COOS COUNTY HEARING OFFICER
ANALYSIS, CONCLUSIONS, AND
RECOMMENDATIONS
TO THE COOS COUNTY BOARD OF COMMISSIONERS

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(APEAL OF AN EXTENSION REQUEST)
COOS COUNTY, OREGON

FILE NO. ACU 14-08 / AP 14-02
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I. **Summary of Proposal and Process**

A. **Summary of Proposal, Issues to be Decided, And Recommendations.**

As the board is aware, Pacific Connector Gas Pipeline, L.P. (“PCGP”) originally received a Conditional Use Permit (“CUP”) approval for the pipeline on September 8, 2010. Opponents appealed the original approval to LUBA, and eventually prevailed on one substantive issue related to the potential impact to a species of native oysters. The County took the case back on remand and conducted additional hearings to address the oyster issue. The County issued a final decision on remand on April 12, 2012. Order No. 12-03-018PL. No party appealed the 2012 decision, and, as a result, it constitutes a final decision on the CUP. The 2012 decision triggered the beginning of a “clock” for implementation of the permit.

The CUP approval contained a number of contingences, none the least of which was the need for PCGP to obtain federal approval from FERC. Apparently, the decision to change the LNG terminal from an import facility to an export facility caused FREC to vacate the “Certificate of Public Necessity and Convenience” that it had previously issued back in 2009. Pacific Connector filed a new application with FERC on May 21, 2013 seeking to construct a gas pipeline to serve the proposed LNG export terminal. Presumably, FERC will issue a new decision on that application sometime in the foreseeable future.

As the applicant notes on page 2 of its Application Narrative, the Ordinance contains a latent ambiguity that makes it unclear how long a conditional use permit remains valid. Depending on how the Ordinance is read, a CUP could remain valid for either two years or four years. Assuming the permit is valid for two years, the permit would expire on April 2, 2014 unless an extension request is made prior to that time.

The applicant requests a two-year extension. However, for reasons discussed in more detail below, this permit may be governed by OAR 660-033-0140.

Working under assumption, if Coos County grants a one-year extension of the CUP, PCGP would have until April 2, 2015 to begin construction on the pipeline.

Thus, this application concerns two rather narrow questions:

1. Does the CUP remain valid for two years or four years?

2. Should Coos County grant an extension of the land use approval for the Gas Pipeline project approved on April 2, 2012, and if so, is the extension good period valid for one year or two years.

The answer to the first question is rather complex. OAR 660-033-0140 appears to govern the time period for permits, or portions of permits, that are issued pursuant to county laws that implement ORS 215.275 and 215.283(1), among other listed statutes. Because a portion of the pipeline is governed by ORS 215.275 and 215.283(1), it follows that at least that portion of the permit is subject to the 2-year time limitation set forth in OAR 660-033-0140(1).
However, with regard to the portions of the pipeline that are not subject to the statutes referenced in OAR 660-033-0140, it could be argued that the default four-year time period set forth in CCZLDO 5.0.700 governs. Nonetheless, in light of the fact that the parties do not argue one way or the other over this issue, the hearings officer recommends that the County use a conservative approach and assume that the entire permit is valid for only two years. This issue is discussed in more detail in the Section entitled “Legal Analysis,” below.

Moving on to the second issue, CCZLDO 5.0.700 contains a set of criteria for evaluating requests for extensions. There are only three substantive approval criteria applicable to this application, as follows:

- An applicant must file an extension request before the permit expires. CCZLDO 5.0.700.A.
- There must have been no substantial changes in the land use pattern of the area or other circumstances sufficient to trigger the filing of a new conditional use permit application for the use. CCZLDO 5.0.700.B.i.
- The applicant must not have been able to begin or continue development during the approval period for reasons outside of the applicant’s control. CCZLDO 5.0.700.B.ii.

For the reasons discussed in the Section entitled “Legal Analysis,” the hearings officer recommends that a one-year extension be granted.

Note: Although the issue is not yet presented in this case, the question may arise in the future as to whether the applicant can receive more than one time extensions. Unfortunately, a quick review of the Coos County Ordinance reveals an ambiguity which makes it unclear whether the Ordinance allows more than one extension.

The case of *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010) highlights the potential issue. In *Scovel*, the City of Astoria granted a second one-year extension to a variance. The Ordinance issue provided as follows:

9.100. **TIME LIMIT ON A PERMIT**, Authorization of a permit shall be void after one year unless substantial construction or use pursuant thereto has taken place. **However, the Commission may, at its discretion, extend authorization for an additional period up to one year on request.** (Second emphasis added).

Despite the use of the singular (*i.e.* “an additional period”), the City of Astoria interpreted this provision such that “each permit and/or extension is a separate issue,” and that the Ordinance “does allow for a one year extension on the permit from the previous expiration date whether that is the original permit or approval of an extension.” Not surprisingly, LUBA rejected the City’s argument, and held that only one-year extension was possible.
In this case, CCZLDO 5.0.700 gives mixed signals regarding whether multiple extensions are possible. The sentence of the Ordinance governing extensions is written in the singular, and read in isolation, suggest that only one extension is possible:

Any conditional use not initiated within said time frame may be granted a two year extension as specified in ORS 215.417 * * * .

On the other hand, the last sentence of CCZLDO §5.0.700 states that “[a]dditional extensions granted are ministerial decisions and not a land use decisions as described in ORS 197.015 and are not subject to appeal as land use decisions per OAR 660-33-0140(3). The use of the plural here suggests that the drafters were looking at OAR 660-33-0140(3) and recognizing that this rule seems to approve of multiple extensions. As a result, it is likely that the drafters intended that multiple requests for extensions were allowed. Again, this case does not currently raise the issue, so there is no pressing need to deal with this issue in this proceeding. Nonetheless, it does appear to be an issue which could surface in the future, and the County may want to give attention to the matter if the when the County undertakes legislative revisions to the text of the zoning Ordinance.

Incidentally, CCZLDO §5.0.700 cites to OAR 660-033-0140 and states that the grant of an extension is not a land use decision. OAR 660-033-0140 states that “[a]pproval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.” It is not clear why OAR 660-033-0140 is written the way it is, but Oregon statutes are crystal clear that a decision to grant an extension of a permit is itself a “permit” subject to LUBA’s jurisdiction pursuant to ORS 197.015(10), especially when the decision is governed by discretionary criteria. See Wilhoft v. City of Gold Beach, 38 Or LUBA 375, 384 (2000); Scovel v. City of Astoria, 60 Or LUBA 371 (2010). Statutes will always prevail over conflicting administrative laws, and there is simply no way to harmonize OAR 660-033-0140 with ORS 197.015. The hearings officer recommends that the County, at some time in the future, revise this section of the Ordinance to make it consistent with state statutes, and, in the meantime, this provision in CCZLDO §5.0.700 should be disregarded. Parties to this case should be given notice pursuant to ORS 215.416(10).

B. Process.

The review timeline for this application is as follows:

- May 12, 2014: Administrative decision issued.
- May 27, 2014: Jody McCaffree files Appeal.
- July 3, 2014: County Planning Director issued Staff report.
- July 11, 2014: Public hearing before the Hearings Officer.
- August 1, 2014: Third Open Record Period Closed (Surrebuttal Testimony).
- August 8, 2014: Applicant’s Final Argument.
- September 19, 2014: Hearings Officer Recommendation issued.
C. **Scope of Review.**

This case presents primarily an issue of law: are there sufficient circumstances present to trigger the need for the applicant to file a new conditional use permit application? In this regard, the facts presented by the parties do not appear to be in significant conflict. However, the parties disagree about the legal ramifications that stem from the substantially undisputed facts. It is incumbent upon the Board to interpret the Ordinance and determine whether the circumstances presented by this case rise to the level which justify requiring the applicant to submit a new application.

The hearings officer believes that the conclusions made herein would be affirmed if appealed. However, the Board of Commissioners (Board or BCC) does not have to accept the legal or factual conclusions of the hearings officer. There are other possible legal conclusions that could be drawn from the evidence. The Board has the authority to modify or overturn the hearings officer’s recommended interpretations and reach different legal conclusions.

The standard by which Land Use Board of Appeals (LUBA) and the courts will review the Board’s decision is also an important consideration. ORS 197.829 provides as follows:

197.829 Board to affirm certain local government interpretations. (1) The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

   (a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
   (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
   (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
   (d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. (Emphasis added).

The Oregon Supreme Court has construed ORS 197.829(1) to require LUBA and the courts to affirm a local government Ordinance interpretation of its own Ordinance if the interpretation is "plausible." *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776 (2010). That deferential standard of review applies only to interpretations of local law adopted by the governing body (as opposed to the interpretations made by lesser bodies such as planning staff, hearings officers or planning commissions. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). In this case, the Ordinance standard at issue does not derive from state law, and LUBA and the Courts would undoubtedly defer to any interpretation of the extension criteria that are plausible given the language used in the Ordinance.

Moreover, because of the subjective nature of the criteria, it is highly unlikely that LUBA and the courts would second guess the County regardless if it approves or denies the
extension based on an application of CCZLDO 5.0.700. As a general matter, LUBA and the courts seem to be highly deferential to local government regarding administrative matters where the applicable statutes or Ordinances do not provide clear guidance. This deference can be seen in analogous case law arising in various contexts. For example, LUBA has stated that a local government has high degree of latitude when determining whether a modification to a land use application should be processed as a new application or not.\(^1\) Also, LUBA and the Courts often are highly deferential when reviewing how a local government implements standards that are highly subjective, since LUBA is not allowed to substitute its judgment for the decision-maker.\(^2\) For example when determining whether a proposed use is “compatible” with the existing neighborhood, the decision-maker “is entitled to appropriate deference in selecting the factors it chooses to consider and how it weights those factors.”\(^3\) While the hearings officer could give other examples, it should suffice to say that in this case, LUBA and the courts will likely give the county wide latitude to interpret and apply CCZLDO 5.0.700.

D. **Summary of LUBA’s Holding in McCaffree v. Coos County.**

A few of the key and persistent issues raised by Ms. Jody McCaffree and other opponents have now been resolved by LUBA. For this reason, the hearings officer will endeavor to summarize the key holdings from this case.

Ms. McCaffree has repeatedly argued, in the face of all reason, that the pipeline application is inconsistent with Coos Bay Estuary Management Plan (“CBEMP”) Policy 5 (“Estuarine Fill and Removal”). However, LUBA disagreed with Ms. McCaffree and her co-petitioners when they raised a similar argument in McCaffree v. Coos County, __ Or LUBA __ (LUBA No. 2014-022 - July 14, 2014). Specifically, LUBA denied petitioners’ contention that CBEMP Policy 5 would apply to an application that proposed to remove a prohibition on exporting LNG. McCaffree, __ Or LUBA at (slip op. at 6-7). LUBA reached this conclusion for two reasons. First, LUBA concluded that petitioners’ assertions constituted a collateral attack on the County’s final decision approving the original conditional use permit. Id. Second, LUBA concluded that petitioners did not explain how CBEMP Policy 5 applied to an application to modify a condition “where no ground disturbing activity of any kind is proposed beyond the ground-disturbing activity that was authorized in the 2010 decision.” LUBA would undoubtedly apply a similar analysis to this case.

Next, Ms. McCaffree has similarly argued that the pipeline application is inconsistent with CBEMP Policy 5a (“Temporary Alterations”). LUBA denied a similar contention in


\(^3\) Clark v. Coos County, 53 Or LUBA 325 (2007). See also Knight v. City of Eugene, 41 Or LUBA 279 (2002); Lanford v. City of Eugene, 26 Or. LUBA 60 (1993) (“This Board has given local governments significant latitude in establishing the permissible parameters of subjective standards which require that public services be found to be ‘adequate.’"

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Specifically, LUBA denied petitioners’ contention that CBEMP Policy 5a would apply to an application that proposed to remove a prohibition on exporting LNG. *McCaffree*, __ Or LUBA at __ (slip op. at 8). LUBA reasoned that CBEMP Policy 5a was not applicable because that application did not propose a “temporary alteration” of the estuary. *Id.*

Finally, Ms. Caffree argues in this case that the modification of Condition 25 to allow use of the Pipeline for the export of gas will convert the Pipeline into a gas “transmission” line that is not allowed in the Forest zone. LUBA denied this same argument in *McCaffree*. Specifically, LUBA held that the plain text of the applicable administrative rule did not support the conclusion that the Land Conservation and Development Commission (“LCDC”) intended to regulate utility lines based upon the direction that the resource flowed:

“There is nothing in the text of OAR 660-006-0025(4)(q) that suggests that LCDC was concerned with the direction that gas (or oil or geothermal resources for that matter) flows when in the pipeline, or that LCDC intended to allow or prohibit lines that carry gas, oil, geothermal, telephone, fiber optic cable depending on the identity of the end user or the direction that the resources flow when in the lines. Simply because LNG is no longer prohibited from flowing from the pipeline into the terminal does not mean that the pipeline is something other than a ‘new distribution line * * *.’”

*McCaffree*, __ Or LUBA at __ (slip op. at 10). Additionally, LUBA pointed out that the administrative rule’s history did not indicate any intent on the part of LCDC to prohibit gas “transmission” lines. *McCaffree*, __ Or LUBA at __ (slip op. at 10-11). The hearings officer will continue to rely on LUBA’s analysis to recommend denial of Ms. McCaffree’s contentions on the “transmission line” issue in this case.

In her testimony in this matter, Ms. McCaffree does absolutely nothing to explain why, in light of *McCaffree* and previous approvals for the pipeline, the hearings officer should reach a different conclusion on any of these issues at this time. Therefore, the hearings officer will proceed in this case under the assumption that the issues raised in the LUBA appeal are now settled.

E. **Procedural Issue: Contents of Record.**

In a letter dated July 11, 2014, Ms. McCaffree states:

I would like to ask that the complete prior records of the original and remanded final decision for this complete pipeline project be included in with this proceeding including all final orders and conditions of approval.

Ms. McCaffree appears to have submitted only very limited portions of those materials; the final decisions of the Board of Commissioners were also submitted into the record by counsel for Pacific Connector at the hearing on July 11, 2014. The Planning Department staff has not
added to the record the hundreds or thousands of pages of material from those past proceedings, and therefore they are not part of the record.

It is incumbent on the parties to a land use proceeding to submit the evidence on which their respective arguments rely. See Rhinhart v. Umatilla County, LUBA No. 2006-128, Order Settling Record, at 3 (Nov. 28, 2006) (request to incorporate a document in the record does not automatically make it part of the record, unless county specifically grants the request). The record includes only those materials actually submitted by the parties or placed into the record by Planning Department staff.

In several cases, Ms. McCaffree’s submissions reference website addresses without physically printing off those website materials and submitting them into the record. LUBA has often cautioned that to merely refer to a document does not make the contents of that document part of the record in the proceeding. See, e.g., Mannenbach v. City of Dallas, 24 Or LUBA 618, 619 (1992) (simply referring to documents in testimony does not place such documents before the local decision maker). A reference to a website address does not make the contents of that website part of the record in this proceeding. As the applicant points out:

Web-based content is neither fixed nor permanent; rather, the content of a website can be changed or deleted without any notice. It is possible that web-based material could change, or be deleted, prior to consideration by you, or after you make your recommendation to the Board of Commissioners. Similarly, a party attempting to rebut website content based on a website address would have no certainty that the web-based content to which they are responding is the same content the other party intended to reference.

Furthermore, allowing parties to incorporate website materials by reference would frustrate administrative and judicial review of land use decisions. Under CCZLDO 5.0.600.C, for example, the Board may conduct its review on the record, considering “only the evidence, data and written testimony submitted prior to the close of the record …. No new evidence or testimony related to new evidence will be considered, and no public hearing will be held.” Similarly, ORS 197.835(2)(a) provides that review of a land use decision by the Land Use Board of Appeals “shall be confined to the record.” Nothing in the CCZLDO, or in the statutes governing land use proceedings, makes web content that is not printed or downloaded and physically submitted to the decision maker a part of the legal “record.” Without a fixed and permanent record, the Board and LUBA will not be able to ascertain reliably the evidence on which the hearings officer relied.

In light of these concerns, the hearings officer did not, and cannot, investigate the website addresses provided by the parties. The content of those websites has not been placed into the record. The hearings officer has based his recommendation to the Board only on the oral testimony and written materials actually submitted into the record.
II. Legal Analysis.

The legal standard at issue, CCZLDO 5.0.700, reads as follows:

**SECTION 5.0.700 EXPIRATION AND EXTENSION OF CONDITIONAL USES**

All conditional uses, except for site plans, variances and land divisions, remain valid for the period set forth in ORS 215.417. Any conditional use not initiated within said time frame may be granted a two year extension as specified in ORS 215.417 provided that:

A. An application for said extension is filed with the Planning Department prior to the expiration of the deadline. The applicant must state the reasons that prevented him from beginning or continuing development within the approval period; and

B. The Planning director finds:

i. that there have been no substantial changes in the land use pattern of the area or other circumstances sufficient to cause a new conditional use application to be sought for the same use; and

ii. that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

Additional extensions granted are ministerial decisions and not a land use decisions as described in ORS 197.015 and are not subject to appeal as land use decisions per OAR 660-33-140(3). (OR-93-12-017PL 2-23-94) (OR-95-05-006 PL 11-29-95) (OR 05-01-002PL 3-21-05)

ORS 215.417 was enacted in 2001 (2001 Or Laws Ch. 532). Although it was since been amended, the version of ORS 215.417 in effect at the time this provision of the Coos County Zoning Code was written provided as follows:

**215.417 Time to act under certain approved permits; extension.** (1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.

(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.

(3) For the purposes of this section, “residential development” only includes the dwellings provided for under ORS 215.213 (1)(t), (3) and (4), 215.283 (1)(s), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3). [2001 c.532 §2]
As mentioned in an earlier section of this recommendation, this application concerns two rather narrow questions:

1. Does the CUP remain valid for two years or four years?

2. Should Coos County grant an extension of the land use approval for the Gas Pipeline project approved on April 2, 2012, and if so, is the extension good period valid for one year or two years.

With regard to the first issue (whether the CUP is valid for two years or four years), the Coos County Zoning and Land Development Ordinance (“CCZLDO”) 5.0.700 states that “[a]ll conditional uses, except for site plans, variances and land divisions, remain valid for the period set forth in ORS 215.417. Any conditional use not initiated within said time frame may be granted a two year extension as specified in ORS 215.417 **.

ORS 215.417 was enacted in 2001 and provides as follows:

\[
\text{215.417 Time to act under certain approved permits; extension. (1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.}
\]

\[
\text{(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.}
\]

\[
\text{(3) For the purposes of this section, “residential development” only includes the dwellings provided for under ORS 215.213 (1)(t), (3) and (4), 215.283 (1)(s), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3). [2001 c.532 §2]}
\]

ORS 215.417 only mentions two “time periods.” The first time period is the time for which certain listed permits remain valid: four years. The second time period is the length of time an extension is valid. CCZLDO 5.0.700 takes the four year time period set forth in the statute and makes it the time period for “[a]ll conditional uses, except for site plans, variances and land divisions.” Thus, based on a rather straight-forward reading of the Ordinance, it appears that the initial time period for a CUP should be four years, and a subsequence extension is two years.

However, there is a state administrative law that complicates the analysis. OAR 660-033-0140 provides as follows:

\[
\textit{Permit Expiration Dates}
\]

\[
\text{(1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or}
\]
forest land outside an urban growth boundary under ORS 215.010 to
215.293 and 215.317 to 215.438 or under county legislation or
regulation adopted pursuant thereto is void two years from the date
of the final decision if the development action is not initiated in that
period.

(2) A county may grant one extension period of up to 12 months if:

(a) An applicant makes a written request for an extension of the
development approval period;

(b) The request is submitted to the county prior to the expiration of
the approval period;

(c) The applicant states reasons that prevented the applicant from
beginning or continuing development within the approval period;
and

(d) The county determines that the applicant was unable to begin or
continue development during the approval period for reasons for
which the applicant was not responsible.

(3) Approval of an extension granted under this rule is an
administrative decision, is not a land use decision as described in
ORS 197.015 and is not subject to appeal as a land use decision.

(4) Additional one-year extensions may be authorized where
applicable criteria for the decision have not changed.

(5)(a) If a permit is approved for a proposed residential development
on agricultural or forest land outside of an urban growth boundary,
the permit shall be valid for four years.

(b) An extension of a permit described in subsection (5)(a) of this
rule shall be valid for two years.

(6) For the purposes of section (5) of this rule, "residential
development" only includes the dwellings provided for under ORS
215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740,
215.750 and 215.755(1) and (3).

Stats. Implemented: ORS 197.015, 197.040, 197.230 & 197.245
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDD 1-2002, f. &
cert. ef. 5-22-02; LCDD 4-2011, f. & cert. ef. 3-16-11; LCDD 6-2013, f.
12-20-13, cert. ef. 1-1-14
It appears that OAR 660-033-0140 applies to at least that portion of the pipeline that traverses EFU zoned lands. OAR 660-033-0140 states that permits pursuant to ORS 215.275 and 215.283(1), among other listed statutes, are only valid for two years unless the County grants one or more one-year extensions. While it is perhaps arguable that these time limitations do not apply to interstate gas pipelines, ORS 215.275(6), the conservative approach is to assume that they do apply. While it might be possible to break the application up in component parts and create separate time limitations period for each part, that may needlessly complicate matters. Thus, to err on the more conservative approach, the hearings officer recommends that the Board of Commissioners apply an initial 2-year time period, and then allow the applicant to apply for one or more one-year extensions for the entire permit, consistent with OAR 660-033-0140.

Turning to the second issue, there are only three substantive approval criteria governing whether an extension should be granted, as follows:

- An applicant must file a written extension request before the permit expires. CCZLDO 5.0.700.A; OAR 660-033-0140(2)(a) & (b).
- There must have been no substantial changes in the land use pattern of the area or other circumstances sufficient to trigger the filing of a new conditional use permit application for the use. CCZLDO 5.0.700.B.i;
- The applicant must not have been able to begin or continue development during the approval period for reasons outside of the applicant’s control. CCZLDO 5.0.700.B.ii. OAR 660-033-0140(2)(c) & (d).

In this case, there is no question that the applicant filed a timely written request for an extension that meet the requirements of CCZLDO 5.0.700(A). It is also clear that the “applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.” CCZLDO 5.0.700(B)(ii). In this case, the applicant needs federal approval for the gas pipeline project, and the project cannot commence until those federal approval are forthcoming. Even the primary opponent to the project, Ms. Jody McCaffree, admits the facts that caused the applicant to be unable to begin or continue development during the approval period, i.e., that the Federal Energy Regulatory Commission (“FERC”) vacated the federal authorization to construct the pipeline. See McCaffree letter dated July 11, 2014 at p. 5.

Thus, as a practical matter, there is only one approval standard is contested: has there been any “substantial changes in the land use pattern of the area or other circumstances sufficient to cause a new conditional use application to be sought for the same use.” CCZLDO 5.0.700.B(i)

The hearings officer attempted to research whether there were any LUBA cases that addressed what type of “circumstances” would justify the denial of an extension request of an extension application. While the hearings officer’s search was not exhaustive, it was sufficiently comprehensive for the hearings officer to conclude that it is unlikely that any case precedent exists. However, as the applicant notes in its letter dated July 25, 2014, LUBA has identified one instance when an extension request would trigger reconsideration of all original approval criteria. As explained below, that instance is distinguishable from this case. In
Heidgerken v. Marion County, 35 Or LUBA 313 (1998), LUBA considered an appeal of Marion County’s denial of an applicant’s request for an extension of a conditional use permit. On appeal, the applicant contended that the county erred in its application of the local Ordinance criterion applicable to extension requests. LUBA sustained the applicant’s assignment of error, in part, concluding that due to “the complete lack of standards” in the county Ordinance, “the county’s exercise of discretion under [the Ordinance provision] is tantamount to a decision reapproving or denying the underlying permit.” Heidgerken, 35 Or LUBA at 326. By contrast, in the case before the hearings officer, CCZLDO 5.0.700 includes specific approval criteria that apply to extension requests. Thus, there is no “complete lack of standards” for such applications in the CCZLDO. Accordingly, unlike Heidgerken, the County’s approval or denial of an extension application is not tantamount to a decision reapproving or denying the original conditional use permit. As such, the original approval criteria do not apply to this application.

According to the applicant, the test under CCZLDO 5.0.700.B(i) can be thought of as a question: have the relevant land use approval standards – or the facts relevant under those standards – changed so substantially as to materially undermine the legal or factual basis for the prior approval? The hearings officer agrees that this is an accurate way to characterize the test. It also seems relatively clear that the answer to this inquiry is “no.”

The first consideration is whether there has been “any substantial changes in the land use pattern of the area.” For example, if development had recently occurred in close proximity to the approved pipeline route, it would be prudent to require a new conditional use permit to address impacts of the pipeline on that new development. However, the parties to the case identified no such development, and staff did not identify any new construction or development that would warrant the need to revisit the pipeline CUP. For this reason, the hearings officer finds, based on the record compiled in this case, that there are “no substantial changes in the land use pattern of the area.”

Ms. McCaffree argues that new information pertaining to the potential for mega-quakes and tsunamis constitutes a “change in the land use pattern of the area.” See McCaffree letter dated July 11, 2014, at p. 22. Her argument is difficult to follow, but she appears to be arguing that a tsunami would change the land use pattern by destroying property adjacent to the estuaries. The hearings officer finds that the term “changes in the land use pattern in the area” is a term of art and refers to changes in development patterns in any given area under consideration. Thus, even if Ms. McCaffree’s argument that that new information pertaining to earthquakes and tsunamis merits reconsideration of the CUP, this information could at best be considered below as a “circumstance,” not as a “change in the land use pattern.”

Ms. McCaffree argues that the County’s approval of three identified quasi-judicial applications constitute a significant change in the Ordinance relevant to the pipeline. See McCaffree’s letter dated July 11, 2014, at pp. 23-24. Presumably, Ms. McCaffree is arguing that the approval of these three land use applications result in a “change in the land use pattern”

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5 In most cases, it is necessary to define what constitutes the “area” for purposes of analyzing whether a substantial change has occurred. Here, the parties have not provided any evidence of any changes in land use patterns that are even remotely close to the pipeline route, so the precise delimitation of the “area” is not necessary.
that trigger the need for a new CUP. However, for the reasons discussed below, none of the three quasi-judicial approvals referenced by Ms. McCaffree constitute any change that is either significant or relevant to the PCGP:

- Coos County File No. ABI-12-01: The boundary changes referenced under this case file number are irrelevant to the PCGP. The Coos County boundary interpretation obtained in the related final decision affected only a small portion of land on the North Spit of Coos Bay in the area commonly known as the old Weyerhaeuser Mill Site, the current location of Jordan Cove Energy Project's proposed energy-generating facility, the South Dunes Power Plant (SDPP). The related boundary changes did not affect the zoning districts or ownership through which the PCGP crosses. The change was neither significant nor relevant to the PCGP.

- Coos County File No. ACU-12-12/ABI-12-02: This Coos County boundary interpretation is also insignificant and irrelevant to the PCGP. The affected zoning districts where the boundary change was made are 6-WD and 5-WD, neither of which is crossed by the PCGP. The boundary change was neither significant nor relevant to the PCGP.

- Coos County File No. ACU-12-16/ACU-12-17/ACU-12-18: This application approved fill in various locations on the Mill Site to make it ready for development. The anticipated development at the time was the SDPP, which is associated with JCEP's proposed LNG terminal, which is interrelated with the PCGP. Accordingly, the fill approval was consistent with the proposed PCGP project, and does not constitute any significant or relevant change of the nature required in the CUP extension criteria. The difference in elevation before and after the approved fill is irrelevant to the PCGP, a subsurface facility.

For the reasons set forth above, the quasi-judicial boundary interpretations in no way affected or were relevant to the PCGP and, further, are not the type of Ordinance changes envisioned in the extension criteria.

Moving on, it is important to consider whether there have been any changes in the applicable land use approval standards for the Pipeline. For obvious reasons, a change in applicable law could be a "circumstance" that is "sufficient to cause a new conditional use application to be sought for the same use." For example, if the approval standards had been comprehensively changed since the time of the initial CUP approval, it would make sense to deny the extension and require the applicant to reapply under the new standards. Nonetheless, according to staff, there have been no such legislative changes, and no party identifies any such changes.

Finally, the County needs to consider whether there are any other "factual" circumstances sufficient to cause a new conditional use application to be sought for the same use. A circumstances is generally defined as a fact or condition connected with or relevant to an event or action. For example, Black’s Law Dictionary defines the term “circumstances” as “attendant or accompanying facts, events, or conditions.” See Black’s Law Dictionary, 6th Ed. at p. 243. Thus, the term is very broad in scope, and could encompass a plethora of potential
issues. At the July 11, 2014 public hearing on this matter, the hearings officer was careful to point out to the applicant that this criterion is potentially very broad in scope, and that it was possible that certain changes in facts could constitute grounds for the county to demand that the applicant submit a new application.

Having said that, the hearings officer would be hesitant to recommend that the applicant undertake a new land use process unless it seemed reasonably likely that the new process would either result in a different outcome, result in new conditions of approval, or require additional evidence or analysis in order to determine compliance. Stated another way, the “circumstances” at issue should only be deemed to be “sufficient” to require a new application if there is a reasonable likelihood that the circumstances change the outcome of the permitting process, create some reasonable uncertainty about whether an approval would be forthcoming, or would require new evidence to properly evaluate. To use a football analogy, only “game changing” circumstances should trigger a new permitting exercise.

As discussed in detail below, that does not appear to be the case here. The opponents do identify certain changes in factual circumstances, but ultimately those changed circumstances are either too insubstantial or not sufficiently relevant to the applicable land use approval standards. Thus, there is no basis for requiring the Pacific Connector to file a new application.

In the following sections, the hearings officer addresses specific issues raised in this case.

A. Connection of Pipeline to LNG Export Terminal Is Not a “Change” Requiring a New Application.

The original approval for the pipeline under County File No. HBCU-10-01 (REM-11-01) included the following condition of approval (“Condition 25”):

The conditional use permits approved by this decision shall not be used for the export of liquefied natural gas.

Final Decision and Order No. 10-08-045PL, Ex. A (“2010 Decision”) at 154. The County included Condition 25 when it approved the pipeline because the applicant voluntarily agreed to it, not because any applicable Oregon or Coos County land use standard distinguished between a natural gas pipeline associated with an import terminal and an otherwise identical natural gas pipeline associated with an export terminal. The Board of Commissioners adopted findings recommended by the hearings officer which found that the direction of gas flow is irrelevant under the land use approval standards applied by Coos County:

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.” * * * * * * Nonetheless, if “reams of testimony” were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning Ordinance provision that requires the County to make that decision.

6 The 2010 Decision is included in the record of this proceeding, AP-14-02, as Exhibit 5.
At the hearing, the applicant agreed to a condition of approval limiting the use of the pipeline to import use. Regardless, the 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 P2d 1261 (2003); *Dayton Prairie Water Ass’n v. Yamhill County*, 170 Or App 6, 11 P3d 671 (2000).

2010 Decision at p. 120. The 2010 Decision does not identify Condition 25 as necessary to ensure compliance with any applicable land use approval standard for the Pipeline.

In 2013, Pacific Connector submitted an application requesting to amend Condition 25. The Board of Commissioners approved that application on February 4, 2014. *See Final Decision and Order No. 14-01-006PL*. Condition 25 was modified to read:

The conditional use permits approved by this decision shall be used for the transportation of natural gas.

The Board’s Final Decision and Order was appealed to the Oregon Land Use Board of Appeals (LUBA). LUBA upheld the Board’s decision. *McCaffree v. Coos County*, __ Or LUBA __ (LUBA No. 2014-022, July 15, 2014) (“McCaffree”).

To put the matter simply, the Board of Commissioners stated in 2010 that the direction of gas flow in the Pipeline is irrelevant under the applicable land use approval standards for the Pipeline. Condition 25 was included only because Pacific Connector agreed to it at the time, not because it was necessary to ensure compliance with an approval standard. When Pacific Connector requested that Condition 25 be modified, the Board of Commissioners agreed to modify the condition. That decision was made in February 2014, more than a month before Pacific Connector filed the application at issue in this proceeding, requesting an extension of the prior land use approval for the Pipeline. Pacific Connector, in other words, sought extension of an existing land use approval for which the direction of gas flow has been determined to be irrelevant.

Ms. McCaffree nonetheless continues to insist that the association of the Pipeline with an LNG export terminal is somehow a “change” requiring a new application. To the extent her argument is based on the April 2012 decision by the Federal Energy Regulatory Commission (FERC) to vacate its December 17, 2009 order approving a certificate of public convenience and necessity for the Pipeline, she has utterly ignored the prior findings by the Board of Commissioners. The Board expressly stated in 2010 that the direction of gas flow does not matter from the perspective of the land use standards applied by Coos County and that the issue of “need” for a natural gas pipeline is to be decided exclusively by FERC. FERC’s determination to withdraw a certificate of public convenience and necessity pending a new federal process does not affect the legal underpinnings of the Board’s prior approval for the pipeline. It also does not affect the ability of the County to enforce conditions of approval that were tied to FERC’s prior conditions. *See Applicant’s Rebuttal dated July 25, 2014, at 11-12.*
To the extent Ms. McCaffree’s argument is based on a contention that the pipeline, if associated with an export terminal, is no longer a permitted use in one or more zones, it is too late to raise that argument. It is well understood that a city cannot deny a land use application based on (1) issues that were conclusively resolved in a prior discretionary land use decision, or (2) issues that could have been but were not raised and resolved in an earlier proceeding. 

Safeway, Inc. City of North Bend, 47 Or LUBA 489, 500 (2004); Northwest Aggregate v. City of Scappoose, 34 Or LUBA 498, 510-11 (1998).7 The time to present that argument was when Pacific Connector submitted its application to modify Condition 25.

Whether the argument is framed in terms of the pipeline no longer being a “utility facility necessary for public service” permitted in the EFU zone, or framed as an argument that the “new distribution line” is not allowed in the Forest zone8 (see McCaffree Surrebuttal, at p.3), the result is the same: the decision by the Board of Commissioners to modify Condition 25 – which preceded the application in this case – removed any argument whatsoever that the pipeline is only a “permitted” or “conditional” use if associated with an LNG import terminal.9 Ms. McCaffree cannot use this proceeding to re-argue the case for an “import only” restriction in the Coos County land use approval – a restriction that was removed before Pacific Connector applied for a two-year extension of the original approval.

Ms. McCaffree also seems to believe that the “import versus export” distinction is relevant in some way to remedies available under the CCZLDO, but her citations to CCZLDO  

7 The basic rules associated with “separate decisions/collateral attack” as set forth in cases such as Dalton v. Polk County, 61 Or LUBA 27, 38 (2009) (appeal of replacement dwelling permit does not allow challenge of prior partition decision); Butte Conservancy v. City of Gresham, 47 Or LUBA 282, 296, aff’d, 195 Or App 763, 100 P3d 218 (2004) (appeal of final subdivision plat does not allow challenge of earlier decision modifying tentative plan condition); Shoemaker v. Tillamook County, 46 Or LUBA 433 (2004) (appeal of 2003 parking deck permit does not allow petitioner to challenge the 2001 dwelling permit); Bauer v. City of Portland, 38 Or LUBA 715, 721 (2000) (appeal of final plat cannot reach issues decided in preliminary plat decision); Sahagain v. Columbia County, 27 Or LUBA 341 (1994) (in an appeal to LUBA from one local government decision, petitioners may not collaterally attack an earlier, separate local government decision.); Headley v. Jackson County, 19 Or LUBA 109, 115 (1990) (same).

8 Indeed, Ms. McCaffree attempted to raise the “new distribution line” issue at LUBA. LUBA noted that she failed to preserve the issue by raising it in the local proceeding. McCaffree, slip op. at 9. LUBA also addressed and rejected the same argument on the merits:

There is nothing in the text of OAR 660-006-0025(4)(q) that suggests that LCDC was concerned with the direction that gas (or oil or geothermal resources for that matter) flows when in the pipeline, or that LCDC intended to allow or prohibit lines that carry gas, oil, geothermal, telephone, [or] fiber optic cable depending on the identity of the end user or the direction that the resources flow when in the lines.

Id. at 10.

9 Testimony and a submittal by John Clarke at the July 11, 2014 hearing goes to this same issue. Mr. Clarke submitted the text of regulations from the federal Pipeline and Hazardous Materials Safety Administration (PHMSA), as well as Oregon Public Utility Commission rules adopting the PHMSA rules by reference. Mr. Clarke’s testimony appeared to be directed at demonstrating that the pipeline is a “transmission” line rather than a “new distribution line” in the Forest zone. However, this argument was rejected by the hearings officer and the County Board of Commissioners, and the County’s decision was affirmed by LUBA in McCaffree.
1.3.200, 1.3.300 and 1.3.800 provide no support to her argument. Ms. McCaffree seems to believe that the current application involves some “change in use” or an approval based on “false information.” It does not. Pacific Connector seeks to extend its prior Coos County land use approval for a pipeline to transport natural gas. That use has not changed. She identifies no “false information or data,” let alone any such information that is or was relevant to the decisions previously rendered by the Board of Commissioners with respect to the pipeline.

Moreover, Ms. McCaffree misreads CCZLDO 1.3.200. That provision relates to issuance of permits or verification letters for “a building, structure, or lot that does not conform to the requirements of this Ordinance,” i.e., existing non-conforming uses or non-conforming development. The proposed pipeline has not been constructed and therefore could not be either a non-conforming use or a non-conforming development. See CCZLDO 3.4.100 (establishing basis for alterations to lawful existing non-conforming uses and structures).

CCZLDO 1.3.300 allows for revocation of a permit by the Planning Director “if it is determined that the application included false information, or if the standards or conditions governing the approval have not been met or maintained ….” Again, Ms. McCaffree does not identify any “false information”; rather she appears to believe that circumstances have changed since the original approval because the pipeline will not serve an LNG import terminal. Yet the approval has been lawfully amended to remove the “import only” requirement in Condition 25. This is not an opportunity for Ms. McCaffree to collaterally attack that decision.

Finally, CCZLDO 1.3.800 relates to violations of the Coos County Zoning and Land Development Ordinance. In 2012, the Board of Commissioners pipeline approved the pipeline on remand from LUBA. The County’s 2012 “remand decision” was lawfully amended just months ago to change the wording of Condition 25. Ms. McCaffree does not explain how the prior approval can now be a “violation” of the very Ordinance under which the decision was made. That is the very essence of an attack that is both collateral and void of substance. Arguments that previously have been raised and rejected do not gain some renewed vitality when raised for the second, third, or fourth time, nor when they are written in all capital letters.

In summary, the approval of the pipeline by the Board of Commissioners was not based on the direction of gas flow, as made clear both by the 2010 Decision and the approved amendment of Condition 25. It also was not based on a finding of “need” for the pipeline. In fact, the Board made it clear that the determination of “need” isn’t a Coos County issue at all. Rather, it belongs exclusively to FERC. The fact that the pipeline is now associated with an LNG export terminal therefore is not a “change” relevant to the approval standards for the pipeline and cannot trigger a requirement for a new application.

**B. Tsunami and Earthquake Risk Were Considered in the 2010 Decision and Are Considered Prior to Construction**

The findings adopted in support of the County’s 2010 decision include a section titled “Potential for Mega-disasters (Tsunamis, Earthquakes, etc.).” Final Decision and Order No. 10-08-045PL, Ex. A at 22-26. Exhibit 5. In that section of the findings, the Board noted that “the risk of a tsunami has been studied and planned for,” and that “no harm is anticipated to occur to the pipe as a result of a design tsunami event.” Id. at 22-23. However, Ms. McCaffree argues
that there is new information with regard to both tsunamis and Cascadia Subduction Zone earthquakes, and that the new information is of such significance that it should require the filing of a new conditional use application for the Pipeline.

The hearings officer was initially of the opinion that new factual information pertaining to tsunamis and Cascadia Subduction Zone earthquakes might constitute a change in “circumstances sufficient to cause a new conditional use application to be sought for the same use.” However, upon reading the submittals by the parties, the hearings officer has become convinced that the new facts do not affect the validity of the assumptions underlying the County’s findings from 2010.

The applicant correctly points out that there are at least two potential problems with Ms. McCaffree’s argument. First, the applicant argues that Ms. McCaffree does not explain how the “new evidence” is relevant to approval standards for the Pipeline. In the initial case use case, HBCU 10-01, the hearings officer simply assumed, for purposes of analysis, that the issue of landslides, tsunamis, and earthquakes did in fact relate to some of the approval standards applicable in the case. The hearings officer stated: “Since there are any number of Ordinance 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.”

However, in this case, the only “standards” that Ms. McCaffree identifies are Statewide Planning Goal 7 and ORS 455.446 to 455.449. She does not explain why a Statewide Planning Goal would be applicable to a quasi-judicial land use application in a county with an acknowledged comprehensive plan and land use ordinances. Planning Department staff indicated at the July 11, 2014 public hearing that the “new studies” have not been adopted by Coos County as part of its Goal 7 program. Goal 7 does not appear to provide a nexus to an approval standard.

Ms. McCaffree’s citation to ORS 455.446 to 455.449 also provides no nexus to approval standards. Even if those statutory provisions apply to the Pipeline, they relate to state building Ordinance requirements rather than local land use standards. As the applicant notes, ORS Chapter 455 is titled: “Building Ordinance.” Building Ordinances are a separate issue from land use approvals, and building Ordinance requirements do not, and cannot, drive land use approvals. In fact, the opposite is true: zoning Ordinances determine what types of uses and structures can be constructed at any given location, and building Ordinances inform the landowner to what minimum standard those allowed structures can be built. For example, ORS 455.447 authorizes the Oregon Department of Consumer and Business Affairs, after consultation with the Seismic Safety Policy Advisory Commission and DOGAMI, to adopt rules to amend the state building Ordinance to establish requirements regarding seismic geologic hazards for certain types of facilities; it also requires developers of such facilities to consult with DOGAMI on mitigation methods if the facility is in an identified tsunami inundation zone. It is not implemented through the local government’s comprehensive plan and land use ordinances.

Despite Ms. McCaffree’s failure to identify how evidence related to the potential for mega-disasters (Tsunamis, Earthquakes, etc) relate to approval criteria, the hearing officer continues to assume that there are multiple approval standards for which a discussion of these
issues is relevant. As an obvious example, CCZLDO §4.8.400 contains a standard that requires the applicant to prove that “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.” With regard to the relationship between pipelines and forestry operations, it is at least arguable that pipelines could force foresters to change their forest practices in response to potential concerns over pipeline fires. Based on the record created in 2010, the County ultimately found such concerns to be overstated, but it was nonetheless a proper topic of analysis under this criterion. For this reason, the hearings officer does not fault Ms. McCaffree for failing to link the issue of earthquakes to specific approval criteria.

However, the applicant raises a second issue that cannot be so easily overlooked. Ms. McCaffree does not demonstrate how the purported new information would alter or undermine the findings adopted in 2010. She states that “new tsunami inundation mapping was released by the Department of Oregon Geology and Mineral Industries on February 12, 2012.” See McCaffree Written Testimony at 21. She also notes that Oregon State University has issued “a new report entitled, ‘13-Year Cascadia Study Complete – And Earthquake Risk Looms Large.”’ McCaffree Written Testimony at 21.

As indicated in the 2010 Decision, the applicant’s geotechnical engineers “studied the potential effect of a ‘design tsunami event,’ which is apparently a 565 year return period, an event that would produce a “predicted three feet of temporary scouring.” 2010 Decision at 22-23. In other words, this is not a situation in which the applicant assumed that there would not be a tsunami. To the contrary, the applicant assumed that the pipeline would be in an area impacted by a major tsunami. The Board found, however, that “tsunamis are not much of an issue considering the pipe will be a thicker grade of steel and it will be buried in 5-8 feet of sediment and encased in four inches of concrete.” 2010 Decision, at p. 22.

The OSU study, documented by a press release of less than 3 pages (see McCaffree letter dated July 11, 2014, Ex. 10) also does not undermine the findings from 2010. As described in the press release, the study documents that the southern Oregon coast may be most vulnerable to a Cascadia Subduction Zone earthquake (and tsunami event) “based on recurrence frequency.” In other words, the study appears to focus on the likelihood that such an earthquake will occur over any given period of time. Again, this was not a case in which the applicant dismissed such an earthquake as an improbable event. To the contrary, the applicant’s analysis, as discussed in the 2010 findings, assumed that a major event (a 565 year return period event) would occur during the life of the project. Given the assumption that such a “mega-quake” would occur during the life of the project, the Board’s 2010 findings are unaffected by a study showing that a quake is even more likely than previously believed.

Ms. McCaffree’s surrebuttal dated August 1, 2014 includes, as Exhibit A, a press release regarding a study of earthquake risk, which states, “The highest risk places have a 2

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10 As the hearings officer recalls, the record created in the 2010 case demonstrated that 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 Other Gas by Pipeline: Minimum Safety Standards; 18 CFR § 380.15, Site and Maintenance Requirements; and other applicable federal and state regulations.
percent chance of experiencing ‘very intense shaking’ over a 50-year lifespan ….” This is not a change that undermines any assumptions or analysis underlying the original approval because Pacific Connector already assumed that the Pipeline would face the type of seismic and tsunami event that occurs only once in 565 years. Again, the applicant did not assume a “mega-quake” event is improbable and will not occur; rather, the applicant’s experts examined what would happen if a rare seismic event did occur during the lifetime of the Pipeline. Nothing in Ms. McCaffree’s submittals demonstrates that the applicant failed to assess that risk.

In her surrebuttal dated August 1, 2014 Ms. McCaffree also asserts that “the current proposed pipeline would no longer be underground on the North Spit but some 40+ feet in the air, subjecting it to earthquake and tsunami hazards.” McCaffree Surrebuttal at 1. She references Exhibit E of her rebuttal submittal, which includes three cross-sections of the access and utility corridor for the LNG terminal – located between the South Dunes Power Plant and gas conditioning facility to the east and the LNG terminal to the west. This relates to the terminal, and is beyond the scope of this proceeding. But even assuming those cross-sections are part of the Pipeline rather than within the scope of the approvals for the Jordan Cove Energy Project, they do not show the Pipeline hanging 40+ feet in midair. Rather, the three cross-sections show the Pipeline buried adjacent to a roadway (Section B-B), secured to a pad along a roadway (Section C-C), and secured to a pad along a roadway that is elevated less than 10 feet. Again, even assuming for purposes of argument that this is a “change” from the application reviewed by the hearings officer and Board of Commissioners in 2010 and on remand in 2011-2012, Ms. McCaffree does not identify any land use approval standard to which the change is relevant. As already stated, ORS 455.446 to 455.449 point to review of seismic risks under building Ordinances, not the CCZLDO.

In any event, the current application is simply for an extension of the prior land use approvals for the Pipeline. The fact that there may now be somewhat different plans before FERC, including the alternate Brunschmid and Stock Slough alignments, does not bar extending the land use approval for the original alignment as approved in 2012. As the Board of Commissioners recognized in the 2010 Decision, FERC will decide the route of the Pipeline. The contents of the record before FERC at any particular moment do not constitute a substantial change in land use approval standards or factual circumstances that prevent the County from extending the prior approval.

C. National Environmental Policy Act (“NEPA”) Requirements are Beyond the Scope of this Application.

In its initial approval of the Pipeline in 2010, the County rejected arguments by opponents who “believed that [the land use approval] process should be put on hold until other regulatory processes are fully completed.” Final Decision and Order, Coos County Board of Commissioners, No. 10-08-045PL at 143 (Sept. 8, 2010) (the “2010 Decision”). Ms. McCaffree once again takes issue with the concurrent processing of local land use approvals and FERC approvals, and argues that the County should not make any land use decisions while the completion of the federal Environmental Impact Statement (EIS) is still pending. See McCaffree letter dated July 11, 2014, at pp. 5-6. Ms. McCaffree, however, fails to identify any local land use approval standard that requires the completion of an EIS. This is not surprising because the
EIS is a requirement under federal law, the National Environmental Policy Act. 42 U.S.C. § 4321 et. seq.; 40 C.F.R. § 1502.5.

As the Hearings Officer previously noted:

[T]his 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, and the hearings officer has recommended a condition of approval to ensure that no construction occurs until the Notice to proceed is issued.

2010 Decision at 143.

In subsequent proceedings related to the amendment of Condition 25, opponents again attempted to raise NEPA as an issue, but the County found these arguments to be “misdirected” because NEPA-related issues were “simply not within the scope” of that proceeding. Condition 25 Decision at p. 5. In the Brunschmid Decision, the County again rejected identical arguments offered by Ms. McCaffree. In the current proceeding, Ms. McCaffree’s arguments related to NEPA remain misdirected, and she offers no new arguments to compel reconsideration of this issue. FERC compliance with its responsibilities under the NEPA is simply beyond the scope of this local land use proceeding and has no bearing on its outcome.11

NEPA was signed into law on January 1, 1970. Congress enacted NEPA to establish a process for reviewing actions carried out by the federal government for environmental concerns. NEPA imposes certain obligations on the federal government, but not state or local governments. See 42 U.S.C. § 4331(b). The Act establishes national environmental policy and goals for the protection, maintenance, and enhancement of the environment and provides a process for implementing these goals within the federal agencies. NEPA does not generally apply to state or local actions, but rather applies to the decisions of federal agencies, as "major federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added).

A requirement of NEPA is that all agencies of the federal government prepare an environmental impact statement ("EIS") when they undertake or fund "major federal actions" that significantly affect the quality of the human environment, but once again the obligation is on a federal agency and not on a local or state government. 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. § 1501.4 (the Council on Environmental Quality's NEPA regulations also explicitly reference that a federal agency is the responsible party for completing an EIS, "[i]n determining whether to prepare an environmental impact statement the Federal agency shall ….") (emphasis added).

11 Ms. McCaffree’s vague references to state and federal regulation by the Oregon Public Utilities Commission and U.S. Department of Transportation Pipeline Safety and Hazardous Materials Administration are similarly misplaced in this local land use proceeding. See McCaffree Written Testimony, at 6.
The courts have also found that "NEPA does not regulate the conduct of private parties or state or local governments. NEPA requires the federal government to issue an environmental impact statement before taking any action 'significantly affecting the quality of the human environment.' 42 U.S.C. § 4332(2)(C). Since NEPA requires only action by the government, no private party can comply with NEPA. It is for that reason that in a lawsuit to compel compliance with NEPA, no one but the federal government can be a defendant." Forest Guardians v. Bureau of Land Management, 188 F.R.D. 389, 393 (D.N.M. 1999).

NEPA also establishes the Council on Environmental Quality ("CEQ"). As the Federal agency tasked with implementing NEPA, the CEQ promulgated regulations in 1978 implementing NEPA. See 40 CFR Parts 1500-15081. These regulations are binding on all federal agencies. The regulations address the procedural provisions of NEPA and the administration of the NEPA process, including preparation of EISs.

Among the rules adopted by the CEQ is 40 CFR §1506.1, which is entitled “Limitations on actions during NEPA process.” This section provides as follows:

(a) Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program.
when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

The Coos County land use approvals have no effect on the FERC process, as they do not “limit the choice of reasonable alternatives” being considered by the EIS. If, as part of the NEPA process, FERC ends up choosing a different route as the preferred alternative, then the applicant simply has to go back to the drawing board and re-apply for new land use permits. As a case in point, we see exactly taking place here: FERC apparently did not like a portion of the applicant’s preferred route, and, as a result, the applicant is back before the County seeking new land use approvals for an alternative route.

Contrary to the position taken by opponents in previous cases, there does seem to be legitimate reasons why an applicant would seek land use approvals either before seeking FERC approval or via concurrent processes. If the County were to find that land use approval was not forthcoming, then FERC would need to have that into consideration to some extent. See 40 CFR 1506(2)(d). However, the reverse is not necessarily true – land use approval does not limit FERC’s evaluation in any way.

The County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. There is nothing in the county plan or implementing ordinances or in any other document which makes either the NEPA statute or the Environmental Impact Statement (“EIS”) a "plan" provision or other approval criterion for this application. See Seto v. Tri-Met, 21 Or LUBA 185, 202 (1991), aff’d, 311 Or 456 (1995); Standard Ins. Co. v. Washington County, 16 Or LUBA 717 (1988), aff’d, 93 Or. App. 78 (1998), pet for review withdrawn, 307 Or 326 (1989). The hearings officer has found nothing from his own independent research which would either require or allow the County to put a local land use process on hold pending NEPA review by FERC.

In short, the NEPA process and the state-mandated, County-implemented land use process are operating on separate tracks, and appear to have little, if any, intersection. LUBA has held that in cases where a NEPA process must be undertaken in conjunction with a local

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12 40 CFR 1506(2)(d) provides:

To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.
land use process, that the NEPA process need not precede the land use process. Standard Ins. Co., 16 Or LUBA at 724. In Standard Ins. Co., LUBA recognized that even after an EIS is prepared, that local comprehensive plans are "subject to future change." Id. LUBA acknowledged the possibility that the adoption of a plan amendment or a series of amendments might result in the need to prepare a supplementary EIS. Id. (citing Comm. for Nuclear Responsibility v. Seaborg, 463 F. 2d 783, (D.C. Cir. 1971)). Nonetheless, LUBA noted that “there is no requirement that a new EIS precede such plan amendments.”

Finally, it is worth noting that under NEPA regulations, until a decision is made and an agency issues a record of decision, no action can be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives. The NEPA process is to be implemented at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delay later in the process and to avoid potential conflicts. 40 CFR 1501.2. In this case, FERC will not issue a “Notice to Proceed” until all of its conditions are satisfied. The hearings officer has recommended a condition of approval to ensure that no construction occurs until the Notice to Proceed is issued.

It should also be reasonably clear to all involved that County land use approval of the proposed route should not be viewed by FERC as any sort of endorsement by the County Board of Commissioners. In this regard, PCCG should not attempt to use land use approvals as ammunition in the FERC approval process. At best, County land use approval of the pipeline route simply means that, as conditioned, the proposed route does not violate land use standards and criteria.

D. FERC’s Act of Vacating its 2009 Order Approving the Pipeline As an Import Facility Is Not Relevant to These Proceedings.

On December 17, 2009, FERC issued an order approving a certificate of public convenience and necessity for the Pacific Connector Gas Pipeline. 129 FERC ¶ 61,234. Appendix B of that Order, attached to the applicant’s July 25, 2014 submittal as “Attachment E,” sets forth environmental conditions for that approval. Several of those conditions were incorporated by reference into the conditions of approval for the Board’s Final Decision and Order No. 10-08-045PL; the conditions approved by the Board also reference a section of the Final Environmental Impact Statement (FEIS) as well as the applicant’s Erosion Control and Revegetation Plan (ECRP).

The opponents take note of the fact that FERC vacated its Order approving the certificate of public convenience and necessity for the Pacific Connector Gas Pipeline in 2012. Ms. McCaffree argues that FERC’s decision to vacate its December 17, 2009 Order creates a situation where the Coos County’s conditions of approval can no longer reference conditions in that order, or documents included in that FERC record (such as the FEIS and ECRP).

As the applicant correctly notes, the question presented here is not whether those conditions and documents from the prior FERC record remain enforceable by FERC. Rather, they are incorporated into the County’s conditions of approval, and the question is whether the content of the condition can be determined. As evidenced by Attachment E to the applicant’s July 25, 2014 submittal, the prior FERC conditions have not vanished – they are readily
accessibility, as are the other documents that were part of that FERC record. As long as the County can determine the content of conditions or documents incorporated by reference in the County’s conditions of approval, it can enforce those conditions. FERC’s decision to vacate the 2009 Order does not constitute a change of circumstances necessitating a new conditional use application because the meaning of the County’s conditions of approval can still be discerned and those conditions can be enforced by the County.

E. CBEMP Policies and 5a Do Not Apply.

Ms. McCaffree argues that “[t]here has been no finding of ‘need’ and ‘consistency’ that supports this change of direction of the flow of gas in the pipeline.” McCaffree letter dated July 11, 2014, at p. 7. Ms. McCaffree again misunderstanding the nature of the current proceeding, regarding an extension of time for an existing Conditional Use Permit. The amendment of Condition 25 has already been approved, and this is not the forum in which to appeal that prior decision. To the extent that the Natural Gas Act and related federal regulations require the Pipeline to meet a “public need” or “public interest” standard, this is an issue within FERC’s sole jurisdiction and therefore not relevant to this proceeding.

As in previous cases, Ms. McCaffree seeks to CMEMP Policy 5 as a nexus to a public need requirement. Ms. McCaffree cites CBEMP Policy 5(I)(b), which requires that an applicant who is proposing dredging and fill operations in an estuary to show that “a need (i.e., a substantial public benefit) is demonstrated,” and that “the use or alteration does not unreasonably interfere with public trust rights.”

However, as the hearings officer has noted on numerous occasions, CBEMP Policy 5 and 5a are inapplicable to the pipeline application. For example, in the County’s 2010 Decision, the County determined that, in the absence of an applicable local land use approval standard, “‘need’ is simply not an approval criterion for this decision,” rejecting arguments from opponents, including Ms. McCaffree, who had “asserted the belief that eminent domain should not be used unless there is a local ‘need’ for the project.” 2010 Decision, at p. 144. Further, the County found that “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.” Id.

Ms. McCaffree concedes that a low intensity pipeline (such as is proposed here) is allowed in the Estuary zoning districts, but argues that “that does not mean that the digging a trench or an HDD would also be allowed.” McCaffree letter dated July 11, 2014, at p. 7. Instead, she argues that “essentially allowing a pipeline structure in these zones could mean you just placed the pipeline on top of the tidal muds and/or shorelands.” While the hearings officer understands the concept behind McCaffree’s argument, it is not supported by any language in the Ordinance. To the contrary, CBEMP Policy #2 allows "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation." Moreover, it simply makes no sense to suggest that utilities which are typically buried beneath the ground should be only allowed across the surface of estuaries. If anything, that result would tend to be the polar opposite of what Policy 5 is trying to achieve. A pipeline set forth above the ground would have a plethora of additional impacts that are not present with a buried pipeline. As just one
example, an above ground pipeline would limit opportunities for other uses, such as boating. For this reasons, the hearings officer rejects Ms. McCaffree’s argument.

Although Ms. McCaffree does not cite to it, the Ordinance language in CBEMP Policy 5(I)(b) that she references has its origins in Statewide Planning Goal 16. Under the Section of the Goal entitled “Implementation Requirements,” the following is provided:

2. Dredging and/or filling shall be allowed only:
   a. If required for navigation or other water-dependent uses that require an estuarine location or if specifically allowed by the applicable management unit requirements of this goal; and,
   b. If a need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights; and
   c. If no feasible alternative upland locations exist; and,
   d. If adverse impacts are minimized.

Coos County’s Zoning Ordinance defines the terms “dredging” and “fill” as follows:

**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.

**FILL:** The placement by man of sand, sediment, or other material, usually in submerged lands or wetlands, to create new uplands or raise the elevation of land. Except that "fill" does not include solid waste disposal or site preparation for development of an allowed use which is not otherwise subject to the special wetland, sensitive habitat, archaeological, dune protection, or other special policies set forth in this Plan (solid waste disposal, and site preparation on shorelands, are not considered "fill"). "Minor Fill" is the placement of small amounts of material as necessary, for example, for a boat ramp or development of a similar scale. Minor fill 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 of Hayes Inlet. 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 Ordinance, 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...
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. As Ms. McCaffree previously noted, 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 hearings officer continues to find that the PCGP does not include any "temporary alterations."

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

**TEMPORARY ALTERATION.** Dredging, filling, or another estuarine alteration occurring over a specified short period of time which is needed to facilitate a use allowed by an acknowledged plan. Temporary alterations may not be for more than three years and the affected area must be restored to its previous condition. Temporary alterations include: (1) alterations necessary for federally authorized navigation projects (e.g., access to dredged material disposal sites by barge or pipeline and staging areas or dredging for 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." Because of the specific definition of pipeline, with incidental dredging necessary for its installation, is a more specific use category than that of "temporary alterations," the pipeline use is not deemed to be a temporary alteration.
which would, as such, require compliance with Policy #5a. Accordingly, the hearings officer continues to find that CBEMP Policy #5a is inapplicable. Ms. McCaffree has offered no plausible reason for the County to reconsider this prior determination in this limited extension request proceeding.

Similarly, the “need” standard in OAR 345-026-0005 is inapplicable to interstate natural gas pipelines subject to FERC jurisdiction. That regulation was promulgated by the Oregon Energy Facility Siting Council (“EFSC”). It expressly applies only when EFSC is determining whether to issue a “site certificate” for certain non-generating facilities, including natural gas pipelines. See OAR 345-023-0005 (“To issue a site certificate for a facility described in sections (1) through (3), the Council must find that the applicant has demonstrated the need for the facility”). The applicant, however, is not seeking a site certificate from EFSC. Thus, OAR 345-023-0005 is not applicable in the current proceeding. Moreover, a natural gas pipeline under FERC jurisdiction, including the Pipeline, is by statute exempt from the requirement to obtain a site certificate from EFSC. See ORS 469.320(2)(b) (“A site certificate is not required for … [c]onstruction or expansion of any interstate natural gas pipeline or associated underground natural gas storage facility authorized by and subject to the continuing regulation of the Federal Energy Regulatory Commission or successor agency”). There is, in other words, no plausible basis for concluding that this extension application is subject to EFSC’s “need” standard for non-generating facilities.

On page 10 of her letter dated July 11, 2014, Ms. McCaffree presents an excerpt from the LUBA oral argument in the McCaffree v. Coos County case. In the provided dialogue between a LUBA administrative law judge and the applicant’s attorney, the attorney for Pacific Connector appears to concede that a change from import to export would require a different analysis when addressing the “public need” question. However, there is insufficient amount of dialogue presented to understand the context of the conversation between the LUBA ALJ and the attorney. The dialogue does not make apparent what criteria they are referring to. For all we can tell, the conversation may be related to the FERC proceeding. Regardless, the hearings officer continues to stand by its analysis contained on pages 7 to 15 of the hearings officer’s recommendation in HBCU 13-02 under the heading “Limits of the Police Power, A Lawful Condition Must Promote the Health, Safety, Morals, or General Welfare of the Community in Order to Be Constitutional, which is hereby incorporated by reference. In those findings, the hearings officer concludes that pipeline that has previously received cannot be denied simply on account of the fact that the applicants proposed a change in the direction of the gas. While the police power is broad, there would be no public health, safety, morals, or general welfare nexus that would allow the local government to deny a previously approved use on zoning grounds, when there is no physical change in the structure.

F. The County Has Previously Determined that the Pipeline is a “Distribution Line,” Not a “Transmission Line” under the DLCD Administrative Rules Implementing Statewide Planning Goal 4.

The 2010 Decision permitted the Pipeline in the Forest zone as a “new distribution line” under the applicable Goal 4 regulations and local zoning. OAR 660-006-0025(4)(q); CCZLDO 4.8.300(F). 2010 Decision at 80–7. The issue was again raised in the proceedings regarding the amendment of Condition 25, with the County finding that the term “distribution line” as used in
the applicable Goal 4 regulations was not mutually exclusive of the term “transmission line” as
used in ORS 215.276. Instead, the County concluded that the proposed Pipeline, regardless of
the direction of gas flowing within it, “constitutes a ‘distribution line’ as that term is used in
ORS 215.276(1)(c), and also that it constitutes a gas ‘transmission line’ as that term is
used in 215.276(1)(c).

On appeal, LUBA found that Ms. McCaffree had not preserved her arguments related to
this “distribution line” issue, but also provided alternative reasoning clearly rejecting her
contentions on the merits. LUBA’s analysis of this issue is conclusive: “The definition of
‘transmission line’ for purposes of the Exclusive Farm Use statute is inapposite for purposes of
determining whether, under the Goal 4 rule that regulates uses in the Forest zone, the pipeline is
a ‘new distribution line.’” McCaffree, ___ Or LUBA at ___ (slip op. at 10). After review of the
text, context, and legislative history, LUBA concluded that “for purposes of conditional uses
that are allowed in the Forest zone, all non-electrical lines with rights-of-way of up to fifty feet
in width are classified as ‘new distribution lines.’” Id.

Ms. McCaffree’s reliance on inapplicable definitions from unrelated federal regulations
is misplaced, and her attempt to raise this issue once again is rejected. In any event, the
County’s analysis of this issue and LUBA’s analysis in McCaffree v. Coos County are
determinative of this issue.

G. The County Has Previously Determined that the Pipeline is a “Public Service
Structure” as Defined by CCZLDO 2.1.200, and is Permitted in the EFU zone
as a “Utility Facility Necessary for Public Service.”

On page 11 of her letter dated July 11, 2014, Ms. McCaffree argues that the pipeline use
to export natural gas is not a “utility” or a “public service structure. Ms. McCaffree argues that
the pipeline cannot be a “public service structure” because it would not be a “structure” as
defined in the CCZLDO. However, she ignores the fact that the relevant definition of “utilities”
specifically includes “gas lines,” and identifies them as “public service structures.”

The County has previously determined that a pipeline used to import natural gas is a
“public service structure” as defined in CCZLDO 2.1.200, and is permitted in the EFU zone as a
“utility facility necessary for public service.” 2010 Decision at p. 108 – 112. While gas lines
arguably do not qualify as “structures” under the Ordinance’s current definition, the County
previously addressed any potential confusion arising from the inconsistent definitions of
“structure” and “utilities.” In the 2010 Decision, the County analyzed the issue extensively and


15 CCZLDO 2.1.200:

UTILITIES: Public service structures which fall into two categories:
1. Low-intensity facilities consisting 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).

16 CCZLDO 2.1.200 (“STRUCTURE: Walled and roofed building including a gas or liquid storage tank that is
   principally above ground.”).
concluded that, as a result of 2009 amendments to the definition of the term “structure,” the
“Ordinance contains internal inconsistencies between the formal definition of the term ‘structure’
and the usage of that term throughout the Ordinance.” 2010 Decision at p. 111. Resolving these
inconsistencies based on the clear inclusion of “gas lines” within the definition of “utilities,” the
County ultimate found the interstate gas pipeline to be a “utility.” Id. at p. 111–12.

Interstate natural gas pipelines are recognized under state land use laws as being a
‘utility facility’ for purposes of rural zoning in EFU zones. Because of this fact, the County
cannot conclude that ‘interstate natural gas pipelines and associated facilities’ are not a ‘utility,’
notwithstanding any quirks in the zoning Ordinance’s definition of ‘utility.’ To do so would be
contrary to the legislative intent behind ORS 215.275.

Ms. McCaffree’s attempt to raise this issue once again is yet another collateral attack on
this prior decision. While it might be possible for the Board of Commissioners to deny an
extension of a conditional use permit on the grounds that if believes it previously interpreted the
law incorrectly, the hearings officer does not see any flaws in the County’s previous holdings.
In fact, the hearings officer strongly believes that Ms. McCaffree’s analysis on this issue is
flawed and would likely be overturned on appeal if adopted.

H. The Pipeline’s Compliance with Applicable CBEMP Policies Has Previously
   Been Determined;

 a. The Applicant Has Previously Demonstrated Compliance with CBEMP
    Policy 14.

The County comprehensively addressed compliance with CBEMP Policy 14 in the 2010
Decision. See 2010 Decision, at p. 123–26. In that decision, the County found that “[t]his plan
policy is met,” determining 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.” Id. at p. 126. Ms. McCaffree
identifies no changes that would affect this analysis.

 b. CBEMP Policy 11 Does Not Apply.

As the applicant has explained previously, not all CBEMP Policies are applicable to all
activities in all CBEMP zoning districts. Instead, CCZLDO 4.5.150 describes how to identify
which policies are applicable in which zoning districts. Ms. McCaffree, however, persists in
identifying CBEMP policies without explaining how or why such policies apply to the Pipeline.
For example, she now argues that CBEMP Policy 11 requires the County to receive a
determination from various other agencies prior to permit issuance. See McCaffree letter dated
July 11, 2014, at p. 14. Yet, Policy 11 is not applicable in any of the zoning districts crossed by
the Pipeline (6-WD, 7-D, 8-WD, 8-CA, 11-NA, 11-RS, 13-NA, 18-RS, 19-D, 19B-DA, 20-RS,
21-RS, 21-CA, 36-UW).

In any event, Ms. McCaffree reads more into Policy 11 than the text permits. Policy 11
is, like many of the other CBEMP policies, a legislative directive to the County requiring
coordination with state and federal agencies, rather than applicable review criteria for land use applications such as the current application by Pacific Connector. Policy 11 does not preclude the County from issuing any permits until all other such approvals have been received, as such a requirement would conflict with the statutory requirement that the County process a permit within 150 days of when it is deemed complete. ORS 215.427.

Regardless, the applicant’s conditions of approval require the applicant to obtain all necessary state and federal permits prior to construction, thereby providing sufficient evidence that the authority of these agencies over their respective permitting programs will be respected and the permitting efforts will be “coordinated.” See 2010 Decision, Staff Proposed Condition of Approval #14 (“All necessary federal, state and local permits must be obtained prior to commencement of construction, including any required NPDES 1200-c permits. . . .”)

c. CBEMP Policy 4 Does Not Apply.

On page 14 of her letter dated July 11, 2014, at p. 14, Ms. McCaffree argues that CBEMP Policy 4 requires coordination with various state agencies prior to County sign off on Permits. However, CBEMP Policy 4a is similarly inapplicable to a “low-intensity utility facility” such as the Pipeline in any of the CBEMP zoning districts traversed by the Pipeline. Ms. McCaffree’s out-of-context recital of the language of Policy 4a, which addresses “Fill in Conservation and Natural Estuarine Management Units,” is irrelevant to this proceeding. Policy 4a applies to aquaculture activities involving dredge and fill in the 8-CA, 11-NA, 13-NA, 19B-DA, 21-CA, and 36-UW zones crossed by the Pipeline. However, low-intensity utilities in each of those zones, such as the Pipeline, are subject only to general conditions which do not include Policy 4a. See CCZLDO 4.5.376; 4.5.406; 4.5.426; 4.5.541; 4.5.601; 4.5.691. Thus, Policy 4a does not apply to the Pipeline.

Ms. McCaffree identifies no substantial change in land use patterns or the Ordinance which would mandate consideration of the applicability of any of the CBEMP policies to the Pipeline as part of the proceedings for this extension request.

d. The County Has Previously Determined CBEMP Policy 50 to be Inapplicable to the Pipeline.

On page 11 of her letter dated July 11, 2014, Ms. McCaffree make a half-hearted effort to explain why she thinks Plan Policy 50 applies to this case. However, the County has previously rejected arguments suggesting that CBEMP Policy 50 was applicable to the Pipeline. In response to “comments suggesting that a gas pipeline should be considered a ‘high-intensity’ utility facility” inapplicable for rural parcels, the County responded that “[t]he Ordinance resolves the issue in a manner that is unambiguous and conclusive against [that] argument. Given the recognition that gas lines are a ‘low-intensity’ facility,’ Plan Policy 50 does not assist the opponents in any way.” 2010 Decision, at p. 138. Ms. McCaffree has identified no changes in land use patterns or zoning that would alter the County’s prior conclusion that “[t]his plan policy is met.” Id.

I. Routine Changes to Oregon Coastal Management Program Do Not Create Circumstances that Warrant a New Application Process.
In her letter dated July 11, 2014, Ms. McCaffree argues that a “Notice of Federal Concurrence for Routine Program changes to the Oregon Coastal Management Program” was issued on March 14, 2014, and that this notice includes some undisclosed changes to the Coos County Comprehensive Plan. Ms. McCaffree concedes that she does not know if these proposed changes will have any impact on the pipelines, but recommends that the extension can be denied so that the County can look into the issue.

The OCMP implements the federal Coastal Zone Management Act (“CZMA”). The CZMA was enacted in 1972 and was designed to foster the development of state programs for “the effective management, beneficial use, protection, and development of the coastal zone.” If a state wishes to participate, it submits its program to protect the water and land resources of the coastal zone – its “coastal management program” (“CMP”) – to the U.S. Department of Commerce for approval. States are not required to participate; unlike other federal regulatory programs, including the Clean Water Act and the Clean Air Act, the federal government does not administer a coastal zone program if a state elects not to participate.

The CZMA offers a succinct explanation of the effect of an approved CMP, the process for state review of an applicant’s certification of consistency with the “enforceable policies” of the CMP, and the process and standard for review by the Secretary of Commerce:

After final approval by the Secretary of a state’s management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant’s certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant’s certification, the state’s concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification or until, by the state’s failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative

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17 16 U.S.C. § 1451 et seq.
18 Id. § 1451(a).
or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.\textsuperscript{19}

“Enforceable policies” for purposes of the CZMA consistency determination are those portions of the CMP “which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone.”\textsuperscript{20}

Oregon’s Department of Land Conservation and Development (“DLCD”) is in the process of updating Oregon’s Coastal Management Program. As one part of that update process, DLCD submitted to the federal Office of Ocean and Coastal Resources Management (“OCRM”) the current substantive provisions of the Coos County Comprehensive Plan and CCZLDO that DLCD requested be incorporated into Oregon’s Coastal Management Program. OCRM concurred with that incorporation on February 8, 2014. See Exhibit 11 attached to McCaffree Letter dated July 11, 2014.

As the applicant correctly points out, all that this “routine change” to Oregon’s Coastal Management Program did was to incorporate the County’s current substantive land use provisions as part of the CMP. That is clear from OCRM’s February 18, 2014 letter to DLCD: “Thank you for the Department of Land Conservation and Development’s (DLCD) October 1, 2013 request to incorporate current versions of the Coos County Comprehensive Plan (which includes the Coos Bay Estuary Management Plan and the Coquille River Estuary Management Plan), and the Coos County Zoning and Land Development Ordinance, into the Oregon Coastal Management Program.” See Exhibit 11 attached to McCaffree Letter dated July 11, 2014 (emphasis added). The applicant provided DLCD’s listing of the relevant Coos County provisions as submitted to OCRM. See Attachment A to Marten Law letter dated July 25, 2014. Coos County did not amend, revoke or supplement any of its land use standards applicable to the Pipeline. Rather, DLCD simply provided the federal government with updated information about the provisions of the County’s comprehensive plan and land use standards that are incorporated in the Oregon CMP for purposes of making consistency determinations under the CZMA. That does not alter the standards applied by you or the Board of Commissioners in land use proceedings for the Pipeline. In short, Ms. McCaffree’s incorrect claim that “there are obviously changes that have occurred” notwithstanding, the routine changes in the State’s CMP are not changes in the pipeline or in the local land use standards applicable to the Pipeline.

\textbf{J. Changes to FEMA Floodplain Mapping Do Not Constitute a Circumstance Which Warrants a New CUP Application.}

The Board of Commissioners adopted, as part of Final Decision and Order No. 10-08-045PL, the following “pre-construction” condition of approval:

\textsuperscript{19} Id. § 1456(c)(3)(A).
\textsuperscript{20} Id. § 1453(6a); see also 15 C.F.R. § 930.11(h).
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.

Under CCZLDO 4.6.230(4) as then in effect, “other development” had to be reviewed and authorized by the Planning Department prior to construction. Authorization could not be issued unless a licensed engineer certified that the proposed development would not:

a. result in any increase in flood levels during the occurrence of the base flood discharge in 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.

This flood hazard review, as described in the CCZLDO, occurs prior to construction. It was not part of the land use review in Final Decision and Order No. 10-08-045PL or Final Decision and Order No. 12-03-018PL.

Ms. McCaffree cites “amendments to the CCZLDO having to do with Floodplain Overlay boundaries and Plan Policy 5.11” as a basis for denying the requested extension of those prior approvals for the Pipeline. See McCaffree letter dated July 11, 2014, at p. 23. Although she asserts that “the new FEMA boundaries will directly impact the pipeline and the proposed route,” she does not explain how such changes are relevant to the land use approval standards for the Pipeline. She submits into the record of this proceeding a copy of Final Decision and Ordinance 14-02-001PL, but omitted Attachment A to that Ordinance, which shows the specific changes adopted by the Board.

The applicant submitted a complete copy of Ordinance 14-02-001PL as Attachment B to their Surrebuttal. Nothing in the ordinance alters any finding made by the Board in 2010 and 2012. Critically, the provisions addressing “other development” have been moved to CCZLDO 4.6.217(4), but are identical to the prior version of the Ordinance quoted above, and are still addressed by the Planning Department prior to construction. The changes clarify that the special flood hazard area is based on March 17, 2014 Flood Insurance Rate Map (“FIRM”). CCZLDO 4.6.207(1). Condition 15 of the 2010 decision, however, is not tied to any particular version of the FIRM. The applicant does not vest into any particular FIRM map, nor does it vest into certain editions of the building Ordinances or SDC ordinances. Therefore, Condition 15 remains adequate to ensure that, prior to construction, the applicant must meet the standards for “other construction” for portions of the Pipeline within the special flood hazard area of Coos County. The Board’s adoption of revised Floodplain Overlay provisions does not constitute either a “substantial change in the land use pattern of the area” or “other circumstances sufficient to cause a new conditional use application to be sought.”

In her surrebuttal dated August 1, 2014, Ms. McCaffree speculates as to how new flood hazard mapping might affect the Pipeline. See McCaffree Surrebuttal at p.1. In reality, the Board of Commissioners did not rely on the FEMA flood hazard boundaries for its findings of compliance with any approval standards in 2010 or on remand in 2012. With Condition 15 in place, the County has assurance that Pacific Connector must address FEMA’s mapped flood
hazard areas prior to construction. Alterations in those maps are accommodated within the current approval; a new application is unnecessary.

K. Pipeline Alignment

Ms. McCaffree further attempts to confuse the issues by arguing that Pacific Connector has changed the alignment of the pipeline by way of her reference to Exhibits 17 and 18 on page 24 of her July 11, 2014 letter. The simple response is that this application merely seeks to extend the Coos County approval of the original pipeline route. The final decision and order did not include a condition to build the approved alignment. Any potential alternate alignments from the FERC record are irrelevant and do not constitute any change in the County's zoning ordinance or land use patterns in the surrounding area.

L. Potential Impacts to Oysters Were Addressed in the 2010 and 2012 Decisions and by the Oyster Mitigation Plan

Two letters from Ms. Lili Clausen, Clausen Oysters, express concerns regarding access to oyster beds, construction-related suspended sediment impacts, and potential alternative routes. See Exhibit 1 (letter from L. Clausen to Coos County Planning Department dated June 28, 2014), Exhibit 3 (Undated submittal from Lili Clauson asking various questions of the County), and Exhibit 7 (letter from L. Clausen to Coos County Planning Department dated July 21, 2014). Ms. Clauson had previously expressed similar concerns in a prior two-page handwritten letter dated May 13, 2010, which was specifically considered by the County in its original decision approving the Pipeline. 2010 Decision, at 74–77. The applicant directly addressed issues raised by Ms. Clausen through a letter report prepared by Robert Ellis, Ph.D., of Ellis Ecological Services. That report described the measures taken by the applicant to avoid and mitigate impacts to oyster beds, providing substantial evidence that any impacts on commercial oyster beds in Haynes Inlet (and other natural resources) caused by the Pipeline would be “temporary and de minimis.” Id. at 74–77, 80.

Various opponents appealed the original 2010 land use approval to LUBA. LUBA remanded the 2010 Decision for further analysis of potential impacts to native Olympia oysters. Citizens Against LNG v. Coos County, 63 Or LUBA 162, LUBA No. 2010-086 (March 29, 2011). On remand, the hearings officer presided over a land use proceeding in which an extensive record pertaining to native Olympia oysters was developed. To the hearings officer’s recollection, Ms. Clausen did not participate in the remand proceedings. Nonetheless, after extensive consideration of potential impacts to such native oysters, the County concluded that “the applicant has met its burden of proof to demonstrate that the proposed pipeline construction will reduce any potential harm to the Olympia Oyster population in Haynes Inlet to such a degree that there is at most a de-minimis or insignificant impact on the oyster resources that the aquatic zoning districts 11-NA and 13A-NA require to be protected.” Final Decision and Order, 12-03-018PL, at 68 (Mar. 13, 2012) (the “2012 Decision”). As part of the remand proceedings, the applicant has developed an Oyster Mitigation Plan and has agreed to not only relocate Olympia oysters from the Pipeline route, but also to create additional new habitat within the pipeline right of way “that will result in a significant increase in the numbers of Olympia oysters in Haynes Inlet.” Id. at 29; see also 2012 Decision, Condition of Approval, Conditions on Remand No. 1 (“The applicant shall comply with the terms and conditions of the applicant’s

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In her July 21, 2014 letter, Ms. Clausen states that “I did not like the tone used in telling me, at the meeting, that the whole oyster issue was settled. We the commercial oyster growers, do expect our concerns to be addressed.” However, the hearings officer was taken aback by the lack of situational awareness inherent the Clausen Oyster oral presentation. For a company that alleges to have a lot at stake, Clausen Oyster’s participation in the various land use process to date has been surprisingly intermittent and cursory. Landowners have a responsibility to keep abreast of land use proceedings that affect their land. In light of the preceding actions described above, it seems highly irresponsible of Clausen Oysters to have not participated in the “remand” proceedings in which oyster issues were extensively discussed and debated. To add insult to injury, when Ms. Clausen did finally show up two years later, it was merely with a laundry list of questions pertaining to this case. She was unprepared to testify, and was generally at a loss to meaningfully contribute and advocate for any particular viewpoint. The County sends out formal notices pertaining to hearings for land use actions, and County staff does make efforts to educate citizens about these land use processes. However, it incumbent upon landowners to be ready to present their case at the appropriate time. Furthermore, to the extent that landowners do not fully understand the nuances of these land use processes, they should consider obtaining formal representation from attorneys who are well versed in land use laws, particularly when they believe their economic interest are at stake.

Be that as it may, the County has previously found that the applicant has demonstrated that it will not have a significant impact on oysters in Haynes Inlet, either commercially farmed or wild native oysters. Nothing in Ms. Clausen’s letter identifies a substantial change in land use patterns, the zoning Ordinance, or the pipeline that would justify revisiting these prior determinations.

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III. CONCLUSION.

For all of the above stated reasons, the hearings officer recommends that the Board of Commissioners approve a one year extension to Order No. 12-03-018PL.

Respectfully submitted this 19th day of September, 2014.

ANDREW H. STAMP, P.C.

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