures during construction (i.e., slope breakers/waterbars);

• installing trench breakers in the pipeline trench to minimize groundwater flow down the trench which can cause in-trench erosion;

• backfilling the trench according to Pacific Connector’s construction specifications;

• restoring the right-of-way promptly to approximate original contours or to stable contours after pipe installation and backfilling;

• installing properly designed and spaced permanent waterbars;

• revegetating the slope with appropriate and quickly germinating seed mixtures;

• providing effective ground cover from redistributing slash materials, mulching, or installing erosion control fabric on slopes, as necessary; and

• monitoring and maintaining right-of-way as necessary to ensure stability.

The Board finds that these BMPs are adequate to address the risk of landslides.

4. Riparian vegetation removal and the "public utility" exemption.

Generally, the CCZLDO requires that riparian vegetation must be maintained within 50 feet of certain waterbodies. However, applicable code provisions in the EFU, Forest, Rural Residential and CBEMP zoning districts include the following exemption: "Riparian vegetation may be removed in order to site or properly maintain public utilities and read right-of-way."

WELC and other opponents assert that the PCGP is not a "public utility" to which this exemption can be applied. However, the pipeline falls within the CCZLDO definition of a "low-intensity utility facility," which is described as including gas lines for "public service." CCZLDO §2.1.200. The pipeline also falls within the ORS 757.005(1)(a)(A) definition of a "public utility," which includes "[a]ny corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power...."

Contrary to the unsupported assertions of several opponents, the term "public utility" referenced in the analogous provision of ORS 215.213(1)(d) is not concerned with whether the utility is owned by a public or private entity but whether the facility is so impressed with a public interest that it comes within the field of public regulation. 42 Or Att'y Gen 77 (1981) (cited in McCaw Communications, Inc. v. Marion County, 96 Or App 552, 773 P2d 779 (1989)).
Notwithstanding the applicability of this exemption, in circumstances where riparian vegetation must be removed for construction of the pipeline, Pacific Connector is proposing to restore riparian vegetation within 25 feet of the impacted waterbody. Pacific Connector has stated that it will comply with all FERC requirements regarding waterbody crossings, and has provided a detailed Erosion Control and Revegetation Plan (ECRP) that was developed using FERC's Upland Erosion Control, Revegetation, and Maintenance Plan and FERC's Wetland and Waterbody Construction and Mitigation Procedures. The applicant's ECRP and the two referenced FERC documents were submitted into the record as part of the applicant's submittal dated May 12, 2010.

Section 10.12 of the ECRP includes detailed information regarding planting of native shrubs and trees in wetland and riparian areas to mitigate impacts from construction, and provides that "in riparian areas, shrubs and trees will be planted across the right-of-way for a width of 25 feet from the waterbody banks." ECRP pages 38-39.

WELC also contends the applicant has not established that any necessary removal of riparian vegetation will be "the minimum necessary," as required within riparian areas in the Rural Residential and CBEMP zones. In response to these concerns, during the second open record period the applicant provided correspondence from Randy Miller of Pacific Connector dated June 17, 2010, which identifies measures that have been taken by the applicant in designing the project in order to minimize impacts to riparian vegetation, including the following:

- Construction impacts to riparian areas have been minimized to the extent possible through routing efforts to ensure a safe, stable alignment for long-term pipeline integrity. Through these efforts, the alignment follows ridgelines and watershed boundaries in many areas, significantly minimizing waterbody and riparian crossings.
- Construction work area limits have been minimized and work area setbacks from waterbodies and wetlands provided where feasible based on topographic and engineering constraints.
- Construction schedules across waterbodies have been planned to coincide with ODFW recommended in-stream work windows and the low-flow periods, unless an unknown occurrence of northern spotted owls or marbled murrelets arise which create a conflict in seasonal restrictions between species. Should such a conflict arise, Pacific Connector would work with federal and state wildlife agencies to determine the appropriate construction schedule.
- Streambeds will be restored to their preconstruction contours, elevations and grade and streambanks will be restored to their approximate original contour or to a stable configuration to ensure stability and to restore floodplains. These measures will ensure that streamflow characteristics and floodplain functions are restored.
- Streambeds will be reclaimed with replacement of existing spawning substrate.
- After construction is complete, large woody debris will be placed in streams or banks depending upon the size of the stream, its pre-construction condition relative to the presence or absence of trees and other site specific factors.

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• All riparian areas will be restored and revegetated including trees and shrubs where appropriate and in accordance with the federal and state permit conditions.
• Coniferous and shrub vegetation will be re-established within affected riparian areas for a distance of 25 feet on each side of intermittent and perennial waterbodies, or to the limit of the existing riparian vegetation.
• The pipeline maintenance corridor has been narrowed to the minimum necessary and to comply with DOT maintenance requirements.
• Erosion control will be implemented as described in the project's Erosion Control and Revegetation Plan (ECRP) through implementation of extensive BMPs as required by federal, state, and local permits. The ECRP includes BMPs for construction and post-construction; it provides environmental controls for waterbody and wetland crossings, spill management, hydrostatic testing, and trench dewatering. Restoration procedures include recontouring, soil compaction and scarification, seedbed preparation, seed mixes, fertilization, noxious weed control, and maintenance.

As explained in the June 17, 2010 correspondence from Randy Miller, and in the above-cited provisions of the ECRP, the applicant has exceeded any applicable County standards regarding protection of riparian vegetation. The applicant has demonstrated that the amount of riparian vegetation that will be removed will be the minimum necessary, and that vegetation will be replanted in any event. WELC does not explain what additional measures could be taken, or otherwise provide evidence that refutes Mr. Miller's testimony. For this reason, the Board rejects WELC's arguments regarding this issue. Nevertheless, to ensure compliance with the applicant's representations, the Board imposes Condition of Approval A.18 to read as follows:

"Riparian vegetation removal shall be the minimum necessary for construction and maintenance of the pipeline, and shall comply with all FERC requirements for wetland and waterbody protection and mitigation both during and after construction. The applicant shall restore riparian vegetation 25 feet from the streambanks on either side of waterbodies on private lands where riparian vegetation existed prior to construction, consistent with the applicant's ECRP."

The Board finds that the applicant's proposed condition (Condition of Approval B.3) is redundant with Condition of Approval A.18 and should be deleted and identified as "Intentionally deleted."

5. Coordination with Native American Tribes (CCZLDO §3.2.700)

The applicable county requirements governing archaeological resources are CBEMP Policy #18 and CCZLDO §3.2.700, which directly implements Policy #18. Representatives from the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians testified that the following Code provision was applicable to this case:

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SECTION 3.2.700. Process for Tribe(s) Review and Response of Proposed Development within Acknowledged Archaeological Sites. Properties which have been determined to have an "archaeological site" location must comply with the following steps prior to issuance of a "Zoning Compliance Letter" for building and/or septic permits.

1. The County Planning Department shall make initial contact with the Tribe(s) for determination of an archaeological site(s). The following information shall be provided by the property owner/agent:
   a. plot plan showing exact location of excavation, clearing, and development, and where the access to the property is located; and
   b. township, range, section and tax lot(s) numbers; and
   c. specific directions to the property.

2. The Planning Department will forward the above information including a request for response to the appropriate tribe(s).

3. The Tribe(s) will review the proposal and respond in writing within 30 days to the Planning Department with a copy to the property owner/agent.

4. It is the responsibility of the property owner/agent to contact the Planning Department in order to proceed in obtaining a "Zoning Compliance Letter" (ZCL) or to obtain further instruction on other issues pertaining to their request.[OR-00-05-014PL]

By its express terms, CCZLDO §3.2.700 only applies if the proposed land use will occur on lands determined to be an "archaeological site" location. The County has generally mapped "cultural areas" consistent with Statewide Planning Goal 5, but the specific location of Native American cultural sites is not provided in the Goal 5 maps for security reasons. Nonetheless, the reference in Section 3.2.700 to acknowledged "archaeological site" locations is a reference to these Goal 5 maps. The generalized Goal 5 Element map makes clear that portions of the proposed pipeline will travel through lands that are identified as "Areas of Archaeological Concern" in the Coos County Comprehensive Plan. Therefore, the route chosen by the applicant triggers CCZLDO §3.2.700 review, although, as discussed below, the timing of that review is an issue.

The correct application of CCZLDO §3.2.700 and CEBMP Policy #18 was one of the issues addressed by LUBA in the appeal of the Jordan Cove LNG terminal, Southern Oregon

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18 Policy #18: Protection of Historical, Cultural and Archaeological Sites

Local government shall provide protection to historical, cultural and archaeological sites and shall continue to refrain from widespread dissemination of site-specific information about identified archaeological sites.

I. This strategy shall be implemented by requiring review of all development proposals involving a cultural, archaeological or historical site, to determine whether the project as proposed would protect the cultural, archaeological and historical values of the site.

II. The development proposal, when submitted shall include a Site Plan Application, showing, at a minimum, all areas proposed for excavation, clearing and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify the Coquille Indian Tribe and Coos, Siuslaw, Lower

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Pipeline Information Project v. Coos County, 57 Or LUBA 44, 2008. In that case, LUBA held that Policy #18 is only triggered upon the applicant's submittal of a "site plan application" that identifies "all areas proposed for excavation, clearing or construction." The County's requirements for coordination and consultation with the tribes do not begin under Policy #18 until such an application has been submitted. At that point, the tribes have 30 days to submit a written statement regarding any objections to the specific development proposal, and if the tribes and the applicant cannot agree on appropriate protective measures, the county must hold a public hearing to resolve the dispute.

In its review of the LNG terminal on remand from LUBA, the Board of Commissioners adopted the following interpretation of Policy #18 and CCZLDO §3.2.700:

Umpqua Tribe(s) in writing, together with a copy of the Site Plan Application. The Tribe(s) shall have the right to submit a written statement to the local government within thirty (30) days of receipt of such notification, stating whether the project as proposed would protect the cultural, historical and archaeological values of the site, or if not, whether the project could be modified by appropriate measures to protect those values. "Appropriate measures" may include, but shall not be limited to the following:

a. Retaining the prehistoric and/or historic structure in situ or moving it intact to another site; or

b. Paving over the site without disturbance of any human remains or cultural objects upon the written consent of the Tribe(s); or

c. Clustering development so as to avoid disturbing the site; or

d. Setting the site aside for non-impacting activities, such as storage; or

e. If permitted pursuant to the substantive and procedural requirements of ORS 97.750, contracting with a qualified archaeologist to excavate the site and remove any cultural objects and human remains, reinstating the human remains at the developer's expense; or

f. Using civil means to ensure adequate protection of the resources, such as acquisition of easements, public dedications, or transfer of title. If a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply. Land development activities, which violate the intent of this strategy, shall be subject to penalties prescribed in ORS 97.990. III. Upon receipt of the statement by the Tribe(s), or upon expiration of the Tribe(s) thirty day response period, the local government shall conduct an administrative review of the Site Plan Application and shall:

a. Approve the development proposal if no adverse impacts have been identified, as long as consistent with other portions of this plan, or

b. Approve the development proposal subject to appropriate measures agreed upon by the landowner and the Tribe(s), as well as any additional measures deemed necessary by the local government to protect the cultural, historical and archaeological values of the site. If the property owner and the Tribe(s) cannot agree on the appropriate measures, then the governing body shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archaeological values of the site.

IV. Through the "overlay concept" of this policy and the Special Considerations Map, unless an exception has been taken, no uses other than propagation and selective harvesting of forest products consistent with the Oregon Forest Practices Act, grazing, harvesting wild crops, and low intensity water-dependent recreation shall be allowed unless such uses are consistent with the protection of the cultural, historical and archaeological values, or unless appropriate measures have been taken to protect the historic and archaeological values of the site. This strategy recognizes that protection of cultural, historical and archaeological sites is not only a community's social responsibility, it is also legally required by ORS 97.745. It also recognizes that cultural, historical and archaeological sites are non-renewable cultural resources.
"LUBA's remand regarding archaeological resources issues under Policy #18 is based upon a lack of clarity regarding whether LDO 3.2.700 implements Policy #18. As explained in more detail below, the Board finds that the 'Site Plan Application' requirement contemplated by Policy #18 is intended by the county to be implemented through the submittal of a 'plot plan' under LDO 3.2.700 at the time the applicant requests a zoning compliance (verification) letter under LDO 3.1.200 for the issuance of building permits by the State of Oregon Building Codes Division. In its final opinion LUBA stated:

'We leave open the possibility that the county might interpret LDO 3.2.700 to fully implement CBEMP Policy #18 because all development subject to CBEMP Policy #18 will require a zoning compliance letter and the decision making required by Paragraph III of CBEMP Policy #18, including any required 'administrative review' and 'quasi-judicial hearing' will occur under LDO 3.2.700(4). But any attempt to defer the quasi-judicial hearing and necessary decision making that may be required to resolve disputes between the tribes and the applicant to a point in time after the conditional use approval is granted, must ensure that the required decision making and quasi-judicial hearing will be provided later before the proposed development can commence.'

"Consistent with the above-quoted portion of LUBA's decision, the Board of Commissioners finds that LDO 3.2.700 provides the county's intended process for the tribe(s) review of proposed development in order to fully implement Policy #18. Although the plan policy and code provision do not expressly cross-reference each other, the stated purpose of LDO 3.2.700 is to provide a 'Process for Tribe(s) Review and Response of Proposed Development within Acknowledged Archaeological Sites,' and Policy #18 is also designed to protect such sites. Like Policy #18, LDO 3.2.700 provides the Tribes a 30-day review period within which to review a development proposal and respond in writing.

"Significantly, LDO 3.2.700 makes clear that the time for compliance with applicable requirements regarding protection of archaeological resources is at any time before a 'zoning compliance letter' is requested for purposes of obtaining building permits, not at the time of conditional use permit approval. Under LDO 3.2.700, this is accomplished through the applicant's submittal of a 'plot plan showing exact location of excavation, clearing, and development.' The time for application of the Policy #18 and LDO 3.2.700 requirements is prior to obtaining a zoning compliance..."
letter and building permit under LDO 3.1.200 (LDO 3.2.700 refers to a 'zoning compliance letter,' which the Board finds is the equivalent of a 'zoning verification letter' as described under LDO 3.1.200).

"Therefore, the Board finds that the 'Site Plan Application' contemplated by Policy #18 is the 'plot plan' contemplated under LDO 3.2.700, which expressly implements the policy. JCEP must comply with the specific coordination and administrative hearing requirements of Policy #18 prior to obtaining a zoning compliance (verification) letter as required for issuance of building permits under LDO 3.1.200, rather than as part of its conditional use permit approval. The administrative review and hearing required under Policy #18 will occur at the time a 'plot plan' and related information are submitted for obtaining the necessary zoning compliance letter.

In this case, the Supplemental Staff Report provides:

The consultations, surveys, and reports undertaken by the applicant regarding compliance with state and federal law governing cultural and archaeological resources are explained in Section 4.10 of the FEIS. As described in Sections 4.10.1.3 and 4.10.2.3 of that document, Pacific Connector has surveyed the pipeline route, and has prepared a Cultural Resources Survey Report identifying locations of archaeological sites along the route, and filed that report with both FERC and the State Historic Preservation Officer (SHPO), as required under state and federal law. However, according to staff, the report is not included in the record because under state and federal law, the contents of the report cannot be made available for public review in order to protect specific cultural sites that may be of interest to artifact hunters. This confidentiality requirement is also recognized in CBEMP Policy #18, which provides that the county "shall refrain from widespread dissemination of site-specific information about identified archaeological sites."


CCZLDO §3.2.700 sets forth a process that is, by its express terms, applicable only "prior to issuance of a 'Zoning Compliance Letter' for building and/or septic permits." In this case, a zoning compliance letter will be required prior to obtaining a building permit from State Building Codes in order to construct and connect the pipeline to the meter station at the LNG terminal. At that point, the notice required under Policy #18 must be provided to the tribes, who will be entitled to submit comments and concerns regarding resource sites along the entire pipeline route. Other state agencies may also require county sign-off on a land use compatibility
statement. The planning department will ask for comment from the appropriate tribe (Coquille or Confederated) consistent with CCZLDO §3.2.700 prior to issuance of a zoning compliance letter or sign-off on a land use compatibility statement.

Given this backdrop, the concerns of the Tribes can be addressed. The Cultural Resources Protection Coordinator for the Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, Ms. Arrow Coyote, wrote a letter dated June 10, 2010 in which she states the following:

Section 3.2.700 would fail to protect the County's cultural resources if it were limited only to cases where a permit was being issued under the Oregon Building Codes Agency regulations. Too many ground disturbing activities would not be covered including roads, underground cables and pipelines. The placement of Section 3.2.700 in provisions involving use and the context of the section itself strongly suggest that the intent of the County was to protect its cultural resources, and those of the tribes, when any ground disturbing activity occurs that requires County approval.

The CCZLDO language is unambiguous and only applies to "building and/or septic permits." While it may be true that certain other ground-disturbing activities do not trigger CCZLDO §3.2.700, it is not within the Board's authority to rewrite the CCZLDO as part of this application process. However, the concern may be overstated, because, as quoted above, staff advises that building permits will be required for the pipeline's connection to the meter station itself. The Board agrees that this is the case. In any event, the Tribes are afforded what are perhaps even stronger protections under the FERC condition of approval No. 17, discussed below.

With regard to CBEMP Policy #18, the Board’s Remand Order sets forth a workable solution for implementation of that policy. In a June 6, 2010 letter, the Hearings Officer stated that “[a]t this point, I am inclined to agree with the applicant that compliance [with CBEMP Policy #18 and CCZLDO §3.2.700] can be met with a condition of approval.” The Hearings Officer further stated that “I would be interested in hearing from the Tribes whether they have any reason to believe that a condition of approval would not be sufficient to address their concerns.” The Tribes responded to the Hearings Officer’s request in a letter dated June 10, 2010. In that letter, Ms. Coyote expresses a generalized concern that CBEMP Policy 18 may not have any force once a CUP is issued. However, given the condition of approval proposed by the applicant, see infra, the Board finds that CBEMP Policy 18 and CCZLDO §3.2.700 will continue to have full force.

In her June 10, 2010 letter, Ms. Coyote explains that in the FEIS, FERC staff recommended certain conditions of approval related to cultural resources. See FEIS 4.10-21 and 5-32. These conditions were adopted, in somewhat modified form, in the Dec. 17, 2009 FERC Order. See FERC Order at p. 72-73. FERC’s Condition 17 provides as follows:

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Jordan Cove and Pacific Connector shall not begin construction and/or use any of their respective proposed facilities, including related ancillary areas for staging, storage, temporary work areas, and new or to-be-improved access roads until:

a. Jordan Cove and Pacific Connector each file with the Secretary remaining cultural resource survey reports and requested revisions, necessary site evaluation reports, and required avoidance/treatment plans;

b. Jordan Cove and Pacific Connector each file with the Secretary comments on the reports and plans from [SHPO], appropriate land management agencies, and interested Indian tribes;

c. The [ACHP] has been afforded an opportunity to comment, and a Memorandum of Agreement has been executed; and

d. The Commission staff reviews and the Director of Office of Energy Projects (OEP) approves the cultural resource reports and plans, and notifies Jordan Cove and Pacific Connector in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed”.

Thus, this condition requires certain action to be taken prior to construction of the proposed pipeline. Ms. Coyote faults Pacific Connector for not completing the tasks set forth in the condition, as follows:

These deficiencies are specifically as follows:

1. Re-routing of the pipeline in the Fairview Area to avoid two known sites 35CS225 and 35CS226 that will be impacted by the pipeline (FEIS 4.10-9).

2. Failure of draft unanticipated discovery plan to correctly identify state law process, address monitoring of ground disturbing activities adequately, or identify the role of the Confederated Tribes, and no requirement that the Project make use of the State-Tribal Inadvertent Discovery Plan.

3. Although the cultural resource surveys in the Haynes Inlet have been conducted, Pacific Connector has not provided with [sic] the Confederated Tribes with a rerouting plan to avoid the newly discovered archaeological sites.

4. Lack of cultural resources surveys and testing at the crossings at Kentuck and Willanch Sloughs.

5. Further archaeological investigation including trenching below the dredge fill at Graveyard Point.

7. The lack of an MOA outlining future consultation responsibilities or any other aspect of cultural resource protection.

While it is understandable that the tribes may be concerned that their issues could get lost in the shuffle, so to speak, it seems premature to criticize the applicant at this point in time for any failures to comply with FERC Condition 17. The applicant is a long way away from starting construction, and it seems that most, if not all, of the issues germane to CBEMP Policy #18 will get worked out as a part of the process of satisfying FERC Condition 17. By making FERC’s condition a requirement for this approval, the County can assume a supervisory role as well.

In her letter dated June 10, 2010, Jody McCaffree states the following:

Since dredging by Pacific Connector Gas Pipeline could impact unknown burial sites among other Archeological impacts that may yet be discovered in the area of the proposed pipeline route, it is the duty of the Hearings Officer and Commissioners to deny this permit application until the issues and concerns of the Tribe have all been resolved.

Id. at p. 29. However, given the Board’s prior interpretation, Ms. McCaffree’s suggested resolution makes no sense. As interpreted by the Board, CBEMP Policy #18 and CCZLDO §3.2.700 set forth processes that are to be undertaken after CUP approval is obtained. The Board finds that it is feasible for the applicant to fulfill the FERC conditions and to undertake the analysis required by CBEMP Policy #18 and CCZLDO §3.2.700. While it may be that this analysis will lead to further revisions and modifications to the route and/or other aspects of the proposal, that is a factual matter that will develop with time.

In any event, the applicant proposed a condition of approval on this issue which is essentially the same as the condition on this issue added to the LNG terminal approval. Staff proposed a condition of approval on this issue as well. The Hearings Officer recommended approving the applications, subject to both the applicant-proposed and staff-proposed conditions. The Board reviewed the Hearings Officer's recommendation and discovered minor variations between the language of the applicant-proposed and staff-proposed conditions. Prior to the deliberations in this matter, County staff submitted a staff report recommending that the Board accept the applicant's condition and delete the staff condition. At the deliberations in this matter, the Planning Director further advised the Board that the staff-proposed condition should be tweaked to reflect that the applicant would not be required to obtain approval of septic permits or a plot plan for the pipeline. Accordingly, the Board strikes the staff-proposed condition on this subject and instead adopts the applicant’s proposed condition of approval as Condition of Approval B.24 to read as follows:

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Historical, Cultural and Archaeological.

At least 90 days prior to issuance of a zoning compliance letter under CCZLDO Section 3.1.200, the County Planning Department shall make initial contact with the affected Tribe(s) regarding the determination of whether any archaeological sites exist within the CBEMP areas proposed for development, consistent with the provisions of CCZLDO Section 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of CCZLDO Section 3.2.700, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources have been identified, the County may approve and issue the requested zoning compliance letter and related development proposal; (2) if the Tribe(s) and the applicant reach agreement regarding the measures needed to protect the identified resources, the development can be approved with any additional measures the County believes are necessary to protect those resources; or (3) if the County finds that there will be adverse impacts to identified CBEMP Policy #18 resources on the site and the applicant and the Tribe(s) have not reached agreement regarding protection of such resources, then the County Board of Commissioners shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archaeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of Section 5.8.200 of the CCZLDO with the Board of Commissioners serving as the Hearings Body.

The Board finds that imposing this condition of approval addresses the opponents' concerns.

B. Multiple Approval Standards Related to Specific Zones

1. Rural Residential RR-2 and RR-5 Zones.

The staff report notes that the proposed pipeline crosses a total of approximately 0.37 of a mile of private property zoned Rural Residential - 5 (RR-5), and approximately 0.10 of a mile of private property zoned Residential Rural - 2 (RR-2). According to the applicant, the pipeline crosses five RR-5 zoned areas from MPs 10.15 to 10.25, 11.94 to 12.04, 12.47 to 12.49, 14.22 to 14.28, and 22.59 to 22.71. From MPs 4.17 to 4.22 and 10.12 to 10.15, the pipeline crosses property zoned RR-2. All of the RR-5 and RR-2 zoned lands crossed are private.

The applicable code provision is CCZLDO §4.2.900 (7), which provides as follows:

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SECTION 4.2.900.7 – The use must be found compatible with surrounding uses or may be made compatible through the imposition of conditions.

The County has interpreted this standard to mean that the proposed use "is capable of existing together with surrounding uses without discord or disharmony." That formulation was upheld as falling within the permissible range of interpretations under ORS 197.829(1). *Clark v. Coos County*, 53 Or LUBA 325 (2007). In *Clark*, LUBA also upheld the County's conclusion that the "compatibility" requirement of CCZLDO 4.2.900(7) only applies to existing uses, and not to future or potential uses or additions to residential property. *Id.* at 330.

Compatibility standards of this sort are extremely subjective in nature. *Corbett/ Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601, 617 (1993); *Knight v. City of Eugene*, 41 Or LUBA 279 (2002). As LUBA has noted, “[i]ndividual perceptions may widely diverge about whether a proposed development will be compatible with the existing setting or the type and scale of development envisioned in planning documents. The term is flexible and, therefore, an imperfect standard for judging the acceptability of proposed development” *See Marineau v. City of Bandon*, 15 Or LUBA 375 (1987).

Given the deferential scope of review LUBA and the Courts apply to a governing body's code interpretations under ORS 197.829(1); *Church v. Grant County*, 187 Or App 518, 525, 69 P3d 759 (2003) and *Stiporen v. Medford*, 231 Or App 585, 220 P3d 427 (2009), *rev allowed* 348 Or 19 (2010), the Board has a fairly wide degree of latitude on this issue. However, LUBA has cautioned, in a pre-*Clark* case, that it is not proper to, in effect, balance the need for the land use against the potential harm to surrounding uses. *See Vincent v. Benton County*, 5 Or LUBA 266 (1982). Whether that holding survives *Clark* and ORS 197.829(1) is unclear, but in all likelihood, it does not.

Nonetheless, by defining the proposed use as a “conditional use” in the zone, there has already been a legislative determination that gas pipelines are not *per se* incompatible with rural residential uses. Were that not the case, then gas pipeline uses would be considered to be a prohibited use in the zone. Thus, the issue becomes whether the proposed pipeline creates specific incompatibility issues with the uses that currently exist in the surrounding areas.

The term “surrounding uses” is not defined in the CCZLDO. No party attempts to assert that analysis of any particular geographical area is required. The applicant seems to have attempted to define the “surrounding area” via its maps and aerial photographs. The applicant's analysis focuses on all structures within 100 feet of edge of the corridor, the temporary work areas and uncleared storage areas. The Board finds that the applicant’s maps and aerial photos included with the June 17, 2010 letter from Mr. Gregory are adequate to define the “surrounding area,” and accepts the 100 foot limit as acceptably defining the limit of possible impacts.

WELC and other opponents argue that the pipeline should not be allowed in the Rural Residential zones because the applicant has failed to identify nearby uses with sufficient specificity, and therefore the county cannot make the "compatibility" determination required.
under CCZLDO 4.2.900(7). See Letter from WELC staff attorney Jan Wilson, dated June 8, 2010 at p. 7. Also, WELC contends that the applicant has not provided sufficient detail regarding mitigation measures that would be employed to ensure compatibility with rural residential uses. See Letter from WELC staff attorney Jan Wilson, dated June 8, 2010, at p. 7.

As the applicant notes, WELC does not present any evidence of its own suggesting that a particular segment of pipe is not compatible with an existing use in the rural residential zones. Rather, WELC’s focus seems to be on the argument that the applicant’s evidence is per se insufficient to meet its threshold burden of proof, even in the absence of any evidence to the contrary. In this regard, WELC is correct that the applicant has the burden of proof to

19 The June 10, 2010 letter from WELC states:

“The application narrative says that the surrounding uses include “residential uses, pasture land, and forest operations.” This list is too vague as to which uses are where and how close to the pipeline and what, exactly, is being done on the property. For example, a “residential use” could include a backyard children’s play area or garden beds or a residential septic field – all things that may be impacted in a variety of ways. Without knowing what uses – specifically – are on each of the specific properties, it is impossible for the hearings body to make the required finding of “compatibility.”

Further, the applicant makes general assertions of minimization and mitigation, without detailing what would be done where, so that those things can be incorporated into the conditions of approval, as required by CCZLDO 4.2.900(7). What does the applicant mean when it says that it would engage in “appropriate” measures to protect homes and structures during pipeline construction and that it would restore disturbed areas “as closely as possible” to preconstruction condition? For example, where the pipeline crosses pasture land, would gates be installed in existing pasture fence, or would fences be moved, or would livestock (or pets) be merely excluded from the pipeline right-of-way (presumably with appropriate monetary compensation for the loss of pasture land)? By quoting Condition 43 of the FERC order, does the applicant mean to request that the same condition of approval be incorporated into the county’s decision and also to assert that the condition is adequate to make the pipeline compatible with surrounding uses? By including the Groundwater Supply Monitoring and Mitigation Plan, which itself is vague about exactly what wells, springs, and seeps are near the proposed pipeline route, does the applicant mean to have those determinations made part of the conditions of approval?

Under recent and current Oregon law, as interpreted by LUBA and the Court of Appeals, where an approval criteria specifically requires a finding – such as the requirement of a finding of compatibility with surrounding uses, in this case – the decision can not merely defer and delay determination of the relevant finding until the applicant gets around to providing the factual data necessary to make the finding. Instead, in order to defer a finding such as the “compatibility” finding required here, the county must find (a) that it is feasible for the applicant to satisfy the criteria and (b) that the later process, where the finding is actually made, offers the same level of public review and participation as the original proceeding. In this case, the applicant has not provided the data necessary to make a “compatibility” finding, has not even provided enough data to make it possible to determine that satisfying the compatibility requirement is even feasible, and has made no suggestion about any future process that would allow that determination to be made with the same level of public participation as this current process.

Thus, lacking adequate information to make the required finding, the county should deny the application.”

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demonstrate compliance with an approval criterion, but as discussed, below, the applicant has met its burden.

WELC states that a “residential use could include a backyard children’s play area or garden beds or a residential septic field – all things that may be impacted in a variety of ways,” but then does not describe any of those alleged ways. It is not intuitive to the Board how an underground pipe in normal operation 50 to a 100 feet away from a “backyard children’s play area” or a “septic drainfield” could impact those uses. The only obvious potential impact would be those resulting from a leak or an explosion, which is discussed below. Nonetheless, with regard to septic drain fields, the FERC conditions require the applicant to file a plan with the Secretary “outlining measures that should be implemented to mitigate pipeline construction impacts on domestic water supply systems and septic systems.” See FERC Condition No. 43. The Hearings Officer found that it is feasible for the applicant to demonstrate compliance and recommended that the FERC condition be applied here. The Board agrees and adopts Condition of Approval A.8 to read as follows:

"To protect residences and structures, evidence of compliance with FERC's Certificate Order, Condition #43 must be provided prior to issuance of zoning clearance."

The April 14, 2010 application narrative, at pages 22-23, provides a description of why the pipeline is compatible with surrounding rural residential uses. Notably, as a sub-surface facility, the pipeline creates no real “compatibility” issues other than (1) temporary disturbances during construction, and (2) restricting the landowner from building new structures on top of the pipeline right-of-way.

The applicant has provided detailed information regarding compatibility and mitigation measures with existing residential uses in correspondence from Rodney Gregory and Derrick Welling on Williams Pipeline letterhead, dated May 11, 2010. The May 11, 2010 correspondence also provided two pages of detailed information regarding location of the pipeline in relation to existing residential structures, and also identified measures that will be taken to minimize and mitigate impacts on residential uses. See Williams Pipeline May 11, 2010 letter at p. 18-9.

Therein the applicant stated:

Within RR-5 zoned lands near MP 14.25, there are two residences within 100 feet of the construction area. There are also several structures within RR-5 zoned lands within 100 feet of the construction area. Within RR-2 zoned lands, there are no residences within 100 feet of the construction area; however, there are several structures located within 100 feet of the construction area. The structures are shown on the Environmental Alignment Sheets provided in Exhibit 1 to the application narrative.

Pacific Connector will undertake specific measures to ensure safety and mitigate impacts on residential uses and structures.
including the following: (1) installation of orange safety fence between the construction right-of-way and the residence; (2) avoiding removal of trees and landscaping wherever possible; (3) restoring all lawn areas and landscaping within the construction right-of-way consistent with the requirements of FERC's upland plan; (4) maintaining access to residences at all times during construction; (5) providing alternative sewer facilities if septic systems are disturbed during construction, including repairing and restoring such systems if necessary.

Consistent with the above, the principal method for mitigating impacts to existing residential areas will be to ensure that the construction proceeds quickly through such areas (thus minimizing exposure to nuisance effects, such as noise and dust) and limiting the hours of operations that high-decibel noise levels can be conducted. Landowners will be notified prior to construction and access and traffic flows will be maintained during construction activities, particularly for emergency vehicles. Pacific Connector has developed and will implement Landowner Complaint Resolution Procedures.

Dust minimization techniques such as watering will be used on-site and all litter and debris will be removed daily from the construction site. Pacific Connector will comply with all local noise ordinances. Pacific Connector does not currently plan to work on Sundays. However, certain activities, such as waterbody crossing construction and hydrotesting, may require a 24-hour work schedule. Pacific Connector will attempt to schedule activities during normal working hours.

After project construction, landowners affected by the project will have use of the right-of-way, provided it does not interfere with the easement rights granted to Pacific Connector for construction and operation of the pipeline system.

Mature trees, vegetation screens and landscaping will be preserved to the extent possible while ensuring the safe operation of construction equipment. Landowners will be compensated for removal of trees. Immediately after backfilling the trench and weather permitting, all lawn areas and landscaping within the construction work area will be restored. Permanent structures will not be permitted on the permanent right-of-way, including houses, tool sheds, garages, poles, guy wires, catch basins, swimming pools, trailers, leaching fields, septic tanks, or any other objects not easily removed; nor in general is grading or removal of cover allowed without Pacific Connector’s involvement. Pacific
Connector will compensate landowners for damage to homes if the damage is caused by pipeline construction. Depending on the specific circumstances, Pacific Connector may choose to relocate residents during construction activities. Arrangements will be determined through negotiations between the landowner and Pacific Connector's Land Representative prior to construction.

Within 50 feet of a residence, the edge of the construction work area will be fenced for a distance of 100 feet on either side to ensure that construction equipment and materials, including the spoil pile, remain within the construction work area. Fencing will be maintained, at a minimum, throughout the open trench phases of pipeline installation. Where feasible, Pacific Connector has reduced the construction right-of-way near residences and placed temporary work areas as far as practicable from the residences. Pacific Connector will also limit the period of time the trench remains open prior to backfilling.

WELC does not specifically take issue with these findings.

Regarding WELC's argument concerning lack of sufficient information about nearby uses, it is not clear what additional information WELC believes is necessary to make the necessary determination about compatibility. The applicant has identified the specific locations of all residential structures on the alignment sheets attached to the April 14, 2010 application narrative as Exhibit 1. The applicant also provided correspondence dated June 17, 2010 from Rodney Gregory of Pacific Connector (attached as Exhibit 8 to the applicant's June 17, 2010 record submittal), providing further information regarding the compatibility issue and enclosing the following additional materials:

1. A table that identifies all structures located within 100 feet of the proposed pipeline corridor, or any TEWA or UCSA. Properties are identified by milepost, ownership, zoning, land use type, and the distance of each structure on the property from the corridor, TEWA or UCSA.

2. Close-up version of the aerial photo alignment sheets for the properties identified in the above-referenced table, showing all structures within 100 feet of any portion of the project and identifying their precise distance from the project.

The Board reviewed the information in the application, as set forth above, and concludes that this information constitutes substantial evidence that an underground natural gas pipeline is capable of existing together with surrounding rural residential zone uses without discord or disharmony. Once built, the pipeline itself will be underground and will not create noise, dust, vibration, or other impacts. The use will only generate traffic during inspections and periodic maintenance. The pipeline will not impair views or obstruct access to solar energy. The pipeline will not be a visual blight. The 30 foot corridor will remain clear of trees, shrubs, and similar vegetation, but that is not far removed from what happens when roads are built, and there is no suggestion that road are incompatible with rural residential uses. As discussed elsewhere, there is some potential

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that the corridor will be used by off-road vehicles, but that possibility will be minimized with the appropriate condition of approval.

The only potential impacts are construction related, and all construction creates some temporary impacts – regardless of the proposed use under consideration. A review of LUBA case law reveals that compatibility analysis typically does not focus on temporary construction-related impacts of that sort. However, even to the extent that the criterion is focused on those types of temporary construction impacts, the code allows uses that might be incompatible to be “made compatible through the imposition of conditions.” CCZDO 4.2.900(7) As the testimony of the applicant makes clear, it is feasible for a pipeline to be constructed in a manner that is compatible with neighboring residences, and the FERC conditions will ensure compatibility during construction.

The biggest potential compatibility concern stems from the property shown on Drawing No., 3430.33-X-9007. (MP 13.8 to MP 14.4). On the drawing (aerial photograph), that property is listed as the “Ketchum residence,” but the table accompanying Mr. Gregory’s June 17, 2010 letter shows the property as being owned by “Robert G. Scoville.” In any event, that property has two residential structures that are 2.5 feet and 5.7 feet from the edge of the construction easement, and even that is somewhat misleading since it appears that the easement was reduced in width at that location to avoid those structures. The FERC condition of approval appears to provide a remedy for this particular landowner, as it requires “evidence of landowner concurrence if the construction work area and fencing would be located within 10 feet of a residence.” Presumably, this consent requirement gives the landowner a high degree of negotiation leverage in the event the applicant does go this route. The applicant has testified that it has latitude under FERC’s Order to make minor adjustments to the route of the pipeline. The Hearings Officer recommended a condition of approval requiring the pipeline to be rerouted to avoid the residence shown on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4).

The Board finds that the Hearings Officer’s recommended condition may have misstated the name of the landowner as well as the direction the pipeline would need to be relocated in order to minimize impacts to the residence in question. Moreover, the Board finds the recommended condition may actually reduce the applicant’s flexibility to respond to the landowner’s concerns. Finally, the Board finds that the proposed condition is too narrow in scope and should apply to all landowners along the pipeline alignment. Accordingly, the Board modifies and adopts the condition as Condition of Approval A.4 to read as follows:

"The pipeline will be rerouted, where feasible, in order to avoid impacts to the property identified on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4). If requested, the applicant shall work with affected property owners within the pipeline’s alignment to make minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands’ pursuant to FERC Order Condition #6 in order to avoid or minimize impacts to structures or the owner’s use of the property."

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30 From the aerial photographs, the structures appear to a dwelling and a detached garage.

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In looking at the remainder of the aerial photographs and maps, it appears there is sufficient distance between the actual location of the pipeline and nearby residences to ensure co-existence without “discord or disharmony.”

There is quite a bit of evidence in the record suggesting that gas pipelines occasionally explode, causing destruction to property and occasionally even injury and death to humans. See Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. For example, a natural gas pipe explosion in Carlsbad, New Mexico killed eleven people on August 19, 2000. Id. The argument advanced by the opponents seems to be that any utility has the potential to cause death and injury is per se incompatible with rural residential uses. However, the Board has already determined that the proposed use is a conditional use in the zone, and therefore this type of “per se” incompatibility argument is a collateral attack on the legislative enactment of the code.

Moreover, it is difficult to rely on anecdotal evidence as a basis to conclude incompatibility. For example, most of the incidents cited by opponents involve older pipes with deferred maintenance issues. See Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. The applicant has testified that the newer designed pipes have more built-in safety features and use better materials, and are less likely to have the same type of maintenance issues as experienced with older pipes. As a decision-maker in a land use hearing, one cannot simply speculate that the applicant will fail to maintain his equipment or that it will not follow federal safety and inspection requirements, particularly based on anecdotal evidence of past events, often associated with unrelated actors. See Champion v. City of Portland, 28 Or LUBA 618 (1995) (“Illegal acts, such as those alleged by petitioner, might provide the basis for a code enforcement proceeding. However, petitioner fails to show that the alleged illegal activity by the applicants is relevant to any legal standard applicable to the approvals granted by the city in the decision challenged in this appeal.”); Canfield v. Lane County, 16 Or LUBA 951, 961 (1988) (“Petitioner's view that the conditions will be violated is speculation . We do not believe the county is obliged to assume future violations of the condition.”).

Moreover, even if one assumes that a future accident will happen, it does not follow that occasional loss of life and property damage from accidents necessarily means that the gas pipeline utility use is not compatible with residential use. Obviously, if an explosion occurred, it would cause “discord or disharmony.” However, the evidence in the record shows that the potential for an explosion at any one particular location is statistically very low, perhaps akin to the odds of a person getting hit by lightning. For example, the publication entitled “Out of Sight Out of Mind No More” was published in 2000, and documents less than 200 oil and gas pipeline deaths over the period from 1984-1999. See Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. The Board finds that the small potential for an accidental explosion does not form a basis to conclude that the pipeline is not “compatible” with any particular surrounding use.

Finally, the Board finds that the risk of an accident causing the pipeline is no greater than the risk of any other life-threatening accident, such as an electrical house fire, electrocution,
a tree fall, etc. We live in a modern society that demands certain conveniences, such as running water, electricity, natural gas, and automobiles. It is simply not possible to completely avoid the risk of death or injury to humans resulting from the provision of such systems. The allowance of automobile use, for example, is virtually guaranteed to kill tens of thousands of Americans every year, despite laws that demand reasonable and safe operation of these automobiles, and vigorous enforcement of such laws. And yet, despite the carnage caused by cars, is there any question that cars are "compatible" with residential areas, rural or otherwise? Is there any movement to bar cars on the grounds that human life will be saved? No, of course not. Similarly, all Americans take on a certain degree of risk of harm or death by having gas and electricity in their homes; and yet electrical and gas appliances and furnaces are still considered to be "compatible" with residential uses. Indeed, they are necessary for modern residential use. The bottom line is the risk of harm to life and property here is miniscule, and is far outweighed by the benefits to society. Therefore, public utility uses such as gas pipelines are compatible with residential uses despite the incidental risks associated therewith.

In closing on this issue, the application narrative also notes the following condition of approval being required by FERC that will ensure future compatibility with residential property:

"43. Prior to pipeline construction, Pacific Connector shall file with the Secretary, for the review and written approval of the Director of OEP:

a. The results of a civil survey of the entire pipeline route that identifies all residences and commercial structures within 50 feet of the construction right-of-way;

b. A plan outlining measures that should be implemented to mitigate pipeline construction impacts on domestic water supply systems and septic systems; and

c. For any residence closer than 25 feet to the construction work area, a site-specific plan that includes:

(1) A description of construction techniques to be used (such as reduced pipeline separation, centerline adjustment, use of stove-pipe or drag-section techniques, working over existing pipelines, pipeline crossover, bore, etc.), and a dimensioned site plan that shows:

(i) the location of the residence in relation to the pipeline;
(ii) the edge of the construction work area;
(iii) the edge of the new permanent right-of-way; and
(iv) other nearby residences, structures, roads, or waterbodies.

(2) A description of how Pacific Connector would ensure the trench is not excavated until the pipe is ready for installation and the trench is backfilled immediately after pipe installation; and

(3) Evidence of landowner concurrence if the construction work area and fencing would be located within 10 feet of a residence."

The Hearings Officer recommended that the County impose a substantively identical condition. The Board agrees and adopts Condition of Approval A.8 for this purpose.

Testimony presented at the hearing, expressed concern about the possibility that the gas

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pipeline will affect shallow rural wells and water supplies. It is not readily apparent or intuitive that a natural gas pipeline will have any effect on water supplies. Without more focused testimony and supporting evidence, the Hearings Officer did not give speculative testimony such as this any credence.\(^{21}\) The Board sees no reason to do so either. As discussed above, FERC Condition 43 addresses this issue.

2. **Industrial Zone (IND)**

The proposed pipeline will cross approximately 0.07 mile of IND zoned property adjacent to Jordan Cove. According to staff, the site was previously impacted by industrial use (Weyerhaeuser yard).

The applicant has requested a consistency determination of the permitted nature of the use in the IND zone.

CCZLDO §4.1.100 sets forth the purposes of the Industrial (IND) zone:

The purpose of the “IND” district is to provide an adequate land base necessary to meet industrial growth needs and to encourage diversification of the area’s economy accordingly. The “IND” district may be located without respect to Urban Growth Boundaries, as consistent with the Comprehensive Plan. The “IND” designation is appropriate for industrial parcels that are needed for development prior to the year 2000, as consistent with the Comprehensive Plan.

CCZLDO §4.6.610 states that a “site plan review” is required for all uses in the IND zone. The term “use” is defined in a manner that includes “facilities.” The term “utility” is defined in a manner that encompasses “facilities.” Therefore, a utility is a “use.” However, a “utility facility not including power for public sale” is a permitted use pursuant to Section 4.2.600 and Table 4.2-e. The Board finds that the proposed gas pipeline is a “utility facility not including power for public sale” within the meaning of CCZLDO §2.1.200, and that it is an outright permitted use in the IND zone.

Staff states that “the pipeline will be located beneath the surface of the site and is a necessary component of the previously approved LNG facility.” Therefore, staff asserts that further site plan review is not necessary.

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\(^{21}\) The hearings officer is mindful of the fact that lay-person testimony can, under the right set of facts, undermine contradictory expert testimony. See *Johns v. City of Lincoln City*, 35 Or LUBA 421, 428 (1999); *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999). However, under this set of facts, no reasonable decision-maker would accept the vague and unsubstantiated opinions of lay persons that the pipeline will harm wells, particularly when the applicant’s experts concluded that no such harm will result. To constitute substantial evidence sufficient to overcome such expert testimony, the opponents would need to support their conclusions and opinions with some sort of actual collaborating evidence or facts, and not just rely on an unsubstantiated, self-serving opinions.

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WELC and Jody McCaffree take issue with the staff report’s conclusions. In a letter dated June 8, 2010, WELC’s staff attorney states:

CCZLDO §4.4.610 requires site plan review for “all” uses in the Industrial (IND) zoning district. Development proposed for the IND zones includes not only the pipeline itself but also temporary construction areas. The applicant has not applied for site plan review for these development activities, and thus the pipeline cannot be approved in the IND zones until the site plan review is completed. A condition of approval may be an appropriate way to ensure compliance with the code requirement for site plan review.

The applicant responds to these assertions in its letter dated June 24, 2010, as follows:

[Re]quiring a site plan review for a subsurface pipeline crossing of a portion of the Industrial zone would be inappropriate for several reasons. First, Section 5.6.400 indicates that the related development standards are intended to address a traditional "development of a site and building plans," which is obviously not implicated by the installation of a subsurface gas pipeline. Farther, the standards of the section largely apply to structures and other types of above-surface improvements, which also cannot be applied to a subsurface pipeline. As discussed above in Section 5 of this letter, the pipeline is not a "structure" under the county code definition. Finally, the applicant submits that the only relevant standard in Article 5.6 is the Threshold Standard in Section 5.6.5003 [sic] which provides, in pertinent part, that "The Planning Director, at his discretion, may waive part or all of the site plan requirements including fees, if, in the Director's judgment, the proposed development is de minimis in extent to the existing development." This section allows the county discretion to find that the provisions of Article 5.6 are inapplicable because they were not intended to address a subsurface gas pipeline.

WELC is correct that the CCZLDO would typically require a site plan review for this site prior to development. Specifically, CCZLDO §5.6.300 states that “[w]ithin any zone designation requiring a site plan review, no building permit or verification letter shall be issued for the erection or construction of a permitted or conditional use until the plans, drawings, sketches and other documents required under Section 5.6.500 have been approved by the Planning Director in conformity with the criteria specified in Section 5.6.400.” (emphasis added). Notwithstanding this general requirement, CCZLDO §5.6.500(3) authorizes the Planning Director to waive the site plan requirement. This provision states: "The Planning Director, at [her] discretion, may waive part or all of the site plan requirements including fees, if, in the Director’s judgement [sic], the proposed development is diminimus [sic] in extent to the existing development."

The Hearings Officer found that nothing would be accomplished by requiring a “site plan

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review” of an underground gas pipeline across an old Weyerhaeuser yard. Further, the Board finds that the development standards of CCZLDO §5.6.400 are intended to apply to structures and other types of above surface improvements, and are not applicable to subsurface pipelines and their ancillary facilities, including temporary construction areas. Further, as conditioned, any adverse effects caused by the construction and operation of the pipeline on existing development will be fully mitigated. Accordingly, the pipeline will necessarily be *de minimis* in nature to existing development in this zoning district. The Board finds that the authority delegated by the Board to the Director under CCZLDO §5.6.500(3) also necessarily applies to the Board. The Board finds that the site plan requirements of this section are not applicable to the pipeline and its ancillary facilities, including temporary construction areas.

3. Coos Bay Estuary Management Plan (CBEMP)

The PCGP will cross through 15 CBEMP zoning districts. Compliance with the standards and policies applicable in those districts is addressed in the following documents submitted by the applicant in this proceeding:

- The application narrative dated April 14, 2010, at pages 26-50;
- Correspondence dated May 17, 2010 from Randy Miller of Pacific Connector, specifically addressing compliance with standards in CBEMP aquatic districts;
- Correspondence dated June 9, 2010 from Robert Ellis, Ph.D., of Ellis Ecological Services (the "Ellis Report"), and correspondence from Robert Ellis dated June 17, 2010, also addressing concerns about project impacts in CBEMP aquatic districts; and
- Correspondence dated June 17, 2010 from Derrick Welling of Pacific Connector, addressing compliance with standards for upland CBEMP districts.

**CCZLDO Section 4.5.100.**

Some opponents raised CCZLDO 4.5.100 as a potentially applicable approval standard. It is a purpose statement stating general objectives, not an approval criterion. *Standard Insurance Co. v. Washington County*, 16 Or LUBA 30, 34 (1987) (descriptions of characteristics of a zoning district are not approval criteria); *Bennett v. City of Dallas*, 17 Or LUBA 456, aff’d, 96 Or App 645 (1989); *Slotter v.City of Eugene*, 18 Or LUBA 135, 137 (1989); *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990) (Purpose statement stating general objectives only is not an approval criterion. Section 4.5.150 How To Use This Article). This Section contains specific language that implements the CBEMP. The main purpose is to clearly stipulate where, and under what circumstances, development may occur.

**CCZLDO Section 4.5.150.**

Section 4.5.150(5)(a) states that the Management Objective provides general policy guidance regarding the uses that are, or may be allowed in the district. Section 4.5.150(5)(b)
states that to determine whether and under what circumstances a use is allowable certain symbols
denote whether the use is permitted or allowed subject to conditional use review. The symbol
“P” means the use or activity is permitted outright subject only to the management objective.
The symbol “G” indicates the use may be allowed subject to “General Conditions” which
provide a convenient cross-reference to applicable CBEMP Policies.

As discussed elsewhere in this decision, the proposed natural gas pipeline is considered to
be a “low-intensity” utility facility under the Code. Low-intensity utilities are listed as “P-G” in
all of the CBEMP zones where the pipeline will be located, which are identified and discussed
below. Also, for each of the CBEMP zones, the applicable “General Conditions” are identified.
The applicable CBEMP Policies are addressed separately in this decision.

a. 6-Water-Dependent Development Shorelands (6-WD):

The 6-WD zoning district is a former industrial log yard, which will be the site of the
Jordan Cove LNG terminal. The upland LNG terminal and all of its associated facilities and
accessory uses, including the first segment of the pipeline, were approved in the 6-WD district as
part of the Coos County Board of Commissioners decision dated December 5, 2007, and
subsequent decision on remand from LUBA on August 21, 2009.22

Section 4.5.275 Management Objective: This district shall be managed so as to protect
the shoreline for water-dependent uses in support of the water-related and non-
dependent, nonrelated industrial use of the area further inland. To assure that the district
shoreline is protected for water-dependent uses while still allowing non-water-dependent
uses of the inland portion of the property (outside of the Coastal Shoreland Boundary),
any new proposed use of the property must be found by the Board of County
Commissioners (or their designee) to be located in such a manner that it does not inhibit
or preclude water-dependent uses of the shoreline. Further, use of wetlands in the district
must be consistent with state and federal wetland permit requirements.

Section 4.5.276(A)(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27,
30, 49, 50, and 51.

Citizens Against LNG makes the following comments regarding this site:

The proposed Pacific Connector pipeline route will cut through
prime Industrial waterfront shoreline property making the property
limited for future development. No structures can be built over the
pipeline or in the easement areas. The Port has expressed concerns
about this,23 which was noted in the recent Pacific Connector

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22 On December 5, 2007, the Coos County Board of Commissioners adopted Order No. 07-11-289PL
approving County File No. HBCU-07-04 regarding JCEP’s proposed LNG import terminal as a water-dependent
industrial and port facility, with the import terminal described in the decision to consist of upland facilities for LNG
importation, processing, energy generation and transhipment into the interstate gas pipeline.

23 Pacific Connector Clean Water Joint Permit - Appendix I - Wetland Mitigation PCGP - page 4:

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401/404-permit application to Army Corps, DEQ and DSL. (See Exhibit P) The pipeline will also impact the shoreline area of Jordan Cove itself; impacting resource and development areas there as well. Impacts to protected Wetlands and Archeological sites noted on Coos Counties Shoreland Values Requiring Mandatory Protection Map will also occur in Jordan Cove, clearly violating the zoning requirements in this district. (See Exhibit B) Alternative Pipeline Routes that would have gone towards the North first instead of going directly East along the shoreline of the Coos Bay Estuary were never considered or analyzed by the Pacific Connector as indicated by their map of alternative routes. (See Exhibit A-1)

This would have not only avoided impacts to future water dependant industrial development in this area, but also would not have been so impacting to the estuary. By using this more northerly route, most of the Pacific Connector right of way west of I-5 would cross property owned by Weyerhaeuser Corporation – which has supported the LNG development and would benefit from the sale of its North Spit property. The more northerly route would also avoid impacts to Rural Residential and EFU lands in Coos County. (See Exhibit A-1 & A-2)

See letter from Jody McCaffree, dated June 190, 2010, at p. 6. These type of “alternative route” are within the province of FERC, not the County. Nonetheless, the applicant responds as follows:

[I]ntallation of the pipeline as a component of the approved LNG terminal will cause only temporary disturbance within the 6-WD zoning district. Pacific Connector has coordinated with Weyerhaeuser and Roseburg Forest Products to ensure that the pipeline location would not impede their existing or planned, future water-dependent uses or non-water-dependent uses or non-dependent, non-related industrial uses of the area further inland. Pacific Connector will obtain a 50-foot permanent right-of-way for the pipeline from landowners, and permanently engineered structures will not be allowed within the permanent right-of-way. However, once the pipeline is constructed and in operation, most water-dependent uses may proceed as they did prior to the pipeline.

"...The WC-1A-2A alignment modification on the north spit between approximately MP’s 0.9 and 2.4 basically follows the original land route. Pacific Connector consulted with Clausen Oysters as well as the Port of Coos Bay about the modification to the WC-1A route variation. Although the WC-1A-2A is superior compared to WC-1A in avoiding direct effects to the oyster beds, Clausen Oysters have expressed concerns with the potential construction/turbidity impacts of this route variation including WC-1A when compared to Pacific Connector’s Proposed Route in the Bay that was filed in the FERC Certificate application. The Port of Coos Bay also indicated that WC-1A-2A would cross more areas that are within the Port’s future development plans than the original WC-1A route.

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installation. Furthermore, the beginning location of the pipeline is
determined by the location of the LNG Terminal, which was
approved by Coos County as an accessory component to the
primary water-dependent port and industrial use. Pacific
Connector has applied for state and federal wetland permits and
will comply with all state and federal requirements.

Given both the coordination that has occurred between the applicant and Weyerhaeuser, and the
distinct lack of objection from Weyerhaeuser in this proceeding, the Board finds that the
proposed pipeline is not inconsistent with the management objective of the 6-WD zone.

The management objective is met.

b. 7-Development Shorelands (7-D)

The pipeline crosses the 7-D zoning district from MPs 0.97 R to 1.15 R and from MPs
1.22 R to 1.65 R. This section is privately owned by Weyerhaeuser Company. Section
4.5.286(A)(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 49, 50,
and 5.

Pacific Connector would utilize the Roseburg Dock and the Weyerhaeuser Cove pipe
storage and contractor yards during construction, which are partially zoned 7D. As described
above, Roseburg Dock is a former industrial log yard, and the Weyerhaeuser Cove area is an old
industrial site, half of which is paved.

Section 4.5.285 Management Objective: This shoreland district, which borders a
natural aquatic area, shall be managed for industrial use. Continuation of and expansion
of existing nonwater-dependent/non-water-related industrial uses shall be allowed
provided that this use does not adversely impact Natural Aquatic District #7. In addition,
development shall not conflict with state and federal requirements for the wetlands
located in the northwest portion of this district.

Installation of the pipeline is consistent with the objective to manage the area for
industrial use. The pipeline will be constructed using a stove pipe technique along the existing
dirt service road on the Weyerhaeuser property that runs east-west just north of the Jordan Cove.
This technique is being proposed to install the pipeline within the existing footprint of the road in
order to avoid a known Point Reyes bird's-beak plant community, designated as a State
Endangered Species, that borders the Jordan Cove shoreline as well as surveyed archeological
sites located along the north and west shores of the Jordan Cove. The service road and all
temporary extra work areas (TEWAs) would be reclaimed following installation of the pipeline
within this district. Neither construction of the pipeline nor the permanent right-of-way will
cross the 7-D district; therefore, there will be no direct impacts to 7-NA. To avoid indirect
impacts, Pacific Connector will implement the ECRP throughout construction and restoration,
which details the best management practices that will be installed to contain all project
disturbance within the FERC-certificated boundaries (i.e., the construction right-of-way and
TEWAs). Where the southern boundary of TEWA 1.19-N is adjacent to 7-NA, Pacific

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Connector will install silt fencing to ensure that there is no off-site sedimentation or impact to 7-NA. Pacific Connector has applied for the necessary state and federal wetland permits and will comply with all state and federal requirements (see response to Policy #17 for consistency with significant wildlife habitat requirements).

In addition to the foregoing, the above-referenced Ellis Report provides the following testimony regarding compliance with the 7-D management objectives:

"As outlined above, zone 7-D will be used as a temporary construction yard. Construction in the 7-D zone would be required to comply with a DEQ 1200-C Construction Stormwater Permit, which includes requirements for erosion control plans. The erosion control plans will be submitted to the Oregon Department of Environmental Quality prior to initiation of construction and will include specifics on erosion control measures and BMPs to be implemented during construction. These protective measures could include the installation of silt fences, mulch blankets, slope breakers, straw wattles or other erosion controls. BMPs and other protective measures will preclude adverse impacts to the adjacent zone 7-NA aquatic unit, as required under the management objectives." Ellis Report, page 17.

The applicant asserts that, as a result of this information, “the first [sic third] condition of approval proposed by staff in the May 13, 2010 staff report is no longer necessary.” That condition states "The applicant’s plan to protect the 7-NA district from adverse impacts due to the temporary construction phase of the pipeline shall be provided to the Planning Department. The Board agrees.

Citizens Against LNG makes the following comments regarding a neighboring site which is zoned 7-NA:

Applicant hasn’t shown there will be no adverse effect on management unit 7-NA, where the Management Objective is, “to protect natural resources.” PCGP states they are submitting a plan to the Planning Dept in the future (SR Cond. 3), but this is not sufficient. In order to analyze this project properly we need to be able to see how they plan to protect this management unit. Stormwater and watershed runoff along with impacts from the pipeline easement and dredging being so near the shoreline in this area are highly likely to cause degradation to the waterway in management unit 7-NA. In addition, cumulative impacts from pipeline dredging of other estuarine water areas will filter down to this management unit. Habitat species and marine life degradation will occur and this clearly violates the management objective of unit 7-D and 7-NA. This Zoning District has a noted Wetland on the West end of Jordan Cove that will also be impacted by the

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pipeline-dredging proposal, making the project clearly not in zoning compliance. (See Exhibit B).

See letter from Jodi McCaffree, dated June 190, 2010, at p. 7. However, the applicant does not propose to build within the 7-NA zoned property, and therefore criteria in the 7-NA zone are not applicable here. Protection to neighboring area will be accomplished via the various federal CWA permits that the applicant will be required to obtain.

c. **8-Water-Dependent Development Shorelands (8-WD)**

The pipeline crosses the 8-WD zoning district from MPs 1.65 R to 1.70 R. This section is privately owned by Weyerhaeuser Company. Section 4.5.371(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 49, 50 and 51. Pacific Connector proposes to utilize Weyerhaeuser Cove for pipe storage and as a contractor yard during construction (also designated as TEWAs 1.19-W/1.24-W), which is partially zoned 8-WD. The Weyerhaeuser Cove area is an old industrial site, half of which is paved.

*Section 4.5.370 Management Objective: This shoreland district shall be managed to allow the continuation of and expansion of aquaculture, along with the development of a boat ramp and limited tie-up facilities, to permit public access to the Estuary.*

Upon completion of construction, the Weyerhaeuser Cove yard will be reclaimed to pre-construction conditions, allowing pre-construction activities to continue unimpeded. Pacific Connector will obtain a 50-foot permanent right-of-way for the pipeline. The development of the boat ramp and limited tie-up facilities would not be impeded as long as the boat ramp is not proposed within the 50-foot right-of-way. The pipeline will be buried and will not interfere with public access to the Estuary.

As the applicant notes, aquaculture is defined in the county code as "[r]aising, feeding, planting, and harvesting fish and shellfish, and associated facilities necessary for such use." The use of this upland district for the continuation and expansion of aquaculture should not be impacted during construction (i.e., utilization of the Weyerhaeuser Cove yard) and will not be impacted once the pipeline is installed. Aquaculture can continue post-construction as it did pre-construction. Additional responses regarding potential construction-related impacts on aquaculture and other natural resources in the CBEMP aquatic districts are addressed elsewhere in this decision.

d. **8-Conservation Aquatic (8-CA)**

The pipeline crosses a small portion of the 8-CA zoning district between mileposts 1.70 R and 1.78 R (see environmental alignment sheets attached as Exhibit 1 to April 14, 2010 application narrative). The 8-CA district includes upland and tideland areas east of the Southern Pacific Railroad right-of-way and the adjacent Weyerhaeuser industrial site. Section 4.5.376(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.
Pacific Connector will utilize portions of the Weyerhaeuser Cove yard as a temporary construction and storage area, but not the submerged and submersible tideland areas located within the 8-CA zoning district. The only impact on tideland areas will be the installation of the pipeline itself.

**Section 4.5.375 Management Objective:** This district, because of its sheltered condition and location near productive aquatic resource areas, shall be managed for development of low-intensity recreational facilities. The uses shall be limited by the small size of the area and the natural depths of the channel. The low-intensity recreational facilities must be located in such a manner that conflicts will not arise with the existing aquaculture use, which is also a permitted use.

The management objective for the 8-CA zone is to manage the land "for development of low intensity recreational facilities." However, low-intensity utility facilities are a permitted use in the zone, subject to the aforementioned CBEMP policies. Thus, there is clear legislative intent indicating that low-intensity utility facilities will not undermine the management objectives of the zone, at least to the extent that CBEMP policies are satisfied. The Board rejects the general tenor of arguments made by opponents suggesting that (1) only recreational use are allowed, and (2) a pipeline is *per se* incompatible with the management objective.

The applicant states that upon completion of construction, the Weyerhaeuser Cove yard will be reclaimed to pre-construction conditions, allowing pre-construction activities to continue unhindered. Following installation, the pipeline will be buried and will not affect any boating or other low-intensity recreational facilities or aquaculture uses. Impacts during construction will be temporary. As defined by Section 2.1.200, aquaculture is, "[r]aising, feeding, planting, and harvesting fish and shellfish, and associated facilities necessary for such use."

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the discussion below regarding the 11-NA zoning district and the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010, submittal.

In their letter dated June 8, 2010, WELC asserts the following:

The proposed project impacts the 8-CA site where the pipeline crosses the tideland area and where the Weyerhaeuser Cove yard will be used for construction staging and storage. The specific management objective there includes protection of the "existing aquaculture use." Neither the original application nor the supplemental materials are clear on the nature of the "existing aquaculture" or how it would be protected. The applicant says merely, "After the pipeline is installed, aquaculture can continue as it did pre-construction." Given the sensitivity of fish and shellfish to the turbidity and dredging likely to accompany the construction and installation of the pipeline, it seems more details are necessary.
in order for the county to make the determination that the pipeline will, indeed, be consistent with the resource capabilities and management unit purposes and objectives.

In response, the applicant submitted the Ellis Report. This extensive analysis contained therein provides the following expert testimony regarding compliance with the 8-CA management objectives:

"the impacts of the project to the zoning district will be short-term, primarily limited to the period of construction, with some lasting impacts to small patches of eelgrass. The eelgrass is expected to recover within three years or less and will be replanted at densities higher than are present currently. Following construction, the zone will be recontoured to preconstruction conditions, and there will be no lasting impacts to boating, clamming or other low-intensity recreational uses. Furthermore, effects to aquaculture (specifically oyster growing) should likewise be short-term, as discussed above." Ellis Report, pages 17-18.

The Board finds that a proposed pipeline is not considered to be a "recreational facility" for which conflicts with aquaculture must be limited under this management objective. Had the drafters envisioned a different reading of the Code, it seems unlikely that i: would have made low-intensity utility facilities a permitted use in the zone. Nonetheless, the applicant notes that the long-term continuation and expansion of aquaculture should not be impacted during construction and the pipeline will have no impacts once it is installed. After the pipeline is installed, aquaculture can continue as it did pre-construction. Additional responses regarding potential construction-related impacts on aquaculture and other natural resources in the CBEMP aquatic districts are addressed elsewhere in this decision.

e. 11-Natural Aquatic (11-NA)

The pipeline crosses the 11-NA zoning district from mileposts 2.7C R to 4.12. This is a tideland area located at the north end of Haynes Inlet. Section 4.5.406(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

Section 4.5.405 Management Objective: This extensive intertidal/marsh district, which provides habitat for a wide variety of fish and wildlife species shall be managed to protect its resource productivity. The opening in the Highway 10! Causeway is a designated mitigation site ("low" priority).

24 LUBA provided extensive analysis of what the term "protect" means in the context of Goal 16 in Columbia Riverkeeper v. Clatsop County, __ Or LUBA __ (LUBA No. 2009-100, April 12, 2010):

The definition of "protect" contains stringent language: "save or shields from loss, destruction, or injury," "Save" has many definitions, including "i.f: to preserve or guard from injury, destruction or loss." Webster's Third New International Dictionary 1981 (1981). "Shield" is defined as "to protect with or

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Citizens Against LNG makes the following comments regarding this zone:

However, to install the pipeline in either district, PCGP would need to engage in the ACTIVITY of wet open cut method, which would fall under the definition of dredging. In both zoning districts 11-NA and 13A-NA, any new dredging is a prohibited activity. So, although a “low-intensity utility” may be a permitted USE in zoning districts 11-NA and 13A-NA, any kind of new dredging is an impermissible ACTIVITY in zoning districts 11-NA and 13A-NA. PCGP must not only explain in what sense its pipeline is a low-intensity utility; it must also find some means other than the wet open cut dredging method for laying its pipeline in order to be permissible within zoning districts 11-NA and 13A-NA.

as if with a shield.” Id. at 2094.

Context for interpreting the goal definition of “protect” is provided by considering its use within the text of Goal 16. The goal itself provides that its purpose is:

“To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and
“To protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon’s estuaries.” (Emphases added.)

* * * * *

Although we agree with the county that the Goal definition of “protect” does not require that estuarine resources identified for protection be completely or absolutely protected from any “loss, destruction, or injury” whatsoever, the county has made a planning decision under the CCCP policies at issue that implement Goal 16 and the scheme set forth in the second paragraph of Goal 16, quoted above, to “protect” as opposed to a decision to “maintain,” “develop,” or “restore” traditional fishing areas and endangered or threatened species habitat. Having made that “protect” planning decision, the local program to protect those estuarine resources must not allow “loss, destruction, or injury” beyond a de minimis level. Thus, the development that is to be allowed by the disputed rezone is not consistent with the Goal definition of “protect” unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a degree that there is at most a de minimis or insignificant impact on the resources that those policies require to be protected. (Emphasis added).

In this case, the management objective of the 11-NA zone is to “protect its resource productivity.” Thus, the County has also made the “protect” determination in its Comprehensive Plan and Zoning Code for the 11-NA zone.

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See letter from Jody McCaffree, dated June 10, 2010, at p. 8. As discussed elsewhere, the applicant does not have to “explain in what sense its pipeline is a low-intensity utility” because the Code makes it such as a matter of law. With regard to the contention that dredging is not an allowed activity in the 11NA and 13A-NA zones, the following definition from CCZLDO 2.1.200 applies:

DREDGING: The removal of sediment or other material from a stream, river, estuary or other aquatic area: (1) Maintenance Dredging refers to dredging necessary to maintain functional depths in maintained channels, or adjacent to existing docks and related facilities; (2) 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, or to obtain fill for the North Bend Airport runway extension project; (3) Dredging to Maintain Dikes and Tidegates refers to dredging necessary to provide material for existing dikes and tidegates; (4) 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.

The applicant is not proposing “new dredging” because it is not proposing to deepen the channel. In fact, it is not at all clear that the applicant is dredging at all, since that definition requires the “removal of sediment or other material from the estuary.” The applicant is not proposing to remove any sediment from the water. Nonetheless, to the extent that the applicant’s activities constitute dredging within the meaning of the code, the type of dredging will be “incidental dredging necessary for installation” of a pipeline. See Statewide Planning Goal 16. In this regard, CBEMP Policy 2, entitled “General Schedule of Permitted Uses and General Use Priorities.” provides as follows:

MANAGEMENT UNIT: NATURAL

B. Uses and Activities listed below MAY be allowed in Natural Management Units when it is established that such are consistent with the resource capabilities of the area and the purpose of the management units (LCDC Goal #16) (pursuant to "Linkage" and "Goal Exception" findings in this Plan) but also subject to special conditions and other policies set forth elsewhere in this Plan.

* * * * *

9. Pipelines, cables and utility crossings, including incidental dredging necessary for their installation.

Thus, incidental dredging for pipeline installation is permitted in the 11-NA and 13-NA zones, if the applicant can demonstrate that pipelines are consistent with (1) the resource capabilities of the area, and, (2) the purpose of the management units. This two-part test mirrors the requirement set forth in Statewide Planning Goal 16.
CBEMP Policy #4 provides the test for determining whether that two-part test is met:

"a determination of consistency with resource capability and the purpose of the management unit shall be based on the following:

i. a description of resources identified in the plan inventory;

ii. an evaluation of impacts on those resources by the proposed use (see Impact Assessment procedure, below);

iii. a determination of whether the proposed use or activity is consistent with the resource capabilities of the area, or that the resources of the area are able to assimilate the use and activity and their effects and continue to function in a manner to protect significant wildlife habitats, natural biological productivity, and values for scientific research and education.\textsuperscript{25} (Underlined emphasis added.

Before addressing that test, however, the Board addresses two contentions related to the above analysis. In her letter dated June 10, 2010, Jody McCaffree contends that portions of the PCGP project will constitute "temporary alterations" subject to CBEMP Policy #5a. This contention is not persuasive for the reasons set forth below.

First, CBEMP Policy #2 implements Statewide Planning Goal 16 and provides a general schedule of permitted uses and general use priorities in the aquatic areas of the estuary. The policy divides the aquatic areas into the three management units described in Goal 16, namely those of Natural, Conservation and Development. Each management unit, at Section B., describes the uses and activities that may be allowed, subject to different required findings, in each of the separate management units. Ms. McCaffree is correct that the list of uses for the Natural management unit in Section B of Policy #2 includes "temporary alterations." However, that list also includes "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation," which more closely describes the PCGP project. The fact that the applicable use category already contemplates incidental dredging activities associated with the installation of "pipelines" indicates that any temporary impacts associated with the use are already contemplated as part of the allowed "pipeline" use designation. Under such circumstances, it would be redundant for the county to separately consider "temporary alterations" associated with the PCGP. Therefore, the Board finds that the PCGP does not include any "temporary alterations."

Second, the Statewide Planning Goals define what constitutes a "temporary alteration," as follows:

\textbf{TEMPORARY ALTERATION.} Dredging, filling, or another estuarine alteration occurring over a specified short period of time

\textsuperscript{25} The underlined portion of CBEMP Policy 4, quoted above, is a word-for-word copy of the standard set forth in the GOAL 16 rule, as amended on Oct. 11, 1984 by LCDC.

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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 jetting 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.

The PCGP project does not fall within any of the listed categories.

Third, the pipeline use, including incidental dredging necessary for its installation, is also allowed in both the Conservation and Development management units "without special assessment of the resource capabilities of the area." However, as explained above, because the specific definition of pipeline, with incidental dredging necessary for its installation, is a more specific use category than that of "temporary alternations," the pipeline use is not deemed to be a temporary alteration which would, as such, require compliance with Policy #5a. Accordingly, the Board finds that CBEMP Policy #5a is inapplicable.

However, in the alternative, the Board finds that Policy #5a is satisfied in this case based upon the analysis and reference to record submittals discussed below, in conjunction with the following review criteria set out in Section II of Policy #5a, as follows:

\[ a. \text{ The temporary alteration is consistent with the resource capabilities of the area (see Policy #4).} \]

This criterion is satisfied by the Ellis Report submitted by the applicant, as mentioned elsewhere in this decision.

\[ b. \text{ Findings satisfying the impact minimization criterion of Policy #5 are made for actions involving dredge, fill or other significant temporary reduction or degradation of estuarine values.} \]

This criterion has been satisfied by the applicant's record submittals consisting of the letters from Randy Miller of Pacific Connector dated May 17, 2010 (describing how the application is consistent with all applicable aquatic management unit purpose statements) and of June 9, 2010 (identifying the state and federal environmental permits required for the aquatic portions of the project and the relationship with applicable CBEMP standards, and providing his professional opinion that it is feasible for Pacific Connector to obtain the necessary state and federal permits). Specifically, Randy Miller's June 9, 2010 letter describes the need for the PCGP project to obtain permits from the Oregon Department of State Lands (DSL) acting under the Oregon Removal-Fill Law (ORS 196. 800 et seq.) and the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (CWA). By cross reference, CBEMP Policy #5 (Estuarine Fill and Removal), at Section I.d contains the

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relevant criterion that: "adverse impacts are minimized". Mr. Miller's letter, at pages 3-4, specifically states that: "The Corps will also evaluate the proposal under the 404(b)(1) Guidelines (Guidelines) which require, among other things, a stringent evaluation of alternative, impact avoidance and mitigation" (emphasis added). Further, the Corps cannot issue a permit under Section 404 without issuance of a water quality certificate by the Oregon Department of Environmental Quality (DEQ) under Section 401 of the CWA. Mr. Miller's letter also points out that the project will require a permit from the DEQ for a certification under Section 401 of the CWA and for a 1200-C (NPDES) permit under Section 402 of the CWA.

In summary, compliance with CBEMP Policy #5.I.d will be satisfied by the issuance of Pacific Connector's required permits from the Corps, DSL and DEQ, the review criteria of which are coincidental with the approval criteria of Policy #5 as outlined above, thereby being consistent with the review criterion of Policy #5a.II.b.

c. The affected area is restored to its previous condition by removal of the fill or other structures, or by filling of dredged areas (passive restoration may be used for dredge areas, if this is shown to be effective).

This criterion is satisfied through the evidence provided in the applicant's record submittals contained in the Ellis Report (see page 3 describing the incidental trenching and backfilling construction techniques proposed for pipeline installation which constitute the "removal of the fill" or the "filling of dredged areas") and the letter of June 4, 2010 from Randy Miller, Staff Environmental Scientist for Pacific Connector Gas Pipeline (see pages 3-4 describing the wet open cut crossing method to be used within Haynes Inlet). This criterion is satisfied.

d. The maximum duration of the temporary alteration is three years, subject to annual permit renewal, and restoration measures are undertaken at the completion of the project within the life of the permit.

This criterion is also satisfied by the evidence submitted in the letters from Robert Ellis and Randy Miller above described, which describe the related construction activities that will take less than 3 years. See also April 30, 2010 letter from Mark Whitlow to Patty Evernden (describing the tentative construction schedule and indicating that the pipe installation would occur in year two and the project restoration would occur in year three).

A second contention is raised by WELC in its letter dated June 8, 2010. WELC’s argument is a bit difficult to follow, due to the nature of the subject matter, so it is set forth verbatim:

In its application and again in its May 17, 2010 supplemental submittal letter, Pacific Connector references the Coos Bay Estuary Management Plan (CBEMP) Policy 2, which explains that there are, in fact, three estuarine management units within the CBEMP area: Natural, Conservation, and Development. Within

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Policy 2, certain uses for each management unit are allowed “without special assessment of the resource capabilities,” subject to specific conditions for each particular zoning designation. (The zoning designation indicates the type of management unit – for example, the C in zone 8-CA (Conservation Aquatic) indicates that it’s a Conservation management unit, whereas the N in 13-NA (Natural Aquatic) indicates that it’s a Natural management unit.)

The applicant asserts that Policy 2 says that pipelines “may be allowed in all three types of management units,” and that does not, in fact, seem to be the case. Section B.9 under the Natural management unit listing in Policy 2 does list pipelines, and Section B.4 under the Development management unit listing includes “all activities allowed in Natural and Conservation units.” But pipelines are not within the list for the Conservation management unit in Policy 2. Thus, in those zones within the Conservation management unit, the analysis of the resource capabilities and the purpose of the management unit – which ensures compliance with not merely the local plan (CBEMP) but also statewide Goal 16 and the federal Coastal Zone Management Act - cannot be so cursory.

WELC does appear to be correct that the “pipeline” category found at “Natural Management Unit” (“NMU”) B9 and in Development Management Unit (“DMU”) B4 is not specifically mentioned under the list of allowed uses under the Conservation Management Unit ("CMU"). However, WELC misreads the import of that omission.

CBEMP Policy #2 is intended to implement Statewide Planning Goal 16. Goal 16 makes clear that “[p]ermissible uses in conservation zones shall be all uses listed in (1) above except temporary alterations.” See Statewide Planning Goal 16, at p. 3 (under “Management Units” Section (2): Conservation). According to DLCD staff, pipelines are an “allowed use or activity” in the CMU. See “A Citizen’s Guide to the Oregon Coastal Management Program,” DLCD, March 1997, at p. 19 (Table entitled “Permitted Uses in Estuary Management Uses”). Conversely, pipelines are subject to resource capability review in the NMU and DMU. Id.

There is no indication that Coos County intended to apply CBEMP Policy #2 in a more strict manner than Goal 16. Admittedly, CBEMP Policy #2 CMU A(1) creates an ambiguity because of the use of the phrase “all uses permitted outright.” WELC reads that phrase “permitted outright” as being a reference to only the nine uses set forth at NMU A (1)-(9). That is perhaps understandable, since the NMU A(1)-(9) uses are those that do not require a “special assessment of the resource capabilities in the area.” One might be tempted to say that the NAU A(1)-(9) uses are permitted “outright” and the NMU B(1)-(10) uses are permitted “conditionally” (i.e. requiring a special assessment). However, the same sentence in CMU A(1) goes on to say “(except for ‘temporary alterations.’)” There would be no need to list that specific exception if the intent had been to only include the nine NMU (A)(1)-(9) uses in the first place. One first level maxim to be considered under PGE v. BOLI is that that courts will give effect to all sections of a statute, in order to produce a harmonious whole. ORS 174.010; Lane County v.

Moreover, there would be no apparent policy reason for allowing pipelines in NMU’s but not allow them in the more permissive CMU. Therefore, given that Goal 16 allows pipelines in conservation areas, the Board interprets CBEMP Policy #2 CMU A(1) to be consistent with, and not more strict than, Goal 16, by interpreting the phrase “all uses permitted outright in Natural Management Unit (except for ‘temporary alterations.’)” to include the NMU B (1)-(10) uses such as “pipelines, cables, and utility crossings, including incidental dredging necessary for their installation.”

Turning back to the two-part test, the applicant submitted the Ellis Report, which provided a determination of consistency with resource capability and the purposes of the management units utilizing the three-part analysis articulated above in Policy #4. Page 17 of that Ellis Report includes the determination of consistency which finds, in pertinent part, that “[a]ll resources will be able to assimilate the pipeline and its effects, and will continue to function in a manner protective of significant wildlife habitats, natural biological productivity and values for scientific research and education.”

In Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc., LUBA affirmed a county’s analysis under locally adopted “Resource Capacity test” criteria. Analysis of those criteria led to the following conclusion: “Habitat disturbance will ultimately be temporary as the site will be restored following mining operations in a manner that must satisfy both ODFW and DOGAMI requirements. Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc., Or LUBA ___ (LUBA No. 2009-128, March

26 Curry County’s code, at CCZO 7.040(14)(a), contains test for evaluating a proposed uses consistency with the resource capabilities of the area which was similar to the test set forth at CBEMP 

(a). Resource Capability Test. Certain uses in estuarine areas require findings of consistency with the resource capabilities of the area.

"(1) A determination of consistency with resource capability shall be based on:

"(a) Identification of all resources existing at the site and factors relating to the resource capabilities of the area.

"(b) Evaluation of impacts on those resources by the proposed use.

"(c) Determination of whether any or all of the identified resources can continue to achieve the purpose of the management unit if the use is approved.

"(2) In determining the consistency of a proposed use or activity with the resource capabilities of the area, the county shall utilize information from federal or state resource agencies regarding any regulated activities in estuarine areas.”

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12, 2010). Once reclaimed, the property should provide the types of vegetative cover and promote the same animal species it supports now.” Id. Stated in the words of the Columbia Riverkeeper case, the question presented in whether the incidental dredging associated with pipeline installation has “at most a de minimis or insignificant impact on the resources.” Columbia Riverkeeper v. Clatsop County, ___ Or LUBA ___ (LUBA No. 2009-100, April 12, 2010). Those appear to be different formulations of essentially the same test.

In its final argument letter dated June 24, 2010, the applicant concludes that the installation of the pipeline will have no permanent impacts but admits that construction activities will result in some temporary impacts:

The applicant states that following construction, the buried pipeline will not impact the intertidal/marsh district. Potential impacts during construction have been analyzed as part of the FERC NEPA process and are provided in the Section 4.5.2.3 of the Final Environmental Impact Statement (FEIS). Impacts to threatened and endangered species have also been analyzed and provided to FERC in a draft Biological Assessment (BA) that was provided to the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) for consultation. USFWS and NMFS transmitted comments to FERC that have led to a revised BA that is pending transmittal to those agencies.

Following construction of the pipeline, Pacific Connector is proposing on-site wetland restoration for estuarine habitats impacted by construction of the pipeline through the Haynes Inlet of Coos Bay which also includes the intertidal/marsh district. Although the construction area across Haynes Inlet does not intercept high density eelgrass beds, all low and medium density eelgrass beds will be replanted at high density levels. The incremental gain to high density levels will provide sufficient compensation for the short-term loss of eelgrass caused by the PCGP construction.

The pipeline route would temporarily impact mitigation site M-8(b) (Highway 101 Causeway) during construction. Construction of the natural gas pipeline within Haynes Inlet would involve burying approximately 2.5 miles of 36-inch diameter steel pipe. The steel pipe would be covered with a 4-inch layer of concrete and installed a minimum of five feet (measured from the top of the pipe) below the substrate surface. The burial depth was established based on the predicted maximum scour depth and to comply with 49 CFR 192.327. Construction would involve excavating an in-water trench, storing excavated material for backfill to the side of the trench, installing the pipe, backfilling the trench and re-grading. Trenching would be conducted with a barge-mounted bucket dredge where water depth allows. In shallow areas along the alignment, marsh excavators, which
are capable of trenching in shallow water, would be used. During the ebb tide, marsh excavators utilize tracks around pontoons to allow excavation in both "wet" and "dry" terrain. The pipeline would be laid using a "pipe push" method. During the portions of the alignment installed using the "pipe push" method, the lay barge would remain stationary and the pipe sections would be pushed and floated out from the barge into the pre-dredged ditch as they are completed, using pre-designed floats.

Following is a summary of preliminary work procedures, BMPs, and protective measures that will be implemented during construction to minimize short-term and long-term impacts to water resources, biological resources and the surrounding environment:

1. Work will be conducted in compliance with the comprehensive plan, zoning requirements and other local, state and federal regulations pertaining to the project.

2. The contractor shall develop a turbidity monitoring and management plan (TMM) that describes measures to reduce turbidity impacts resulting from dredging and backfill operations to ensure compliance with federal and state water quality standards.

3. Where water depths allow, the dredge bucket will be kept below the water surface while placing excavated soil along the trench in order to minimize turbidity.

4. The pipeline trench will be backfilled as quickly as possible after the pipeline is installed to minimize the distribution of excavated spoil from tidal influence.

5. Turbidity will be monitored in accordance with the 401 Water Quality Certification (WQC) requirements during dredging and backfilling operations by the environmental inspector. If turbidity levels exceed established tolerances, then the procedures outlined in the 401 WQC will be followed.

6. Turbidity curtains may be deployed, as practicable, in certain areas to protect sensitive resources such as oyster and eelgrass beds. Implementation of turbidity curtains is limited by local site conditions including flow velocities. Use and location of turbidity curtains will be determined during final design or as approved by the environmental inspector.

7. Construction will be scheduled to reduce impacts to sensitive resources and will be in accordance with the recommended in-water work window established by ODFW.

8. Work below mean higher high water (MHHW) will be conducted during the recommended in-water work window established by ODFW and approved by USFWS and NMFS.
The recommended in-water period for Coos Bay is October 1 through February 15.

9. Construction impacts will be confined to the minimum area necessary to complete the project.

10. When practicable, fueling and maintenance of equipment will occur more than 150 feet from the nearest wetland, ditch or flowing or standing water. (Fueling large compressors, cranes and generators 150 feet away may not be practicable.)

11. The contractor shall prepare a Spill Prevention Control and Countermeasure (SPCC) Plan prior to commencing work (available upon request).

12. All equipment used for construction activities will be cleaned and inspected prior to arriving at the project site to ensure no potentially hazardous materials are exposed, no leaks are present and the equipment is functioning properly.

13. The contractor shall perform daily inspection of construction equipment to ensure there are no leaks of hydraulic fluids, fuel, lubricants or other petroleum products.

14. Biological monitoring will be conducted as required by state and federal permit conditions.

15. A work plan will be prepared and submitted to the appropriate agencies prior to construction.

16. A site restoration plan will be prepared and submitted to the appropriate local, state and federal agencies prior to construction.

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010 submittal as Exhibit 1.

In addition to the foregoing, the June 9, 2010 letter report submitted by Robert Ellis, Ph.D., of Ellis Ecological Services provides the following testimony regarding compliance with the 11-NA management objectives:

"As discussed throughout this Impact Assessment, the installation of the pipeline will impact fish and wildlife habitat within this zoning district. However, as discussed, the impacts will be short-term and primarily limited to the period of construction. Following a brief recovery period (months in the case of benthic invertebrate recolonization to a few years for eelgrass restoration), the pipeline will not interfere with this zoning district's resource productivity." Ellis Report, page 18.
The applicant’s expert witness, Robert Ellis, Ph.D., of Ellis Ecological Services conducted extensive analysis of the potential environmental impacts of the pipeline construction. The result of that effort is discussed in the Ellis Report, which sets forth the Resources Capacity Analysis envisioned by CBEMP Policy #4, including a description of all resources existing at the site, an impact assessment, and a determination of consistency relating to the resource capabilities of the area. The Board has read the Ellis Report in detail and has determined the report constitutes substantial evidence confirming that impacts will be temporary and insignificant. There is no expert evidence in the record to the contrary. The Board adopts the Ellis Report as additional findings in support of the application as if it was fully set forth herein.

f. 11-Rural Shorelands (11-RS)

The pipeline crosses the 11-RS zoning district from MPs 4.12 R to 4.17 R. In this segment, the pipeline exits Haynes Inlet and crosses a rural area that is dominated by trees. Section 4.5.401(15)(a) lists the use as permitted subject to CBEMP Policies 17, 18, 23, 38, 34, 14, 49, 50 and 51. Other than the pipeline and the construction easement itself, there are no other accessory project components within zoning district 11-RS.

**SECTION 4.5.400 Management Objective:** This district shall be managed so as to continue its rural low-intensity character and uses that have limited (if any) association with the aquatic district. This district includes three designated mitigation sites (M-12, M-13 and M-22). However, only Site M-22 shall be protected from pre-emptive uses. Other sites are “low” priority, and need not be protected. (See Policy #22).

Following installation, the buried pipeline will not affect the rural low-intensity character of the district nor the uses that have limited (if any) association with the aquatic district. All disturbed areas will be recontoured and revegetated in a manner consistent with the ECRP, and those areas that were forested prior to construction will be reforested except for the 30-foot maintained corridor centered over the pipe. The PCGP does not impact mitigation sites M-12, M-13, or M-22.

g. 13A-Natural Aquatic (13A-NA)

The pipeline crosses the 13A-NA zoning district from mileposts 1.78 R to 2.70 R. The pipeline crosses the Haynes Inlet in this zone. Section 4.5.426(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

**Section 4.5.425 Management Objective:** This district shall be managed to allow the continuance of shallow-draft navigation while protecting the productivity and natural character of the aquatic area. The openings in the two road dikes are designated mitigation sites [M-5(a) and (b), “low” priority]. Maintenance, and repair of bridge crossing support structures shall be allowed. However, future replacement of the railroad bridge will require Exception findings.
Construction of the 2.80-mile route across Haynes Inlet that includes district 13A-NA will occur within the ODFW-recommended in-water work timing window from October 1 of Year One construction through February 15 of Year Two. ODFW has recommended the in-water work timing window in Coos Bay be delayed to October 15 to minimize impacts to a fall Chinook fishery. The applicant proposed a condition of approval requiring fill and removal activities in Coos Bay be conducted between October 1 and February 15 unless otherwise modified by ODFW. The Board finds that this condition properly recognizes ODFW’s jurisdiction in this field and modifies and adopts the condition as Condition of Approval B.6 to read as follows:

"Fill and removal activities in Coos Bay shall be conducted between October 1 and February 15, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife."

Following construction of the pipeline, Pacific Connector is proposing on-site wetland restoration for estuarine habitats impacted by construction of the pipeline through the Haynes Inlet of Coos Bay which also includes district 13A-NA. Although the construction area across Haynes Inlet does not intercept high density eelgrass beds, all low and medium density eelgrass beds will be replanted at high density levels. The incremental gain to high density levels will provide sufficient compensation for the short-term loss of eelgrass caused by the PCGP construction. Additionally, the pipeline will be buried five feet below the bottom of the Inlet and will not affect shallow-draft navigation or the natural character of the aquatic area. The project does not impact mitigation sites M-5(a) or (b) and will not affect the bridges.

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the response above regarding the 11-NA zoning district and the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant’s May 17, 2010 submittal as Exhibit 1.

In addition to the foregoing, the Ellis Report provides the following testimony regarding compliance with the 13A-NA management objectives:

"Although there may be some temporary disruption of navigation during pipeline construction as discussed above, the pipeline will be buried five feet below current grade and will have no lasting effect on shallow-draft navigation. Affected low and medium density eelgrass beds in the zone will be replanted at high densities and are expected to recover quickly." Ellis Report, page 18.

The management objective is met, for the reasons stated both in the Ellis Report and the findings propose for the 11-NA zone, supra.

h. 18-Rural Shorelands (18-RS)
The pipeline crosses the 18-RS zoning district from MP 10.74 R to 11.10 R. In this segment, the PCGP alignment is located within a vacant pasture area and crosses East Bay Drive. Other than the pipeline and the construction easement itself, there are no other accessory project components within zoning district 18-RS. Section 4.5.481(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 20, 22, 23, 27, 28, 34, 49, 50 and 51.

SECTION Management Objective 4.5.480: This district shall be managed to allow continued use as pasture-grazing but shall also be managed to allow dredged material disposal or mitigation. This district contains two designated mitigation sites, U-12 and U-16(a) (“high” priority). It also contains designated dredged material disposal site 30(b). The development of the disposal site would preclude mitigation use, and vice versa. Use of this site for dredged material disposal is the higher priority because of the scarcity of suitable sites (see Policies #20 and #22).

Construction of the pipeline would temporarily impact this area. Following construction, the district could be used as pasture-grazing unimpeded by the pipeline. In agricultural areas, the pipeline will be installed with 5 feet of cover, to allow farming activities to continue safely over the pipeline. The area will be revegetated to preconstruction conditions; therefore, grazing could continue unhindered. Furthermore, the pipeline would not preclude use of the site for dredged material disposal; nor would the pipeline preclude mitigation development of the site (see discussion of CBEMP Policies #20 and #22 for more detail).

The management objective is met.

i. 19-Development Shorelands (19-D)

The pipeline crosses the 19-D zoning district from MP 11.10 R to MP 8.10. In this segment, the pipeline crosses a large, undeveloped privately owned parcel. In addition to the pipeline and construction easement itself, accessory uses within this segment of the alignment include a permanent access road at MP 7.70 and block valve #2 at MP 7.70. Section 4.5.536(15)(a) lists the use as permitted subject to CBEMP Polices 14, 17, 18, 27, 49, 50 and 51.

SECTION 4.5.535 Management Objective: This district is a large parcel (152 acres) of filled, undeveloped property in a single ownership bordering on a maintained shallow-draft channel. While the site is presently suitable for pastureland, the Plan anticipates that these characteristics will make it an important water-dependent/water-related industrial site in the future. To protect the site for future industrial development, the Plan designates it “D” (Development). According to staff, the parcel’s large size and the limitation on water access from only the Coos River shoreline makes it unlikely that the entire site can be utilized for only water-dependent/water-related uses.

Therefore, to assure that non-water-dependent/non-water-related uses that which to locate on the site do not limit or preclude water-dependent uses of the shoreline, development must be consistent with a site plan that accomplishes this goal and is approved by the Coos County Board of Commissioners or their designee.
At page 20 of her June 10, 2010 letter, Ms. McCaffree states that the management objective for zoning district 19-D requires consistency with a site plan for the future development of the zoning district.\footnote{27}

The applicant notes that during construction, pipeline installation will temporarily impact this large parcel, which is owned by Weyerhaeuser. A site plan has not yet been developed by the landowner for future development of the site. However, following construction, the buried pipeline will be compatible with future industrial development. The only restriction will be the development of permanently engineered aboveground structures within the 50-foot permanent right-of-way. Pacific Connector states that they have consulted with Weyerhaeuser regarding the pipeline alignment, and there was no indication from Weyerhaeuser that the PCGP will impact future development plans. The accessory access road follows an existing pasture two-track road and would provide access to block valve assembly #2 for maintenance and operation purposes. The access road would be 25 feet wide and 154 feet long, and would be graveled. Block valve assembly #2 would be located within the 50-foot permanent right-of-way and would occupy a 50x50-foot area enclosed by a 7-foot high safety fence.

The Board finds that following construction, the buried pipeline will be compatible with future industrial development. The proposed access road follows an existing pasture two-track road. A review of Alignment Sheet 008 (Exhibit 1 to the application narrative of April 14, 2010), reveals that the alignment of the pipeline within the 19-D zoning district avoids the river frontage portions of the district except for the area of crossing, thus assuring that the pipeline will not interfere with future water-dependent or water-related uses or developments. The last sentence in paragraph 1 of the management objective set out in Section 4.535 indicates that the parcel's large size and the limitation of water access from only the Coos River shoreland makes it unlikely that the entire site can be utilized for only water-dependent/water-related uses. Otherwise stated, the management objective recognizes that the portions of the district most available for future water-dependent/water-related uses are the portions of the district along the water frontage, which will not be areas of the 19-D zoning district used for the proposed pipeline crossing. Accordingly, the Board finds that the pipeline crossing will not limit or preclude water-dependent uses of the 19-D shoreland.

The management objective is met.

\footnote{27} Ms. McCaffree testifies as follows:

Where is the required site plan? Proposal includes permanent road. Applicant must demonstrate road won't limit or preclude future water-dependent uses or impact important archaeological sites that may be found in this zoning district. This zoning district, also known as Graveyard Point, is subject to policy's 14, 17, and 18, among others. Coos County's, "Shoreline Values Requiring Mandatory Protection" map shows the pipeline will be in violation of policy 18 due to it impacting an important and vital Archeological Site on Graveyard Point. (See Exhibit D) PCGP's application should be denied due to this issue and in any event would not be in line with Coos County's zoning management objectives and policies for this area that require both, "Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands, and Protection of Historical, Cultural and Archaeological Sites."
i. **19B-Development Aquatic (19B-DA)**

A portion of the pipeline and related construction areas will be located in the 19B-DA zoning district. This area is on the north bank of the Coos River. Section 4.5.541(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

**CCZLDO Section 4.5.540 Management Objective:** This development aquatic district shall be managed primarily to maintain use of the channel for access to future upland development adjacent to Christianson Ranch.

The pipeline will be installed beneath the bottom of Coos River and will allow use of the channel for access to future upland development of any adjacent properties.

**CCZLDO Section 4.5.541 Uses Activities and Special Conditions**

The pipeline is permitted, subject to general conditions, as a low intensity utility in the 19B-DA district. The 19B-DA General Condition states that inventoried resources requiring mandatory protection in the district are subject to Policies #17 and #18. As addressed under the CBEMP Policy section below, the PCCP is consistent with each of those policies.

The management objective is met.

k. **20-Rural Shorelands (20-RS)**

The pipeline crosses the 20-RS zoning district from MPs 8.22 to 8.39. This segment of the pipeline is located on the south bank of the Coos River. Section 4.5.546(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

**Section 4.5.545 Management Objective:** This district shall be managed for rural uses along with recreational access. Enhancement of riparian vegetation for water quality, bankline stabilization, and wildlife habitat shall be encouraged, particularly for purposes of salmonids protection. This district contains two designated mitigation sites, U17(a) and (b), “medium” priority, which shall be protected as required by Policy #22.

The project will not impact mitigation sites, U-17(a) and (b). Once installed, the pipeline will not prohibit rural uses or recreational access. Additionally as discussed above, the temporary access road areas within the 20-RS district will be returned to their previous condition following construction. In this area on the south side of the Coos River, the area is pastureland and may continue be used as pastureland following construction. A 1,750-foot HDD is the crossing method for the Coos River. This crossing method will avoid impacts to the river its banks, and riparian vegetation and will provide the maximum protection to wildlife habitat within and adjacent to the river.

The only risk to this zone is a possibility of a frac-out from the HDD bore. This issue is discussed in the section addressing the 20-CA zone. For the reasons set forth therein, the Board
finds that it is feasible to conduct HDD boring operations in an environmentally safe manner if the applicant follows the BMPs it has proposed to FERC, including those set forth in the HDD Contingency Plan.

The management objective is met.

1. **20-Conservation Aquatic (20-CA)**

The pipeline crosses the 20-CA zoning district from mileposts 8.12 to 8.22. The 20-CA district is aligned with the Coos River. Section 4.5.551(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

*Section 4.5.550 Management Objective:* This aquatic district shall be managed to allow log transport while protecting fish habitat. Log storage shall be allowed in areas of this district which are near shoreland log sorting areas at Allegany, Shoreland District 20C, and Dellwood, Shoreland District 20D, as well as in areas for which valid log storage and handling leases exist from the Division of State Lands.

Pacific Connector states that it will use a horizontal directional drilling (HDD) method to install the pipeline below the Coos River. Using this crossing method, the PCGP will be installed approximately 57 feet beneath the bottom of the Coos River and will not impact log transport and will not impact fish habitat.

The HDD method involves boring under a feature and pulling the pipeline into place through the borehole that has been reamed to accommodate the diameter of the pipeline. This procedure involves three main phases: pilot hole drilling, subsequent reaming passes, and pipe pullback. These phases are explained in detail in correspondence from Randy Miller of Pacific Connector dated May 17, 2010. Upon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided. Additional details on the HDD process are included in Section 2.4.2 of the FEIS.

In addition to the foregoing, the Ellis Report provides the following additional testimony regarding compliance with the 20-CA management objectives:

"As discussed above, this zoning district will be traversed using HDD methodology, which should have no affect on either fish habitat or log storage." Ellis Report, page 18.

WELC states the following in a letter dated June 8, 2010:

The proposed project impacts the 20-CA site where the pipeline crosses the Coos River. The management objective for this site is to "allow log transport while protecting fish habitat." For this crossing, the applicant would use "horizontal directional drilling" (HDD), as described in the supplemental letter and the FERC environmental impact statement. The applicant gives the
assurance that, "[u]pon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided." However, as was abundantly documented in the FERC process, unsuccessful HDD, including "frac-outs," can be devastating to aquatic species, sensitive resources and water quality. [See FEIS p 2-97, 4.3-50-51, 4.5-101-102]. We all know that the risks of environmental disasters – even when extremely low in probability – can result in unacceptable consequences. Given the very real risk of unsuccessful HDD occurring in at least one point among the many waterbody crossings proposed for the pipeline route, the applicant should be required to minimize the waterbody crossings where possible and document that the crossing point chosen is one that would have a relatively lower magnitude of harm to protected resources should the crossing go awry. The applicant should also be required to detail exactly how frac-outs and other drilling mishaps would be handled to minimize the potential environmental damage.

This last point is well taken, and, according to FERC, the HDD Contingency Plan addresses these issues. Both the Ellis Report and the discussion of the HDD Contingency Plan contained in the FEIS constitute substantial evidence.

In her June 10, 2010 letter, Jody McCaffree states:

Application says “construction will use appropriate measures to minimize impacts; all impacts will be mitigated.” Applicant must describe potential impacts on fish habitat; construction and mitigation measures. Pacific Connector is proposing to use the Horizontal Directional Drilling (HDD) method for the crossing of the Coos River (MP 8.18). The HDD method involves boring under the Coos River and pulling the pipeline into place through the borehole that has been reamed to accommodate the diameter of the pipeline. This procedure involves three main phases, pilot hole drilling, subsequent reaming passes, and pipe pullback. HDD typically is used for the crossing of major waterbodies (greater than 100 feet wide). Williams who will be responsible for constructing the PCGP has a HDD failure rate since 2000 of 2 of 6 involving 36’ pipelines. Failure rates result in what is known as frac-outs where drilling muds are released into the waterbody. Frac-outs occurred with the 12-inch pipeline and the impacts to vital marine life and habitat were significant. Photos of the stream damage caused by the 12-inch line can be seen in Exhibit U. Potential releases of drilling fluid bentonite clay can wear down fish gills and impair fish vision making difficulty and predation easy (ODFW quote). As shown in the testimony above, the
impacts on fish habitat should this occur would be difficult or impossible to mitigate.

As discussed by FERC, FEIS p 2-97, 4.5-101-102, the risk of frac-outs from a properly-supervised HDD method bore are low, particularly if PCGP “locate[s] the HDD entry and exist points a good distance away from the backs of the waterbody.” *Id.* at p. 4.5-102.

The management objective is met.

### **21-Rural Shorelands (21-RS)**

The pipeline crosses the 21-RS zoning district from MPs 10.97 to 11.11 and MPs 11.14 to 11.32. The segments of the PCGP Project within the 21-RS district are located on the east and west banks of Catching Slough. Section 4.5.596(15)(a) lists the use as permitted subject CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

**SECTION 4.5.595 Management Objective:** This shoreland district of generally diked farm land shall be managed to maintain the present low-intensity, rural character and uses in a manner compatible with protection of the aquatic resources. An existing heron rookery located in the district shall be preserved by protecting those trees in the rookery which are used by the birds. This district contains a number of designated mitigation sites. The following are “high” or “medium” priority, and must be protected as required by Policy #22: U-28, U-29(b), U-30(b), U-32(a)and (b), U-33, U-34(c) and (d). The following are “low” priority sites, and received no special protections: U-21(b), U-22, U-23, U-24, U-26, U-27, U-29(a), U-32(c) and U-34(a) and (b).

Upon completion of installation, the pipeline will not affect the present low-intensity, rural character and uses in the area because the pre-construction uses will be allowed to continue following construction both across and adjacent to the right-of-way. As detailed in the 21-CA narrative section below Catching Slough will be crossed using a conventional bore, protecting the diked waterbody. Pursuant to the County Shoreland Values map, the heron rookery is located where Catching Slough enters Coos Bay, which is several miles north of where the pipeline crosses Catching Slough. Nonetheless, between MPs 10.97 and 11.32, the pipeline will be installed in pasture lands, and there will be no tree removal required for that segment of pipeline construction. Therefore any trees used as bird habitat near that segment of the route will be protected. The pipeline will cross the northeastern edge of designated mitigation site U-22 and will cross the middle of designated mitigation site U-24. Both designated mitigation sites are “low” priority sites and, as stated above, receive no special protections. Furthermore, as discussed below this segment of the pipeline satisfies the requirements of Policy #22.

The management objective is met.

### **21-Conservation Aquatic (21-CA)**
The proposed pipeline crosses the 21-CA zoning district from MPs 11.11 to 11.14. This segment of the pipeline will cross Catching Slough. Section 4.5.601(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

Section 4.5.600. Management Objective: This aquatic district shall be managed to allow rural upland uses while protecting aquatic resources. Dredging for routine repair/maintenance of dikes shall only be permitted if no alternative upland source of suitable fill material is reasonably available and/or land access is not possible.

According to the applicant, the upland areas will be returned to their previous condition in compliance with the ECRP. Therefore, the rural upland uses on the surrounding pasture lands will be able to continue once construction is complete.

Pacific Connector proposes to use a conventional bore method to install the pipeline below Catching Slough. The bore method is intended to provide additional protection to aquatic resources within the Slough. The specific type of bore that will be utilized for crossing Catching Slough will be determined during the design phase of the project and depends primarily on construction characteristics and the type of soils present.

According to the applicant, a conventional bore requires bore pits (launching and receiving) on either side of the feature being bored (i.e., waterbody, road, railroad, etc.). The depth of the bore pits is dependent on the required pipeline depth and the construction equipment placed in the bore pits, and the bore pits are sized to allow for the necessary equipment and workers. The equipment, depending on the type of conventional bore, is lowered into the pit. Because conventional boring does not limit water migrating into the bore, an important factor in the design of launching and receiving pits is groundwater control. According to the applicant, dewatering systems using deep wells or well points are frequently used, and trench boxes or sheet piling are often used to support the pit walls and to temporarily cut off groundwater inflows.

In addition to the foregoing, the Ellis Report provides the following additional testimony regarding compliance with the 21-CA management objectives:

"As stated above, adjacent rural uses will be temporarily impacted by pipeline construction. However these areas will be returned to pre-construction conditions following installation of the pipeline. Because Catching Slough will be bored under for pipeline installation, BMPs and other avoidance measures should protect all aquatic resources." Ellis Report, page 19.

WELC discusses this issue in their June 8, 2010 letter from attorney Jan Wilson:

The proposed project impacts the 21-CA site where the pipeline is bored under Catching Slough. The management objective for that area is to allow rural upland uses while protecting aquatic resources. The applicant proposes to use “conventional” boring methods, including dewatering, to install the pipeline under the
slough. The supplemental letter indicates that many of the details for this crossing are yet to be worked out, and thus the county may not yet be able to make the feasibility determination required to satisfy this approval criterion. It is not clear, for example, how the dewatering might affect the aquatic resources, both in the short and long term.

WELC’s testimony is again focused on the argument that the applicant has not put forth enough evidence to meet its prima facie burden of proof. This is simply not a very effective tactic, given that the applicant’s experts have listed the BMPs that they will use to avoid harm to aquatic resources, and have opined that those resources will be adequately protected. See ECRP.

WELC opines that ‘it is not clear * * * how the dewatering might affect the aquatic resources, both in the short and long term.” However, this criticism seems rather vague and uninformed, particularly given the fact that the ECRP addresses the BMPs that will be employed to prevent sediment laden water from being reintroduced directly into water-bodies during de-watering operations. See ECRP at p. 23. In any event, the “technical details” of how the crossing will occur are engineering and scientific matters that can worked out at a later date.

The management objective is met.

36-Urban Water-Dependent (36-UW)

This site is known as the Georgia Pacific-Coos Bay site. The property contains an active sawmill and lumber yard and it is located within zoning district 36-UW. Section 4.5.691(15)(a) lists the use as permitted subject to CBEMP Policies 16, 17, 18, 23, 27, 49, 50 and 51. Pacific Connector would utilize the Georgia Pacific-Coos Bay site as an accessory pipe storage and contractor yard temporarily during construction.

SECTION 4.5.690 Management Objective: This shorland district, which includes a mix of water-dependent and non-water-dependent industrial uses and an area bordering the 35-foot channel which is “suitable for water-dependent use”, shall allow only water-dependent uses along the deep-draft channel, except as allowed by Policy #16. In the remainder of the district, existing uses shall be permitted to continue and expand.

The temporary storage of pipe and equipment and temporary addition of mobile office trailers during construction will be similar to the existing operations associated with the active sawmill and lumber yard, and as stated in the objective, “existing uses shall be permitted to continue and expand.”

The management objective is met.

Other Estuary and Bay Related Concerns

Impact to Oyster Beds from Turbidity resulting from Wet Crossing Construction or “Open Cutting” Techniques.
Ms. Lilli Clausen entered a letter into the record dated May 13, 2010 and testified verbally, expressing concern that the pipeline construction activity in Haynes Inlet will silt up and kill her oyster beds. The Board’s task in evaluating this letter is made more difficult because the letter does not state exactly where their oyster beds are in relation to the proposed pipe. Nonetheless, the map Ms. Clausen submitted seems to suggest that her oyster beds are very close to the proposed pipe location. Ms. Clausen does not submit any scientific expert testimony to support her contentions, which is highly problematic.

The Board has read the materials provided by the applicant which address this issue, including:

- letter from Mr. Randy Miller dated May 17, 2010
- the Ellis Report.  
- Excerpts from the FEIS entitled “Wildlife and Aquatic Resources”, at p. 4.5-93.
- Environmental Condition No. 24 in the FEIS.

The applicant states that the contractor will develop a turbidity monitoring and management plan (“TMMP”) “to ensure compliance with federal and state water quality standards.” See Miller letter dated May 17, 2010, at p. 5. In the June 6, 2010, letter, the Hearings Officer requested more information regarding the specific numeric water quality standards that are at issue and more information to demonstrate that the specific BMPs proposed in the TMMP will make it feasible to comply with the applicable regulations and protect the oyster beds. In addition, requested additional information verifying that the specific standards set forth in state and federal law are sufficient to ensure that oyster beds are protected under conditions similar to what the applicant will be facing in Haynes Inlet.

The applicant also stated that “turbidity will be monitored in accordance with the 401

\[28\] In its June 16, 2010 letter, WELC purports to “object” to the applicant’s submittal of the Ellis Report, complaining that that the opponents were not provided enough time to review and comment on the report. As the applicant notes, however, “the Ellis Report was prepared and submitted in direct response to concerns and questions raised at the public hearing; the Ellis Report contains precisely the type of surrebuttal evidence that is intended to be provided during the second open record period established by the hearings officer.”

The applicant is also correct that “the opponents have had plenty of time to gather and provide their own evidence regarding alleged impacts on aquatic species and habitat, but have apparently chosen not to do so.” As the applicant points out, there is no rule that says opponents may only comment on evidence submitted by an applicant; rather, they are obviously free to create their own evidentiary record and force the decision-maker to make a determination regarding whose evidence is more “substantial.” Had WELC elected to submit its own evidence at the close of the open record period, the applicant would have been similarly limited to a seven-day response period.

Finally, the Board notes that any party had a right to file a written request to submit new evidence to respond to that surrebuttal evidence submitted during the second period (and raise “new issues” related to that evidence). ORS 197.763(6)(c) & (7). The type of evidence accepted under this provision is limited: it has to be evidence and argument that “respond(s) to new evidence submitted during the period the record was left open.” See ORS 197.763(6)(c). Thus, the requested open-record period is an evidentially sound, but limited to additional surrebuttal evidence; the parties can only raise “new issues” that relate to the rebuttal evidence, etc., raised during the first open-record period. No party availed themselves of that opportunity.
Water Quality Certification (WQC) requirements during dredging and backfilling operations by
the environmental inspector." The applicant goes on to state that "if turbidity levels exceed
established tolerances, then procedures outlined in the 401 WQC will be followed." Although
that statement may be reasonable and true, it really does not communicate much information to a
lay person, and does not provide enough information to make a feasibility finding. The Hearings
Officer requested more detailed information concerning the specific WQC requirements, as well
as information regarding the "environmental inspector."

In response to these issues, the applicant submitted the Ellis Report, which provides a
detailed analysis of the following:

(a) the type and extent of alterations in the aquatic zoning districts that will result from
trenching, pipeline construction, installation and backfill (pages 4-6);

(b) types of resources that would be affected within those zoning districts, including
vegetation, invertebrates, fish and wildlife (pages 6-10);

(c) expected extent of impacts of construction activities on those resources (pages 11-
16); and

(d) methods that could be employed to avoid or minimize adverse impacts (page 16).

The relevant conclusions of the Ellis Report regarding potential impacts on aquatic
resources are quoted and/or summarized as follows:

- Plants (eelgrass) – "Therefore, light limitation and direct sedimentation on eelgrass beds
is expected to be localized and only result in minor short-term effects on local patches of
eelgrass beds proximate to the construction area. Outside of the immediate area, turbidity
should not represent an additional indirect source of impact to eelgrass habitats or
dependent aquatic species. Thus, the pipeline installation should not affect the ability of
the eelgrass beds to function in a manner to protect significant wildlife habitats, natural
biological productivity and values for scientific research and education." Ellis Report,
page 11.

- Invertebrates – "Following construction, recovery of the benthic community is expected
to be rapid, particularly the epibenthic community that provides the majority of the food
resources for fish. In a previous study, benthic communities on mud substrates in Coos
Bay that were disturbed by dredging activities recovered to pre-dredging levels in four
weeks (Newell et al. 1998). It is anticipated that some of the longer lived organisms such
as clams and large polychaetes will require up to a year or more to fully recover pre-

- Fish – The October to February inwater work period will not coincide with the presence
of protected sturgeon or salmonids, with the exception of migrating coho salmon adults in
the fall. Primary impacts would be due to turbidity, but fish would likely avoid active
work areas and would be expected to move to less turbid waters. "The elevated
suspended sediment conditions would be short-term during pipeline installation and
would not be continuous at any one location. This would reduce the chances of continuous elevated exposure for any fish that may remain in a localized area." Ellis Report, page 13.

- Oyster Beds – "Four companies lease lands within the bay that they seed with juvenile oysters (spat) and later harvest. Some beds are present in Haynes Inlet near the pipeline corridor. However, all oyster growing areas have been avoided by re-routing the proposed pipeline. Hazardous spills or burial of spat by increased sedimentation have the potential to impact survival and production of these oysters. ** Adverse effects would be restricted to the short-term period of active construction as sedimentation and erosion control plans would attempt to limit elevated turbidity and suspended sediment near known rearing areas. Any inwater work would comply with turbidity standards as administered under the DEQ Section 401 Clean Water Act certification program.

"** Because oyster beds often occur near the mouths of sediment-laden rivers, oysters are quite tolerant of high suspended sediment loads (Wilbur et al. 2005). Although deep burial can cause mortality, Dunnington (1968) reported that oysters buried 1.25 cm or less could 'usually clear their bills of sediment if the water was warm enough for active pumping.' It is highly unlikely that dredging near the oyster beds will cause sediment deposition significant enough to cause mortality. PCGP is currently in consultation with oyster growers (discussed below) on potential remedies should oyster production be negatively affected." Ellis Report, page 15.

The Ellis Report goes on to describe turbidity monitoring requirements and potential impact minimization practices that could be required in the event that field-testing confirms turbidity standards are being exceeded. In addition, additional safeguards will be provided by virtue of the fact that the applicant will need to obtain permits under the Clean Water Act. Finally, the consultation requirement will provide additional safeguards.

The evidence provided by the applicant constitutes substantial evidence. This is particularly true given that the scientific analysis provided by the applicant has not been rebutted by the opponents. The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." Constant Velocity Corp v. City of Aurora, 136 Or App 81, 901 P2d 258 (1995); Younger v. City of Portland, 305 Or 346, 357, 752 P2d 262 (1988). "A finding lacks substantial evidence when the record contains credible evidence weighing overwhelmingly in favor of one finding and the agency finds another without giving a persuasive explanation." Camasser Services, Inc v. Employment Dept., 163 Or App 270, 274, 987 P2d 652 (1999). In this case, the applicant has met its burden of proof. Given the record, to rule against the applicant on this issue would be reversible error. In this regard, there was a complete failure by the opponents to submit credible scientific expert testimony of their own.

ii. Sediment Quality in Coos Bay

More than one opponent testified that the bay is full of hazardous waste that is currently buried in layers of sediment, and that dredging in these areas will cause these substances to be re-introduced into the aquatic environment. The FEIS confirms this may be true. See Page 4.5-93 ("Wildlife and Aquatic Resources"). With regard to impacts to fish, the FEIS addresses the

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effects of these chemicals on salmon and other fish and concludes that there will be long-term impacts. In the absence of the scientific evidence to the contrary discussed below, the Board would accept the FERC findings in the FEIS as constituting substantial evidence.

The FEIS also states that “suspended sediment may adversely affect filter feeding commercially and recreationally important clams and oysters near the pipeline route in the bay where most of the sediment would be suspended.” FERC FEIS at p. 4.5-94. In the Hearings Officer’s June 6, 2010 letter to the parties, he opined that “[t]he FEIS goes on to conclude, rather unconvincingly, that ‘[a]dverse effects would be restricted to the short-term period of active construction as sedimentation and erosion control plans would attempt to limit elevated turbidity and suspended sediment near known rearing areas.” Id. In that same letter, the Hearings Officer stated that “[w]hat concerns me is that there is no evidence to conclude that short term exposure to construction-related turbidity is not significant in filter feeding organisms. Common sense suggests that filter-feeding organisms will ingest the toxic compounds, making them inedible or, at the very least, undesirable. The applicant needs to do more to address this issue.”

The applicant addresses this issue in its June 24, 2010 final argument, as follows:

First, as noted in the FEIS, there are no known hazardous waste sites in the area of Coos Bay that would be crossed by the pipeline. FEIS page 4.5-93. In the absence of any contrary evidence provided by opponents regarding the actual presence of contaminated sediments along the route of the pipeline through the bay, the applicant submits that the hearings officer could adopt approval findings based on this evidence alone. However, the FEIS does go on to state that historically there has been boat painting in the general area of Coos Bay that could have resulted in deposits of toxic compounds, and that there is evidence regarding the presence of tributyltin in Catching Slough. FEIS page 4.5-93.

In response to these concerns, the applicant submitted a letter from Staff Environmental Scientist Randy Miller dated June 4, 2010. That letter notes that “[t]he proposed pipeline work in Haynes Inlet requires confirmation that the sediment that will be excavated is of sufficient quality that water quality impacts will not occur as a result of chemical constituent concentrations in the sediment.” The letter goes on to explain in detail the steps that have been taken by Pacific Connector, and what will be required in the future regarding evaluation of sediment quality.

Pacific Connector has prepared a Level 1 Sediment Quality Assessment that was submitted to the Corps and to the Project Review Group (PRG) for review. The PRG responded in a letter dated December 3, 2009 recommending that Pacific Connector undertake the following steps: (1) preparation of a Sediment Analysis Protocol (SAP) in accordance with the established
Sediment Evaluation Framework (SEF) used for waters of the Pacific Northwest; (2) division of the project area into three dredged material management units; (3) collection of nine sediment cores along the proposed alignment within Haynes Inlet; and (4) physical/chemical analysis of the sediment samples.

Following the recommendations of the PRG, Pacific Connector prepared a January 2010 SAP (copy attached to the letter from Randy Miller), which has been approved by the Corps and the PRG. The purpose of the SAP is to assess whether chemicals of concern are present in sediment in the Haynes Inlet portion of the project area (mileposts 1.7 to 4.1). Chemicals of concern and screening levels established by the SEF are listed on Table 1 of the SAP.

The June 4, 2010 letter from Randy Miller notes that prior sediment testing near the project area indicates that contaminants of concern are not present in the project area at concentrations of concern: "The Coos Bay area studies indicate that there is no reason to believe that chemical contaminants are present in the project area at concentrations greater than SEF screening levels." Miller letter, page 2. Should the sampling to be undertaken by Pacific Connector observe any chemical constituents at concentrations higher than the SEF standards, Pacific Connector will work with the Corps, DEQ, NMFS and the USFWS to apply appropriate mitigation measures or revised construction methods to ensure that no adverse water quality impacts will result from pipeline construction.

The applicant has also submitted a letter dated June 17, 2010 from Robert Ellis, Ph.D., of Ellis Ecological Services (Exhibit 9 to applicant's June 17, 2010 submittal), which responds to concerns stated during the first open record period regarding what steps the applicant will take to evaluate risk posed by contaminated sediments, and the framework that will be applied in order to assess potential risks, including bioaccumulation concerns.

The SAP establishes the methods for sampling and analysis of sediment within the planned pipeline route in order to satisfy the recommendations of the PRG and to ensure that water quality impacts will not occur as a result of sediment contamination. It would be appropriate for the county to impose a condition of approval requiring the applicant to undertake the sampling and analysis set forth in the SAP in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet.
The Board finds that information contained in the June 4, 2010 letter from Mr. Miller, the June 17, 2010 letter from Mr. Ellis, and the SAP constitutes substantial evidence regarding the specific pipeline impacts sufficient to rebut the general conclusions of the FEIS and to respond to concerns expressed by opponents. As quoted above, the applicant proposed the Board impose a condition of approval requiring the applicant to undertake the Sediment Analysis Protocol ("SAP") during dredging operations. The Board finds it is important for the applicant to complete the sampling and analysis of the SAP. However based upon staff recommendation, the timing of these steps should be accelerated in order to identify and address issues as soon as possible. Accordingly, the Board adopts Condition of Approval B.19 to read as follows:

"Prior to construction, the applicant shall be required to undertake the sampling and analysis set forth in the Sediment Analysis Protocol (SAP) in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet."

Given these extensive avoidance, minimization and mitigation measures proposed by the applicant, and subject to this condition, the Board concludes that any impacts to resources will be temporary and de minimis. Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc., ___ Or LUBA ___ (LUBA No. 2009-100, March 10, 2010).

q. **Forest Zone (F) (CCZLDO Article 4.8)**

**CCZLDO §4.8.300(F)**

The proposed pipeline will cross approximately 39.47 miles of Forest-zoned lands within the County (see Tables 1 and 2 in the application narrative). Of the 39.47 miles, 10.76 miles are on BLM-managed lands, while the remaining segments are located on privately owned lands. The Environmental Alignment Sheets in Exhibit 1 to the application narrative provide the landowner and zoning information with the parcel data overlaying aerial photography.

The majority of the pipeline route through the County is located on Forest-zoned lands. As shown on Table 1 in the application narrative, the pipeline would cross Forest-zoned lands between the following mileposts: 4.22 to 6.25, 6.44 to 8.28, 8.54 to 10.42, 8.95 to 9.06, 9.10 to 10.12, 10.52 to 10.97, 11.32 to 11.94, 12.04 to 12.47, 12.49 to 14.22, 14.28 to 15.69, 15.73 to 15.89, 15.95 to 19.24, 20.05 to 21.81, 21.87 to 22.59, 23.06 to 29.52, 30.15 to 45.70.

The applicant must demonstrate compliance with CCZLDO §4.8.300(F), which is a codification of OAR 660-006-0025(4)(q). This administrative rule allows the following conditional uses in forest zones:

"New electric transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g.,
gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width." OAR 660-006-025(4)(q). 29

Opponents argue that the proposed pipeline use is a gas "transmission line," which they assert is not allowed in the Forest zone due to CCZLDO § 4.8.300(F). See Letter from Jan Wilson dated June 8, 2010, at p. 5. They argue that only gas "distribution" lines are allowed, and a distribution line is one that distributes gas to homes in the County. The opponents seek to differentiate the proposed Pacific Connector pipeline on the grounds that it does not "distribute" gas to residents or businesses within the County, but is instead one that "transmits" gas to California and other locales. 30

The applicant responds to this argument as follows:

Several opponents have argued that the PCGP is a "transmission" gas pipeline rather than a "distribution" line, and that the pipeline is therefore not allowed under the applicable Goal 4 rule,

The language in [OAR 660-006-0025(4)(q)] expressly and unambiguously defines all new utility lines as "distribution" lines, with the exception of new electric lines, which are identified as "transmission" lines. For purposes of this state rule, and the corresponding county code provision, there is no such thing as a natural gas "transmission" line. While the opponents may disagree with the appropriateness of this characterization, the text of the rule is not ambiguous and cannot be changed by the hearings officer.

The opponents' argument is based on the fact that the PCGP is described in other materials and in FERC documents as an interstate natural gas "transmission" facility. The opponents' argument

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29 Identical language is included in CCZLDO § 4.8.300(F) regarding conditional uses in the county Forest zone.

30 In their letter dated June 8, 2010, WELC states as follows:

Because the provision mentions "electrical transmission lines" separately from "distribution lines," which, by the given list of examples, include more than just electrical lines, it is not clear that non-electrical transmission lines are allowed under the provision. The definitions section of the county code makes no distinction between transmission lines and distribution lines, though it does define utility "service lines" to include "distribution lines" for both electrical and non-electrical utility services. In any event, the applicant has the burden of showing how the proposed natural gas pipeline, which seems to be merely transmitting natural gas through the county (from the proposed LNG import facility to the main north-south interstate pipeline that transmits natural gas through multiple western states between the Canadian and Mexican borders), rather than distributing it to any Coos County users, falls within the defined administrative conditional use.
assumes that the PCGP's classification by FERC must also be consistent with its classification under OAR 660-006-0025(4)(q) and CCZLDO § 4.3.800(F). Following this assumption, opponents argue that interstate natural gas pipelines are prohibited in forest zones because the rules only allow "transmission" lines for electricity. Opponents argue that the PCGP is not a distribution line under their interpretation and therefore is not allowed in forest zones as a conditional use.

It is important to clarify the interpretive issue before the county and the proper scope of analysis. The interpretive issue is limited to the classification of the PCGP under the county's forest zone. The county's forest zone provisions allowing new distribution lines were adopted to implement OAR 660-006-0025(4)(q) and, therefore, must be interpreted consistently with the Goal 4 rules. Cotter v. Clackamas County, 36 Or LUBA 172 (1999). Accordingly, the focus of the analysis is on the Goal 4 rule rather than the local code language. Id.

Because the issue before the county is the classification of the PCGP under Goal 4, the county should not consider FERC's classification of the PCGP under federal law. Stated simply, the county's land use review and FERC's review of the PCGP are two separate processes, each applying a different set of definitions and standards. In its review process, FERC does not consider or determine the classification of the PCGP under Goal 4 or the county forest zone. Similarly, the county's land use review process does not involve any definitions or review criteria established by FERC or federal law. FERC's classification of the PCGP, which forms the bulk of the opponents' analysis, has no bearing on the on the classification of the PCGP under Goal 4.

Under the Goal 4 rule, the classification of the PCGP is a question of statutory construction, which must be reviewed under the analysis established in PGE v. Bureau of Labor and Industries, 317 Or 606 (1993). The first level analyzes the text and context of the provision. The second level considers legislative history that is offered by the parties, even if the text and context of the provision do not present an ambiguity. State v. Gaines, 340 Or 160, 171-72 (2009). "However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." Id. The third level of analysis, maxims of statutory construction, is only considered if the text, context, and legislative history do not answer the interpretive question. Id.

Under the Goal 4 rule, the classification of the PCGP is a question of statutory construction, which must be reviewed under the
analysis established in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). The first level analyzes the text and context of the provision. The second level considers legislative history that is offered by the parties, even if the text and context of the provision do not present an ambiguity. *State v. Gaines*, 340 Or 160, 171-72 (2009). "However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." Id. The third level of analysis, maxims of statutory construction, is only considered if the text, context, and legislative history do not answer the interpretive question. Id.

a. The text and context of the Goal 4 rule establish that the PCGP is a "new distribution line" under OAR 660-0006-0025(4)(q).

OAR 660-006-0025 includes a long list of uses and activities that are either allowed outright or as conditional uses in rural forest zones. Two of those uses are relevant to the classification of the PCGP. OAR 660-006-0025(3)(c) allows "Local distribution lines (e.g., electric, telephone, natural gas) and accessory equipment" as outright permitted uses. OAR 660-006-0025(4)(q) allows, as conditional uses: "New electric transmission lines with right-of-way widths of up' to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width."

The text of OAR 660-006-0025 reflects that separate classification schemes are used for electrical and non-electrical lines. For purposes of Goal 4, electrical lines are classified as either local distribution lines (allowed outright) or transmission lines (allowed as a conditional use with up to 100 feet of right-of-way). Non-electrical lines are classified as either local distribution lines (allowed outright) or new distribution lines (allowed as a conditional use with up to 50 feet of right-of-way). Nothing in the text of Goal 4 identifies either non-local electrical distribution lines or non-electrical transmission lines as a separate classification. Instead, all non-local non-electrical lines are classified as new distribution lines. Such lines are allowed as conditional uses with up to 50 feet of right-of-way.

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31 Identical language is included in CCZLDO § 4.8.200(H) regarding uses permitted outright in the county Forest zone.

32 When LCDC amended the Goal 4 rules in 1992, "electrical" was deleted from the listed types of distribution lines in OAR 660-006.0025(4)(q) because non-local electrical lines became separately classified as transmission lines.

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The opponents interpret Goal 4 to require the same classification schemes for both electrical and non-electrical lines — *i.e.* transmission and distribution lines. The distinction, opponents argue, is that a gas distribution line must be designed to provide local utility customers with supplies of gas. However, this interpretation ignores the fact that OAR 660-006-0025(3)(c) and CCZLDO § 4.8.200(H) specifically allow local distribution lines as a use permitted outright. Consequently, OAR 660-006-0025(4)(q) must be interpreted to allow distribution lines that serve more than just local customers. See ORS 174.010 (statutes must be construed to give effect to all provisions). Further, Goal 4 does not identify any non-electrical lines (e.g., telephone, oil, and fiber optic cable) as transmission lines. Under the opponents' interpretation, all non-electrical lines, even telephone phone lines, that are not restricted to local service would be prohibited in the Forest zone. The text of Goal 4 does not support this interpretation.

The statutory context of the Goal 4 rule confirms that the PCGP is properly classified as a new distribution line. The Goal 4 utility line classification scheme is derived from ORS Chapter 772, which establishes the amount of right-of-way that can be condemned for various types of utility lines. ORS Chapter 772 makes clear that "transmission" is a classification used only for electrical lines and electrical utilities.33 No other type of utility line (e.g., gas, oil, geothermal, telephone, fiber optic cable) is classified as a "transmission" line under ORS Chapter 772, including utility lines that might be classified as a transmission line under federal law. Consequently, all non-electrical utility lines, including the PCGP, are properly classified as distribution lines for purposes of the Goal 4 rule.

The opponents' classification scheme erroneously ignores ORS Chapter 772 and, instead, focuses on the classification of the PCGP under other laws and FERC documents. As explained above, this interpretation loses sight of the fact that the proper analysis is whether the PCGP is a distribution line under Goal 4, not FERC's rules or some other source of law. Neither Goal 4 nor ORS Chapter 772 implements either federal law or Williams' classification scheme. Therefore, federal law does not provide context for interpreting Goal 4. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

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33 In fact, when the Goal 4 rule was adopted, nothing in Oregon law classified gas lines as "transmission lines."

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The purpose statements in Goal 4 and the Goal 4 rule also provide context for interpreting the term "new distribution lines." The purpose of Goal 4 and the Goal 4 rule is to conserve and protect lands for timber production. Goal 4 and the Goal 4 rule recognize that five general types of uses may be allowed in forest zones, subject to the standards in Goal 4 and the Goal 4 rule. OAR 660-006-0025(1). New distribution lines are part of the general category of locationally dependent uses allowed by Goal 4. However, the "distribution" label is not what is important for ensuring that these lines are consistent with the purpose of Goal 4. Instead, these lines are made consistent with the purpose of Goal 4 through the 50 foot permanent right-of-way standard in OAR 660-006-0025(4)(q) and the conditional use criteria in OAR 660-006-0025(5). The opponents' labeling distinction between "distribution" and "transmission" lines does not further the purpose of Goal 4 and the Goal 4 rule. In fact, if opponents' arguments were correct, it would be impossible to site an interstate gas pipeline across Forest-zoned land in Oregon.

In short, the Goal 4 rule classifies all gas lines as either local distribution lines or distribution lines. Goal 4 does not recognize a separate classification for gas transmission lines because there is no similar classification under ORS Chapter 772 or any Oregon statute that could serve as relevant context. Therefore, under Goal 4 and CCZLDO 4.8.300(F), the PCGP is a distribution line and is allowed as a conditional use with up to 50 feet of right-of-way width.

b. The legislative history of the Goal 4 rule confirms that the PCGP is properly classified as a distribution line.

The legislative history of the Goal 4 rule confirms that the classification scheme for utility lines was developed based on the classification scheme in ORS Chapter 772, which does not identify gas transmission lines as a separate classification. OAR 660-006-0025 was first adopted by LCDC in 1990 and classified all types of utility lines, including electrical lines, as either local distribution lines or distribution lines. All distribution lines were allowed as conditional uses with up to 50 feet of right-of-way. In 1992, LCDC amended the rule to allow "new electric transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210" and deleted the reference to "electrical" under distribution lines. The apparent reason for this revision was to make the Goal 4 rules consistent with ORS Chapter 772, which

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34 General purpose statements are not approval criteria for a land use decisions. However, purpose statements can provide context for a statutory or regulatory interpretations.

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recognized electric transmission lines as a separate classification
and provided for additional right-of-way condemnation authority
for such lines. No amendment was necessary for other types of
utility lines because ORS Chapter 772 did not classify any other
types of lines as transmission lines. Consequently, LCDC’s
decision to amend the Goal 4 rules to recognize electrical
transmission lines does not reflect an intent to classify, and thereby
prohibit, any other type of utility line as a transmission line.


The opponents appear to be correct that the gas pipeline industry distinguishes between
gas transmission lines and gas distribution lines. See generally, William A. Mogel and John P.
Gregg, Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines,
ENERGY LAW JOURNAL, Vol. 42, page 155; 157 (1983). In the industry, it is apparently
understood that interstate gas pipelines are generally used for the “transmission” of natural gas.
Id. FERC seems to adopt this distinction as well, as the discussion in the FEIS makes clear.

However, the applicant is correct that there is no indication in Statewide Planning Goal 4
or OAR 660-006-0025(4)(q) that LCDC purposefully intended to use the federal vernacular, and
there is no indication that LCDC sought to purposefully exclude interstate gas “transmission”
pipelines from Forest zones. As the applicant notes, neither the FERC classification or other
federal law is necessarily “context” for interpreting DLCD’s administrative rule, because there is
simply no evidence to suggest that OAR 660-006-0025(4)(q) implements federal law or was
enacted with federal law in mind.

OAR 660-006-0025(4)(q) specifically lists “gas” amongst a list of examples of
“distribution lines.” Because the rule creates a separate category for “local” gas distribution lines,
the only logical inference is that all other gas lines (i.e. “non-local gas lines) are a conditional use.
By using the term “transmission” lines for electrical lines, the rule is intending to recognize the
vernacular used in the state statute. See ORS Chapter 772.

The legislative history is also telling because there is really no discussion regarding gas
“transmission” lines. If DLCD were making a purposeful decision to exclude interstate gas
transmission lines from Forest zones, one would think that such a monumental decision would
have generated more debate and attention. Such debate and discussion would be reflected in the
legislative history. However, the tenor of the legislative history is much more in line with
“housekeeping” changes, and not major shifts in policy.

Moreover, as the Hearings Officer’s discussion on preemption makes clear, it is doubtful
that DLCD would have the authority to exclude interstate gas transmission lines from the Forest

35 “There are three major segments of the natural gas industry: production, transmission, and distribution. Essentially, interstate natural gas pipeline companies act as middlemen, buying natural gas from producers at the
wellhead, transporting it, and reselling it directly to large end-users or to local distribution companies, which in turn
resell it for a variety of end-users.”

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zone in any event. This is particularly true for parts of the state not subject to the CZMA. Along those same lines, the opponents' argument also seems to conflict with the apparent purpose behind ORS 215.275(6), which, as stated elsewhere herein, appears to be a legislative recognition of federal preemption on the issue of interstate gas pipelines in Farm zones.

The Board concludes that the interstate gas pipeline proposed here is a “distribution line” within the meaning of OAR 660-006-0025(4)(q). In any event, the Board further concludes that even if the application is proposing an interstate gas “transmission” line, and even if CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) could be read to bar such gas transmission lines in a Forest zone, those laws would be preempted by federal statute. The Board adopts herein the applicant’s argument, as set forth above, as additional findings.

50 Foot Right of Way Corridor and Temporary Right of Way.

Another issue stemming from CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) concerns the fact that the applicant is proposing a temporary construction corridor that exceeds 50 feet. As quoted above, CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) allow “new distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width.” The applicant has testified that the permanent right-of-way for the PCGP will not exceed 50 feet at any point along the pipeline route. As reflected in the FEIS, Pacific Connector originally proposed a right-of-way with varying widths depending upon the underlying land ownership. However, as explained in the applicant’s letter dated June 17, 2010, Pacific Connector has adjusted the project right-of-way width to a consistent 50 foot width in response to public comments from FERC and other agencies.

Several opponents argue that the proposed pipeline exceeds the “50-foot right-of-way” requirement because an additional 45-foot temporary construction easement is required during construction of the pipeline. WELC makes the opponent’s argument in their letter dated June 8, 2010:

[It is clear that [OAR 660-006-0025(4)(q)] allows for the wider 100-foot right-of-ways only for electrical lines. The non-electrical lines – even if properly characterized as “distribution” lines – are limited to those that can be fit into a 50-foot right-of-way. The provision makes no distinction between “temporary” and “permanent” rights-of-way, and the applicant’s attempt to squeeze an unallowed 95-foot right-of-way into the 50-foot right-of-way limit is a blatant attempt to establish an unpermitted use. It is not clear why it would take more than 50 feet of right-of-way to install a three-foot diameter pipe, but, in any event, the county code has clearly determined that, in Forest zones, the maximum linear clearing width that would not significantly interfere with primary forest operations and forest habitat values is 50 feet. The applicant’s proposal for a pipeline that ostensibly requires a 95-foot right-of-way – during construction or anytime – is not allowed in the Forest zones.

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The state statutes are to the same effect. ORS 772.210(3)\textsuperscript{36} gives gas public utilities condemnation rights “not exceeding 50 feet in width,” and specifically note that the 50-foot limit is intended to accommodate all the right-of-way necessary for “constructing, laying, maintaining and operating” the pipeline and “including necessary equipment.” There is absolutely no provision in the law for a “temporary” construction easement wider than the 50-foot right-of-way limit.

The applicant responds as follows:

However, [the opponents’] interpretation is not supported by the text and is inconsistent with a recent decision by the Oregon Energy Facility Siting Council (EFSC). As noted above, the language used in the county code to describe the use category comes directly from the Goal 4 implementing regulation. OAR 660-006-0025(4)(q) provides that gas distribution lines are permitted on forest lands within a 50-foot right-of-way. The

\textsuperscript{36} ORS 772.210. Construction of service facilities, right of entry and condemnation of lands:

(1) Any public utility, electrical cooperative association or transmission company may:

(a) Enter upon lands within this state in the manner provided by ORS 35.220 for the purpose of examining, locating and surveying the line thereof and also other lands necessary and convenient for the purpose of construction of service facilities, doing no unnecessary damage thereby.

(b) Condemn such lands not exceeding 100 feet in width for its lines (including poles, towers, wires, supports and necessary equipment therefore) and in addition thereto, other lands necessary and convenient for the purpose of construction of service facilities. If the lands are covered by trees that are liable to fall and constitute a hazard to its wire or line, any public utility or transmission company organized for the purpose of building, maintaining and operating a line of poles and wires for the transmission of electricity for lighting or power purposes may condemn such trees for a width not exceeding 300 feet, as may be necessary or convenient for such purpose.

(2) Notwithstanding subsection (1) of this section, any public utility, electrical cooperative association or transmission company may, when necessary or convenient for transmission lines (including poles, towers, wires, supports and necessary equipment therefore) designed for voltages in excess of 330,000 volts, condemn land not to exceed 300 feet in width. In addition, if the lands are covered by trees that are liable to fall and constitute a hazard to its wire or line, such public utility or transmission company may condemn such trees for a width not exceeding 100 feet on either side of the condemned land, as may be necessary or convenient for such purpose.

(3) Notwithstanding subsection (1) of this section, a water or gas public utility may condemn such lands, not exceeding 50 feet in width, as may be necessary or convenient for purposes of constructing, laying, maintaining and operating its lines, including necessary equipment therefore, (Emphasis Added).

(4) The proceedings for the condemnation of such lands shall be the same as that provided in ORS chapter 35, provided that any award shall include, but shall not be limited to, damages for destruction of forest growth, premature cutting of timber and diminution in value to remaining timber caused by increased harvesting costs, (Emphasis Added).

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language does not suggest intent by DLCD to limit anything other than the permanent right-of-way corridor.

As noted in my June 17, 2010 correspondence, the EFSC Final Order approving the COB Energy Facility supports the interpretation that the 50-foot width limitation included in OAR 660-006-0025(4)(q) is intended to include only the permanent, operational right-of-way, and not temporary construction areas. In that case, the pipeline crossed through a Klamath County forest zone that applied the OAR 660-006-0025(4)(q) use category. The findings in that decision indicate that construction would require a 120-foot wide corridor along a segment of the pipeline located within a forest zone. Despite a 120-foot construction corridor through the forest zone, EFSC approved the natural gas pipeline as a new distribution line with a right-of-way of 50 feet or less in width, and applied the following condition, "[t]he certificate holder shall limit the width of the permanent/operations easement for the natural gas pipeline to no more than fifty feet on lands zoned FR" (emphasis added).

Pacific Connector has proposed conditions of approval designed to ensure (a) that the permanent right-of-way is no wider than 50 feet, and (b) that all temporary construction areas will be restored to their preconstruction condition.

See Applicant's final Argument, at 9-10.

The Klamath County case provides some authority that the standard practice with regard to this issue is to consider temporary construction easements to be separate and distinct from "right of way" as that term is used in the above-cited administrative rule. The case of Friends of Parrett Mountain v. Northwest Natural Gas Co., 336 Or. 93, 79 P.3d 869 (2003) provides similar insight as to the standard practice. In Friends of Parrett Mountain, the Oregon Supreme Court noted the following facts pertaining to an intrastate natural gas pipeline authorized by the Oregon Energy Facility Siting Council:

The certificate authorizes Northwest Natural to construct its pipeline within an approximately 62-mile long, 200-foot wide corridor designed around 10 significant "constraint points." Inside that corridor, Northwest Natural will build the pipeline within an 80-foot wide, temporary construction easement. Upon completion of the project, the width of the easement will be reduced to 40 feet and become permanent. (Emphasis added).

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37 The findings addressing the forest zone review criteria state that "[d]ue to local topography (side slopes), construction of this segment of the pipeline would require 120-foot-wide corridor." Final Order, COB Energy Facility, at 334.

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The parties to the Parrett Mountain case did not raise the "temporary construction easement" issue to the Supreme Court, so the case cannot be viewed as formal precedent on that issue. Nonetheless, it provides further indication that EFSC does not consider the temporary easement to be "right-of-way" within the meaning of the statute.

WELC's argument assumes that the 45-foot wide "temporary" portion of the easement area is "right-of-way." Indeed, the FEIS refers to this area as the "95 foot wide construction right-of-way." On the other hand, Figure 2.3-1 of the FEIS, page 2-64, makes it fairly obvious that it is not physically possible to build a pipeline within 50 feet of ROW. As the Board has previously noted, state law is generally preempted to the extent it is inconsistent with FERC authorizations. Therefore, the Board rejects the contention that the application must be denied because it proposed a greater right-of-way than may be contemplated by OAR 660-006-0025(4)(q).

WELC also cites ORS 772.210(3), which states that "a water or gas public utility may condemn such lands, not exceeding 50 feet in width, as may be necessary or convenient for purposes of constructing, laying, maintaining and operating its lines, including necessary equipment therefore." It does not appear that the applicant is relying on ORS 772.210(3) as the source of its condemnation authority. Rather, the applicant relies on ORS 772.510(3), which provides that "[t]hese pipeline companies may appropriate and condemn such lands, or easements thereon or thereover, in such width as is reasonably necessary to accomplish their pipeline company purposes, by proceedings for condemnation as prescribed by ORS chapter 35." This statute appears to allow the pipeline company to condemn pretty much whatever it reasonably needs in terms of right-of-way.

Applying the PGE v. BOLI methodology, the text of OAR 660-006-0025(4)(q) could be read to support WELC's position. But a legal standard such as this cannot be read in a vacuum. State v. Stoneman, 323 Or 536, 546, 920 P2d 535 (1996). The context of a statute or statutory scheme can sometimes reveal an ambiguity in a particular phrase that, standing alone, appears to have a clear meaning, Southwood Homeowners Ass'n v. City Council of Philomath, 106 Or.App. 21, 806 P.2d 162 (1991) (citing Dennehv v. City of Portland, 87 Or.App. 33, 40, 740 P.2d 806 (1987).

For the reasons explained elsewhere in this decision, the statutory context, including ORS 215.275 and ORS 772.210(3), supports PCGP, and tilts the balance in favor of the applicant's

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28 In Stoneman, the Oregon Supreme Court stated:

It is true that, when viewed in isolation, ORS 163.680 (1987) appears to have contained a content-based proscription on expressive material. It forbade commerce in certain forms of expression--films, videotapes, and the like in terms of their content--"sexually explicit conduct by a child under 18 years of age." But a statute cannot be read in a vacuum. An examination of the context of a statute, as well as of its wording, is necessary to an understanding of the policy that the legislative choice embodies. See PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-11, 859 P.2d 1143 (1993) (first level of interpretation of statute involves examining both text and context). A closer look at the provision under examination here, within its statutory context, reveals a different focus. (Emphasis added).
interpretation. Thus, the Board finds that the 45-foot temporary easement area is not “right-of-way” within the meaning of OAR 660-006-0025(4)(q), or in the alternative, that OAR 660-006-0025(4)(q) is inconsistent with both ORS 772.510(3) and federal law and therefore is preempted and without legal force on that issue.

SECTION 4.8.400.

CCZLDO §4.8.400 is entitled “Review Criteria for Conditional Uses in Section 4.8.300,” and provides as follows:

- A use authorized by Section 4.8.300 ... may be allowed provided the following requirements are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands.

A. The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands; and

As the applicant correctly notes, there are several important limitations on this standard. First, it is important to note that this criterion relates to significant impacts on farming and forest practices and significant cost increases. The applicant is not required to demonstrate that there will be no impacts on farming or forest practices, or even that all impacts that may force a change or increase costs have been eliminated through mitigation or conditions of approval. See Rural Thurston, Inc. v. Lane County, 55 Or LUBA 382, 390 (2007).

Secondly, LUBA has affirmed the County's determination that CCZLDO 4.8.400 is limited in its scope and does not require the extensive analysis applied under the similarly-worded provisions of ORS 215.296(1). Comden v. Coos County, 56 Or LUBA 214 (2008). For example, LUBA held that the required analysis under CCZLDO 4.8.400 need not include any of the following: (1) identification of a particular geographic area of analysis, (2) an "exhaustive pro forma description of all farm and forest practices on nearby lands," or (3) consideration of farming practices not intended to generate a profit. Id. Furthermore, since this code section does not implement ORS 215.296(1), LUBA rejected attempts to rely on cases interpreting the statute to argue that the code standard was not satisfied. Id.

i. Accepted Forest Practices.

Mr. Jake Robinson of Yankee Creek Forestry testified at the May 20, 2010 hearing and submitted a letter dated June 7, 2010. Mr. Fred Messerle of Messerle and Sons also testified and submitted letters dated May 2, 2010 and June 10, 2010. Since the issues raised in these letters overlap, they are considered together.

Mr. Robinson and Mr. Messerle state that the pipeline will force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands. In support of that conclusion, they raise the following issues:

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• The limited number of hard crossings across the pipeline easement will increase costs, because it changes the way an entire stand of trees is harvested.

• 95 foot wide easement will fragment timber stands, making them more difficult to log efficiently.

• The “hard edge” will cause tree blow downs, because trees that were previously sheltered from wind will now be fully exposed.

• Corridor will promote trespass, both in terms of vehicles and pedestrians. Additional human traffic will cause an increased risk of damage to trees via disease (including Port Orchard Cedar root rot and Douglas Fir root rot), fire, and vandalism.

• Increased vector for noxious weeds,

• Increased vector for fire,

• Trees on the edge of the easement will be of poor quality because they have more exposure to sunlight and, as a result, grow more limbs, and they will be on a different growth cycle as compared to neighboring trees.

• Pipeline reduces the ability to fight fire because it impedes access to forest via bulldozers and making it more difficult to create “cat lines.”

• Reduced ability to use land for conservation easements, etc.

• Increased costs associated with monitoring the construction of the pipeline,

The Board finds Mr. Robinson and Mr. Messerle to be credible expert witnesses and is sympathetic to the concerns they raise. The applicant’s expert, Mr. Dallas Hemphill, has 45 years of experience in the forest industry and also is a credible expert witness. In effect, this case presents a “battle of experts,” and the Board has the difficult task of choosing to agree with one side over the other. In this case, the Board agrees with the evidence provided by the applicant. The following factors influence this conclusion:

First, it seems that many of the concerns raised are of a type that would be true no matter what kind of pipeline was proposed. For example, in every case where a pipeline traverses forest lands in Oregon, the resulting corridor will result in a new forest edge, and that edge will experience some degree of blow downs due to previously-sheltered trees receiving increased exposure to wind. Despite these types of foreseeable impacts, there has already been a legislative determination, both at the state and county level, that pipelines are an allowed use in the Forest zone. Therefore, it cannot be assumed that standard practices associated with pipeline construction and operation will automatically, in every case, force a significant change in, or significantly increase the cost of, accepted forest practices on forest lands. Otherwise, pipeline uses would have simply been prohibited in Forest zones. Here, the opponents have not asserted that there is something particular about their land or County forest land in general that causes the

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pipeline to have anything beyond the typical expected impacts. Their testimony is simply too
generalized to be persuasive.

Second, and perhaps more importantly, all of the increased costs can form the basis of an
increased just compensation award. In the Hearings Officer’s letter dated June 6, 2010, he
requested that the parties discuss the applicability or inapplicability of ORS 772.210(4), which
addresses the issue of what costs factor into the just compensation analysis:

ORS 772.210(4) The proceedings for the condemnation of such
lands shall be the same as that provided in ORS chapter 35,
provided that any award shall include, but shall not be limited to,
damages for destruction of forest growth, premature cutting of
timber and diminution in value to remaining timber caused by
increased harvesting costs. (Emphasis Added).

Although the Hearings Officer questioned the applicability of this statutory section, the
applicant appeared to accept the compensation rules set forth in ORS 772.210(4). See Report
dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest
Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" at p. 3
(“This policy with respect to damages may be interpreted in the specific context of forestry to
mean that whatever incremental costs and value losses can be identified and demonstrated to
result from the granting of the pipeline easement will be reflected in the company’s appraisal of
damages payable to the owner. Therefore, the landowner should not experience any
uncompensated logging or access costs.”)

The Hearings Officer found it significant that the landowner would be compensated for
both the value of the land taken and the value of the timber removed. The Hearings Officer
further understood Mr. Hemphill’s testimony to mean that the landowner would be compensated
for the timber as if it was already of a mature size ready for harvest. The Hearings Officer
deemed this requirement important, since he determined that a stand of 20 year trees probably
has little to no current value. On the basis of this reasoning, the Hearings Officer determined
that the applicant presented substantial evidence that the pipeline would not significantly
increase the cost of forestry operations. To ensure compliance with this standard, the Hearings
Officer proposed a condition of approval.

Although the Board disagrees with the Hearings Officer’s conclusion that a stand of 20-
year trees has no current value, the Board otherwise concurs with the Hearings Officer’s
conclusion on this issue. The Board further finds the condition should be modified to provide
compensation for loss of product value due to blow-downs and to apply to all timberlands not
only those that are commercial in nature. Accordingly, the Board adopts the modified condition
as Condition A.5 to read as follows:

"The proceedings for the condemnation of such lands shall be the
same as that provided in ORS chapter 35, provided that any award
shall include, but shall not be limited to, damages for destruction
of forest growth, premature cutting of timber, diminution in value

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to remaining timber caused by increased harvesting costs, and loss of product value due to blow-downs. Whatever incremental costs and value losses to timber lands can be identified and demonstrated to result from the granting of the pipeline easement will be reflected in the company’s appraisal of damages payable to the owner. Therefore, the landowner should not experience any uncompensated logging or access costs. [See ORS 772.210(4) and Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.]"

Subject to the unrelated modification discussed in more detail below, the Board adopts this condition as Condition of Approval A.5.

In its final argument, Pacific Connector acknowledges that the PCGP will have limited effects on accepted forest practices on the forest lands in the vicinity of the pipeline right-of-way. See Applicant’s final Argument. However, the Board finds that those limited impacts will not force a significant change in the accepted forest practices in the vicinity of the pipeline. Nor will those limited impacts significantly increase the cost of accepted forest practices. As explained in the application narrative, accepted forest practices in the vicinity of the pipeline corridor include timber production and harvesting, hauling harvested timber, logging road construction and maintenance, application of chemicals, and disposal of slash.

The pipeline project will have effects on the timbered areas located in the Forest zone both during and after construction in the form of the cleared corridor. As discussed in the application narrative, the pipeline must maintain a 30 foot cleared corridor directly over the pipeline for safety purposes. However, the remaining 20 feet of permanent right-of-way, as well as the temporary construction areas will be replanted in a manner consistent with Pacific Connector’s Erosion Control and Revegetation Plan (ECRP). The permanent removal of a 30-foot strip of trees within the Forest zone will not force a significant change to the surrounding forest practices.

Several opponents argue that the cleared 30 foot strip itself is a significant change. However, as discussed above, if any tree removal required for the footprint of the conditional use itself could be interpreted as forcing a significant change, no use with a permanent tree removal footprint could ever be approved as a conditional use in a Forest zone. The Board finds that is clearly not the intent of this review criterion. Instead the relevant analysis is whether the use contained within that footprint or impact area will force a significant change on forest practices adjacent to the impact area for the use itself.

The PCGP will also have temporary effects on adjacent forest lands and forest practices during construction. The landowner will be unable to conduct accepted forest practices within

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39 The term "forest practices" is defined by the Oregon Forest Practices Act as “any operation conducted on or pertaining to forestland, including but not limited to (a) reforestation of forest land; (b) road construction and maintenance; (c) harvesting of forest tree species; (d) application of chemicals; and (e) disposal of slash.” ORS 527.620(5).

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the temporary construction easement and work areas during pipeline construction. However, all temporary construction areas and all but 30 feet of the 50-foot right-of-way will be replanted and restored in manner consistent with the final ECRP. Once the restoration occurs, the landowner will be able to continue accepted forest practices in those areas. The Hearings Officer proposed a condition of approval to this effect. The Board agrees that the applicant should replant timberlands; however, the Board finds that the landowner is not required to continue engaging in forest practices in those areas. Accordingly, the Board modifies and adopts the condition as Condition of Approval A.20 to read as follows:

"Evidence shall be provided to demonstrate that all temporary construction and staging areas have been abandoned and that those areas that were forested prior to construction have been replanted, consistent with the requirements of this approval, the FERC Order, and the applicant's ECRP."

Further, the Board finds that the applicant-proposed Condition of Approval B.3 is redundant with Conditions of Approval A.20 regarding forestlands and A.21 regarding farmlands. Accordingly, the Board deletes Condition of Approval B.3 and identifies it as "Intentionally deleted."

Finally, the pipeline will have limited effects on accepted forest practices once construction is complete. Public comments raised concerns related to the following potential effects on forest practices adjacent to the pipeline: future pipeline crossings, location of heavy forestry equipment, fragmentation of parcels owned by smaller private timber operators, spread of invasive species, and off-highway vehicle use. These issues are addressed in detail in the following documents, which are adopted herein as findings:

- The application narrative dated April 14, 2010, at pages 15-17;
- Correspondence dated May 11, 2010 from Rodney Gregory of Pacific Connector, at pages 10-13;
- Correspondence dated June 8, 2010 from Rodney Gregory of Pacific Connector, at pages 1-4 (Exhibit 10 to the applicant's submittal dated June 9, 2010);
- Correspondence dated June 17, 2010 from Mark Whitlow of Perkins Coie LLP, at pages 3-6;
- Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" (attached as Exhibit 3 to the applicant's submittal dated June 17, 2010).

In his report dated June 17, 2010, Mr. Hemphill analyzed the specific size and location of each individual tract that would be impacted by the pipeline, and the potential impacts to forestry operations that could be caused by access restrictions, pipeline crossing restrictions, reduction in the amount of harvestable timber, and fragmentation of specific tracts.

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Mr. Robinson's comments are based on the premise that "most of" the impacted forest lands within the County are private, non-industrial timber lands, whose owners do not have the land-base to absorb the increased costs of timber operations. Robinson letter, page 3. However, in his response Mr. Hemphill reviewed the specific list of forestry tracts that will be traversed by the pipeline and determined that, out of 39 miles of forest-zoned land, only approximately 9.4 miles of the pipeline would cross property owned and operated by small "non-industrial" private forest operators.

Mr. Messerle states that the pipeline will encourage trespassing, which will potentially increase the possibility of introducing diseases to trees, including two different types of root fungi. Mr. Hemphill responds with the following testimony:

Port Orford Cedar root rot is already widespread throughout the second-growth areas of southwest Oregon. Laminated root rot is also naturally widely distributed throughout western Oregon. It is not transmitted by soil on traffic, but "...is only known to spread by root contact between infected trees or infected stumps and susceptible trees." (Thies, W. and R. Sturrock, 1995: Laminated Root Rot in Western North America, USDA Forest Service Res. Bull. PNW-GTR-349, Portland.) Therefore the pipeline cannot be expected to accelerate the infestation of either pathogen.

Unfortunately, the Thies / Sturrock report was not included in the record, so the truth of the assertion cannot be verified. Nonetheless, the mere citation to authority indicates confidence in the assertion and itself provides a micron of weight which tips the scales in favor of the applicant regarding a substantial evidence finding.

With regard to the allegation that the pipeline will encourage trespassing, Mr. Hemphill rebuts those assertions as well:

Trespass is an issue throughout western Oregon timberlands. The additional opportunity provided by the pipeline and its access routes would however be only slightly incremental to the problem. The pipeline operator will install robust traffic controls (gates, etc.) that private landowners are often unwilling or unable to afford, thus likely mitigating the problem. Consequently, there should be a negligible increase in human-caused fires, which in any case are often a result of logging and forestry activities. Similarly, there should not be a significant rise in vandalism and other unauthorized activities.

Mr. Hemphill also adequately rebuts, the "hard edge" problem, as follows:

This can be an issue on all forest edges, including those cutting lines and road rights-of-way created by the landowner itself. The proposed vegetation
management strategy on the easement will serve to limit windfall potential. Vegetation will be controlled only on the central 30 feet of the easement, over the pipeline. Outside this area, on the remainder of the easement natural regeneration can be expected to occur, or the landowner may choose to plant. The 30-foot cleared area is narrow enough—about the same as a road right-of-way—that the trees crowns will soon close in (as Mr. Messerle points out in his submission) sufficiently that windfall should not be a significant issue.

Mr. Robinson and Mr. Messerle both assert that the 30-foot strips that will be re-grown will nonetheless produce trees of poor quality due to excessive limbs. Mr. Hemphill fully rebuts this concern with the following testimony:

As the landowner will be compensated for the loss of land and original timber on the easement, any timber that he may subsequently be able to produce in the two strips is therefore a bonus, at no cost to the landowner. It can be retained until the landowner's adjacent timber is mature and then logged concurrently; in this sense, the strips on the construction easement do not constitute unmanageable fragments. Limby trees are produced on forest edges, but in this case the edge trees will have grown on land for which the landowner has already been compensated for the land and original timber. As a result, the landowner's trees on the edge of the 95-foot construction easement will not have this edge effect. None of the more valuable 1-3P grade logs are ever produced in a second growth stand.

In response to the argument that the pipeline will hamper firefighting efforts, Mr. Hemphill states:

Any outbreak of fire would be reported to the pipeline operator concurrently with the landowner. The pipeline operator would be an integral part of the response team. The only time this process would delay fire response would be where the fire was caused by logging or forestry activity...Areas too steep to be accessible by excavator will be hand-slashd on a similar schedule.

Mr. Hemphill further testified that the applicant will conduct routine vegetation maintenance clearing on the 30-foot strip every three to five years and that in the interim, the vegetation will attain only "small dimensions." Staff originally proposed a condition of approval requiring that the pipeline operator mow this vegetation every three to five years; however, the Board finds that it is important to provide the applicant flexibility to identify and implement the most beneficial and cost-effective technique to maintain this vegetation. Accordingly, the Board modifies and adopts this condition as Condition of Approval A.23, which reads as follows:

"The pipeline operator will conduct routine vegetation maintenance clearing on the 30-foot strip every 3-5 years. [See Report entitled Forest Practices and Economic Issues related to

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To summarize on the issue of impact to forest practices, Mr. Hemphill concludes that the incremental increased costs to these timber operators generally amounts to a range of 1-2% of total production costs, which is certainly not an amount that could be described as a "significant" increase in the cost of forestry operations. Second, perhaps more importantly, and as required by Condition of Approval A.5, all of these costs will be included as part of the compensation paid to landowners by the pipeline operator, and therefore such costs will not be borne by the landowners. Therefore, there will be no actual increase in costs to the landowners of forestry operations.

Thus, to the extent there are any increased costs due to operational changes in the forest practices occurring around the pipeline right-of-way, those costs will be considered in the monetary compensation package paid by Pacific Connector to the landowner. Thus, the Board finds that there will be no significant increase in costs of forest practices to the landowners along the pipeline route.

ii. Accepted Farming Practices.

As explained in the application narrative, and in more detail in correspondence dated May 11, 2010 from Rodney Gregory of Pacific Connector (at pages 6-10), the proposed pipeline will not force a significant change in or significantly increase the costs of accepted farm practices, even on those lands that the pipeline directly crosses.

As described in Pacific Connector's prior submittals, the PCGP will have short-term impacts on farming practices within the temporary construction areas and permanent right-of-way during construction activities. Specifically, farming practices within the right-of-way and the temporary construction areas will be interrupted during construction. However, those short-term construction impacts will not cause a significant change in farming practices because of their temporary nature and because farming practices will be able to continue on lands directly adjacent to the temporary construction areas. Furthermore, Pacific Connector must compensate the landowner not only for the permanent right-of-way, but also for any demonstrated loss in crop production within the temporary construction areas. Consequently, the pipeline will not result in any increased cost in farming practices for the landowner, much less a significant increase in cost.

Following construction, adjacent farming practices, including crop lands and grazing pastures may resume within the temporary construction areas as well as over the permanent right-of-way itself. As explained in Rodney Gregory's correspondence dated May 11, 2010, in EFU areas Pacific Connector will install the pipeline five feet below the surface in agricultural areas to make certain that farming equipment may cross through the right-of-way without impacting the structural integrity of the pipeline. Pacific Connector will undertake many other steps as described in Mr. Gregory's May 11, 2010 letter and in the ECRP that are specifically designed to ensure that impacts on agricultural uses will be minimized.
Except as discussed below, the opponents did not rebut the applicant’s evidence or otherwise present substantial evidence of their own explaining how the applicant's proposed efforts to minimize the impacts of the pipeline would be inadequate or ineffective. Therefore, the Board finds that the application satisfies this standard as to accepted farming practices.

The opponents raised two issues—application of herbicides along the pipeline route and potential impacts to groundwater supplies—that, while not specifically directed at this criterion, could be considered impacts on surrounding lands devoted to farm use. Therefore, the Board addresses these issues under this approval criterion below.

(1) **Use of herbicides in pipeline corridor**

Ms. Jody McCaffree of Citizens Against LNG questioned the applicant's herbicide application policy. Although Ms. McCaffree did not connect her concerns to any applicable approval standards, the applicant presented rebuttal on the record to clarify the applicable herbicide application policy.

As stated on the record, as a general practice during pipeline operations, herbicides will not be used to control vegetation as a means to maintain the permanent 30-foot cleared corridor centered over the pipeline. As set forth in Section 12.6 of the ECRP, where weed control is necessary, the applicant will employ hand and mechanical methods (pulling, mowing, disk ing, etc.) to prevent the spread of potential weed infestations. However, spot treatments with appropriate herbicides will be conducted where applicable depending on the specific weed and site-specific conditions using integrated weed management principles. The applicant will not use aerial herbicide applications. Spot herbicide treatment would only be utilized when it could be effective (i.e., where plant phenology and effective herbicide treatment windows coincide) prior to and post construction. Any herbicide treatment would be conducted by a licensed applicator using herbicides labeled for the targeted species and registered for the use. The applicant will not utilize herbicides on any right-of-way without landowner consent/approval and will obtain all required permits from the local jurisdictions/authorities.

As detailed in Section 12.6 of the ECRP, in order to prevent impacts to sensitive areas and habitats, herbicides would not be applied during precipitation events or when precipitation is expected within 24 hours or as specified on the label. Herbicides will not be used within 100 feet of a wetland or waterbody, unless allowed by the appropriate agency. To ensure sensitive species/habitats are not adversely impacted, the biological surveys will map any sensitive species proposed and/or listed under the Endangered Species Act, survey and manage species, and federally (BLM and Forest Service) sensitive species. If noxious weed infestations occur in the vicinity of sensitive sites, the proper treatment buffers will be applied to avoid potential adverse impacts to non-targeted species. In these areas site-specific control will be designed (e.g., application rate and method, timing, wind speed and direction, nozzle type and size, buffers, etc.) to mitigate the potential for adverse disturbance and/or contaminant exposure.

Thus, the applicant will not apply herbicides to the entire right-of-way to control noxious weeds, but rather spot treatments of herbicides may be used in select areas as summarized above. Ms. McCaffree is recommend County oversight of the applicant’s herbicide application, if any, within the pipeline corridor. In response to these specific concerns about
herbicide application, the applicant proposed, the Hearings Officer recommended, and the Board adopts a condition of approval requiring the applicant to use weed control and monitoring methods consistent with the Weed Control and Monitoring sections of the final ECRP. The Board further finds that consequences to landowners may potentially be significant if the applicant engages in aerial application of pesticides. Thus, the Board finds that it is appropriate to memorialize the applicant's representation that there will be no such application of pesticides, in Condition of Approval B.5.

(2) Groundwater impacts

Various opponents expressed concern that the pipeline would adversely impact groundwater supplies. Substantial evidence in the record refutes this contention. First, the risk of impacts to the water supply is limited, as there are no public groundwater supply wells or springs within 400 feet of the proposed construction disturbance according to the State Department of Environmental Quality public water supply database. Second, Condition 43.b of the FERC Order attached to the applicant's correspondence dated May 12, 2010 requires the applicant to prepare a Groundwater Supply Monitoring and Mitigation Plan ("Groundwater Plan") to identify, assess, and monitor groundwater supplies; to prevent impacts to groundwater resources; and to mitigate unavoidable impacts. The applicant has prepared the Groundwater Plan pursuant to this condition, which is included as Exhibit 3 to the April 14, 2010 application narrative. The components of the Groundwater Plan are further summarized in the June 3, 2010 letter from Jared Ellsworth, P.E. of Pacific Connector Gas Pipeline, which is attached as Exhibit 7 to the applicant's submittal dated June 9, 2010.

During the deliberations in this matter, the Board expressed concerns whether the Groundwater Plan would adequately protect area groundwater supplies. Specifically, the Board expressed concern that installation and operation of the pipeline could adversely affect water supply to private wells and/or the supply of water from private wells to homes. The Board finds that compliance with the Groundwater Plan will prevent these occurrences for the following reasons. For example, the applicant will contact landowners within 200 feet of the right-of-way prior to construction requesting their cooperation in identifying groundwater wells, springs, or seeps that could potentially be impacted by the project. The applicant will request permission to take field measurements for baseline water quality and yield as well as for the following parameters: temperature, pH, turbidity, and specific conductance. Samples will be analyzed in a laboratory for TPH, fecal coliform, and nitrate. The applicant will also conduct post-construction sampling if requested by the landowner or in disputed situations to determine the effects of construction, if any, on both the yield and quality of the groundwater supply. Moreover, the applicant will engage in various measures to prevent impacts to groundwater resources, including compliance with: (1) a Spill Prevention, Containment, and Countermeasures Plan to prevent the inadvertent release of fuels, solvents, or lubricants used during construction; and (2) blasting plans to minimize impacts to groundwater resources from blasting activities. Finally, the applicant will implement required mitigation measures on a site-specific basis to remedy any adverse impacts on the yield or quality of water supplies. Such mitigation measures may include ensuring a temporary supply of water and, if necessary, replacing permanent water supply.

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The Board also finds there is not substantial evidence in the record as to why or how the Groundwater Plan is inadequate, incomplete, or otherwise ineffective. The Board finds that the Groundwater Plan will be sufficient to ensure the pipeline will not adversely impact groundwater supplies or any farm practices that rely thereon.

In sum and for the reasons stated above, the proposed pipeline will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices.

Finally, the Board addresses the proposed conditions of approval requiring compliance with the Groundwater Plan. First, the Board finds that the staff and applicant have proposed nearly identical conditions on this issue. Accordingly, the Board intentionally deletes the applicant's proposed condition (Condition of Approval B.22). Further, in order to ensure compliance with all aspects of the Groundwater Plan, the Board adopts the staff-proposed condition (Condition of Approval A.2) as modified to read as follows:

"To minimize impacts to wells and groundwater, the applicant must comply with the Groundwater Supply Monitoring and Mitigation Plan approved by the federal Office of Energy Projects within FERC, including without limitation, provisions requiring: (a) subject to landowner consent, testing and sampling groundwater supply wells for both yield and water quality; and (b) as needed, implementing site-specific measures to mitigate adverse impacts on the yield or quality of groundwater supply."

**The PCGP will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.**

The opponents further contended that the proposed pipeline will significantly increase fire hazard, fire suppression costs, and risks to fire suppression personnel. The Board denies these contentions, because the applicant has offered substantial evidence in support of the conclusion that these increases will not occur. Pursuant to CCZLDO 4.8.400, the second standard for conditional use review in the forest zone is:

"The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel." 40

(i) Fire hazard

The proposed pipeline will not significantly increase fire hazard. The pipeline will be subject to exacting safety requirements that will significantly minimize the risk of a fire caused by the pipeline itself. Specifically, the pipeline and all associated facilities will be designed and maintained to conform with or exceed US Department of Transportation (DOT) requirements found in Title 49 Code of Federal Regulations (CFR), Part 192 Transportation of Natural and

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40 The wording for this criterion is taken directly from the Goal 4 rule at OAR 660-006-025(5).

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Other Gas by Pipeline: Minimum Safety Standards; 18 CFR § 380.15, Site and Maintenance Requirements; and other applicable federal and state regulations.

Comments to the Hearings Officer suggested that FERC had not adequately addressed pipeline safety and fire issues. While not directly relevant to the County's approval criteria, it is important to clarify that the Federal Department of Transportation rather than FERC is responsible for ensuring pipeline safety, while the Pipeline Hazardous Materials Safety Administration Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation of natural gas by pipeline. While FERC is not the agency responsible for pipeline safety, the Reliability and Safety Section of the FEIS does include a pipeline facilities discussion at Section 4.12.10. That section describes the DOT safety responsibilities, as well as the specific safety standards the pipeline must comply with in greater detail.

(1) Fire fuel in pipeline corridor

Several comments raised concerns about fire fuel within the 30-foot cleared corridor created by slash or vegetation that would grow along the right-of-way between maintenance clearings. First, based upon its vegetation maintenance and distribution practices, the applicant does not anticipate increased risk from potentially hazardous fuels, which is assumed to imply woody debris or biomasses distributed on the right-of-way after clean-up and reclamation. As explained in more detail in correspondence from Rodney Gregory dated June 9, 2010, as part of the FERC review process, the applicant worked in conjunction with the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) to develop a standardized set of fuel loading specifications for BLM and private lands, and separate specifications for USFS lands. These fuel loading specifications are set forth in Section 10.2 of the ECPR and are developed specifically for the PCCP project based on the amount of woody material expected to be encountered during construction. During right-of-way clean-up and reclamation, slash materials will be spread across the right-of-way at a rate that does not exceed these fuel load specifications. The fuel loading standards will also apply to slash materials that may be generated during periodic right-of-way maintenance activities that will likely occur about every five years along the pipeline.

On National Forest Lands the maximum amount of slash that would be scattered across the right-of-way will be 12 tons per acre, which would be distributed over the following fuel loading size classes:

<table>
<thead>
<tr>
<th>Fuel Loading by Size Class</th>
<th>Tons/Acre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size Class (Diameter)</td>
<td></td>
</tr>
<tr>
<td>0-1/4”</td>
<td>&lt; 1</td>
</tr>
<tr>
<td>1/4–3”</td>
<td>4-8</td>
</tr>
<tr>
<td>3-8”</td>
<td>7-12</td>
</tr>
<tr>
<td>Maximum</td>
<td>12</td>
</tr>
</tbody>
</table>

On BLM lands the fuel load specifications are:

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<table>
<thead>
<tr>
<th>Fuel Loading by Size Class</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size Class (Diameter)</td>
</tr>
<tr>
<td>---------------------------</td>
</tr>
<tr>
<td>0-1/4&quot;</td>
</tr>
<tr>
<td>1/4 -8&quot;</td>
</tr>
<tr>
<td>&gt;8&quot;</td>
</tr>
</tbody>
</table>

Adapted from USFS Fuel Loading Standards

These measures will significantly reduce the risk of fires associated with vegetation remaining in the cleared corridors. In order to ensure that fuel loading measures are consistent across the entire corridor, the applicant would accept a condition of approval requiring the BLM loading standards on private lands. On federal lands, at the discretion of the BLM and USFS, the applicant will remove larger slash pieces (more than eight inches in diameter) from the project area and deck them in designated storage sites, or at road crossings. This material will be made available to the public through the various agencies' firewood programs.

Second, the cleared corridor will have less heavy timber that burns with higher intensities once ignited, and will have a greater percentage of lighter fuels according to the fuel loading specifications designed specifically for the proposed pipeline. While the lighter fuels spread within the project corridor may burn somewhat faster than timbered fuels, the lighter fuels are much easier to suppress, burn at a lower intensity, and react more quickly to changes in humidity and moisture. Additionally, the clear-cut corridor will provide fire suppression personnel with an opportunity to utilize the lighter fuels as a control and access point should a fire start in a forest that includes the pipeline corridor.

Finally, revegetation and maintenance of the corridor, as described in the ECRP, will reduce the risk of fires rather than increase the risk. The applicant has consulted with the Natural Resources Conservation Service ("NRCS") and land management agencies to develop seed mixtures appropriate for the corridor, including seed mixtures (described in Table 10.9-1 of the ECRP) for revegetation of private lands. The seed mixtures emphasize native plants adapted to the site conditions. During right-of-way negotiations, private landowners may request other seed mixtures, and the mixtures specified through those negotiations will be documented in landowner right-of-way agreements. The ECRP describes how the applicant will control noxious weeds, reseed the corridor, and monitor to promote successful revegetation.

In upland areas, vegetation within the permanent easement will be periodically maintained by mowing, cutting and trimming either by mechanical or hand methods. The permanent easement will be maintained in a condition where trees or shrubs greater than six feet tall will be controlled (cut or trimmed) within 15 feet either side of the centerline (for a total of 30 cleared feet). This will limit the overall fuel load within the corridor while discouraging the growth of "ladder fuels" that otherwise could allow fire to reach the lower limbs of mature trees. Routine vegetation maintenance clearing shall not be done more frequently than every three years. However, to facilitate periodic corrosion and leak surveys, a corridor not exceeding 10 feet in width centered on the pipeline may be maintained annually in an herbaceous state. In no
case will routine vegetation maintenance clearing occur between April 15 and August 1 of any year.

Outside of this 30-foot corridor, mature trees will be allowed to re-establish. Allowing mature trees to re-establish will promote cooling and shading of the 30-foot corridor, which also reduces fire potential.

(2) **ATV / OHV Use in Pipeline Corridor**

Based on *Utsey v. Coos County*, 38 Or LUBA 516 (2000), it is clear that ATVs / OHVs can be the type of activity that causes a significant impact on forestry, due to the increased risk of fire from sparks generated in the engines of these vehicles. The Board understands that the applicant proposes to work with landowners on a case-by-case basis to reduce ATV / OHV impacts via the use of dirt and rock berms, log barriers, signs, and locked gates, etc. *See also* Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" at p. 4. The Board agrees with the testimony of the opponents that fences placed in key locations (i.e. where access to the pipeline would otherwise be easy) would be an effective means to discourage ATV / OHV use. The Board has proposed a condition of approval requiring the applicant to work with landowners in an effort to provide impediments to access to ATVs and OHVs.

(2) **Pipeline Corridor as a Conduit for Fire**

Multiple opponents argued that the corridor itself would act as a conduit for fire. No scientific evidence or other clear foundation was presented to support the theory. Substantial evidence does not exist to support a conclusion if the only supporting evidence “consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based.” *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), aff'd in part, rev'd in part on other grounds, 305 Or 384, 752 P2d 271 (1988).

The applicant admits that the cleared corridor will have less heavy timber that burns with higher intensities once ignited, and will have a greater percentage of lighter fuels according to the fuel loading specifications designed specifically for the proposed pipeline. However, no evidence of that leading to a conduit effect is in the record. Mr. Hemphill downplays the concern in his report dated June 17, 2010 due to the fact that the corridor will be mowed every three to five years, as needed. *See "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline,"* at p.5.

The Board notes that this issue was briefed extensively in the Douglas County case, and the County agreed with the applicant's position on that issue. *See* Douglas County Planning Commission Findings of Fact and Decision, at p. 63-5.

**(ii) Fire suppression costs and personnel**

At the hearing, there was considerable discussion regarding the potential for a forest fire caused by a ruptured gas pipeline. The Hearings Officer agreed with the applicant that such a risk is remote. However, if it did occur it has the potential to be a huge problem, and this type of
event is probably the most likely emergency response scenario in the rural area. The Hearings Officer previously expressed concerns about the capability of small rural fire departments, which are often manned by volunteers, to combat fires in remote areas of the County. See letter dated June 6, 2010.

The applicant discussed these issues in its May 11, 2010 submittal. See Letter from Rodney Gregory and Derrick Welling dated May 11, 2010, at p. 14-17. The applicant also discussed the fact that there will be personal on call 24 hours a day that can coordinate an immediate response to situations as they develop. See also Reliability and Safety Report dated March 2010, at p. 8. The applicant's "Reliability and Safety Report" dated March 2010 stated that various actions will be taken in the future, such as training and meetings with emergency responders. Id. The report also stated that "Williams Pacific Operator will use adequate local or contract resources to support the pipeline and facilities if an emergency occurs."

The applicant also addressed the issue in its final argument dated June 24, 2010, as follows:

For the reasons set forth above and in the applicant's prior submittals, the fire risk associated with the pipeline is low. Therefore, the pipeline will not significantly increase risks to fire suppression personnel, nor will it significantly increase fire suppression costs. The presence of the pipeline will require coordination between the applicant and local fire personnel. In order to comply with federal safety regulations, the applicant must coordinate with local emergency response groups prior to commencing pipeline operations. As detailed in Section 4.12.10 of the FEIS, the applicant will meet with local responders, including fire departments, to review plans and communicate specifics about the pipeline. If requested, the applicant will also participate in any emergency simulation exercises and provide feedback to the emergency responders.

While there will be some additional cost to local fire suppression organizations in order to participate in the coordination efforts, the majority of the education and coordination costs will be borne by the applicant and the costs to local department will not be significant. Furthermore, those efforts will in turn reduce the risk to fire suppression personnel that respond to a fire in the vicinity of the pipeline. As detailed in the Reliability and Safety Report, which is attached as Exhibit 7 to the applicant's May 11, 2010 submittal:

"1.6.1 Emergency Response Capabilities

"Williams Pacific Operator will maintain 24-hour emergency response capabilities, including an emergency-only phone number,
which accepts collect charges. The number will be included in informational mail-outs, posted on all pipeline markers, and provided to local emergency agencies in the vicinity of the pipeline and compressor station.

"In addition, Williams Pacific Operator will develop emergency response plans for its entire system. Operations personnel will attend training for emergency response procedures and plans prior to commencing pipeline operations. Williams Pacific Operator will meet with local emergency responder groups (fire departments, police departments, and other public officials) to review plans and will work with these groups to communicate the specifics about the pipeline facilities in the area and the need for emergency response. Williams Pacific Operator will also meet periodically with the groups to review the plans and revise them when necessary. If requested by local public emergency response personnel, Williams Pacific Operator will participate in any operator-simulated emergency exercises and post-exercise critiques. Williams Pacific Operator will use adequate local or contract resources to support the pipeline and facilities if an emergency occurs."

Friends of Living Oregon Waters (FLOW) contends that the application should be denied because the applicant has not yet obtained authorization for use of water that might be needed during construction of the pipeline for fire suppression purposes. First, FLOW does not identify any applicable approval criteria that it believes would authorize the hearings officer to deny the application due to a failure to prove that it can obtain water for fire-fighting purposes a year or more in advance.

Second, this issue is addressed in the letter from Derrick Welling of Pacific Connector (attached as Exhibit 5 to the applicant's June 17, 2010 submittal), which explains that necessary water for fire suppression and other activities will be obtained in accordance with the required federal and state permitting requirements, and that all water withdrawals will meet or exceed all permitting requirements. The applicant will comply with all federal and state requirements during the fire season that mandate the amount of water required on the right-of-way for adequate fire suppression during timber removal and construction activities.

The opponents contend that FERC has not adequately addressed pipeline safety and fire issues, and they have questioned the lack of an emergency response plan in the FEIS. As explained above, the federal DOT rather than FERC is responsible for ensuring pipeline safety, and there is no formal federal requirement to include an emergency response plan at this stage of
the proposal or as part of the FEIS. However, in order to respond to the comments on this issue, the applicant has provided an example of the type of Public Safety Response Manual that will be provided, which was attached as Exhibit 8 to the applicant's submittal dated May 11, 2010. Further, the applicant has provided some information regarding Emergency Response Capabilities in the Reliability and Safety Report, which was attached as Exhibit 7 to the applicant's May 11, 2010 submittal.

It appears that fire protection personnel in the County should already be receiving some training in incident response to natural gas pipeline fires, due to the approval of the 2002 12” pipeline. In that application, the applicant promised to train fire personnel on specific methods for responding to natural gas pipeline fires. The applicant here has also proposed to conduct additional training at the applicant's expense.

The Board finds that it is reasonable to conclude that the pipeline will not significantly increase risks to fire suppression personnel or significantly increase fire suppression costs. After all, a pipeline is expected - on a statistical basis - to have an expected incident rate of one per every 280 years, and one injury can be expected every 1001 years. See Hearings Officer Decision, File No. HBCU-02-04, at p. 43. It stands to reason that if no incidents occur, then the cost of responding will necessarily not increase.

Moreover, there was significant expert testimony introduced in the Pipeline Solutions, Inc. case, File No. HBCU-02-04, from first responders that have pipelines located in their district. See Hearings Officer Decision, File No. HBCU-02-04, at p. 43. Those first responders were unanimously of the opinion that the cost to their department was little or nothing. The hearings officer in that case found such evidence to be "particularly persuasive." Although this case involved a 36” pipeline instead of a 12” pipeline, the Board does not find that to be a significant difference. While the applicant in this case did not provide much in the way of similar testimony, the hearings officer’s findings in HBCU-02-04 are themselves substantial evidence that can be relied on to form a conclusion in this case as well. Such evidence might not be afforded as much weight, and could have been overcome by current testimony from first responders expressing negative implications associated with the proposed pipeline, but no testimony of this type was received into evidence. Therefore, the Board finds that substantial evidence exists in the record to support a conclusion in the applicant’s favor on this issue.

Specifically, the Board finds that the applicant’s evidence is sufficient to support a finding that the standard is either satisfied or that feasible solutions to identified problems exist, and that a condition of approval can be imposed to ensure compliance. *Rhine v. Multnomah County*, 23 Or LUBA 442,447-48 (1992). As noted in the Reliability and Safety Report, an emergency response plan has not yet been developed for the pipeline. The sample report demonstrates the feasibility of creating a similar report for this facility, however. The applicant has proposed a condition of approval requiring submittal of a County pipeline-specific Public Safety Response Manual ("PSRM") to the County prior to construction, and the Hearings Officer recommended imposing this condition. Staff proposed that the condition be modified to require the applicant provide the PSRM prior to commencing operations. The Board agrees that the applicant should provide a PSRM; however, the Board finds that staff’s proposal may not provide sufficient time for the applicant to distribute the PSRM and coordinate with area emergency

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response personnel. Accordingly, the Board modifies and adopts the condition as Condition of Approval B.19 to read as follows:

"At least six (6) months' prior to delivery of any gas to the Jordan Cove Energy Project LNG import terminal, the applicant shall: (1) submit a project-specific Public Safety Response Manual to the County, and (2) in order to comply with federal safety regulations, coordinate with local emergency response groups. As detailed in Section 4.12.10 of the FEIS, Pacific Connector will meet with local responders, including fire departments, to review plans and communicate specifics about the pipeline. If requested, Pacific Connector will also participate in any emergency simulation exercises and provide feedback to the emergency responders."

For these reasons, the Board finds that the proposed pipeline will not significantly increase fire hazard, fire suppression costs, or risks to fire suppression personnel.

**Section 4.8.600, Section 4.8.700 and Section 4.8.750**

At the hearing, the parties presented different views regarding the applicability of CCZLDO Sections 4.8.600, 4.8.700 and 4.8.750. Section 4.8.400 provides as follows:


A use authorized by Section 4.8.300 and Section 4.8.350 may be allowed provided the following requirements are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands.

A. The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands; and

B. The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and

C. All uses\(^{41}\) must comply with Section 4.8.600, Section 4.8.700 and Section 4.8.750. (Emphasis added).

By their own terms, however, Section 4.8.600, Section 4.8.700 and Section 4.8.750 only

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\(^{41}\) The term "use" is defined as follows: "USE: The end to which a land or water area is ultimately employed. A use often involves the placement of structures or facilities for industry, commerce, habitation, or recreation."

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appear to apply to “dwellings” and “structures.” There is a significant ambiguity in the CCZLDO regarding whether a utility is a “structure” as that term is defined in the CCZLDO. The Board resolves this ambiguity and, for the reasons stated below, interprets the CCZLDO to find that a "utility" is not a "structure" for purposes of these applications.

Mark Sheldon and others argue that the proposed pipeline is a “structure” within the meaning of the CCZLDO. His comments cite a CCZLDO definition of “structure” as follows: “Anything constructed or installed or portable, the use of which is required [sic?] a location on a parcel of land.” He cites “Section 2.1.200” as the source of this quote. However, that is an outdated definition. The current definition in the CCZLDO is as follows:

“STRUCTURE: Walled and roofed building including a gas or liquid storage tank that is principally above ground.”

As stated by staff on the record, the County amended the definition of “structure” on September 8, 2009, through adoption of Ordinance 09-07-003PL. This was one of several legislative CCZLDO amendments initiated in response to Federal Emergency Management Agency (“FEMA”) updates. The amendments were necessary in order for the County to continue in the National Flood Insurance Program. As further stated by staff on the record, the current definition of “structure” was taken from the model ordinance provided by DLCD.

The Board must construe the various provisions of the CCZLDO. When construing a statute, the court will first look directly at the text of the statute itself. See Whipple v. Howser, 291 Or 475, 635 P2d 782 (1981) (citing Greyhound Corp. v. Mount Hood Stages, Inc., 437 US 322, 330, 98 S Ct 2370, 2375 (1978)). Emphasizing the need to look first to the language of the statute, the Whipple court stated:

“The cardinal rule for the construction of a statute is to ascertain from the language thereof the intent of the law makers as to what the purpose was to be served, or what the objective was designed to be attained.”

Whipple, 291 Or at 479 (citing Swift & Co. and Armour & Cave, Co. v. Peterson, 192 Or 97, 233 P2d 216 (1951). See also State of Oregon v. Buck, 200 Or 87, 92, 262 P2d 495 (1953). The Whipple court also cited to State ex rel. Cox v. Wilson, 277 Or 747, 562 P2d 172 (1977), in which the court stated:

“There is, of course, no more persuasive evidence of the purpose of a statute then the words by which the legislature undertook to give impression to its wishes.”

There the text of CCZLDO §2.1.200 seems to be clear and unambiguous. The plain text of this definition excludes a subsurface pipeline from being considered a "structure" under the CCZLDO.
However, one factor that complicates the analysis is, as Mr. Sheldon notes, the CCZLDO defines the term “utility” as “public service structures.” CCZLDO 2.1.200. The meaning of a seemingly unambiguous code provision can be clouded by contextual provisions in the same legislative scheme: “It is true that the context of a statute or statutory scheme can sometimes reveal an ambiguity in a particular phrase that, standing alone, appears to have a clear meaning. Southwood Homeowners Ass'n v. City Council of Philomath, 106 Or.App. 21, 806 P.2d 162 (1991) (citing Denneh v. City of Portland, 87 Or.App. 33, 40, 740 P.2d 806 (1987)).

One commonly employed first-level maxim of statutory construction is that in the absence of some indication of contrary intent, it is likely that a term is intended to have the same meaning throughout a legislative enactment. Knapp v. City of North Bend, 304 Or 34, 41, 741 P2d 505 (1987); State v. Holloway, 138 Or App 260, 267-68, 908 P2d 324 (1995)(The fact that a regulatory document uses a term consistently throughout the document strongly suggests that the drafters intended the same meaning in the provision in dispute); Kahn v. Pony Express Courier Corp., 173 Or App 127, 141, 20 P3d 837, rev. den. 332 Or 518, 32 P3d 898 (2001). Thus, when determining the meaning of a term within a legislative enactment, it is sometimes possible to look to other examples of the use of that term in the same legislative enactment, in order to gather insight as to the overall intended meaning of the term. However, this interpretative maxim often applies with less force where, as here, the legislative enactment is a patchwork of amendments made over time, because the likelihood that the subsequent amendments have made changes using terms and phrases that are not in keeping with the original terms increases.

In addition, when a word used in a zoning ordinance is defined, the definition as set forth in the definition section usually controls over a generalized dictionary definition. However, that is not always the case. In fact, CCZLDO §2.1.100 recognizes that a word used in the ordinance will usually have the meaning as defined in CCZLDO §2.1.200 but provides an exception when “it is plainly evident that a different meaning is intended.”

In this case, the Board finds that it is plainly evident that the definition of the term “utility” should not be interpreted in connection with the definition of “structure.” Indeed, the use of the defined term “structure” in the definition of “utility” is not very intuitive, given that “structures” are defined as being something that is a “walled or roofed building.” Otherwise, the suggestion would be that, in addition to being public service related a “utility” must be either a building or a gas or liquid storage tank. The question is whether the CCZLDO, as written, evinces a purposeful intent to use the term “structure” in a consistent manner throughout the CCZLDO. It does not.

In this case, the context provided within the definition of “utility” suggests that the term “structure” is being used there in a more broad sense (and consistent with the earlier CCZLDO definition). For example, among the list of “utilities” are water, sewer, and gas lines, which are typically routed underground and do not constitute “structures” within the meaning of the new definition. If the Board interprets the CCZLDO such that the term “utility” only includes “structures” that meet the new definition of that term, (i.e. a “walled and roofed building including a gas or liquid storage tank that is principally above ground”), then the interpretation would effectively bar all underground utilities. Furthermore, it would effectively require that

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each utility had to be a “building.” The Board finds that this construction of the CCZLDO is not consistent with legislative intent.

Thus, it is apparent that this inconsistency results from the recent code update process, as there was a failure to cross-check the code to see how the new definition of “structure” affects provisions such as the definition of “utility.” Take, as an example of this failure, the language of CCZLDO 4.8.750(B): “all buildings or structures except for fences shall be set back....” This code provision assumes that a fence is a structure; otherwise, there would be no reason to express the “exception.” But a fence is clearly not a “walled and roofed building including a gas or liquid storage tank that is principally above ground.”

The Board concludes that the CCZLDO contains internal inconsistencies between the formal definition of the term “structure” and the usage of that term throughout the CCZLDO. The applicant discusses the inconsistency as follows:

Nonetheless, this inconsistency does not override the obvious intent of the drafters to exclude subsurface pipelines from the definition of a "structure" when that definition was recently adopted in 2009. As explained by staff in the supplemental staff report, the Coos County Board of Commissioners adopted the new definition of "structure" on September 8, 2009 as part of a series of code amendments related to flood damage prevention under FEMA requirements. The county adopted the language provided in the "Oregon Model Flood Damage Prevention Ordinance," which was provided by DLCD to local governments to ensure compliance for purposes of participation in the National Flood Insurance Program. The hearings officer appears to be correct that the county's adoption of the model ordinance did not include a cross-check of other uses of the term "structure" in the county code for consistency. However, the ambiguity created by inconsistent use of the defined term in a separate definition does not override the clear intent of the drafters to only apply the term "structure" to walled and roofed buildings.

See letter from Mark Whitlow to Patty Everenden dated June 24, 2010, at p. 11. The Board agrees, and finds that the Code uses the term “structure” differently and inconsistently throughout the CCZLDO. This does not appear to be purposeful, but rather, as discussed above, results from the 2009 amendments to the definition of the term “structure.” Therefore, although the CCZLDO definition of “utility” expressly presumes that utilities are “structures,” the term “structure” in that context means something along the lines of “anything constructed or installed, the use of which requires a location on a parcel of land.”

Therefore, based upon this legislative history the Board construes these provisions of the CCZLDO together and interprets the CCZLDO such that the term “structure” as used in Section 4.8.600, Section 4.8.700 and Section 4.8.750 is defined as set forth in the definition section of the CCZLDO, whereas the term “structure” as set forth in the definition of “Utility” means

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anything constructed or installed or portable, the use of which requires a location on a parcel of land."

In addition, the Board finds that the reference to the term “use” at Section 4.8.400(C) does not broaden the applicability of Section 4.8.600, Section 4.8.700 and Section 4.8.750 to include “uses” that are not “structures.” Depending upon whether one relies on the definition of “structure” or the definition of “utility,” different conclusions arise. The Hearings Officer noted that Section 4.8.600 appears to be a direct codification of OAR 660-006-0029 and 4.8.700 is a direct codification of OAR 660-006-0035. As such, the Hearings Officer found that these provisions of the CCZLDO cannot be interpreted in a manner that is less restrictive than state law. The state administrative rules use the terms “dwellings” and “structures” but do not appear to define the terms. The Hearings Officer did not find any obvious applicable references in state law defining the term “structure.” Therefore, the Hearings Officer concluded that state law leaves the task of defining the term to the local governments tasked with implementing OAR Chapter 660, division 6. The Board adopts by reference the Hearings Officer’s findings regarding the relationship between state law and these provisions of the CCZLDO.

Regardless of the issue created by the term “use” in Section 4.8.400(C), the question remains whether an underground utility is a “structure.” As stated above, the Board finds that Section 4.8.600, Section 4.8.700 and Section 4.8.750 only apply to structures as that term is used in CCZLDO 2.1.200, notwithstanding the definition of the term “utility.” In the alternative, the Board has prepared findings set forth below that assume, arguendo, that utilities are “structures,” and, as a result, CCZLDO 4.8.600, 4.8.700 and 4.8.750 are applicable. As demonstrated below, the analysis under those sections is somewhat awkward when applied to a gas pipeline, but ultimately the applications can satisfy those standards.

CCZLDO §4.8.600

The application narrative dated April 14, 2010 explains how the proposed pipeline will meet the siting standards at CCZLDO §4.8.600, .700, and .750. The Board adopts that portion of the April 14, 2010 application as findings as if fully set forth herein. CCZLDO §4.8.600 is a direct codification of OAR 660-006-0029(1). The administrative rule provides as follows:

(1) Dwellings and structures shall be sited on the parcel so that:

(a) They have the least impact on nearby or adjoining forest or agricultural lands;

(b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;

(c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and

(d) The risks associated with wildfire are minimized.

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The intended purpose of OAR 660-006-0029(1) is clarified by OAR 660-006-0029(2):

(2) Siting criteria satisfying section (1) of this rule may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.

As an initial matter, OAR 660-006-0029(2) makes clear that OAR 660-006-0029(1) and CCZLDO §4.8.600(A) were not intended to apply to linear features such as gas pipelines. Setbacks and clustering are not consistent with linear features such as gas pipelines. While it is possible to site pipelines “close to existing roads,” the applicant has already taken that step.42 In addition, CCZLDO §4.8.600(A) starts with the premise that one can “site” a structure on a particular property in a location that minimizes the impacts and harms that such a structure will cause on neighboring forest and farm lands, forest operations, etc, as compared to other locations on the site. That type of analysis is really not well-suited towards determining the best location for a linear pipeline feature. With a linear feature such as a pipeline, it is safe to say that, as a general rule, the route that causes the least impact is generally going to be the shortest, most direct route. The applicant certainly has proposed the shortest feasible route, and therefore has likely met the intent of this provision. In addition, the applicant testified that it has some latitude under the FERC Order to make site-specific locational adjustments to the general alignment approved by FERC in order to accommodate landowner’s preferences. The Board finds that site-specific concerns of that nature are best addressed as part of that process and adopts Condition of Approval A.4 to ensure compliance.

42 In its May 11, 2010 submittal, the applicant states:

Finally, where practicable, the alignment of the PCGP Project utilized existing rights-of-way and pipeline and powerline corridors while providing a safe distance between these existing utilities. A table identifying specific areas where the PCGP is co-located with existing right-of-way and corridors is attached as Exhibit 2 to this letter. While the alignment of the pipeline parallels existing roads and railroads in a number of areas, routing the pipeline entirely within existing right-of-way was not feasible. For example, many existing transportation easements were avoided because of the negative impact to traffic flow during construction. Additionally, many roads are located in valleys or drainage bottoms adjacent to streams where it is not feasible to install a large-diameter, steel pipeline due to large construction area requirements, confining topographic conditions, and waterbodies running parallel to the alignment. Many forest roads are located on steep side slopes where it is impractical to route the pipeline because of constructability/stability requirements and concern with the long-term safety and integrity of the pipeline. To ensure the pipeline is installed properly within consolidated (non-filled) materials and to provide the necessary equipment space, construction on steep side slopes requires significantly more construction areas to accommodate the necessary cuts or excavations. Long-term safety and the potential for third-party damage to the pipeline must be considered. Finally, future road expansions or improvement projects may require the pipeline to be relocated where it has been constructed within road easements, which may create unforeseen environmental, landowner, and system impacts.

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Subsections (B) of CCZLDO §4.8.600 requires the applicant to provide evidence that “the domestic water supply” is from a source authorized by law. The Board finds that this section is context supporting the conclusion that an underground utility is not a “structure” within the meaning of the definition of structure in CCZLDO §2.1.200. But even if that is not the case, CCZLDO §4.8.600(B) only applies to uses that require or propose domestic water usage. Obviously, a gas pipeline has no use for a domestic water supply.

Subsection (C) and (D) of CCZLDO §4.8.600 only apply if the use includes a “dwelling,” and therefore are not implicated here.

CCZLDO §4.8.700 (Fire Siting Safety Standards).

CCZLDO §4.8.700 contains certain requirements that apply only to dwellings or structures that have a roof. Moreover, the CCZLDO also gives the Planning Director the ability to “authorize alternative forms of fire protection when it is determined that these standards are impracticable.” In this case, the applicant proposes a 30 foot cleared corridor, centered on the pipe. See Application Narrative, at p. 13. The Board determines that demanding additional primary and secondary firebreaks under CCZLDO §4.8.700 (A)(1) & (3) are not practicable because they are not needed and they conflict with the objectives sought to be achieved by other CCZLDO criteria. Similarly, the garden hose requirement in CCZLDO §4.8.700 (A)(2) is also impracticable. CCZLDO §4.8.700 (B), (C), (D), (E), (F) and (H) are clearly inapplicable. CCZLDO §4.8.700 (G) would be applicable assuming utilities are structures, but should be easily met via a condition of approval. The Board amends Condition of Approval B.17 to ensure compliance with this standard.

CCZLDO §4.8.750 (Development Standards).

CCZLDO §4.8.750 contains development standards for “development” and “structures.” The minimum lot size provisions and setback provisions do not apply to linear utility features that must, by their very nature, traverse property lines of all sizes. That is because there is no set of facts under which those criteria could be met. If the County had intended to prohibit linear utility features entirely, it would not have made them administrative conditional uses in the Forest zone. Indeed, these CCZLDO standards are further evidence that utilities are not meant to be considered “structures” within the meaning of CCZLDO 2.1.200. Further, CCZLDO §4.8.750 (C) through (I) do not appear to contain any substantive requirements applicable here.

Jody McCaffree contends that the proposed permanent access road to block valve #4 is not allowed in the Forest zone under Goal 4. OAR 660-006-0025(3) identifies uses that are consistent with Goal 4 and allowed outright on forest lands. Private access roads are not specifically enumerated as an allowed use under this rule. Nevertheless, the Board finds that the access road is a use permitted outright in conjunction with the pipeline.

First, the County’s definition of "road" in CCZLDO 2.1.200 indicates that roads are not to be construed as a "use" per se, but as a "public or private way created or intended to provide ingress or egress for persons to one or more lots, parcels, areas, or tracts of land." Further, the definition of road "does not include a private way that is created or intended to provide ingress or
egress to such land in conjunction with the use of such land exclusively for forestry, mining, or agricultural purposes."

When the principal use is allowed in the zone, that right carries with it all associated uses which are normally essential, auxiliary and incidental thereto, (as opposed to those uses which are mere non-essential accessory uses). For example, an applicant for a McDonald’s restaurant does not have to seek separate approval of an “office” in order to have a room in the structure dedicated to administrative functions. It is understood that all restaurants have an office where administrative matters are attended to, and land use approval for a “restaurant” inherently and automatically includes an incidental administrative office to support that restaurant use (but not for other unrelated commercial functions).

As relevant here, LUBA has held that unenumerated uses that are necessary and accessory to an enumerated forest use are permitted "because they are, in effect, part of uses expressly authorized by Goal 4." *Lamb v. Lane County*, 7 Or LUBA 137, 143 (1983). OAR 660-006-0025(3)(c) allows a pipeline use outright as a "[l]ocal distribution lines (e.g., electric, telephone, natural gas) and accessory equipment." Similarly, OAR 660-006-0025(4)(q) allows new gas distribution lines as a conditional use. As the applicant explains on page four of the application narrative dated April 14, 2010, the proposed road is "necessary for the operation and maintenance of the pipeline." Without this road, the applicant will be unable to access the block valve, which is a necessary component of the pipeline, and ensures that the applicant can operate the pipeline in a safe manner. In this way, the access road is "necessary and accessory" to, and thus effectively a part of, the pipeline use. Therefore, under *Lamb*, the access road is permitted under Goal 4.

Finally, accepting Ms. McCaffree’s interpretation of OAR 660, Division 6 runs counter to legislative intent, as it at least curtails, and in many cases effectively nullifies, the use rights granted under the rule. If the Board were to agree that access roads in conjunction with one of the enumerated uses are not allowed, it would effectively preclude development of many of the allowed uses on forest lands that cannot otherwise exist in the absence of developing an access road. For example, many farm uses, private hunting and fishing operations, and caretaker residences — all permitted outright on forest lands under OAR 660-006-0025(3) — could be inaccessible and therefore effectively undevelopable under Ms. McCaffree’s interpretation of the rule. Similarly, conditional uses such as cemeteries and firearms training facilities could not exist without road access; neither could any of the dwellings allowed under OAR 660-006-0027. These listed uses all contemplate being able to provide at least a private road for access. There is no evidence that LCDC intended for such a harsh construction of the rule. The Board rejects Ms. McCaffree’s contention.

r. Exclusive Farm Zone (EFU) (CCZLDO Article 4.9)


The applicant notes that the proposed pipeline will cross approximately 3.72 miles of property in Coos County zoned Exclusive Farm Use (EFU), all of which is privately owned. The
3.72 miles of EFU-zoned parcels are interspersed throughout the length of the pipeline within Coos County. The Board concludes that the pipeline is consistent with the requirements of ORS Chapter 215, OAR 660, Division 33, and the applicable approval criteria of the CCZLDO.

CCZLZO §4.9.450 is more or less a direct codification of ORS 215.283(1)(c).\(^{43}\) CCZLZO §4.9.450 provides:

The following uses and their accessory uses may be allowed as hearings body conditional uses in the “Exclusive Farm Use” zone and “Mixed Use” overlay subject to the corresponding review standard and development requirements in Sections 4.9.600\(^{44}\) and 4.9.700.\(^{45}\)

* * * * * *

C. Utility facilities necessary for public service.... A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided.

In this regard, it is perhaps worthwhile to note that a “utility facility” necessary for public service is a use that is allowed “outright” under ORS 215.283(1). See Brentmar v. Jackson County, 321 Or 481, 496, 900 P2d 1030 (1995) (“legislature intended that the uses delineated in ORS 215.213(1) be uses ‘as of right,’ which may not be subjected to additional local criteria”).

Under state law, utility facilities sited on EFU lands are subject to ORS 197.275, as well as the administrative rules adopted by LCDC.\(^{46}\) ORS 215.275 provides:

\(^{43}\) ORS 215.283(1) provides, in relevant part:

(1) The following uses may be established in any area zoned for exclusive farm use: * * * .

(c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275.

\(^{44}\) CCZLDO 4.9.600 Siting Standards for Dwellings and Structures in the EFU Zone.

\(^{45}\) CCZLDO 4.9.700 Development Standards for dwellings and structures (CCZLDO 2.1.200 defines “Structure: Walled and roofed building includes a gas or liquid storage tank that is principally above ground.” The proposed pipeline is not a “structure” under this definition and therefore the siting standards do not apply.

\(^{46}\) OAR 660-033-0130(16) provides as follows:

(16)(c) A utility facility is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service. To demonstrate that a utility facility is necessary, an applicant must show that

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215.275 Utility facilities necessary for public service; criteria; rules; mitigating impact of facility. (1) A utility facility established under ORS 215.213 (1)(c) or 215.283 (1)(c) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.

(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

(a) Technical and engineering feasibility;

(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

(A) Technical and engineering feasibility;

(B) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

(b) Costs associated with any of the factors listed in subsection (1)(a) of this rule may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities and the siting of utility facilities that are not substantially similar.

(c) The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

(d) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on surrounding farmlands.

(e) In addition to the provisions of subsections 16(a) to (d) of this rule, the establishment or extension of a sewer system as defined by OAR 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of OAR 660-011-0060.

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.

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(c) Lack of available urban and nonresource lands;
(d) Availability of existing rights of way;
(e) Public health and safety; and
(f) Other requirements of state or federal agencies.
(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.
(4) The owner of a utility facility approved under ORS 215.213 (1)(c) or 215.283 (1)(c) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.
(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c) or 215.283 (1)(c) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.
(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

The exception in Subsection 6 states that subsections 2-5 do not apply to “interstate natural gas pipelines.” This appears to be a legislative recognition of federal preemption on the issue of route selection for interstate gas pipelines.

The negative inference created by the stated exceptions to subsections 2 through 5 is that an applicant for an interstate natural gas pipeline is technically supposed to be subject to ORS 215.275(1). This subsection contains the requirement that the applicant to show that the proposed facility “is necessary for public service.” According to subsection 2, the “necessary for public service” requirement is met if the applicant demonstrates that “the facility must be sited in an exclusive farm use zone in order to provide the service.” Of course, given that the determination of whether something is “necessary” is dependent on analysis which is set forth in subsections 2 through 5, it remains unclear exactly what an applicant proposing a natural gas pipeline is
required to do to demonstrate that its facility is “necessary.” LCDC seems have recognized this in their administrative rule implementing ORS 215.275, as they exempt FERC-regulated pipelines from the “necessary for public service” test. See OAR 660-03300139(16).47 Given the nature of ORS 215.275(2)-(5), the Board concludes that ORS 215.275(1) contains no substantive standards applicable to interstate natural gas pipelines, but even if it did, those requirements would be preempted by federal law.

47 OAR 660-033-0130 (16) provides:

(16)(a) A utility facility is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service. To demonstrate that a utility facility is necessary, an applicant must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

(A) Technical and engineering feasibility;

(B) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

(b) Costs associated with any of the factors listed in subsection (16)(a) of this rule may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities and the siting of utility facilities that are not substantially similar.

(c) The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

(d) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on surrounding farmlands.

(e) In addition to the provisions of subsections 16(a) to (d) of this rule, the establishment or extension of a sewer system as defined by OAR 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of OAR 660-011-0060.

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

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WELC addresses this criterion by arguing that “[r]eams of testimony submitted to [FERC] explained how the ** pipeline is not at all necessary in order for natural gas to be provided to US residents.” See Letter from WELC staff attorney Jan Wilson dated June 8, 2010, at p. 5. Ms. Wilson goes on to state that California and other states will not need natural gas, and that “the threat of this pipeline being used to bring domestic natural gas ** to a coastal terminal is very real.” Id. Frankly, the Board fails to understand why, from a land use perspective, it matters which direction the gas is traveling, or why exporting gas is a “threat.” To the contrary, it seems that if the United States is to be faulted, it is because it fails to export enough goods to other countries. Nonetheless, if “reams of testimony” were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning code provision that requires the County to make that decision.

At the hearing, the applicant agreed to a condition of approval limiting the use of the pipeline to import use. Regardless, case law makes clear that the issue of whether new gas pipelines are “needed” is not relevant to any approval standard contained in ORS 215.275 or CCZLDO §4.9.450. Sprint PCS v. Washington County, 186 Or.App. 470, 63 P.3d 1261 (2003); Dayton Prairie Water Ass’n v. Yamhill County, 170 Or.App. 6, 11 P.3d 671 (2000).

The applicant addresses the issue as follows:

The PCGP is an interstate natural gas pipeline that has been authorized by and is subject to regulation by FERC under Section 7c of the NGA under which a Certificate of Public Convenience and Necessity has been issued to Pacific Connector to construct, install, own, operate, and maintain the PCGP. The PCGP is a utility facility under CCZLDO Section 4.9.450.C.

Due to its linear nature and the points of connection it must make from the JCEP LNG Terminal site on the North Spit over the 49.72 miles to the interstate pipeline connection near Malin, Oregon, it is necessary for some segments of the pipeline to be situated in agricultural land in satisfaction of this review criterion and the companion criterion of ORS 215.275(1). ORS 215.275(6) exempts interstate natural gas pipelines from the provisions of ORS 215.275(2)-(5) and OAR 660-33-0130 has a similar exemption.

The PCGP is a locationally dependent linear facility that must cross exclusive farm use land in order to provide natural gas service between the Jordan Cove terminal and the existing pipeline system. In order to achieve the project purpose, the pipeline must start at the Jordan Cove terminal and exit Coos County on the county’s eastern boundary to eventually connect to the existing pipeline near Malin, Oregon. Given the large expanses of EFU-zoned lands scattered throughout the rural portions of Coos County, even if avoidance of EFU lands were the only

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consideration in the pipeline alignment, it would not possible for
the pipeline to avoid all EFU zoned lands and maintain a
reasonably direct route through Coos County. Therefore, the
PCGP must be sited in the Coos County EFU zone in order to
provide the planned natural gas service. Under the existing
alignment, the impacts to EFU-zoned land is limited, amounting to
only 3.72 miles of the total of 49.72 miles crossed within Coos
County. Therefore, while not eliminated, impacts to EFU lands
were minimized during the alignment selection process. The
alignment selection process is discussed in detail in Section 3.4 of
the FEIS.

Staff commented on the need issue as follows:

The pipeline will travel from the North Spit to the Douglas county
line for a distance of approximately 50 miles. The pipeline route
will travel through 3.72 miles of EFU land. The applicant states
that it would not be possible to avoid all EFU zoned lands and
maintain a reasonably direct route, and has provided a detailed
description of the alternative route analysis that was undertaken as
part of the FERC review and approval process in its
correspondence dated May 11, 2010, as well as the pipeline
location alternatives analysis in Section 3.4 of the FEIS, which is
included in the applicant’s May 12, 2010 submittal. Given the
need to cross most of the county to achieve the project purpose,
and the large expanses of EFU land throughout rural portions of
the county, there appears to be a need to site the pipeline on
agricultural land in order to provide the utility facility service.

In its May 11, 2010 submittal, the applicant states:

Third, as discussed above, the pipeline is a locationally dependent
linear facility that must cross EFU land in order to achieve a
reasonably direct route. In order to achieve the project purpose,
the pipeline must start at the Jordan Cove LNG terminal and exit
Coos County on the county’s eastern boundary in order to
eventually connect to the existing pipelines near Roseburg,
Medford and Malin, Oregon.48 Given the number and
configuration of EFU-zoned lands in the rural portions of Coos
County, it is not possible for the pipeline to avoid all EFU zoned
lands and maintain a reasonably direct route through Coos County.

The Board agrees with the applicant and staff for the reasons stated above, and frankly finds

48 The location of the Jordan Cove LNG terminal itself was selected as the result of a separate alternatives
analysis approved by FERC.

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assertions to the contrary to be frivolous. It seems rather obvious that it would not be possible to build a pipeline from one end of Coos County to the other without traversing any EFU land. To the extent that it could be accomplished, the route would be highly circuitous, and the need to traverse difficult forested terrain would far outweigh any benefit to EFU lands. In any event, the County has no ability to determine that an interstate gas pipeline is not needed or that alternative routes are feasible. As discussed earlier, those issues are within the sole province of FERC to decide.

Various opponents raised the issue that the proposed pipeline is not an “interstate pipeline” for purposes of ORS 215.275(6) because the segment of pipeline being proposed under consideration does not cross state lines. See e.g., Letter from WELC staff Attorney Jan Wilson dated June 8, 2010, at p. 6.

The applicant responds as follows:

WELC and other opponents continue to argue that the PCGP is not an "interstate" gas pipeline under ORS 215.276(6) because it is only located within the State of Oregon. Although the pipeline itself is only physically located within Oregon, it will transport liquefied natural gas from the FERC-approved LNG import terminal on the North Spit of Coos Bay into the interstate pipeline system, and that gas will then be sold in interstate commerce. The PCGP is therefore an interstate natural gas pipeline subject to federal jurisdiction and regulation by FERC. There would be no FERC jurisdiction over this project if it were not an interstate gas pipeline. During the first open record period, Pacific Connector submitted relevant portions of the Natural Gas Act, which explains that the basis for FERC jurisdiction over this project is the fact that it is an interstate pipeline because the pipeline will allow for the "transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." 15 USC § 717(b). Further, that section excludes from

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49 15 U.S.C. 717(a)-(c) provides as follows:

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable
FERC jurisdiction only those truly "intrastate" projects where the natural gas is received "within or at the boundary of a State if all the natural gas so received is ultimately consumed within such state." 15 USC § 717(c). Because the PCGP will transport natural gas into interstate commerce through the interstate pipeline system, it is an "interstate natural gas pipeline" within the meaning of FERC statutes and rules and ORS 215.275(6).

See Final Argument letter from Mark Whitlow dated June 24, 2010, at p. 23. The applicant is correct for the reasons stated above. The term “interstate” in ORS 215.275(6) refers to any segment of a gas pipeline that is interconnected with other segments in a manner that allows gas to flow in interstate commerce. Therefore, the fact that this particular segment of pipeline is located entirely within Oregon does not mean that it is not an “interstate” gas pipeline. See NGA, 15 USC § 717(b), and Section 1671(8) of the Natural Gas Pipeline Safety Act of 1968. As the applicants pointed out, the fact that FERC believes that it has jurisdiction over the project is perhaps the most telling evidence that the opponent’s argument is plainly wrong.

4. **CBEMP Policies – Appendix 3 Volume II**

a. **Plan Policy #14 General Policy on Uses within Rural Coastal Shorelands.**

I. Coos County shall manage its rural areas within the "Coos Bay Coastal Shorelands Boundary" by allowing only the following uses in rural shoreland areas, as prescribed in the management units of this Plan, except for areas where mandatory protection is prescribed by LCDC Goal #17 and CBEMP Policies #17 and #18:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

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e. Water-dependent commercial and industrial uses, water-related uses, and other uses only upon a finding by the Board of Commissioners or its designee that such uses satisfy a need which cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in rural areas built upon or irrevocably committed to nonresource use.

g. Any other uses, including non-farm uses and non-forest uses, provided that the Board of Commissioners or its designee determines that such uses satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas. In addition, the above uses shall only be permitted upon a finding that such uses do not otherwise conflict with the resource preservation and protection policies established elsewhere in this Plan.

This strategy recognizes (1) that Coos County's rural shorelends are a valuable resource and accordingly merit special consideration, and (2) that LCDC Goal #17 places strict limitations on land divisions within coastal shorelands. This strategy further recognizes that rural uses "a through "g" above, are allowed because of need and consistency findings documented in the "factual base" that supports this Plan.

Staff states that this plan policy applies to 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS and 21-RS. The pipeline is a permitted use in each of these CBEMP zoning districts. Staff asserts that the "pipeline is a necessary component of the approved marine terminal and LNG facility which are water-dependent uses and must be located in these CBEMP shoreland zones.” Therefore, the proposal is consistent with this plan policy.

Jody McCaffree's letter of June 10, 2010, disagrees with staff, and asserts that the applications are deficient with respect to CBEMP Policy #14. As the applicant notes, Ms. McCaffree is incorrect for several reasons:

Policy #14 was previously interpreted and applied by the Board of County Commissioners in both the application of Jordan Cove Energy Project, L.P. (Coos County Department File No. #HBCU-07-04, Coos County Order No. 07-11-289PL) and in the application of the Oregon International Port of Coos Bay (Coos County Planning Department File No. #HBCU-07-03, Coos County Order No. 07-12-309PL). Copies of both decisions are included in the documents submitted into the record by the applicant at the public hearing on May 20, 2010. Those decisions provide written findings showing compliance with Policy #14, partially through Board findings from the Board's findings from the adoption of the Coos County Comprehensive Plan (see findings from HBCU-07-03 below). Regarding the Board's decision approving JCEP's LNG terminal application, the Policy #14 finding appears at page 13 and states:

"The proposed LNG terminal is an industrial and port facility that is water-dependent and consistent with the uses allowed in the 6-WD zoning district. The proposed use satisfies a need that cannot be accommodated on uplands or shorelands in urban and

50 PCGP and its associated facilities were approved under JCEP's prior LNG Terminal application.

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urbanizable areas or in other rural areas built upon or irrevocably
committed to non-resource use. The Board relies upon and adopts
the conclusions of the hearings officer regarding consistency with
Policy #14. The applicant has provided evidence sufficient to
establish that [the] proposed site on the North Spit is the only site
available below the railroad bridge with sufficient size and the
necessary water-dependent characteristics for the proposed facility,
including access to one of the only three deep-draft navigation
channels in the State of Oregon."

Regarding the Board's decision approving the Port's Oregon Gateway Marine Terminal
application, the Policy #14 findings appear at page 20 and provide:

"The Board finds that the proposed water-dependent use satisfies a
need that cannot be accommodated on uplands or shorelands in
urban and urbanizable areas or in other rural areas built upon or
irrevocably committed to non-resource use. This fact was
recognized in the inventories and factual base portion of the Coos
County Comprehensive Plan (CCCP) at Volume II, Part 2, Section
5-82. (See North Spit Industrial Needs under Section 5.8.3 of the
CCCP). Background reports produced to support CCCP Volume
II, Part 2, generally concluded that large vacant acres of
industrial land with deep-draft channel frontage are in short supply.
Further, as documented in the applicant's Description of
Alternative Sites and Project Designs contained in its August 24,
2007 Revised Application, the North Spit is the only site available
with sufficient size and the necessary water-dependent
characteristics suitable for future land needs for import and
transshipment, with related processing facilities for energy
resources and cargo handling, and for marine cargo bound to the
West Coast and international ports."

Accordingly, the County previously determined that compliance with Policy #14 was established
during the legislative adoption of the County's comprehensive plan with respect to the
designation of portions of the North Spit, including zoning district 6-WD, as a rural area
appropriate for water-dependent industrial development. In addition, the alternatives analysis
required under Policy #14 has been accomplished in several descending layers of analysis for,
variously, no action or postponed action, system alternatives, LNG terminal site alternatives,
LNG terminal layout alternatives, dredging and dredge material disposal alternatives, and
pipeline route alternatives, all of which are described with great specificity in Section 3.0
(Alternatives) at pages 3-1 through 3-119 of the FEIS.

Under Policy #14, the PCGP would be considered a necessary component of the primary
industrial and port facilities use, at least in zoning district 6-WD, where the pipeline segment
situated within the boundaries of JCEP's LNG terminal is connected to the LNG terminal meter
station at MP00.00, and where other LNG terminal components were described in the decision

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approving the LNG terminal as "associated facilities" (also see utilization of that term in ORS 215.275(6)). The pipeline would otherwise be described as an "other use" in Policy #14 i.e. As an "other use", the PCGP would be reviewed in each CBEMP zoning district as a low-intensity utility. In either event, Policy #14 i.e requires "a finding by the Board of Commissioners or its designee that such uses satisfy a need which cannot be accommodated on uplands or shorelands in urban or urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use," a finding that was already made by the Board in the prior decisions approving JCEP's LNG terminal and, again, approving the Port's Oregon Gateway Marine Terminal. It is appropriate for the Board to make similar findings in this case for the reasons set out below.

As stated in the application narrative, the pipeline must originate at the Jordan Cove LNG terminal which has been permitted by the County as above described. As also provided in several sections of the applicant's narrative, the pipeline route has undergone extensive analysis. The proposed route has been determined by FERC through the NEPA process, as described in the FEIS. The alternative analysis appears at Section 3.0 of the FEIS, and the pipeline alternative analysis is contained in Section 3.4. Based on the alternative analyses and the FERC-determined route, the pipeline must cross these zoning districts. However, following construction, the subsurface pipeline will not be an impediment to the uses associated with the County's rural shoreland areas. Protection for specific resources in those areas are provided in the applicant's responses to Policies #17, #18 and #22 in the applicant's narrative.

In summary, the Board finds that the pipeline, as a necessary component of the approved industrial and port facilities use (the LNG terminal), and/or as a Policy #14 "other use," being the low-intensity utility use identified in the CBEMP zoning districts, satisfies a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use. Specifically, the various alternative analyses above described conclude that the proposed LNG terminal and its associated facilities (as necessary components of the approved industrial and port facilities use, including the first segment of the pipeline connected to the LNG terminal), and the resulting pipeline alignment extending to the east across upland zoning districts 6-WD, 7-D and 8-WD, are uses that satisfy a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use.

This plan policy is met.

b. Plan Policy #16 Protection of Site Suitable for Water-Dependent Uses and Special Allowance for new Non-Water-Dependent Uses in "Urban Water-Dependent (UW) units."

Local government shall protect shorelands in the following areas that are suitable for water-dependent uses, for water-dependent commercial, recreational and industrial uses.

a. Urban or urbanizable areas;

b. Rural areas built upon or irrevocably committed to non-resource use; and
c. Any unincorporated community subject to OAR Chapter 660, Division 022 (Unincorporated Communities).

This strategy is implemented through the Estuary Plan, which provides for water-dependent uses within areas that are designated as Urban Water-Dependent (UW) management units.

I. Minimum acreage. The minimum amount of shorelands to be protected shall be equivalent to the following combination of factors:

a. Acreage of estuarine shorelands that are currently being used for water-dependent uses; and
b. Acreage of estuarine shorelands that at any time were used for water-dependent uses and still possess structures or facilities that provide or provided water-dependent uses with access to the adjacent coastal water body. Examples of such structures or facilities include wharves, piers, docks, mooring piling, boat ramps, water intake or discharge structures and navigational aids.

The only UW zoning applicable to this project is located near Coos Bay which is the site of the Georgia Pacific sawmill and lumber yard. The location is an active sawmill and lumber yard and it is located within zoning district 36-UW. The applicant proposes to establish a contractor yard and location to store pipe on the property. The temporary use will not impact the existing operation or permanently remove any acreage from water-dependent use. Therefore, the proposal is consistent with this plan policy.

II. Suitability. The shoreland area within the estuary designated to provide the minimum amount of protected shorelands shall be suitable for water-dependent uses. At a minimum such water-dependent shoreland areas shall possess, or be capable of possessing, structures or facilities that provide water-dependent uses with physical access to the adjacent coastal water body. The designation of such areas shall comply with applicable Statewide Planning Goals.

As noted above, Pacific Connector would temporarily utilize a portion of the commercial area as a pipe storage yard. The temporary use will have no impact on future water-dependent uses at the site or the designation of water-dependent shoreland areas or the suitability of the shoreland areas to accommodate water-dependent uses.

III. Permissible Non-Water-Dependent Uses. Unless otherwise allowed through an Exception, new non-water-dependent uses which may be permitted in "Urban Water-dependent (UW)" management units are a temporary use which involves minimal capital investment and no permanent structures, or a use in conjunction with and incidental and subordinate to a water-dependent use. Such new non-water-dependent uses may be allowed only if the following findings are made, prior to permitting such uses:

1. Temporary use involving minimal capital investment and no permanent structures:
a. The proposed use or activity is temporary in nature (such as storage, etc.); and
b. The proposed use would not pre-empt the ultimate use of the property for water-dependent uses; and
c. The site is committed to long-term water-dependent use or development by the landowner.

Pacific Connector would temporarily utilize the Georgia Pacific-Coos Bay site as a pipe storage and contractor yard during construction. The location is an active sawmill and lumber yard, owned by Georgia Pacific, and it is located within zoning district 36-UW. Use of a portion of the industrial site as a pipe storage and contractor yard will be temporary in nature (i.e., only during construction) and will not require the development of permanent structures. Further, the temporary use of the existing lumber yard will not pre-empt the ultimate use of the property for water-dependent uses because Pacific Connector will not use the site following construction.

This plan policy is met.

c. Plan Policy #17 Protection of “Major Marshes” and “Significant Wildlife Habitat” in Coastal Shorelands.

Local governments shall protect from development, major marshes and significant wildlife habitat, coastal headlands, and exceptional aesthetic resources located within the Coos Bay Coastal Shorelands Boundary, except where exceptions allow otherwise.

I. Local government shall protect:

a. "Major marshes" to include areas identified in the Goal #17, "Linkage Matrix", and the Shoreland Values Inventory map; and
b. "Significant wildlife habitats" to include those areas identified on the "Shoreland Values Inventory" map; and
c. "Coastal headlands"; and
d. "Exceptional aesthetic resources” where the quality is primarily derived from or related to the association with coastal water areas.

As discussed in detail below, the PCGP crosses near two wetlands identified as significant wildlife habitats. Based on Coos County’s maps, the PCGP does not cross identified major marshes, coastal headlands, or exceptional aesthetic resources.

II. This strategy shall be implemented through:

a. Plan designations, and use and activity matrices set forth elsewhere in this Plan that limit uses in these special areas to those that are consistent with protection of natural values; and
b. Through use of the Special Considerations Map, which identified such special areas and restricts uses and activities therein to uses that are consistent with the protection of natural values. Such uses may include propagation and selective harvesting of forest products consistent with the Oregon Forest Practices Act, grazing, harvesting wild crops, and low-intensity water-dependent recreation.

c. Contacting Oregon Department of Fish and Wildlife for review and comment on the proposed development within the area of the 5b or 5c bird sites.

This strategy recognizes that special protective consideration must be given to key resources in coastal shorelands over and above the protection afforded such resources elsewhere in this Plan.

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 8-CA, 13A-NA, 11A-NA, 11-RS, 18-RS, 19-D, 19B-DA, 20-CA, 20-RS, 21-RS, 21-CA, and 36-UW.

Policy #17 applies to inventoried resources requiring mandatory protection within each of the CBEMP zoning districts. As noted above, the PCGP alignment is near two wetlands identified as significant wildlife habitats on the CBEMP Shoreland Values Map. The first wetland is located at MP 1. According to Pacific Connector's wetland delineation, there is not currently a wetland located within the mapped area. The current wetland location is east and north of the mapped location. The second wetland is located at approximately MP 4.1.

LUBA discussed CBEMP Plan Policy 17 in its decision in Southern Oregon Pipeline Information Project, Inc. v. Coos County, 57 Or LUBA 44 (2008):

"CBEMP 17 requires that 'local governments protect from development major marshes and significant wildlife habitat.' If CBEMP Policy 17 stopped there, SOPIP's argument might have merit. But CBEMP Policy 17(II) goes further and expressly explains how this mandate to protect certain coastal resources is implemented. CBEMP Policy 17(II)(a) explains that the CBEMP 'limit[s] uses in these special areas to those that are consistent with protection of natural values.' (Emphasis added.) CBEMP Policy 17(II)(b) provides that CBEMP Policy 17 is implemented by 'the Special Considerations Map, that identified special areas and restricts uses and activities therein to uses that are consistent with the protection of natural values.' (Emphasis added.) CBEMP Policy 17(II)(b) goes on to list some uses that are consistent with those values. With regard to bird sites, CBEMP Policy 17(II)(c) provides that CBEMP Policy 17 is implemented by contacting the Oregon Department of Fish and Wildlife so that it may 'comment on the proposed development within the area of the 5b or 5c bird sites.' There is simply nothing in the text of CBEMP Policy 17 that suggests it is to be implemented by limiting uses on properties that adjoin or are located near inventoried major marshes or significant..."
wildlife habitat to avoid possible impacts on such marshes and habitat." *SOPIP I*, slip op at 8-9 (emphases in original).

As mentioned above, the County's Shoreland Values inventory map notes that there are two inventoried freshwater wetlands along the pipeline route. The applicant is proposing to bore to avoid the first wetland, which is located at MP 1 in the 6-WD zone. The pipeline will cross to the south of the second wetland, which is located near MP 4.1. There are no other inventoried sites requiring protection.

The opponents do not provide any substantial evidence to suggest that these avoidance techniques are insufficient to protect these sites and the resources contained therein.

This plan policy is met.

d. **Plan Policy #18 Protection of Historical, Cultural and Archaeological Sites**

This Plan Policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 8-CA, 13A-NA, 11-NA, 11-RS, 18-RS, 19-D, 19B-DA, 20-CA, 20-RS, 21-RS, 21-CA, and 36-UW.

The applicant is conducting a cultural resources survey for the project as required under state and federal law. Prior to issuance of a zoning compliance (verification) letter under Section 3.1.200 in order to obtain development permits, Policy #18 requires the applicant to submit a "plot plan" under Section 3.2.700, which then triggers the requirement to coordinate with the Tribe to allow for comments when the development is in an inventoried area of cultural concern. The Tribe has 30 days to comment and suggest protection measures. Policy #18 allows for a hearing process should the Tribe and the developer not agree on the appropriate protection measures. In the prior land use approvals related to the LNG project, the Board of Commissioners imposed a condition to ensure compliance with this Plan Policy. The applicant suggests the same condition be imposed for this application. The Board finds that imposition of the condition is consistent with prior approvals and will ensure compliance with this Plan Policy.

This plan policy is met.

e. **Plan Policy #20 Dredged Material Disposal Sites**

*Local government shall support the stockpiling and disposal of dredged materials on sites specifically designated in Plan Provisions, Volume II, Part I, Section 6, Table 6.1, and also shown on the "Special Considerations Map". Ocean disposal is currently the primary disposal method chosen by those who need disposal sites. The dredge material disposal designated sites on the list provided on Table 6.1, has decreased because the ocean has become the primary disposal method, the in-land DMD sites have diminished and those which have remained on the DMD list are sites which may be utilized in the future and not be cost-prohibitive. Consistent with the "Use/Activity" matrices, designated disposal sites shall be managed so as to prevent new uses and activities which could prevent the sites' ultimate use for dredge material disposal. A designated site may otherwise only be released for some other use upon a finding that a suitable substitute upland site or ocean dumping is available to provide for that need. Sites may*

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only be released through a Plan Amendment. Upland dredged material disposal shall be permitted elsewhere (consistent with the "Use/Activity" matrices) as needed for new dredging (when permitted), maintenance dredging of existing functional facilities, minor navigational improvements or drainage improvements, provided riparian vegetation and fresh-water wetlands are not affected. For any in-water (including intertidal or subtidal estuarine areas) disposal permit requests, this strategy shall be implemented by the preparation of findings by local government consistent with Policy #5 (Estuarine Fill and Removal) and Policy #20c (Intertidal Dredged Material Disposal). Where a site is not designated for dredged material disposal, but is used for the disposal of dredged material, the amount of material disposed shall be considered as a capacity credit toward the total identified dredged material disposal capacity requirement.

1. This policy shall be implemented by:

   a. Designating "Selected Dredge Material Disposal Sites" on the "Special Considerations Map"; and

Within CBEMP zoning district 18-RS, the PCGP will cross DMD 30(b).

   b. Implementing an administrative review process (to preclude preemptory uses) that allows uses otherwise permitted by this Plan but proposed within an area designated as a "Selected DMD" site only upon satisfying all of the following criteria:

      1. The proposed use will not entail substantial structural or capital improvements (such as roads, permanent buildings and non-temporary water and sewer connections); and

      The PCGP will be buried under the 30(b) dredge disposal site and will not entail substantial structural or capital improvements such as roads, permanent buildings and non-temporary water and sewer connections. As discussed above, the PCGP is not a "structure" as that term is defined in CCZLDO Section 2.1.200, and there are no above-ground components within the 30(d) dredge disposal site. Nor is the PCGP a capital improvement to the property which would preclude future use of the site for dredge disposal. The only impacts on future development will be the prohibition of structural improvements within the right-of-way, which is entirely consistent with the stated purpose of Policy #20, preclusion of preemptory uses.

      2. The proposed use must not require any major alteration of the site that would affect drainage or reduce the usable volume of the site (such as extensive site grading/excavation or elevation from fill); and

Following installation of the PCGP, the site will be restored as closely as possible to its pre-construction contours, reestablishing existing drainage patterns. Following construction, dredge material could still be stored over the PCGP in consultation with Pacific Connector, thereby preserving the usable volume of the site.

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3. The proposed use must not require site changes that would prevent the expeditious conversion of the site to estuarine habitat.

The PCGP would not require site changes that would prevent the expeditious conversion of the site to estuarine habitat.

c. Local government's review of and comment on applicable state and federal waterway permit applications for dike/tidegate and drainage ditch actions.

The PCGP will not include dike/tidegate or drainage ditch actions. Therefore, this provision is not applicable.

II. This strategy recognizes that sites designated in the Comprehensive Plan reflect the following key environmental considerations required by LCDC Goal #16:

   a. Disposal of dredged material in upland or ocean waters was given general preference in the overall site selection process;
   b. Disposal of dredged material in estuary waters is permitted in this Plan only when such disposal is consistent with state and federal law;
   c. Selected DMD sites must be protected from preemptory uses.

As discussed above, the PCGP does not involve disposal of dredged material but will allow for dredged material disposal on site 30(b) and will, therefore, not be a preemptory use.

This plan policy is met.

f. Plan Policy #22 Mitigation Sites: Protection Against Preemptory Uses

I. This policy shall be implemented by:

   a. Designating "high" and "medium" priority mitigation sites on the Special Considerations Map; and

According to Coos County’s maps, the PCGP would cross the following mitigation sites:

<table>
<thead>
<tr>
<th>Designated Mitigation Site</th>
<th>Priority</th>
<th>Approximate MP</th>
<th>CBEMP Zoning District</th>
</tr>
</thead>
<tbody>
<tr>
<td>M-9(b) 1</td>
<td>Low</td>
<td>2.70 R</td>
<td>11 NA</td>
</tr>
<tr>
<td>U-12 2</td>
<td>High</td>
<td>10.80 R</td>
<td>18-RS</td>
</tr>
<tr>
<td>U-16(a) 2</td>
<td>High</td>
<td>11.10 R</td>
<td>18-RS</td>
</tr>
<tr>
<td>U-22</td>
<td>Low</td>
<td>10.10</td>
<td>21-RS</td>
</tr>
<tr>
<td>U-24</td>
<td>Low</td>
<td>10.97</td>
<td>21-RS</td>
</tr>
</tbody>
</table>

1 This mitigation site is associated with the Hwy 101 Causeway.
2 PCGP will also cross CBEMP dredged Material Disposal Site 30(b), which is in the same location as mitigation site U-12 and just to the north of mitigation site U-16(a). The PCGP installation will be a temporary disturbance to this dredged material disposal site. According to the Management Objectives of 18-RS, the dredge disposal is considered a higher priority than mitigation for this area. CCZLDO Section 4.5.480 Management Objective provides, "The development of the disposal site would preclude mitigation use, and vice versa. Use of this site for dredged material disposal is the higher priority because of the scarcity of suitable sites (see Policies #20 and #22)."

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b. Implementing an administrative review process that allows uses otherwise permitted by this Plan but proposed within an area designated as a "high" or "medium" priority mitigation site only upon satisfying the following criteria:

Of the 5 designated mitigation areas crossed by the PCGP, 2 are high priority (U-12 and U-16(a)). However, the designated dredge disposal site (30(b)) is the higher priority in this area (see responses to Policy #20 above).

1. The proposed use must not entail substantial structural or capital improvements (such as roads, permanent buildings or non-temporary water and sewer connections); and

The PCGP will be buried within the 30(b) dredge disposal site and will not entail substantial structural or capital improvements such as roads, permanent buildings and non-temporary water and sewer connections. As discussed above, the PCGP is not a “structure” as that term is defined in CCZLDO Section 2.1.200. The PCGP will simply cross the property beneath the surface. The only impacts on future development will be the prohibition of structural improvements within the right-of-way, which is entirely consistent with the stated purpose of Policy #20, preclusion of preemptory uses.

2. The proposed use must not require any major alteration of the site that would affect drainage or reduce the usable volume of the site (such as extensive site grading/excavation or elevation from fill); and

Following installation of the PCGP, the site will be restored as closely as possible to its pre-construction contours, reestablishing existing drainage patterns. Following construction, mitigation could still occur over the PCGP in consultation with Pacific Connector, thereby preserving the usable volume of the site for mitigation purposes.

3. The proposed use must not require site changes that would prevent the expeditious conversion of the site to estuarine habitat; or

The PCGP would not require site changes that would prevent the expeditious conversion of the site to estuarine habitat.

CBEMP 18-RS contains two “high” priority mitigation sites (U-12 and U-16). U-12 is also the site of Dredge Material Disposal Site 30b. The 18-RS Management Objective states that the higher priority is the DMD site.

The presence of the pipeline would not impact the potential for conversion of the site for estuarine habitat.

This plan policy is met.

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Plan Policy 23 states

I. Local government shall strive to maintain riparian vegetation within the shorelands of the estuary, and when appropriate, restore or enhance it, as consistent with water-dependent uses. Local government shall also encourage use of tax incentives to encourage maintenance of riparian vegetation, pursuant to ORS 308.792 - 308.803.

Appropriate provisions for riparian vegetation are set forth in the CCZLDO Section 4.5.180 (OR 92-03-009PL).

II. Local government shall encourage streambank stabilization for the purpose of controlling streambank erosion along the estuary, subject to other policies concerning structural and non-structural stabilization measures.

This strategy shall be implemented by Oregon Department of Transportation (ODOT) and local government where erosion threatens roads. Otherwise, individual landowners in cooperation with the Oregon International Port of Coos Bay, and Coos Soil and Water Conservation District, Watershed Councils, Division of State Lands and Oregon Department of Fish & Wildlife shall be responsible for bank protection.

This strategy recognizes that the banks of the estuary, particularly the Coos and Millicoma Rivers are susceptible to erosion and have threatened valuable farm land, roads and other structures.

The zoning districts through which the PCGP crosses requiring compliance with Policy #23 are 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 20-RS, 21-RS, and 36-UW (Georgia Pacific Yard).

Various opponents raised CBEMP Plan Policy 23 as a basis for denial. The Board has reviewed Plan Policy 23 and finds that this policy does not create a mandatory approval standard applicable to a quasi-judicial land use process. Rather, the policy is framed in aspirational, hortatory, and non-mandatory language. Compare Neuenschwander v. City of Ashland, 20 Or LUBA 144 (1990) (comprehensive plan policies that “encourage” certain development objectives are not mandatory approval standards); Bennett v. City of Dallas, 96 Or App 645, 773 P2d 1340 (1989).

However, Plan Policy 23 states that “appropriate provisions for riparian vegetation are set forth in the CCZLDO Section 4.5.180.” Although it is far from clear that the phrase “appropriate provisions for riparian vegetation” is intended to make CCZLDO §4.5.180 an approval standard, the parties all seem to treat it as such.\(^{52}\)

\(^{51}\) As explained above, the PCGP and its associated facilities were approved under JCEP's prior LNG Terminal application.

\(^{52}\) For example, the applicant states in its application narrative:

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CCZLDO §4.5.180 is entitled “Riparian Protection Standards in the Coos Bay Estuary Management Plan.” This standard requires riparian vegetation protection within 50-feet of an inventoried wetland, lake, or river with the following exception:

(e) Riparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose...

Staff notes that the pipeline is a “public utility” project, and therefore is not subject to the 50-foot riparian vegetation protection. Riparian vegetation may be removed in order to site the pipeline pursuant to the exemption cited above, so long as it is the “minimum necessary to accomplish the purpose.”

Staff also notes that the applicant must comply with all FERC requirements for wetland and waterbody protection and mitigation both during and after construction, and will restore riparian vegetation 25 feet from the streambanks on either side of waterbodies on private lands where riparian vegetation existed prior to construction, consistent with the ECRP.

The Board has already discussed the public utility exception elsewhere in this decision. As discussed herein, the Board finds that opponents are incorrect when they argue that the public utility exception does not apply.

In addition, subsection II does not apply to this case. While Pacific Connector will restore areas disturbed during construction to their pre-construction condition, the PCGP does not include independent permanent streambank stabilization projects. Staff recommended a condition of approval requiring the applicant to contact the Planning Department to determine the appropriate review for any part of the project involving riprap. In light of the fact that the applicant is not specifically proposing any permanent riprap or stream stabilization as part of the PCGP project and that jurisdiction over such activities may lie with a state or federal agency, the Board modifies and adopts the condition as Condition of Approval A.13 to read as follows:

As indicated under subsection I, this policy is implemented through the requirements of CCZLDO Section 4.5.180, Riparian Protection Standards in the Coos Bay Estuary Management Plan. Section 4.5.180 generally requires that riparian vegetation within 50 feet of a wetland, stream, lake or river, as identified on the Coastal Shoreland Fish and Wildlife habitat inventory maps, shall be maintained. However, the standard provides the following exception, "[r]iparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose." The PCGP qualifies as a public utility, and is therefore exempt from the 50-foot riparian vegetation maintenance requirements of CCZLDO Section 4.5.180 provided the vegetation removal is the minimum necessary for the PCGP installation. However, Pacific Connector has designed the project to minimize impacts to riparian vegetation as much as possible.
"Should any part of the project involve permanent structural streambank stabilization (i.e. riprap), the applicant must contact the Planning Department for a determination of the appropriate review, if any."

This plan policy is not an applicable approval criterion.

h. Plan Policy #27 Floodplain Protection within Coastal Shorelands

The respective flood regulations of local government set forth requirements for uses and activities in identified flood areas; these shall be recognized as implementing ordinances of this Plan.

This strategy recognizes the potential for property damage that could result from flooding of the estuary.

This Plan Policy applies to CBEMP 6-WD, 7-D, 8-WD, 18-RS, 19-D, 21-RS and 36-UW, and is implemented by the Floodplain Overlay Zone provisions of CCZLDO Article 4.6. While the pipeline is not specifically addressed under the development options of Section 4.6.230, certain proposed activities are identified as “other development” requiring a floodplain review.

The applicant addresses this policy by showing compliance with the provisions of Article 4.6. The County has indicated that the Flood Insurance Rate Map (FIRM) is consistent with the Federal Emergency Management Agency’s (FEMA) flood hazard map for the County. As in the applicant’s narrative, the PCGP is consistent with the applicable floodplain approval criteria for all areas identified on the FEMA flood hazard map/FIRM as a designated flood area. The FEMA maps identify the 100-year floodplain, which is typically a larger area than the floodplain and floodway areas defined in the Floodplain Overlay standards. In order to be as conservative as possible, the applicant has designed the PCGP so that any portion of the PCGP that crosses an area identified on the FEMA 100-year floodplain map satisfies the more stringent floodway standards.

As a further means to ensure compliance with this policy, staff recommended a condition of approval requiring floodplain certification for "other development" occurring in a FEMA flood hazard area. The Board adopts the staff recommendation in Condition of Approval A.15, subject to an amendment to cross-reference the applicable section of the CCZLDO. As amended, Condition of Approval A.15 reads as follows: "Floodplain certification is required for 'other

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33 "Floodplain" is defined by the CCZLDO as “the area adjoining a stream, tidal estuary or coast that is subject to periodic inundation from flooding.”

34 "Floodway" is defined by the CCZLDO as “the normal stream channel and the adjoining area of the natural floodplain needed to convey the waters of a regional flood while causing less than one foot increase in upstream flood elevations.” Pursuant to CCZLDO Sections 4.6.205 and 4.6.270 “floodways” are identified as special flood hazard areas in a Federal Insurance Administration report entitled “Flood Insurance Study for Coos County, Oregon and Incorporated Areas” and accompanying maps.

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development' as provided in CCZLDO 4.6.230 occurring in a FEMA flood hazard area. The applicant must coordinate with the County Planning Department."

**CCZLDO SECTION 4.6.210. Permitted Uses.**

In a district in which the /FP zone is combined, those uses permitted by the underlying district are permitted outright in the /FP FLOATING ZONE, subject to the provisions of this article.

**CCZLDO SECTION 4.6.215. Conditional Uses.**

In a district with which the /FP is combined, those uses subject to the provisions of Article 5.2 (Conditional Uses) may be permitted in the /FP FLOATING ZONE, subject to the provisions of this article.

As detailed above, the PCGP is permitted either outright or conditionally in each of the base zones that it crosses. As described in this section of the narrative, it also satisfies each of the applicable Floodplain Overlay standards. Therefore, it is also a permitted use in the Floodplain Overlay zone.

**CCZLDO SECTION 4.6.230. Procedural Requirements for Development within Special Flood Hazard Areas.**

The following procedure and application requirements shall pertain to the following types of development:

4. Other Development. "Other development" includes mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of a special flood hazard, but does not include such uses as normal agricultural operations, fill less than 12 cubic yards, fences, road and driveway maintenance, landscaping, gardening and similar uses which are excluded from definition because it is the County’s determination that such uses are not of the type and magnitude to affect potential water surface elevations or increase the level of insurable damages.

Review and authorization of a floodplain application must be obtained from the Coos County Planning Department before “other development” may occur. Such authorization by the Planning Department shall not be issued unless it is established, based on a licensed engineer’s certification that the “other development” shall not:

A natural gas pipeline is not included in the specified list of “other development.” However, because the PCGP construction process will involve the removal and replacement of soil and recontouring activities that are similar to the listed development activities, the following demonstrates that the PCGP is consistent with the “other development” standards.

\[ a. \text{result in any increase in flood levels during the occurrence of the base flood discharge if the development will occur within a designated floodway; or,} \]
b. result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.

The PCGP will be installed below existing grades and no permanent structures will be placed above existing grades within the FEMA 100-year floodplain. In addition, at the completion of the PCGP installation, all construction areas will be restored to their pre-construction grade and condition. Flood plain compliance will be verified prior to construction and the issuance of a zoning compliance letter.

**CCZLDO SECTION 4.6.235. Sites within Special Flood Hazard Areas.**

1. If a proposed building site is in a special flood hazard area, all new construction and substantial improvements (including placement of prefabricated buildings and mobile homes), otherwise permitted by this Ordinance, shall:

   All new construction associated with the PCGP satisfies the following special flood hazard area criteria.

   a. be designed (or modified) and adequately anchored to prevent flotation, collapse, or lateral movement and shall be installed using methods and practices that minimize flood damage. Anchoring methods may include, but are not limited to, use of over-the-top or frame ties to ground anchors (Reference FEMA “Manufactured Home Installation in Flood Hazard Areas” guidebook for additional techniques);

   Installation methods and mitigation measures will avoid and/or minimize flotation, collapse, or lateral movement hazards and flood damage.

   b. be constructed with materials and utility equipment resistant to flood damage;

   The entire PCGP will be constructed with corrosion-protected steel pipe. Where deemed necessary, the PCGP will be installed with a reinforced concrete coating to protect against abrasion and flood damage.

   c. be constructed by methods and practices that minimize flood damage; and

   The PCGP will be constructed by methods and practices that minimize flood damage.

   d. electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

   The subsurface PCGP does not include electrical, heating, ventilation, plumbing, or air conditioning components. Therefore, this criterion is not applicable.
This plan policy is met.

i. **Plan Policy #28 Recognition of LCDC Goal #3 (Agricultural Lands)**

*Requirements for Rural Lands within the Coastal Shorelands Boundary*

Unless otherwise allowed through an Exception, Coos County shall manage all rural lands designated within the Coastal Shorelands Boundary as being suitable for "Exclusive Farm Use" (EFU) designation consistent with the "Agricultural Use Requirements" of ORS 215. Allowed uses are listed in Appendix 1, of the Zoning and Land Development Ordinance.

This policy shall be implemented by using the Special Considerations Map (Policy #3) to identify EFU suitable areas, and to abide by the prescriptive use and activity requirements of ORS 215 in lieu of other management alternatives otherwise allowed for properties within the "EFU-overlay" set forth on the Special Considerations Map, and except where otherwise allowed by exceptions for needed housing and industrial sites.

The "EFU" zoned land within the Coastal Shorelands Boundary shall be designated as "Other Aggregate Sites" inventories by this Plan pursuant to ORS 215.298(2). These sites shall be inventoried as "1B" resources in accordance with OAR 660-16-000(5)(b). Coos County will re-evaluate these inventoried sites pursuant to the requirements of said rule at, or before, County's periodic review of the Comprehensive Plan (OR 92-08-013PL 10/28/92).

This policy applies to CBEMP zones 18-RS, 20-RS and 21-RS. These CBEMP zones list the pipeline as a permitted use.

This policy is implemented by using the Special Considerations Map to identify EFU suitable areas. Certain property along the PCGP alignment is designated as "Agricultural Lands". As described in detail in the EFU section of the narrative, the PCGP is allowed as a utility facility necessary for public service under the agricultural provisions of ORS 215.283(d) and ORS 215.275(6). Therefore, the PCGP is consistent with the Policy #28 requirements for mapped Agricultural Lands.

In addition to referencing ORS Chapter 215, the Policy states that allowed uses are listed in Appendix 1 of the CCZLDO. However, Appendix 1 is entitled "CCCP" and does not apply within the CBEMP boundaries and does not provide a list of uses permitted within agricultural zones. Therefore, the applicant is correct that it appears that the reference is intended to be to Appendix 4, Agricultural Land Use, which does describe uses allowed within exclusive farm use zones.

Subsection 1 of Appendix 4 states, "Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213." ORS 215.213 describes uses permitted in exclusive farm use zones. ORS 215.213(1)(e) permits the following use allowed outright in any area zoned for exclusive farm use: "utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height.

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A utility facility necessary for public service may be established as provided in ORS 215.275. As discussed in the EFU zone section of this narrative, the PCGP is a utility facility necessary for public service pursuant to ORS 215.275. Therefore, the PCGP is also an allowed use in those areas identified as Agricultural Lands on the CBEMP Special Considerations Map.

EFU uses will be impacted during the construction phase of the project. The applicant anticipates that construction (including restoration) will be complete in approximately 3 years. Farm use within the temporary 95-foot will be able to resume post-construction. Compliance with state and county land use requirements regarding agricultural lands is addressed in the EFU section of this staff report.

This plan policy is met.

**j. Plan Policy #30 Restricting Actions in Beach and Dune Areas with "Limited Development Suitability" and Special Consideration for Sensitive Beach and Dune Resources (moved from Policy #31)**

This plan policy is applicable to CBEMP zone 7-D. However, according to staff, there are no beach or dune areas within zoning district 7-D, and therefore the policy does not apply.

**k. Plan Policy #34 Recognition of LCDC Goal #4 (Forest Lands) Requirements for Forest Lands within the Coastal Shorelands Boundary**

This policy applies to CBEMP zones 11-RS, 18-RS, 20-RS, and 21-RS and addresses forest operations in areas of coastal shorelands. There are no identified forest lands in these CBEMP zones, therefore, the policy does not apply.

**l. Plan Policy #49 Rural Residential Public Services**

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS, and 36-UW and addresses acceptable services for rural residential development. This policy does not apply to the proposal.

**m. Plan Policy #50 Rural Public Services**

Coos County shall consider on-site wells and springs as the appropriate level of water service for farm and forest parcels in unincorporated areas and on-site DEQ-approved sewage disposal facilities as the appropriate sanitation method for such parcels, except as specifically provided otherwise by Public Facilities and Services Plan Policies #49, and #51. Further, Coos County shall consider the following facilities and services appropriate for all rural parcels: fire districts, school districts, road districts, telephone lines, electrical and gas lines, and similar, low-intensity facilities and services traditionally enjoyed by rural property owners. This strategy

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35 The County is not a marginal lands county, so the provisions of ORS 215.213 do not apply. The parallel provisions of Oregon law applicable to marginal lands counties (set forth in ORS 215.283) do apply. ORS 215.283(1)(c) is identical to ORS 215.213(1)(c).

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recognizes that LCDC Goal #11 requires the County to limit rural facilities and services

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS and 36-UW and addresses acceptable rural serves. Staff states that “[t]his policy does not apply to the proposal.”

Various opponents cited CBEMP Plan Policy 50 as a reason for denial. Plan Policy 50 states that “Coos County shall consider the following facilities and services appropriate for all rural parcels: ** electrical and gas lines, and similar, low-intensity facilities and services traditionally enjoyed by rural property owners.”

Mark Sheldon wrote comments suggesting that a gas pipeline should be considered a “high-intensity” utility facility. CCZDO 2.1.200 defines the term “utility” as follows:

UTILITIES: Public service structures which fall into two categories:
1. low-intensity facilities consist of communication facilities (including power and telephone lines), sewer, water and gas lines, and
2. high-intensity facilities, which consist of storm water and treated waste water outfalls (including industrial waste water).

Note: in shoreland units this category also includes sewage treatment plants, electrical substations and similar public service structures. However, these structures are defined as "fill for non-water-dependent/related uses" in aquatic areas. (Emphasis Added).

The code resolves the issue in a manner that is unambiguous and conclusive against Mr. Sheldon’s argument. Given the recognition that gas lines are a “low-intensity” facility, Plan Policy 50 does not assist the opponents in any way.

This plan policy is met.

n. Plan Policy #51Public Services Extension.

I. Coos County shall permit the extension of existing public sewer and water systems to areas outside urban growth boundaries (UGBs) and unincorporated community boundaries (UCB’s) or the establishment of new water systems outside UGB’s and UCB’s where such service is solely for:

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS and 36-UW and addresses extension of water and sewer outside of UGBs when necessary for certain development including industrial and exception land development. This policy does not apply to the proposal.
PCGP has received authorization from FERC to construct, install, own, operate and maintain the proposed interstate natural gas pipeline, consistent with applicable state and federal laws and permitting requirements. The county has previously reviewed and approved a series of related applications including a marine terminal and upland LNG facility prior to this matter.

The subsurface pipeline will not impact access to the Estuary. Most impacts from the pipeline will be temporary, and will occur during construction and maintenance of the pipeline. The applicant will work with state and federal agencies on an appropriate plan to mitigate such impacts.

Protection measures will be required as well as mitigation. The applicant will work with state and federal regulators to obtain all necessary permits, which is coordinated with the county through consistency requirements.

C. Miscellaneous Concerns.

1. Evidence of Past Misdeeds by Various Unrelated Pipeline Companies.

The opponents have submitted voluminous testimony discussing past environmental damage done by pipeline companies. For example, Ms. McCaffree also brought to the Hearings Officer’s attention the Shell Oil Sakhalin Island LNG project in Russia. As her testimony and accompanying evidence seem to indicate, a large amount of environmental damage occurred with that project. The opponents also brought up the Mas Tec issue as well. As the Board is well aware, Mas Tec Inc. did a horrible job of complying with its permit requirements, and caused extensive environmental damage. Judge Hogan found that there was plenty of fault to go around in that case, and stated that “lack of government oversight” was a factor. Undoubtedly the County has learned valuable lessons from that experience.

The apparent goal of the opponent’s testimony is to create doubt whether PCGP can conduct its construction activities as promised. As discussed above, however, this type of testimony can seldom form a basis for a denial, since it necessarily requires the decision-maker to speculate about future events. The decision-maker cannot simply assume that the applicant will fail to live up to its promises. To do so would be mere speculation. *Gann v. City of Portland,* 12 Or LUBA 1, 6 (1984).

In a land use process such as this, the primary goal is to determine if it is feasible for the applicant to meet applicable approval standards. Often, the applicant accomplishes this by demonstrating that he or she has a plan, and that the plan is reasonable and likely to succeed. The issuance of a land use permit cannot, in and of itself, guarantee full compliance with applicable laws. Rather, ensuring full compliance with applicable laws requires leadership from the applicant’s management team and vigorous oversight from the various government agencies as well as watchdog groups.

2. Difficulty of Getting Homeowner’s Insurance within 900 feet of Pipeline.

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Mr. David Gonzales and Ms. Jody McCaffree testified that it would be difficult or impossible for a landowner to obtain homeowner’s insurance within 900 feet of a pipeline. Although this could be a potentially important factor, the opponents surprisingly submitted no evidence to substantiate the claim. An assertion of this sort without supporting evidence or documentation is not very useful because it does not constitute substantial evidence. Substantial evidence does not exist to support a conclusion if the only supporting evidence “consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based.” 1000 Friends of Oregon v. LCDC, 83 Or App 278, 286, 731 P2d 457 (1987), aff’d in part, rev’d in part on other grounds, 305 Or 384, 752 P2d 271 (1988).

3. Hearing is Premature Due to Unresolved Issues related to BLM, the FEIS and Requests pending Before FERC.

Many opponents stated that they believed that this process should be put on hold until other regulatory processes are fully completed. The County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. In addition, the Board is not aware of any approval standard that requires this process to be held up pending favorable results in related but separate process. As was discussed at the hearing, however, this approval is not very useful to the applicant if it cannot obtain all of the other required authorizations. It makes sense that the applicant seeks to complete the various applications concurrently, given the length of time it takes to complete each process. In any event, FERC will not issue a Notice to Proceed until all of its conditions are satisfied. Accordingly, the Board adopts a condition of approval to ensure that no construction occurs until the Notice to Proceed is issued.

4. Bentonite as a Carcinogen.

Anita Coppock testified that various construction techniques used by the applicant involve the use of bentonite, which is the person identified as a carcinogen. Bentonite is a clay that originates from weathered volcanic ash. See FEIS. It is a widely used substance for drilling due to its unique properties. It is sometimes used in the wine industry as a clarifying agent. It is also used for various medical and health-related purposes. It may be dangerous for the user to inhale bentonite dust in a pure, out-of-the-bag form, but that is not an issue once it is mixed with water and released into the environment. In short, it is simply not believable that bentonite is a carcinogen, and the Board has not been made aware of any evidence in the record to support the notion that it is dangerous to human health in anything other than as mentioned above.

Unsupported statements are mere conclusions, and do not constitute evidence. For example, in Palmer v. Lane County, 29 Or LUBA 436 (1995), LUBA held that on a statement in a land use application that “a total of 500,000 to 600,000 yards of rock appears to be available at this site depending upon the unexposed rock formations” does not constitute “evidence” because there was no support for the statement. Id. at 441. Similarly, in DLCD v. Curry County, 31 Or LUBA (1996) LUBA disapproved a finding stating that “[t]here can be no conflict with nearby permitted users on nearby lands.” LUBA described the finding as “simply a conclusion” that fails to explain why such conflicts will not occur. Here, there is no evidence, scientific or otherwise, to back up the concern that bentonite is a carcinogen.
5. School Kids Won't Go to School Due to Construction Impacts on Traffic.

One person testified that children will not go to school because of the fact that construction will alter traffic patterns and close roads, etc. The Board is skeptical of this argument for a number of reasons. First, it does not seem to relate to any approval criterion. Secondly, this appears to be a traffic management issue that should be addressed by the public works department prior to and during construction. If properly managed, the Board finds that construction activities associated with the pipeline will not cause significant and widespread disruptions to the transportation infrastructure. Even if problems occurred in the past, the solution is better management, not denying development that otherwise satisfies applicable approval criteria.

6. Use of Eminent Domain for “Public Use” Requires a Public Need or a Public Benefit.

Many opponents asserted the belief that eminent domain should not be used unless there is a local “need” for the project or a “benefit” to the community. For example, Ms. McCaffree dedicates eight pages of what appears to be well-researched argument pertaining to the lack of “need” for the pipeline in her final submittal. See e.g., McCaffree Letter dated June 10, 2010, at p. 39-46. However, whatever the merits to these types of arguments, “need” is simply not an approval criterion for this decision. Compare Hale v. City of Beaverton, 21 Or LUBA 249 (1991) (Public need is not an approval criterion) with Ruef v. City of Stayton, 7 Or LUBA 219 (1983) (Code standard required that a “public need” for a project be established). Although “public need” became a common code standard after the landmark Fasano case, it is no longer a generally applicable criterion in quasi-judicial land use proceedings. Neuberger v. City of Portland, 288 Or 155, 170, 603 P2d 771 (1979).

Even to the extent that “need” could be considered to be a legal requirement, Section 1.3 of the FEIS provides a detailed explanation of the overall need for the PCG project, and that analysis is hereby incorporated by reference herein. Furthermore, the applicant has obtained a "Certificate of Public Convenience and Necessity," which establishes the particular need for the facility. In addition, since the pipeline is expected to transport natural gas in interstate commerce, any local zoning ordinance requiring the pipeline to serve a “need” by local customers, rather than the concerns of interstate commerce, is a clear violation of the Commerce Clause. The fact that Oregon law provides for eminent domain proceedings for interstate natural gas pipelines is evidence that Oregon as a state, considers interstate natural gas pipelines to be important and necessary and to serve an important need. Moreover, the precise need for taking individual properties for the public purpose of siting a natural gas pipeline must be successfully demonstrated in each case or the proposed condemnation would not be allowed.
7. State and federal permitting.

Several public comments suggested that the county should require compliance with the Endangered Species Act, the Coastal Zone Management Act\textsuperscript{56}, the Clean Water Act, and the Clean Air Act. Generally speaking, those issues are outside of Coos County's jurisdiction for purposes of this land use application.

A detailed discussion of the complex and comprehensive state and federal permitting regime for this project is included in the correspondence from Staff Environmental Scientist Randy Miller of Pacific Connector dated June 9, 2010. A list of all state and federal permits, approvals and consultations is attached as Exhibit 5 to the letter on Williams Pipeline letterhead dated May 11, 2010. Also, Section 1.5 of the FEIS details the myriad permits and approvals required for the PCGP and the associated permitting governmental authorities.

For example, it is FERC's responsibility to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act. It is the responsibility of these agencies to protect threatened and endangered species (i.e., northern spotted owl, marbled murrelet, coho salmon, etc.). Additionally, Pacific Connector must submit a certification application to the Oregon Department of Land Conservation and Development and receive certification that the PCGP complies with Oregon's Coastal Management Program. DLCD must in turn consult with other state and local agencies to confirm consistency. Pacific Connector must also apply for and obtain permits under the Clean Water Act (Sections 404, 401, and 402) from the U.S. Army Corps of Engineers and the Oregon Department of Environmental Quality. These permits will regulate activities within and near all waterbodies and wetlands potentially impacted by the PCGP. These permits will include the appropriate TMDL restrictions.

Section 1.5 of the FEIS also details the public process and agency coordination that has occurred to-date in the development of the FEIS. Unless Pacific Connector receives all of the applicable federal permits and approvals FERC will not issue a "Notice to Proceed." Pacific Connector has stated that it would accept a condition that requires the applicant to provide proof of the Notice to Proceed prior to beginning construction, and the Hearings Officer recommended that such a condition be imposed. The Board hereby imposes the recommended condition as Condition of Approval A.14.

8. Federal Forestry Standards

Cascadia Wildlands and other opponents argue that the pipeline will violate requirements of the Northwest Forest Plan on BLM lands, and that the FEIS improperly bases its conclusions

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\textsuperscript{56} Ms. McCaffree argues that the federal Coastal Zone Management Act of 1972 needs to be “considered and evaluated in with this Permit Application.” See McCaffree Letter dated June 10, 2010, at p. 2. However, Ms. McCaffree never makes any effort to explain how she believes the Act applies to this application, or how the application violates the Act. She does not even cite any particular section of the Act which she believes applies. Under these circumstances, her arguments are not developed well enough to provide a decision-maker with fair notice as to what issues she intended to raise. Any issue related to the Coastal Zone Management Act of 1972 is waived.

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regarding environmental impacts on a BLM management plan called the Western Oregon Plan Revision (WOPR), which was been withdrawn by the Department of the Interior in 2009.

Cascadia Wildlands and other opponents correctly point out that the FEIS incorporates the WOPR, and further that the WOPR was withdrawn after issuance of the FEIS and is no longer being used by the Bureau of Land Management (BLM). It is also true that the PCGP alignment crosses federal lands managed by BLM within Coos County. However, the opponents fail to explain how the provisions of the Northwest Forest Plan or the WOPR withdrawal relate to the land use approval criteria applicable to the application currently pending before the county. In fact, these issues are completely irrelevant to the county's applicable criteria under the CCZLDO. The substantive portions of the FEIS affected by the WOPR withdrawal are limited to Sections 4.6.1.2 (Threatened and Endangered Species/Birds) and 4.7.4.2 (Federal Land Use Plans and Land Allocations). Pacific Connector has not referenced either of these sections of the FEIS in support of the current land use application. Furthermore, the FEIS correctly evaluated the project within the regulatory framework that was in force at the time the FEIS was issued. Therefore, the WOPR withdrawal has no impact on this land use application, nor does it invalidate the evidence Pacific Connector has relied upon to demonstrate compliance with the applicable approval criteria.

9. TEWAs, UCSAs and Hydrostatic Testing

Cascadia Wildlands submitted comments arguing that the applicant has failed to sufficiently identify the size and location of Temporary Extra Work Areas (TEWAs) and Uncleared Storage Areas (UCSAs), which are areas that will be used temporarily for construction of the pipeline. Cascadia Wildlands also asserts that the applicant has failed to fully describe and analyze the hydrostatic testing procedures for the pipeline.

Cascadia Wildlands has not attempted to tie these arguments to any applicable County approval criteria, and has alleged no basis on which their arguments (if true) would necessitate denial by the Board. Nonetheless, detailed information regarding these issues was provided in correspondence from the applicant dated June 17, 2010, at pages 10-14.

D. Additional Issues Discussed During Board Deliberations

1. Condition of Approval A.1

The Hearings Officer recommended that the Board adopt the following condition as Condition of Approval A.1:

"All promises and recommendations made by the applicant and its consultants during the course of this proceeding for the purpose of demonstrating compliance with approval standards and performance measures shall be binding on the applicant and shall

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37 However, as noted in Pacific Connector's original application narrative, local governments in Oregon do not have direct land use permitting authority over projects located on lands owned and controlled by the federal government. Furthermore, federal lands are excluded from the CZMA boundary definition under both state and federal law.

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constitute a condition of approval for this permit, whether or not that promise or recommendation is specifically set forth herein as numbered condition of approval below. [See Central Oregon Landwatch v. Deschutes County (Taylor), 53 Or LUBA 290 (2007)]“

This condition would essentially make binding all promises and recommendations made by the applicant and its consultants during the application process. County Planning and Legal staff advised that as written, this condition would be troublesome for the County to enforce and administer. They recommended that the Board strike this condition as being too broad. The Board agrees with staff and finds that imposing the remaining conditions of approval hereinbelow incorporate the written representations and promises made by the applicant and ensure that the applicant will implement the project consistent with applicable approval criteria and related performance measures. The Board deletes Condition A.1 and identifies it as "Intentionally deleted" in the conditions below.

2. Condition of Approval A.7

The Hearings Officer recommended that the Board adopt the following condition as Condition of Approval A.1:

The applicant's plans to protect the 7-NA district from adverse impacts due to the temporary construction phase of the pipeline shall be provided to the Planning Department.

Staff recommended that this condition be deleted. The Board concurs. The applicant addressed this issue in its final argument letter at page 28 by demonstrating that there would be no direct impact to lands located in the CBEMP 7-NA zoning district and that indirect impacts would be avoided through implementation of the mandatory ECRP. Based upon this substantial evidence, the Board deletes this condition and notes it as "Intentionally deleted" in the conditions below.

3. Construction Impacts to County Roads

At the Board deliberations in this matter, Commissioner Stufflebean expressed concern that, although Condition of Approval A.12 requires the applicant to identify construction impacts to County roads, the condition does not ensure that the applicant will address any such impacts in a timely manner. The Board finds that this is an issue of public concern. To ensure that the applicant addresses any impacts to County roads in a timely manner, the Board finds that it is appropriate to require that the applicant file an irrevocable letter of credit or similar instrument with the County. The Board further finds that the letter of credit or similar instrument should remain in place for a five-year period in order to address any impacts identified through that time period. Consistent with CCZLDO 6.5.400 regarding public improvements for new developments, the letter of credit should be in the amount of 120% of the estimated cost of the improvements. Accordingly, the Board modifies Condition of Approval A.12 to add the following two sentences:

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"Prior to issuance of a zoning compliance letter for the project, the applicant shall file a bond, surety, irrevocable letter of credit, cash or other security deposit agreement in the amount of 120% of the estimated cost of necessary improvements to bring County road facilities impacted by pipeline construction back to current or better condition. After five (5) years, the security shall either be forfeited to the County if the applicant does not complete required improvements or be refunded to the applicant if applicant has completed required improvements or there are no improvements to complete."

The Board finds that this modified condition addresses this issue.

III. CONCLUSION

For the above stated reasons, and after consideration of the applicable law and all argument and evidence in the record, the Board finds that the applicant has met its burden of proof to demonstrate that the applications satisfy all applicable approval standards and criteria, or that those standards or criteria can be satisfied through the imposition of conditions of approval. Accordingly, the Board hereby approves the application, subject to the following conditions of approval, which are authorized by Section 52.800 of the CCZLDO:

A. Staff Proposed Conditions Of Approval

1. Intentionally deleted.

2. To minimize impacts to wells and groundwater, the applicant must comply with the Groundwater Supply Monitoring and Mitigation Plan approved by the federal Office of Energy Projects within FERC, including without limitation, provisions requiring: (a) subject to landowner consent, testing and sampling groundwater supply wells for both yield and water quality; and (b) as needed, implementing site-specific measures to mitigate adverse impacts on the yield or quality of groundwater supply.

3. The facility will be designed, constructed, operated and maintained in accordance with U. S. Department of Transportation requirements.

4. The pipeline will be rerouted, where feasible, in order to avoid impacts to the property identified on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4). If requested, the applicant shall work with affected property owners within the pipeline's alignment to make "minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands" pursuant to FERC Order Condition #6 in order to avoid or minimize impacts to structures or the owner's use of the property."

5. The proceedings for the condemnation of such lands shall be the same as that provided in ORS chapter 35, provided that any award shall include, but shall not be limited to, damages

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for destruction of forest growth, premature cutting of timber, diminution in value to remaining timber caused by increased harvesting costs, and loss of product value due to blow-downs. Whatever incremental costs and value losses to timber lands can be identified and demonstrated to result from the granting of the pipeline easement will be reflected in the company’s appraisal of damages payable to the owner. Therefore, the landowner should not experience any uncompensated logging or access costs. [See ORS 772.210(4) and Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.]

6. Pacific Connector shall not begin construction and/or use its proposed facilities, including related ancillary areas for staging, storage, temporary work areas, and new or to-be-improved access roads until:

Pacific Connector files with the Secretary remaining cultural resource survey reports and requested revisions, necessary site evaluation reports, and required avoidance/treatment plans;

Pacific Connector file with the Secretary comments on the reports and plans from [SHPO], appropriate land management agencies, and interested Indian tribes; The [ACHP] has been afforded an opportunity to comment, and a Memorandum of Agreement has been executed; and

The Commission staff reviews and the Director of OEP approves the cultural resource reports and plans, and notifies Jordan Cove and Pacific Connector in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed."

1. Pre-Construction

7. Intentionally deleted.

8. To protect residences and structures, evidence of compliance with FERC's Certificate Order, Condition #43 must be provided prior to issuance of zoning clearance.

9. Coos River Highway is part of the State Highway system, under the authority and control of the Oregon Transportation Commission. Evidence that the applicant has the appropriate state authorization to cross Coos River Highway shall be provided to the Planning Department prior to zoning clearance authorizing construction activity.

10. Temporary closure of any county facility shall be coordinated with the County Roadmaster. Evidence of Roadmaster approval and coordination of any detour(s) shall be provided to the County Planning Department.

11. Each county facility crossing will require a utility permit from the County Road Department. Construction plan showing pullouts and permits for work within the right-of-way for monitoring sites will also require Roadmaster approval.

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12. An analysis of construction impacts shall be provided to the County Roadmaster, which will include a pavement analysis. The analysis must identify the current condition of County facilities and include a determination of the project’s impact to the system and the steps that will be necessary to bring back to current or better condition. Prior to issuance of a zoning compliance letter for the project, the applicant shall file a bond, surety, irrevocable letter of credit, cash or other security deposit agreement in the amount of 120% of the estimated cost of necessary improvements to bring County road facilities impacted by pipeline construction back to current or better condition. After five (5) years, the security shall either be forfeited to the County if the applicant does not complete required improvements or be refunded to the applicant if applicant has completed required improvements or there are no improvements to complete.

13. Should any part of the project involve permanent structural streambank stabilization (i.e. riprap), the applicant must contact the Planning Department for a determination of the appropriate review, if any.

14. All necessary federal, state and local permits must be obtained prior to commencement of construction, including any required NPDES 1200-c permits. Prior to the commencement of construction activities, Pacific Connector shall provide the County with a copy of the “Notice to Proceed” issued by FERC. [See Letter from Mark Whitlow, dated June 24, 2010, at p. 52.]

15. Floodplain certification is required for “other development” as provided in CCZLDO 4.6.230 occurring in a FEMA flood hazard area. The applicant must coordinate with the County Planning Department.

16. Intentionally deleted.

17. The pipeline operator shall maintain an emergency response plan in compliance with 49 CFR 192.615.

2. Construction

18. Riparian vegetation removal shall be the minimum necessary for construction and maintenance of the pipeline, and shall comply with all FERC requirements for wetland and waterbody protection and mitigation both during and after construction. The applicant shall restore riparian vegetation 25 feet from the streambanks on either side of waterbodies on private lands where riparian vegetation existed prior to construction, consistent with the applicant's ECRP.

19. Prior to construction, the applicant shall be required to undertake the sampling and analysis set forth in the Sediment Analysis Protocol (SAP) in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet.

3. Post-Construction

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20. Evidence shall be provided to demonstrate that all temporary construction and staging areas have been abandoned and that those areas that were forested prior to construction have been replanted, consistent with the requirements of this approval, the FERC Order, and the applicant's ECRP.

21. Evidence shall be provided to demonstrate that all temporary construction and staging areas have been abandoned and that those areas have been replanted, re-vegetated and restored to their pre-construction agricultural use, consistent with the requirements of this approval, the FERC Order, and the applicant's ECRP.

22. In order to minimize cost to forestry operations, the applicant agrees to accept requests from persons conducting commercial logging operations seeking permission to cross the pipeline at locations not pre-determined to be “hard crossing” locations. Permission shall be granted for a reasonable number of requests unless the proposed crossing locations cannot be accommodated due to technical or engineering feasibility-related reasons. Where feasible, the pipeline operator will design for off-highway loading at crossings, in order to permit the haulage of heavy equipment. If technically feasible, persons conducting commercial logging operations shall, upon written request, be allowed to access small isolated stands of timber by swinging logs over the pipeline with a shovel parked stationary over the pipeline, subject to the requirement that, if determined by the applicant to be necessary, the use of a mat or pad is used to protect the pipe. The pipeline operator will determine the need for additional fill or a structure at each proposed hard, and shall either install the crossing at its expense or reimburse the timber operator / landowner for the actual reasonable cost of installing the crossing. [See Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 1.]

23. The pipeline operator will conduct routine vegetation maintenance clearing on the 30-foot strip every 3-5 years. [See Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.]

24. In order to discourage ATV / OHV use of the pipeline corridor, the applicant shall work with landowners on a case-by-case basis to reduce ATV / OHV impacts via the use of dirt and rock berms, log barriers, fences, signs, and locked gates, and similar means. Such barriers placed in key locations (i.e. in locations where access to the pipeline would otherwise be convenient for the public) would be an effective means to deter ATV / OHV use.

B. Applicant's Proposed Conditions Of Approval

1. Environmental

1. Intentionally deleted.

2. Intentionally deleted.
3. Intentionally deleted.

4. The applicant shall submit a final version of the Noxious Weed Plan to the county prior to construction in order to address concerns raised regarding invasive species in farm and forest lands.

5. The applicant shall employ weed control and monitoring methods consistent with the Weed Control and Monitoring sections of the ECRP. The applicant shall not use aerial herbicide applications.

6. Fill and removal activities in Coos Bay shall be conducted between October 1 and February 15, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife.

7. The authorized work in Haynes Inlet shall be conducted in compliance with the required U.S. Army Corps of Engineers Section 404 Permit and OR DEQ's 401 Water Quality Certification and 402 NPDES permits, which will mandate turbidity standards, monitoring requirements, and reporting procedures.

8. Petroleum products, chemicals, fresh cement, sandblasted material and chipped paint or other deleterious waste materials shall not be allowed to enter waters of the state. No wood treated with leachable preservatives shall be placed in the waterway. Machinery refueling is to occur off-site or in a confined designated area to prevent spillage into waters of the state. Project-related spills into water of the state or onto land with a potential to enter waters of the state shall be reported to the Oregon Emergency Response System at 800-452-0311.

9. For dredging activity conducted by clamshell bucket, activity shall be positioned from a floating crane or top-of-bank position. In the closed position, the bucket shall be sealed so as to minimize sediment re-suspension.

10. If any archaeological resources and/or artifacts are uncovered during excavation, all construction activity shall immediately cease. The State Historic Preservation Office shall be contacted (phone: 503-986-0674).

11. When listed species are present, the permit holder must comply with the federal Endangered Species Act. If previously unknown listed species are encountered during the project, the permit holder shall contact the appropriate agency as soon as possible.

12. The permittee shall immediately report any fish that are observed to be entrained by operations in Coos Bay to the OR Department of Fish and Wildlife (ODFW) at (541) 888-5515.

13. Pacific Connector will comply with all federal and state requirements during the fire season that mandate the amount of water required on the right-of-way for adequate fire suppression during timber removal and construction activities.
2. **Safety**


15. The pipeline operator shall conduct public education in compliance with 49 CFR 192.616 to enable customers, the public, appropriate government organizations, and persons engaged in excavation related activities to recognize a gas pipeline emergency for the purpose of reporting it to the gas pipeline operator. Such public education shall include a "call before you dig" component.

16. The pipeline operator shall comply with any and all other applicable regulations pertaining to natural gas pipeline safety, regardless of whether such regulations are specifically listed in these conditions.

17. The pipeline operator shall provide annual training opportunities to emergency response personnel, including fire personnel, associated with local fire departments and districts that may be involved in an emergency response to an incident on the Pacific Connector pipeline. The pipeline operator shall ensure that any public roads, bridges, private roads and driveways constructed in conjunction with the project provide adequate access for fire fighting equipment to access the pipeline and its ancillary facilities.

18. The pipeline operator shall respond to inquiries from the public regarding the location of the pipeline (i.e., so called "locate requests").

19. At least six (6) months' prior to delivery of any gas to the Jordan Cove Energy Project LNG import terminal, the applicant shall: (1) submit a project-specific Public Safety Response Manual to the County, and (2) in order to comply with federal safety regulations, coordinate with local emergency response groups. As detailed in Section 4.12.10 of the FEIS, Pacific Connector will meet with local responders, including fire departments, to review plans and communicate specifics about the pipeline. If requested, Pacific Connector will also participate in any emergency simulation exercises and provide feedback to the emergency responders.

3. **Landowner**

20. (a) This approval shall not become effective as to any affected property until the Applicant has acquired ownership of an easement or other interest in the property necessary for construction of the pipeline, and obtains either: (i) the signature of all owners of the property consenting to the application, or (ii) an order of a court in condemnation of the property interest required for the pipeline that operates to obviate the need for consent of owners of property other than the applicant. In the alternative, should this condition 20(a) be deemed insufficient on appeal to satisfy applicable code requirements, the applicant shall instead be subject to the alternative condition 20(b) immediately below.
20. (b) In the alternative to the above condition 20(a), in the event that condition 20(a) is deemed invalid on appeal, this approval shall not become effective as to any affected property until the applicant has acquired an ownership interest in the property and the signatures of all owners of the property consenting to the land use application for development of the pipeline, unless the signature requirement of CCZLDO 5.0.150 is preempted or otherwise invalid under another provision of law including without limitation federal statutes, regulations, or the United States Constitution.

21. The permanent pipeline right-of-way shall be no wider than 50 feet.

22. Intentionally deleted.

23. The applicant shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the utility facility.

4. Historical, Cultural and Archaeological

24. At least 90 days prior to issuance of a zoning compliance letter under CCZLDO Section 3.1.200, the County Planning Department shall make initial contact with the affected Tribe(s) regarding the determination of whether any archaeological sites exist within the area proposed for development, consistent with the provisions of CCZLDO Section 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of CCZLDO Section 3.2.700, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources have been identified, the County may approve and issue the requested zoning compliance letter and related development proposal; (2) if the Tribe(s) and the applicant reach agreement regarding the measures needed to protect the identified resources, the development can be approved with any additional measures the County believes are necessary to protect those resources; or (3) if the County finds that there will be adverse impacts to identified CBEMP Policy #18 resources on the site and the applicant and the Tribe(s) have not reached agreement regarding protection of such resources, then the County Board of Commissioners shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archaeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of Section 5.8.200 of the CCZLDO with the Board of Commissioners serving as the Hearings Body.

5. Miscellaneous

25. The conditional use permits approved by this decision shall not be used for the export of liquefied natural gas.

Approved this 8th day of September, 2010.

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Appendix A. Discussion of Federal Preemption Issues.

The proposed pipeline is authorized pursuant to Section 7 of the Natural Gas Act. ("The Natural Gas Act" or "NGA"). 15 U.S.C. §§ 717 et seq. Section 7 of the NGA authorizes the FERC to issue "certificate[s] of public convenience and necessity" for the construction and operation of natural gas facilities for the transportation of gas in "interstate commerce." The standard for evaluating an application for a certificate of public convenience and necessity is stringent; the FERC must find that the proposed project is "necessary or desirable in the public interest." To find that an action is necessary or desirable, the FERC must determine that the applicant is willing and able to satisfy a panoply of requirements enumerated in section 7, and that the action "is or will be required by the present or future public convenience and necessity." This higher standard is consistent with the extraordinary power of eminent domain that accompanies a certificate of public convenience and necessity.

The Supreme Court has held that the Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 1151, 99 L.Ed.2d 316 (1988). This creates an issue of whether state or local laws that conflict with FERC approvals are preempted by federal law.

Zoning laws are an exercise of the state's police power. Generally speaking, a state's exercise of its police power is subject to the rule that such power cannot place "a substantial burden on interstate commerce. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)." Courts have generally found attempts by state and local governments to stop federally authorized gas pipelines on zoning grounds to constitute a substantial and impermissible burden on interstate commerce *New York State Natural Gas Corp. v. Town of Elma*, 182 F.Supp. 1, 6 (W.D.N.Y.1960) (Operation of town zoning ordinance and building code so as to prevent natural gas company operating, in interstate commerce, a federally authorized pipeline, from construction of measuring and regulating station in connection with line at location which was reasonably necessary to accomplish purposes required was unconstitutional as an undue burden on interstate commerce); *Transcontinental Gas Pipe Line Corp. v. Milltown*, 93 F. Supp. 287, 295 (E.D. N.J. 1950). (Zoning authority was unreasonable, arbitrary and without foundation when it prevented interstate pipeline from going through the town.). *Kern River Gas Transmission Co. v. Clark County*, 757 F.Supp. 11:0 (D.Nev.,1990); *FERC v. Public Service Commission*, 513 F.Supp. 653 (D.N.D.1981) (state regulation of pipeline route preempted). Some courts have even held that, in light of the federal grant of certificates of convenience and necessity and of the Congressional authorization for use of the eminent domain power to the party pipeline companies, state regulation could not thwart construction of necessary gas pipeline facilities. See *Transcontinental Gas PipeLine Corp. v. Hackensack Meadowlands Development Comm.*, 464 F.2d 1358 (3rd Cir.1972), cert. denied 409 U.S. 1118, 93 S.Ct. 909, 34 L.Ed.2d 701 (1973); *National Fuel Gas Supply Corp. v. Public Service Comm'n of State of N.Y.*, 109 P.U.R.4th 383, 894 F.2d 571 (C.A.2 N.Y.,1990).

Unlike the pipeline facility, which is authorized under Section 7 of the NGA, the proposed Jordan Cove LNG terminal itself is authorized pursuant to Section 3 of the Act. See e.g., *AES Sparrows Point LNG, LLC v. Smith*, 470 F.Supp.2d 586 (D.Md.,2007); *AES Sparrow...
**Point LNG, LLC v. Smith**, 527 F.3d 120 (D.C. Md. 2008); (LNG Terminals); Subject to the exceptions discussed below, FERC has exclusive authority under Section 3 of the Natural Gas Act to authorize the siting of LNG terminals.\(^{58}\) That authorization is conditioned on the applicant’s satisfaction of other statutory requirements for various aspects of the project. For example, FERC requires a party seeking to construct an LNG terminal to first obtain authorization from FERC. 15 U.S.C. § 717b(a). In order to do so, applicants must comply with the NGA’s requirements as well as complete FERC’s extensive pre-filing process. See 18 C.F.R. § 157.21. FERC must then consult with the appropriate state agency on numerous state and local issues. See 15 U.S.C. § 717b-1(b). See also generally Jacob Dweck, David Wochner, & Michael Brooks, *Liquefied Natural Gas (LNG) Litigation after the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473 (2006) (describing the history of conflict between federal and state authorities over the siting of LNG terminals).

However, as mentioned above, FERC’s authority over LNG terminals is not absolute. The NGA contains a “savings clause” that provides that “nothing in the [NGA] affects the rights of States under the Coastal Zone Management Act (“CZMA”) and [the Clean Water Act and the Clean Air Act].”\(^{59}\) 15 U.S.C. § 717b(d). Although the exception created by the Savings Clause seems to only apply to Certificates issued pursuant to Section 7 of the Act, it does reflect provisions of the CZMA that apply to Certificates issued under Section 7 of the NGA as well.

Thus, the federal preemption issue in this case is complicated by the fact that much of the County is subject to the CZMA and the Oregon Coastal Management Program (OCMP). The CZMA act states: “Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.” 16 U.S.C. § 1456(c)(1). See also 15 CFR § 930.34 et seq. *Weaver’s Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458 (D.C. R.I. 2009).

The U.S. Congress passed the federal CZMA in 1972 to address competing uses and resource impacts occurring in the nation’s coastal areas. The Act included several incentives to encourage coastal states to develop coastal management programs. One incentive was a legal authority called “federal consistency” that was granted to coastal states with federally approved coastal management programs. As relevant here, the federal consistency provisions of the CZMA require that any federal action occurring in or outside of Oregon’s coastal zone which affects coastal land or water uses or natural resources must be consistent with the Oregon Coastal Management Program. 16 U.S.C. § 1456(c)(3)(A). The federal consistency requirement is a

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\(^{58}\) “[FERC] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” 15 U.S.C. § 717b(e)(1). The pipeline, however, is apparently not part of a terminal.

\(^{59}\) Under Section 401 of the Clean Water Act, a certification of compliance with the state’s water quality standards is required from DEQ for any activity that may result in a discharge into navigable waters. If the 401 certification is denied, the LNG facility cannot be constructed. Similar permits are required from the U.S. Army Corps of Engineers and DEQ for discharge of dredged and fill material. Section 502 of the Clean Air Act, a permit is required for any person to operate a source of air pollution, as detailed in the Act.

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rather unique concept in that state programs for coastal management cannot generally be preempted by federal law.

Nonetheless, the exact degree of regulatory power the CZMA exclusion gives the state is somewhat unclear. As mentioned above, under Section 307(c) of the Coastal Zone Management Act, an applicant must certify that the proposed activity in a designated coastal zone complies with the enforceable policies of the affected state's coastal zone management program. This applies to all Federal permits and authorizations, including FERC and the U.S. Army Corps of Engineers. If the state does not concur with the certification, FERC approval to construct may not generally be granted. Having said that, the State’s CZMA role is very limited. The Commission's only responsibility under the CZMA is to withhold construction authorization for a project until the state finds that the project is consistent with the state's NOAA-approved coastal zone management plan. In addition, there is also an appeals process established with the CZMA. On appeal, the Secretary of Commerce may determine that there are overriding national security interests that justify approval of the project over the state's objection.61

It is unlikely that the applicant in this case would ever have to resort to an appeal to the Secretary, however, since the OCMP does not appear to prohibit the proposed use in any event. Oregon’s Coastal Management Program recognizes that water-dependant activities (such as LNG terminals) require priority consideration, and has set up management zones in areas that are suitable for such water-dependant uses. The proposed Jordan Cove LNG terminal is located in an area which the Comprehensive Plan deems suitable for such use. A pipeline itself is generally not a water-dependant use. However, in this case there is no feasible alternative that avoids a significant water crossing in the Coastal Zone.

Another key factor to consider is that Oregon’s Coastal Management Program does not have an “alternatives analysis” requirement for evaluating the route of an interstate natural gas pipeline, unless an exception to a Goal is required. The OCMP is implemented via the Statewide Planning Goals (specifically Goals 16-19), which, in turn, have been adopted into the County’s Comprehensive Plan. In this regard, the OCMP states:

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60 DLCD is the state of Oregon’s designated coastal management agency and is responsible for reviewing projects for consistency with the OCMP and issuing coastal management decisions. DLCD's reviews involve consultation with local governments, state agencies, federal agencies, and other interested parties in determining project consistency with the OCMP. DLCD's federal consistency decisions are called "coastal concurrences" [approvals] and "coastal objections" [denials]. Objections can be based on an inconsistency with coastal program policies or a lack of sufficient information to determine consistency. In the event of a formal DLCD objection, federal permits, licenses and financial assistance grants cannot be issued, and direct federal activities cannot proceed unless compliance with the OCMP is specifically prohibited by other federal law.

61 Under Section 307(c)(3)(A), the CZMA provides that the Secretary must override a state's objection to a proposed project that requires a federal license or permit if the project is “necessary in the interest of national security.” 16 U.S.C. § 1456(c)(3)(A). A project is not “necessary in the interest of national security” unless a “national security interest would be significantly impaired were the activity not permitted to go forward as proposed.” 15 C.F.R. § 930.122.

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Coastal comprehensive plans have been especially considerate of the national needs for new facilities for energy development, fisheries, development, recreation, ports, and transportation. Major deep and shallow draft ports have identified shoreland areas for new port facilities to support energy resource transshipment, development of new fish processing facilities and areas for expanded marinas.

Even in the event that a pipeline would violate a comprehensive plan standard, the applicant could pursue an exception to a Statewide Planning Goal. As mentioned above, that process would trigger an alternatives analysis.

In addition to other considerations, Congress has also expressly pre-empted a state or local government’s ability to regulate issues related to the safety of pipelines. The Natural Gas Pipeline Safety Act of 1968 originally directed the Secretary of Transportation to establish minimum federal safety standards for the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities used for the transportation of gas. The Act’s text, its legislative history, administration implementation,

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62 For example, 49 U.S.C. Chapter 601 sets out federal safety standards for gas pipelines. 49 U.S.C. § 60104(c) states: “Preemption: A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.

Prior to 1994, there were two Acts controlling the area of interstate pipeline safety - the Natural Gas Pipeline Safety Act of 1968 (NGPSA) and the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA). The NGPSA and the HLPSA were combined and recodified without substantial change at 49 U.S.C. §§ 60101 to 60125 in 1994. See P.L. 103-272, 108 Stat. 1371 (July 5, 1994). The two similar provisions from each Act pertaining to preemption were consolidated into what is now 49 U.S.C. § 60104(c). Compare 49 U.S.C. § 60104(c) with 49 U.S.C. § 1672(a)(1) (NGPSA) and 49 U.S.C. § 2002(d) (HLPSA). Title 49 U.S.C. 1672(b) (1972) originally provided for the establishment of minimum federal safety standards for the transportation of gas. The section concluded:

'Any State agency... may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standard applicable to interstate transmission facilities.'

63 The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse a number of States and uniformity of regulation is a desirable objective. For this reason, section 3 provides for a Federal preemption in the case of interstate transmission lines.’ H.R.Rep.No.1390, 90th Cong., 2d Sess. (1968); 3 U.S.Code Cong. & Admin.News, 90th Cong., 2d Sess. pp. 3223, 3241 (1968).

64 In 1973, the Secretary of Transportation reported to Congress that the Department of Transportation through its Office of Pipeline Safety exercised exclusive authority for safety regulation of interstate gas transmission lines. See Federal-State Relations in Gas Pipeline Safety, 3, 7, 10 (1973).
and judicial interpretation, attest to federal preemption of the field of safety with respect to the establishment and enforcement of standards regulating the interstate transmission of gas by pipeline. *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 F.2d 465, 470 (8th Cir.1987) (Iowa may not impose its own safety standards on facilities). The constitutional basis of preemption is the commerce clause, and the supremacy clause.

In addition, FERC has ruled that state agencies could not use state law to “prohibit or unreasonably delay the construction or operation of [LNG] facilities approved by this Commission.” *Weaver’s Cove Energy, LLC*, 112 F.E.R.C. ¶61070, at ¶ 61,546, *on rehearing*, 114 F.E.R.C. ¶61058, at 61185-6.

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66 U.S.Const., art. I, 8.

67 U.S.Const., art VI.
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Exhibit “B”
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NOTE: U.S.A = BLM