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

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(BRUNDSCHMID / SOUTH SLOUGH ALTERNATIVE ROUTES)
COOS COUNTY, OREGON

FILE NO. HBCU-13-04
DECEMBER 12, 2013

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### III. CONCLUSION, PROPOSED CONDITIONS, AND RECOMMENDATION

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I. **Summary of Proposal and Process**

A. **Summary of Proposal.**

Pacific Connector Gas Pipeline (“Pacific Connector” or “applicant”) originally applied to the Federal Energy Regulatory Commission (“FERC”) to construct, install, own, operate and maintain an interstate natural gas pipeline to transport natural gas from the Jordan Cove liquefied natural gas (LNG) terminal inland to destinations located throughout the United States. The Coos County Board of Commissioners (“Board” or “BCC”) approved a conditional use application in March 2012 for the pipeline.

Since that time the applicant has chosen to change the request to allow for exportation of natural gas. This request triggered a new review through FERC, which is pending. As part of that review, the applicant has found it necessary to request approval for two “alternative” segments for the pipeline. *See Maps attached as Exhibit 1 and 2.*

The proposed changes in the route are necessary to: (1) avoid the Natural Resources Conservation Service’s (NRCS) Brunschmid Wetland Reserve Program Easement; and (2) minimize the Stock Slough crossings. FERC has jurisdiction over where to appropriately site the route, but due to federal consistency requirements set forth in the federal Coastal Zone Management Act, all land use approvals must be obtained from the local government in order to start the project. The NRCS wetland easement was not raised in HBCU 10-01 and is not a county inventoried wetland or part of a county program.

The changes to the pipeline are relatively minor. As discussed herein, the applicant has shown that the applicable criteria could be met and the new segments cross the same type of zoning that the original segments crossed. There is no approved FERC order for this pipeline request yet, and if FERC modifies the route the applicants may be required to go through additional land use reviews.

If approved, these two alternative segments would not technically, from the County’s perspective, replace the two existing segments of the route which the new segments seek to avoid, but as a practical matter, the applicant would only be allowed to build on either the original route or the alternative, but not both. This is due to the fact that FERC will not be approving *both* the original two segments and the two alternate segments. Thus, it is the hearings officer’s understanding that the applicant would, prior to construction, commit to the two alternatives and forego any approvals in HBCU 10-01 for those two segments of the originally approved route.

B. **Process.**

The review timeline for this application is as follows:

- August 23, 2013, Application deemed complete.
- August 30, 2013, County Mailed Public Notice for Hearing.
- September 5, 2013, County Mailed Correction to Notice of Hearing.
- September 13, 2013, County Planning Director issued Staff Report.
- September 20, 2013, Public hearing before the hearings officer.
- October 7, 2013, First Open Record Period Closed (New Testimony).
- October 14, 2013, Second Open Record Period Closed (Rebuttal Testimony).
- October 21, 2013, Third Open Record Period Closed (Surrebuttal Testimony).
- October 22, 2013 & October 24, 2013, Request to have record left open to address Richard Allan’s e-mail testimony which was not made available to the public in time to respond.
- October 25, 2013, Hearings Officer allowed for response to new Richard Allan’s letter only (Seven Days).
- November 1, 2013, Response to Richard Allan’s letter only.
- November 8, 2013, Applicant’s Final Argument.
- December 16, 2013, Hearings Officer’s Recommendation.
- December 16, 2013, Notice of Board of Commissioners Deliberation and Decision.
- January 9, 2014 Deliberations and Decision by the Board of Commissioners.
- January 2014, Adoption of Final Decision by the Board of Commissioners.
- January 2014, 21-day Appeal Period.

Note: This timeline was extended in part to allow opponents and other parties an adequate time to respond to materials submitted by the applicant. The applicant submitted 583 pages of technical supporting materials on September 13, 2013 (i.e. one week prior to the public hearing) which gave neither staff, the hearings officer, or other parties sufficient time to review the materials prior to the Sept. 20, 2013 public hearing. As a result, the hearings officers gave the parties an additional two weeks after the public hearing to submit their initial evidentiary materials and responses. The applicant also submitted major evidentiary “dumps” on Sept. 16 (Exh. 9, 89 pages); Sept. 18 (Exh. 10, 64 Pages); Oct. 11 (Exh. 22, 122 pages). This is a risky tactic, and in a more complex application, such record management would likely have led to the hearings officer recommending denial due to a lack of supporting evidence on key topics. In the future, the applicant is strongly encouraged to submit supporting materials with the initial application submittal to allow the other parties more time these submittals.

C. Scope of Review.

When addressing the criteria and considering evidence, the hearings officer used the standard of review required for land use decisions. The applicant has the burden to provide substantial evidence, supported by the record, to demonstrate that all approval standards are met.

In addition, where the ordinance provisions were ambiguous, the hearings officer applied the PGE v. BOLI methodology to arrive at what he believes to be the correct construction of the statute. State v. Gaines, 346 Or 160, 171–172, 206 P3d 1042 (2009). In so doing, the hearings officer attempted to rely, as much as possible, on past interpretation adopted by the Board, while still making sure that the interpretation would be affirmed if appealed.

The hearings officer believes that the conclusions made herein would be affirmed if appealed. However, the Board of Commissioners does not have to accept the legal or factual conclusions of the hearings officer. There are other possible factual conclusions that could be
drawn from the evidence. The Board may weigh the evidence and draw its own conclusion from that evidence. The Board also 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 code interpretation of its own code 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).

LUBA and the courts are not required to give deference to a local government’s interpretation of state law, or to code interpretations if the code standard at issue implements or mimics state law. In this case, many aspects of the decision are controlled by state law; specifically Statewide Planning Goals 3, 4, & 17. Interpretations of any local code provisions which implement these Goals will be reviewed by LUBA to ensure that they are consistent with the language, policy, and purpose of the Goals. ORS 197.829(1)(d).

With regard to the critical interpretational issues that were made in the earlier pipeline case, HBCU 10-01, the applicant asserts the following:

None of the interpretations and use determinations made in the Prior Decisions have been challenged as they apply to the proposed alternate alignment segments. The interpretations and use

1 Forster v. Polk County, 115 Or App 475, 478, 839 P2d 241 (1992); Kenagy v. Benton County, 115 Or App 131, 134, 838 P2d 1076 (1992); Crosley v. Columbia County, __ Or LUBA __ (LUBA No. 2011-093, April 11, 2012)(LUBA does not give deference to the County’s interpretation of state law, or to its own code to the extent that those code provisions implement and mimic ORS 215.130(5)-(11)).
determinations in the Prior Decisions apply equally to the proposed alternate alignment segments, and such interpretations and use determinations should be accepted and incorporated by reference in this application. See Alexanderson v. Clackamas County, 126 Or App 549, 869 P2d 873 (1994) (presupposing that inconsistent interpretations by a local decision maker might, under some circumstances, be a basis for a reversal of the local decisions).

Although the applicant’s point is well taken, the Board does have some flexibility on these issues. As early as 1969, Oregon courts recognized that a governing body is not necessarily bound to decide a matter in the same manner as a previous governing body. In Archdiocese of Portland v. Washington County, 254 Or 77, 87-8, 458 P2d 682 (1969), the court stated:

“Implicit in the plaintiff's contention is the assumption that the Board of County Commissioners of Washington County is bound by the action of previous Boards of County Commissioners in that county. This assumption is not sound. Each Board is entitled to make its own evaluation of the suitability of the use sought by an applicant. The existing Board is not required to perpetuate errors of its predecessors. Even if it were shown that the previous applications were granted by the present Board, there is nothing in the record to show that the conditions now existing also existed at the time the previous applications were granted.”

See also Alexanderson v. Clackamas County, 126 Or App 549, 869 P2d 873, rev den, 319 Or 150, 877 P2d 87 (1994); Okeson v. Union County, 10 Or LUBA 1, 2 (1983); Reeder v. Clackamas County, 20 Or LUBA 238 (1990); BenjFran Development v. Metro Service Dist., 17 Or LUBA 30, 46-47 (1988); S & J Builders v. City of Tigard, 14 Or LUBA 708, 711-712 (1986).

LUBA has stated, in dicta, that “[A]rbitrary and inconsistent interpretation of approval criteria in deciding applications for land use permits may provide a basis for remand. See Friends of Bryant Woods Park v. City of Lake Oswego, 26 Or LUBA 185, 191 (1993), aff’d 126 Or App 205, 868 P2d 24 (1994) (although local legislation may be susceptible of more than one interpretation, local government may not "arbitrarily *** vary its interpretation"). Thus, it is generally accepted that a county must provide some reason for the change in the interpretation, and cannot arbitrarily flip-flop between interpretations from case to case. For example, when a local government determines that comprehensive plan objectives are mandatory approval standards in one case, it may not later determine that plan objectives are mere guidelines in a different case, absent some explanation for the disparity. Welch v. City of Portland, 28 Or LUBA 439, 448 (1994); Smith v. Clackamas County, 25 Or LUBA 568, 570 n.1 (1993).2

Perhaps the most important limitations in this area is set forth in the case of Holland v. Cannon Beach, 154 Or App 450, 962 P2d 701 (1998). Under Holland, a County cannot conclude that a code standard or plan policy is inapplicable in an initial phase of a case, and then change its mind when the case comes back from LUBA on other issues.

In Holland, petitioner’s subdivision application was denied by the city council on the basis that it did not comply with certain comprehensive plan provisions. On appeal to LUBA, the Board remanded the decision on the basis that the comprehensive plan provisions relied on to support the denial were not applicable to the application.

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2 Perhaps the most important limitations in this area is set forth in the case of Holland v. Cannon Beach, 154 Or App 450, 962 P2d 701 (1998). Under Holland, a County cannot conclude that a code standard or plan policy is inapplicable in an initial phase of a case, and then change its mind when the case comes back from LUBA on other issues.
Finally, it is important to note that LUBA has stated that there may be circumstances where a change in long-standing interpretations may require notice and an opportunity for comment. *Wicks v. City of Reedsport*, 29 Or LUBA 8, 19 (1995); *Heceta Water Dist. v. Lane County*, 24 Or LUBA 402, 419 (1993); *Buckman Community Assoc. v. City of Portland*, 36 Or LUBA 630, 638-9 (1999).

In summary, it is possible for the Board to change the manner in which interpreted its code in past decisions, including interpretations set forth in its Final Decision and Order No. 10-08-045PL (HBCU-10-01) and Final Decision and Order No. 12-03-0018PL, (HBCU-10-01, Remand). To be clear, however, the hearings officer does not recommend any interpretational changes in at this time. Also, any new interpretation adopted as part of this case would not affect any aspect of the pipeline route established in HCBU-10-01 or HBCU-10-01 (Remand), and would only affect the two proposed alternative routes.

Nonetheless, if the Board is inclined to change a past interpretation, the hearings officer recommends that the Board: (1) provide notice to the parties, and (2) hold a public hearing accepting comment and analysis from the parties on the issue or issues subject to the change.

On remand, the city council determined that the application must be denied because it did not comply with a provision in the zoning code related to slope and density. Unfortunately for the city, the city staff had in an earlier staff report concluded that that standard was not applicable, relying on advice from the city attorney. That interpretation had been adopted by the city council in its first decision. So essentially, the decision on remand reversed an earlier, unchallenged code interpretation in the same case.

Petitioner again appealed, and LUBA affirmed the city’s new denial decision. Before the court of appeals, the city argued the earlier staff determination had no import, since the city council had made a different determination than had staff previously that the newly applied standard was in fact applicable. The city argued the council’s interpretation of its own code was subject to *Clark* deference under ORS 197.829(1). The court of appeals rejected this argument, holding that because the city council had adopted the previous staff determination that the standard at issue was inapplicable, that the standard continues to be inapplicable during the pendency of the case, in order to comply with the “no changing of the goal posts” rule. *See ORS 227.178(3).*

*Holland* provides a caveat to the holdings of earlier decisions stating that there is no requirement that a local government’s decision be consistent with past decision, and that the law only requires that the decision be correct when made. *Compare Okeson v. Union County*, 10 Or LUBA 1 (1983); *Halverson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193, 205 (2000). Under *Holland*, once a case comes back on remand from LUBA, any interpretations set forth in the earlier decision which were not appealed become binding on the local government.

However, *Holland* appears to have its own set of limits. *See e.g., Buckman Community Assoc. v. City of Portland*, 36 Or LUBA 630 (1999) (the rule advanced in *Holland* is limited to interpretations governing the same application); *Greer v. Josephine County*, 37 Or LUBA 261, 275 (1999) (“As construed in *Holland*, ORS 227.178(3) constrains a local government’s ability to change interpretations regarding the applicability of its approval criteria, but we do not read *Holland* as constraining reinterpretations of the meaning of indisputably applicable standards.”).
II. Legal Analysis.

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

1. Landowner Consent.

At the September 20, 2013 public hearing, there was considerable discussion concerning the applicant’s ability to submit a land use application for a pipeline that will cross private property, when the landowner does not give consent to the applicant. The only applicable code section requiring landowner consent is Coos County Zoning and Land Development Ordinance (CCZLDO) §5.0.150. The requirement that a property owner or contract purchaser sign the applicant is a mandatory prerequisite to a properly filed application. However, as discussed in the County’s decision in Final Decision and Order No. 10-08-045PL (HBCU 10-01), it is a procedural requirement that can be deferred to a later stage in the approval process so long as additional process is afforded for decisions that involve the exercise of discretion. See Citizens Against LNG v. Coos County, 63 Or LUBA 162, 167-9 (2011).

Thus, the opponents’ concerns pertaining to this issue can be met with a condition of approval.

2. Issue of Whether a Pipeline Is still a “Utility” if it is Only Used for Export Use.

In Case File HBCU-10-01, the BCC concluded that the proposed gas pipeline was both a “utility” and a gas “distribution” line as that term is used in OAR 660-006-0025(4)(q). The county code definition of a "low-intensity utility facility" includes gas lines for "public service." CCZLDO §2.1.200. Thus, gas “distribution” lines are classified as a “low intensity utility” in the Forest zone.

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3 SECTION 5.0.150 is entitled “APPLICATION REQUIREMENTS” and provides, in relevant part:

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

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

Applications shall be submitted by the property owner or a purchaser under a recorded land sale contract. “Property owner” means the owner of record, including a contract purchaser. The application shall include the signature of all owners of the property. A legal representative may sign on behalf of an owner upon providing evidence of formal legal authority to sign. * * * * (Emphasis Added).
The pipeline also falls within the ORS 757.005(1)(a)(A) definition of a "public utility," which includes "[a]ny corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power...." Thus private corporations can own and operate public utilities. In this regard, the term "public utility" referenced in the analogous provision of ORS 215.213(1)(d) is not concerned with whether the utility is owned by a public or private entity but whether the facility is so impressed with a public interest that it comes within the field of public regulation. 42 Or Att'y Gen 77 (1981) (cited in McCaw Communications, Inc. v. Marion County, 96 Or App 552, 773 P2d 779 (1989)).

Oregon Shores Conservation Coalition (“OSCC”) notes that the term “utility” is defined in the CCZLDO as “public service structures.” See Letter from Courtney Johnson dated September 20, 2013, at p. 2. Record Exhibit 12. OSCC argues that, unlike an LNG import terminal which brings in natural gas that could potentially be used by either county residents or U.S. citizens in general, “it is questionable whether an export pipeline remains a utility, because it would no longer be providing LNG service to the domestic public.” Based on this reasoning, Ms. Johnson argues that since the proposed gas pipeline used for export, it no longer complies with CCZLDO §4.9.450.

OSCC’s argument rises or falls on the presumption that a gas pipeline can only fall within the definition of “utility” if it serves the “domestic public” with a service such as natural gas. However, this argument is not well developed in Ms. Johnson’s Sept. 20, 2013 letter, and does not account for either federal preemption doctrines applicable to natural gas pipelines. Nor does it take into account ORS 215.275, which exempts interstate gas pipelines from proving that they are “necessary for public service” in the EFU zone.

While this question is somewhat difficult to resolve, the hearings officer believes that it is legally incorrect to interpret the term “utility” to require either local service or domestic service to the U.S. population. As the hearings officer noted in previous cases, it is apparent from reading the code that the drafters did not, in many instances, contemplate linear pipeline features when drafting various code provisions. Nonetheless, the intent of both the Oregon legislature and LCDC, and by extension — the County - can be determined by a review of the patchwork assortment of statutory provisions and administrative rules applicable to pipelines.

We begin with CCZLDO §4.9.450, which is a provision intended to regulate uses in the EFU zone. CCZLDO §4.9.450(C) applies to “utility facilities necessary for public service.” It is more or less a direct codification of ORS 215.283(1)(c). As such, the hearings officer will

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4 ORS 215.283(1) provides, in relevant part:

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

(c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275.
assume that County intended §4.9.450 to both implement state law and be interpreted consistent with state law. See WKN Chopin, LLC v. Umatilla Electric Cooperative, __ OR LUBA __ (LUBA No. 2012-016 2012)(using same approach).

CCZLDO §4.9.450 provides:

The following uses and their accessory uses may be allowed as hearings body conditional uses in the “Exclusive Farm Use” zone and “Mixed Use” overlay subject to the corresponding review standard and development requirements in Sections 4.9.600\(^5\) and 4.9.700.\(^6\)

* * * * * *

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

Because Subsection (1)(C) appears in the first subsection of ORS 215.283, a “utility facility” necessary for public service is a use that is allowed “outright” in the EFU zone. See Brentmar v. Jackson County, 321 Or 481, 496, 900 P2d 1030 (1995) (“legislature intended that the uses delineated in ORS 215.213(1) be uses ‘as of right,’ which may not be subjected to additional local criteria”). WKN Chopin, LLC v. Umatilla Electric Cooperative, __ OR LUBA __ (LUBA No. 2012-016 2012) (Citing ORS 215.276(1)(c) and noting that “[a] transmission line is a type of ‘utility facility,’ bringing it within the list of “sub 1” uses subject to Brentmar). Uses found in the second subsection of ORS 215.283 can, in contrast, be subject to more intensive regulation by the County.

Under state law, utility facilities sited on EFU lands are subject to ORS 215.275, as well as the administrative rules adopted by Land Conservation and Development Commission (LCDC). ORS 215.275 provides:

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

(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) must show that reasonable alternatives have been considered and that the facility

\(^5\) CCZLDO 4.9.600 Siting Standards for Dwellings and Structures in the EFU Zone.

\(^6\) CCZLDO 4.9.700 Development Standards for dwellings and structures (CCZLDO 2.1.200 defines “Structure: Walled and roofed building includes a gas or liquid storage tank that is principally above ground.” The proposed pipeline is not a “structure” under this definition and therefore the siting standards do not apply.
must be sited in an exclusive farm use zone due to one or more of the following factors:

(a) Technical and engineering feasibility;
(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
(c) Lack of available urban and nonresource lands;
(d) Availability of existing rights of way;
(e) Public health and safety; and
(f) Other requirements of state or federal agencies.

(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.

(4) The owner of a utility facility approved under ORS 215.213 (1)(c) or 215.283 (1)(c) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c) or 215.283 (1)(c) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.

(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

The exception set forth in Subsection 6 of ORS 215.275 is important for two reasons. First, it indicates that the legislature views “interstate natural gas pipelines and associated facilities” as a
type of “utility facility.” Where this not the case, then the legislature would surely have not felt the need to add subsection 6 to ORS 215.275.

Second, ORS 215.275(6) states that subsections 2-5 do not apply to “interstate natural gas pipelines.” Since the criteria set forth in Subsections (2) through (5) are intended to inform the analysis of whether a particular type of facility must necessarily be sited in a EFU zone (as opposed to in other rural or urban lands), then the fact that the legislature excepted gas pipelines from such scrutiny appears to recognize federal preemption on the issue of route selection for interstate gas pipelines. LCDC has also recognized this fact in their administrative rule implementing ORS 215.275, as they exempt FERC-regulated pipelines from the “necessary for public service” test. See OAR 660-033000139(16). Given the nature of ORS 215.275(6), the

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

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

(A) Technical and engineering feasibility;

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

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

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

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

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

(e) In addition to the provisions of subsections 16(a) to (d) of this rule, the establishment or extension of a sewer system as defined by OAR 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of OAR 660-011-0060.
hearings officer concludes that 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 code’s definition of “utility.” To do so would be contrary to the legislative intent behind ORS 215.275.

Further evidence of legislative intent can be found in the administrative rules that implement Goal 4 and define standards for compliance with implementing statutes at ORS 215.700 through 215.799. Unlike the manner in which Oregon statutes address uses allowed in EFU zones, Oregon statutes do not contain a similar “list” of allowed uses for Forest zones. LCDC used its delegated authority to fill that void, however. OAR 660-006-0025 is the LCDC administrative rule that sets forth the list of uses that are allowed conditionally and “by right” in the Forest zone. As relevant here, it provides as follows:

(1) Goal 4 requires that forest land be conserved. Forest lands are conserved by adopting and applying comprehensive plan provisions and zoning regulations consistent with the goals and this rule. In addition to forest practices and operations and uses auxiliary to forest practices, as set forth in ORS 527.722, the Commission has determined that five general types of uses, as set forth in the goal, may be allowed in the forest environment, subject to the standards in the goal and in this rule. These general types of uses are:

* * * *

(c) Locationally dependent uses, such as communication towers, mineral and aggregate resources, etc;

(3) The following uses may be allowed outright on forest lands:

* * * *

(c) Local distribution lines (e.g., electric, telephone, natural gas) and accessory equipment (e.g., electric distribution transformers, poles, meter cabinets, terminal boxes, pedestals), or equipment that provides service hookups, including water service hookups;

(4) The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:

* * * *

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).
(q) New electric transmission lines with right of way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width ***. (Emphasis added).

Thus, OAR 660-006-0025(3)(c) allows certain small-scale pipeline uses outright as a "[l]ocal distribution lines (e.g., electric, telephone, natural gas) and accessory equipment." In contrast, OAR 660-006-0025(4)(q) allows “[n]ew distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width” as a conditional use. OAR 660-006-0025(4)(q) specifically lists “gas” amongst a list of examples of “distribution lines.” Because the rule creates a separate category for “local” gas distribution lines, the only logical inference is that all other gas lines (i.e. "non-local gas lines") are a conditional use.

The LCDC rule uses the term “transmission” lines when describing large scale electrical lines. OAR 660-006-0025(4)(q). In this regard, the rule appears to recognize the vernacular used in the state statute addressing electricity. See ORS Chapter 772. Cyrus v. Deschutes County, 46 Or LUBA 703, 705 n1 (2004) (“The parties advise us that a transmission line transmits electricity from one station or substation to another, while a distribution line is an entirely separate line that distributes electricity to individual properties.”). Opponents have argued that LCDC’s failure to provide for “gas transmission lines” creates a negative implication that such large scale gas pipelines are not allowed.

It is true that LCDC uses the words “distribution lines” instead of “transmission lines” when describing gas pipelines. OAR 660-006-0025(4)(q). However, this appears to be unintentional, and the hearings officer believes that LCDC uses the term “distribution line” in a manner that is synonymous with “transmission line,” as that term is used in ORS 215.275 and 215.276. Had LCDC intended to distinguish between two types of gas “distribution” pipe uses and third category of gas “transmission” pipeline uses, then it is likely that such a policy would have been set forth with express language. By only specifying two categories of gas pipelines, the intent appears to be that all gas pipelines were intended to fit within those two categories of distribution lines.

Furthermore, as the applicant noted in its materials submitted in HCBU 10-01, there is no indication in Statewide Planning Goal 4 or OAR 660-006-0025(4)(q) that LCDC purposefully intended to use the federal or the industry vernacular for gas lines. Also, there is no indication that LCDC sought to purposefully exclude interstate gas “transmission” pipelines from Forest zones when it drafted OAR 660-006-0025. Neither the FERC classification or other federal law is necessarily “context” for interpreting DLCD’s administrative rule, because there is simply no evidence to suggest that OAR 660-006-0025(4)(q) implements federal law or was enacted with federal law in mind.

If anything, the only express discussion of large-scale interstate gas pipelines in the LCDC administrative rules is set forth in the rules regulating uses in EFU zones. OAR 660-033-0130(16). As mentioned above, OAR 660-033-0130(16) states that FERC-regulated gas pipelines are exempt from the “necessary for public service” applicable to other utility facilities seeking to locate in EFU zones. LCDC’s “hands off” approach to gas pipelines in EFU zones was apparently a response to the passage of ORS 215.275(1)-(6) in 1999. See Chapter 816 Oregon Laws 1999 (HB 2865). It would make little sense to create a highly permissive environment for gas pipelines.
in EFU zones but then somehow prohibit them in Forest zones. This is particularly true since as a practical matter, it is not possible to construct gas pipelines for any significant distance in Oregon without routing them through a Forest zone.

The legislative history of OAR 660-006-0025(4)(q) is also telling because there is really no discussion regarding gas “transmission” lines. If LCDC were making a purposeful decision to exclude interstate gas transmission lines from Forest zones, one would think that such a monumental decision would have generated more debate and attention. Such debate and discussion would be reflected in the legislative history. However, the tenor of the legislative history is much more in line with “housekeeping” changes, as opposed to a major shift in public policy.

One final point is worth exploring here. Although no party raised the issue, ORS 215.276 contains language which, on initial glance, tends to further confuse the “transmission” line vs. “distribution” line issue. ORS 215.276 is a little known provision added to ORS Chapter 215 in 2009. See 2009 Or Laws Ch 854 (HB 3153). The statute provides as follows:

215.276 Required consultation for transmission lines to be located on high-value farmland. (1) As used in this section:
(a) “Consult” means to make an effort to contact for purpose of notifying the record owner of the opportunity to meet.
(b) “High-value farmland” has the meaning given that term in ORS 195.300.
(c) “Transmission line” means a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users.

(2) If the criteria described in ORS 215.275 for siting a utility facility that is a transmission line, the utility provider shall, after the route is approved by the siting authorities and before construction of the transmission line begins, consult the record owner of high-value farmland in the planned route for the purpose of locating and constructing the transmission line in a manner that minimizes the impact on farming operations on high-value farmland. If the record owner does not respond within two weeks after the first documented effort to consult the record owner, the utility provider shall notify the record owner by certified mail of the opportunity to consult. If the record owner does not respond within two weeks after the certified mail is sent, the utility provider has satisfied the provider’s obligation to consult.

(3) The requirement to consult under this section is in addition to and not in lieu of any other legally required consultation process. [2009 c.854 §1] (Emphasis added).
Although the opponents in this case did not make the argument, it could be argued that the definition of “transmission line” in ORS 215.276 could be read in conjunction with a negative inference concerning the allowance of gas “distribution lines” in OAR 660-006-0025(4)(q). The argument would be that since gas “distribution lines” are allowed in Forest zones, and since the various statutes and rules – when read together – seem to differentiate between “transmission lines” and “distribution lines” (and specifically allow electrical transmission lines), that gas transmission lines are, by negative inference, not allowed in Forest zones.

However, that line of reasoning is both flawed and an amateurish attempt at statutory interpretation. As an initial matter, any negative inference that can be gleaned from OAR 660-006-0025(4)(q) is tenuous at best. The recent OSB publication entitled “Interpreting Oregon Statutes” Steve Johansen, Hon. Jack Landau, and Anne Villella ed. OSB CLE (2009) contains a lengthy but highly relevant discussion of the use of negative inferences in statutory construction analysis, as follows:

*Expressio unius est exclusio alterius,* another common-law aid to the construction of statutes, “hold[s] that to express or include one thing implies the exclusion of the other, or of the alternative.” Black’s Law Dictionary 620 (Bryan A. Garner ed., 8th ed 2004). The rule may also be stated as *inclusio unius est exclusio alterius.* Waddill v. Anchor Hocking, Inc., 330 Or 376, 382, 8 P3d 200 (2000); Fisher Broadcasting v. Department of Revenue, 321 Or 341, 353, 898 P2d 1333 (1995).

By way of example, saying that citizens are entitled to vote implies that noncitizens are not entitled to vote. Black’s Law Dictionary, *supra,* at 620. Including one group impliedly excludes the other. However, saying that citizens may vote does not expressly say anything about the rights of noncitizens; it simply assumes the negative of the first statement about citizens.

However, both the court of appeals and the supreme court have repeatedly warned the bench and bar that the maxim “is to be applied with caution and merely as an auxiliary rule to determine the legislative intention.” Cabell v. Cottage Grove, 170 Or 256, 281, 130 P2d 1013 (1943).

Although *expressio unius* is consistent with ORS 174.010, and the legislature’s directive to the courts “not to insert what has been omitted or omit what has been inserted,” which the court regularly relies on (*see §§2.32, 5.3*), the court rarely relies on the maxim. In fact, the supreme court has only looked to the rule as an aid to construction once in the last eight years. *See Waddill,* 330 Or at 382.

*Expressio unius* applies only in limited circumstances. “Before the maxim *expressio unius est exclusio alterius* can be instructive as to what a statute excludes, one must first identify what it includes.”
Carlson v. Benton County, 154 Or App 62, 67, 961 P2d 248 (1998) (emphasis added). And, because *expressio unius* is a rule of inference, it gives way to stronger evidence of legislative intent. *Cabell*, 170 Or at 281. Thus, lawyers should limit use of this maxim, and consider its application cautiously:

The maxim “*expressio unius est exclusio alterius*” is not of universal, but of limited, use and application. It is an aid to construction, not a rule of law. It is not conclusive, is applicable only under certain conditions, is subject to exceptions, may not be used to create an ambiguity, and requires great caution in its application . . . It may not be used to defeat or override clear and contrary evidence of legislative intent.


Judge Posner has pointed out another weakness: “The canon *expressio unius est exclusio alterius* is . . . based on the assumption of legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate.” Richard A. Posner, *The Federal Courts: Crisis and Reform* 282 (1985). Judge Posner went on to say “[a]lthough this canon seemed dead for a while, it has been resurrected by the Supreme Court . . . Its recent disparagement by a unanimous Court [in *Herman & MacLean v. Huddleston*, 459 US 375, 386 n 23, 103 S Ct 683, 690 n 23 (1983)] puts its future in some doubt but more likely confirms that judicial use of canons of construction is opportunistic.” Posner, *supra*.

The discussion quoted above has relevance here, and the assumption that OAR 660-006-0025(4)(q) contains a negative inference related to gas “transmission lines” is faulty for a number of reasons.

First, the hearings officer considers the analytical rule which states that “one must first identify what [the statute] includes” “[b]efore the maxim *expressio unius est exclusio alterius* can be instructive as to what a statute excludes.” Here, the rule itself only creates two classes of gas lines (“local gas distribution lines” under subsection 3(c), and non-local “distribution lines” under subsection 4(Q)). To assume that LCDC not only understood that there exists a third possible category of gas pipelines known as “gas transmission lines,” but also that LCDC intended to prohibit such transmission lines seems to be highly speculative at best.

Secondly, even if we assume that a mythical third category of “non-local distribution line” does exist, it is hard to envision what features this third category of pipeline would have that distinguish it from a “transmission line.” In fact, the term would appear to be an oxymoron if it is interpreted to mean anything other than a “transmission line” as defined in ORS 215.276(1)(c). As a practical matter, there is really no way to create three categories of gas pipelines: any individual pipe will either provide local service (in which case it is a local distribution line), or it does not (in which case it will meet the definition of “transmission line” in ORS 215.276(1)(c)). If we are to believe that OAR 660-006-0025(4)(q) establishes some sort of third category of
intermediate non-local distribution line that serves a different function from either the “transmission lines” as defined in ORS 215.276(1)(c) and “local” lines as defined in subsection 3(c), it is certainly not obvious what function such a “distribution line” would serve. Stated another way, gas lines either serve local users (in which they fall under OAR 660-006-0025(3)(c), or they don’t (in which case there are transmission lines under ORS 215.276. In light of this fact, the term “distribution line” as used in OAR 660-006-0025(4)(q) must mean the same thing as “transmission line” as that term is defined in ORS 215.276(1)(c).

Second, the easy explanation why electrical “transmission” lines are called out separately in OAR 660-006-0025(4)(q) from other types of gas and water “distribution lines” is simply to recognize that the large scale overhead electrical lines need a wider 100 foot easement (as compared to the 50 foot easement allowed for gas, water, and similar pipelines, which do not need as high ground clearance).

Finally, the legislative history of ORS 215.276 conclusively resolves any question about whether the definition of “transmission line” in ORS 215.276(1)(c) meaning and intent. ORS 215.276 was enacted in the 2009 legislative session. See House Bill 3153 (2009). On its face, the law applies only to EFU land, was intended to provide requirements for “transmission line” installers to consult with owners of farm land during the siting process.

8 The 1993 case PGE v. BOLI established a strict, three-step methodology whereby legislative history could not be considered if an analysis of the text and context resolved any ambiguity. This rigid hierarchy proved somewhat unpopular with legislators, and in 2001, the Oregon Legislature passed 2001 Or Laws Ch. 438 (HB 3677) in an effort to modify PGE v. BOLI. It amended ORS 174.020 to state, among other things, the following new language:

(1)(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

* * * *

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

It is this 2001 legislative enactment that led the Supreme Court to modify how the PGE v. BOLI test is formulated. See State v. Gaines, 346 Or 160, 171–172, 206 P3d 1042 (2009). Viewed in this light, Gaines is not so much a wholesale repudiation of PGE v. BOLI, but rather it is a judicial recognition of the fact that 2001 OR Laws Ch. 438 causes the first and second steps of the three-step PGE v. BOLI methodology to be effectively compressed into one “first” step.

ORS 174.020 and, by extension, Gaines, now permit a party to submit legislative history to a court, and the court may analyze and give consideration to that legislative history. As stated by the Supreme Court in Gaines:

But, contrary to this court’s pronouncement in PGE, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step -- consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute’s text, where that legislative history appears useful to the court’s analysis.
Although the initial version of the bill was controversial, the final “Dash-11” amendments proved to be rather low-key and non-controversial. Northwest Natural Gas, Portland General Electric, League of Oregon Cities, Oregon Rural Electrical Cooperative Association, 1000 Friends of Oregon, and the Oregon Farm Bureau all testified at various public hearings in favor of the bill, as amended. At no point in the proceedings did any member of the legislature or any commenter opine that the effect of the bill was to prohibit the siting of interstate gas transmission pipelines on Forest land. In particular, Northwest Natural Gas, who owns and operates a large number of “transmission lines,” would obviously not have testified in favor of a bill had the intent been to effectively make all gas pipelines that do not provide local service a prohibited use in the Forest zone.

In light of the aforementioned discussion, the hearing officer recommends the Board of Commissioners continue to find that the interstate gas transmission pipeline falls within the meaning of a “distribution line” as that term is used in OAR 660-006-0025(4)(q).

3. Proposed Alternate Alignments Will Not Have a Significant Impact on Wetlands and Water Bodies.

Opponents assert that the two alternate alignments will have devastating impacts on wetlands and waterbodies, including the Coos River and the tributary to Stock Slough. It does appear that the proposed alternative route will cross approximately 300 more yards of wetlands as compared to the route that was previously approved. See Record Exhibit 9 (page marked “Exhibit B-2” stating distance of this segment of the approved route as encompassing 5,902 ln. ft. of pipe, versus 6,687 ln. ft. for proposed alternative route).

Nonetheless, the two alternative alignment segments are intended for the primary purpose of avoiding impacts to certain high-value wetlands located within the approved route. For example, the so-called “Brunschmid Wetland Reserve alternate alignment segment” is being proposed in order to avoid an approved mitigation site on the north side of the Coos River (e.g., the Brunschmid Wetland Reserve Project, which has an easement held by the USDA Farm Services Agency). The USDA’s Natural Resources Conversation Service submitted a letter dated August 30, 2012 in which it details the reason for the alternative route. See Exh. 15. NRCS explains that it recently spent taxpayer dollars to purchase and restore the Brunschmid WRP easement, and that its restoration efforts would be negatively impacted by the proposed pipeline. Id.

Similarly, the Stock Slough alternate alignment is being proposed in order to avoid crossing Stock Slough Road (County Road 54) in an area of a steep road cut as the alignment descends a steep ridge slope, and further, the route modification avoids two crossings of Stock Slough in the tight meandering bends which were previously crossed immediately below Stock Slough Road and adjacent to a residence.

Ms. Jody McCaffree argues that there is a high potential for landslides resulting from steep terrain in the vicinity of the location where the proposed route crosses the Coos River. See letter from Jody McCaffree dated October 7, 2013, at p. 18. She asserts that these landslides will have a negative effect on water quality. She supports her argument by citing to PCGP’s “Resource Report 10,” at p. 29. In that report, PCGP criticized what was then called the
“Landowner Amended Route” on the grounds that the location the opponents proposed for crossing the Coos River “would likely be infeasible for an HDD because of the topographic conditions on the north side of the river.” Ms. McCaffree states that the alternative route proposed by the applicant in this case is “very close” to the “Landowner Amended Route” that PCGP criticized in its report. Thus, according to Ms. McCaffree, the PCGP report undermines any conclusion that the route proposed in this application is feasible.

Unfortunately, there are no sufficient maps in the record to allow the hearings officer to either conclude that these two sites are at the same location or are otherwise closely correlated. The parties are reminded that the hearings officer is limited to the record when trying to assess arguments and facts, and a lack of maps supporting an argument can prevent effective communication / presentation of the issue. Ms. McCaffree describes them as being “very close” but it is not clear what that really means. The applicant also describes the proposed route as being “similar” to the “Landowner Amended Route.” See Record Exhibit 9 (page marked “Exhibit B-1”).

The Resource Report defines the “Landowner Amended Route” as being “approximately 300 feet from the edge of Millicoma Highway on the north side of the river.” The hearing officer was not able to determine the exact location of the “Landowner Amended Route,” given the maps in the record. Nonetheless, the maps and analysis included at Exhibit 10 of this record do show sufficient space to complete a HDD operation at the proposed alternative route. See January 15, 2013 letter from GeoEngineers, at p. 4, 8 (Exh B., Figure 2). See also Figure 10.6-2 “Brundschmid WRP Avoidance Alternatives.” Ms. McCaffree’s argument does not appear to be well taken.

The HDD method involves boring under a water feature and pulling the pipeline into place through the borehole that has been reamed to accommodate the diameter of the pipeline. This procedure involves three main phases: pilot hole drilling, subsequent reaming passes, and pipe pullback. These three phases were explained in detail in correspondence from Randy Miller of Pacific Connector dated May 17, 2010 and the June 9, 2010 letter report submitted by Robert Ellis, Ph.D., of Ellis Ecological Service. Those documents are not included in this record, but were discussed in Final Opinion and Order 10-08-045PL, which is included in the record. See HBCU-10-01, at p. 70-1. The hearings officer would have preferred to have been able to access these reports to refresh his memory on their contents, as well as the relevant portions of the FEIS that discussed the HDD issue. See FEIS p. 2-97, 4.3-50-51, 4.5-101-102. Unfortunately, since they are not in this record, their evidentiary value is limited to the extent they are discussed in the findings from HBCU 10-01.

And speaking of evidence of limited value, Ms. McCaffree also provides pictures which purport to show the effects of hydraulic fractures occurring in Coos County during the installation of the 12-inch pipe by MasTec, Inc. in 2003. See Exhibit E to McCaffree Letter dated October 7, 2013. These pictures are not correlated or authenticated to any specific location or map, and therefore, the photos are of limited value to the hearings officer. Furthermore, there is no expert testimony explaining the circumstances of these alleged fract-outs. Nonetheless, because of other testimony submitted in this case, as well as the hearings officer’s recollection of the MasTec Inc. issue from the record in HBCU 10-01, the hearings officer is willing to view these photos as providing some evidence of the fact that things did not always go according to plan when the MasTec Inc. pipeline was constructed. However, even assuming for sake of argument that the
photos relate to HDD fractures and unplanned releases of drilling mud, it is unclear whether such HDD fractures were caused by the lack of experience of the MasTec Inc. contractors, or whether there was something inherent in the terrain and geology in Coos County that made it unsuitable for HDD operations. It is only the latter situation that would have direct relevance here, and without any evidence to connect these dots, the hearings officer is not inclined to give this testimony much weight.

On the other hand, the newspaper article provided by Ms. McCaffree provides more interest. According to the news article:

“[c]rews contaminated streambeds with drilling spoils, threatening fish habitat. Regulators later discovered that project managers had not taken adequate steps to protect hillsides from erosion. That led to even more sediments in fish spawning grounds.”

See Exhibit F to McCaffree Letter dated October 7, 2013. Record Exhibit 18. Although the news article says that “crews contaminated streambeds with drilling spoils” we are left to speculate on whether such spoils entered the water due to hydraulic fractures from the HDD operations occurring in conjunction with MasTec Inc. project. In any event, according to the news article, Judge Hogan “said there did not appear to be serious environmental harm,” and that “lack of government oversight” contributed to the problem. Id. Based on the scant evidence in the record, it is not possible to create much of a link between any previous MasTec’s HDD boring mishaps and the present application.

Pacific Connector’s experts testified that proposed crossing of the Coos River has been selected to affect a crossing that is nearly perpendicular to the axis of the Coos River Channel. Additionally, Pacific Connector states that the HDD method will be used to install the pipeline 43 feet below the Coos River. See Exh. 10. Using this crossing method, the Brunschmid alternate alignment segment will not impact log transport and will not impact fish habitat. Attached to Randy Miller’s September 18, 2013 letter is an “Exhibit B” which consists of a January 15, 2013 letter from GeoEngineers.

The GeoEngineers letter is a feasibility study for the proposed Coos River HDD crossing methodology, as it relates to the Brunschmid alternate alignment. The report concludes that the HDD method of installation at this alternate alignment site is feasible. See January 15, 2013 letter from GeoEngineers, at p. 3. This finding is consistent with FERC’s analysis, set forth in the FEIS at p 2-97, 4.5-101-102, noting that the risk of hydraulic fracture from a properly-supervised HDD method bore are low, particularly if PCGP “locate[s] the HDD entry and exist points a good distance away from the backs of the waterbody.” Final Opinion and Order 10-08-045PL, at p. 72 (citing FEIS at p. 4.5-102). The Board may also recall that the applicant had submitted an HDD Contingency Plan that was discussed in the Final Opinion and Order for HBCU 10-01.

Despite these conclusions, there is one aspect of the GeoEngineers letter that causes great concern. Although, surprisingly, no opponents flagged the issue, the report contains a paragraph entitled “Hydraulic Fracture and Inadvertent Returns” in which potentially serious concerns over potential fracturing are raised by the applicant’s own experts:
In general, it is our opinion that there is a relatively high risk of hydraulic fracture along the conceptual HDD profile. The risk of inadvertent surface returns is considered moderate along the alignment. However, the risk of inadvertent returns increases to high within approximately 150 feet of entry and exit.

The contractor’s means and methods, effectiveness at cleaning cuttings from the pilot and reamed holes, and the ability to maintain drilling fluid returns will be instrumental in reducing the risk of hydraulic fracture and inadvertent returns during construction.

See Record Exhibit 10 (January 15, 2013 letter from GeoEngineers, at p. 4). Given that the HDD bore entry and exit holes are proposed to be set back at approximately 500 feet from the shore of the Coos River, the fact that there may be a “high risk” of inadvertent surface returns within approximately 150 feet of entry and exit should not result in immediate damage to the aquatic resources. Nonetheless, according to GeoEngineers, the potential for inadvertent surface returns remains “moderate” for the remainder of the bore. A “moderate risk” does not sound ideal. As noted by Jody McCaffree on page 15 of her letter dated October 7, 2013, “releases of drilling fluid bentonite clay can wear down fish gills and impair fish vision making difficulty and predation easy.” Nonetheless, when compared to maintenance dredging and other activities that are allowed in the 20-CA zone, even a release of drilling mud into the river would be a relatively minor issue by comparison. Nonetheless, the obvious goal should be conduct the HDD operation without any inadvertent surface returns.

The GeoEngineers report makes clear that a contractor’s expertise and attention to detail will have a great effect on the ability of the applicant to be successful in how it conducts the HDD operation. Although it phrases this concern in rather innocuous wording, what the report is really saying that the contractor could potentially damage the resource if they don’t conduct the HDD operations with a high degree of proficiency and attention to detail. This is the most significant concern that the hearing officer has identified with regard to this application. While is probably does not constitute sufficient grounds to outright deny the application, the County needs to keep the applicant on a short leash and insist on measures designed to increase the likelihood of a successful HDD operations. In addition, the applicant may be able to propose some additional technology or construction techniques to the BCC that can get the “moderate” risk down to a “low” risk.”

Perhaps the biggest factor to ensuring the success of the HDD operations will be the selection of an experienced construction team to perform the HDD operation. The hearings officer has proposed a condition of approval that can be imposed upon the applicant, either as written or in a modified form based on the applicant’s input, in an effort to exert some approval authority over the HDD operations. Although it is highly unusual for a local governmental unit to exercise this sort of control over an applicant, in light of the GeoEngineer’s report and the alleged prior history of MasTec Inc’s HDD operations in Coos County, more diligence by the County is likely warranted in this case.

The proposed condition 17b reads as follows:
At least six months prior to construction of the HDD bore under the Coos River, the applicant shall submit, for approval by the Board of Commissioners or its designee, a report detailing the qualifications and work history of the contractor selected to perform the HDD operations. The contractor shall demonstrate to the satisfaction of the Board that it has sufficient experience conducting successful HDD bores of a similar scale and under similar conditions without significant hydraulic fractures or inadvertent surface returns so as to harm aquatic or wetland resources. The report shall include a detailed summary of the means and method that the contractor will use to ensure that inadvertent surface returns are avoided, including a discussion of how it will clean cuttings from the pilot and reamed holes, and how it will maintain adequate drilling fluid returns. The report shall include a contingency plan explaining how inadvertent surface returns of drilling mud will be mitigated. The Board of Commissioners may require the applicant to post a bond to adequately protect against damage to the natural resources sought to be protected.

The hearings officer notes that the applicant has already agreed to provide much of this same information to FERC. See letter from W. Randall Miller to Jill Rolfe dated Sept. 18, 2013, at p. 2, and attached Exhibit C thereto (providing pertinent portion of FERC’s Wetland and Waterbody Construction and Mitigation Procedures). The FERC procedures manual states:

d. Horizontal Directional Drill

For each waterbody or wetland that would be crossed using the HDD method, file with the Secretary for the review and written approval by the Director, a plan that includes:

(1) Site-specific construction diagrams that show the location of mud pits, pipe assembly areas, and all areas to be cleared for construction;

(2) Justification that the disturbed areas are the minimum needed to construct the crossing;

(3) Identification of any aboveground disturbance or clearing between the HDD entry and exit workspaces during construction,

(4) A description of how inadvertent release of drilling mud would be contained and cleaned up, and

(5) A contingency plan for crossing the waterbody or wetland in eth event the HDD is unsuccessful and how the abandoned drill hole would be sealed, if necessary.

Note: The hearings officer understands that there may be other means to ensure a successful HDD bore, and suggests this proposed condition as one of several possible
alternatives. County staff and County Counsel may have additional input for the Board on this issue. Due to the timing of when this information was submitted to the hearings officer, it was not possible for the hearings officer to further flesh out possible alternatives at this stage, without conducting a new public hearing (which the hearings officer deemed inadvisable due to time constraints). The hearings officers in aware of the fact that in HBCU 10-01, the Board modified and deleted some of Staff’s proposed conditions, and recommends that the Board dedicate some time to further reflect on this issue in this case. In the future, the hearings officer recommends that the applicant place more of this type of important technical information into the record at an earlier point in the proceeding.

Regarding wetland crossings, Pacific Connector will utilize and be consistent with FERC’s Wetland and Waterbody Construction and Mitigation Procedures, which are specified in Resource Report 2 and which were attached as Exhibit C to Randy Miller’s September 18, 2013 letter. These procedures are applicable to the alternate alignments and include, where feasible, the limitation of the width of the construction right-of-way through jurisdictional wetlands to 75 feet or less for waterbody crossings. All temporary extra work areas have been located at least 50 feet away from wetland boundaries, except where site-specific conditions prevent the setback. During construction, clearing of buffer vegetation between the temporary extra work areas and the edge of the wetland will not occur. All vegetation clearing will be restricted to the certificated construction right-of-way. Where possible, the only access roads that will be used in wetlands are those existing roads that can be used with no modifications and without impacting the wetlands.

In accordance with FERC’s Wetland and Waterbody Construction and Mitigation Procedures, Pacific Connector will also engage in post-construction maintenance, which includes limiting routine vegetation mowing or clearing adjacent waterbodies to allow a riparian strip at least 25 feet wide to permanently revegetate with native plant species across the entire construction right-of-way. In addition, no herbicides or pesticides will be used within 100 feet of a waterbody, except as allowed by the appropriate land management or state agency.

For the reasons set forth above, the hearings officer finds that the proposed alternate alignment segments will not, if properly conditioned and supervised, have a significant detrimental impact on wetlands or waterbodies. Ms. McCaffree’s evidence is not persuasive enough to conclude that the applicant cannot conduct HDD operations without experiencing fracturing or landslides. Both the McCaffree evidence and the GeoEngineer’s testimony do, however, suggest that Coos County, DEQ, and other agencies should provide a much greater oversight function as compared to what was provided during the construction of the MasTec Inc. pipeline. As stated elsewhere, land use approvals only ensure that a plan exists and that the plan is likely to succeed in carrying out the mission objective; they do not ensure that the plan will be carried out or that things will always go according to plan. The County must continue to exercise an oversight and enforcement function to ensure that plans are carried out as promised.

4. Potential for Mega Disasters (Tsunamis, Earthquakes, Landslides etc).

One common theme throughout much of the testimony provided by opponents stems from the concern that a gas pipeline would create secondary problems such as explosions and fire if the County is hit by a tsunami or earthquake. This issue was previously discussed in the County’s decision in Final Decision and Order No. 10-08-045PL, pages 22-26. That discussion is incorporated herein by reference.
As far as tsunamis are concerns, the hearings officer can envision no risk that would affect the segment of the pipeline at issue here.

A landslide, however, presents a more realistic potential risk factor. Nonetheless, as demonstrated by the Geologic Hazards and Mineral Resources Report prepared by GeoEngineers for Pacific Connector, dated May 29, 2013 and the Revised Geologic Hazards Report, dated October 11, 2013, both submitted into the record (together, the “Geo-Hazard Report”), the applicant has evaluated, analyzed and mitigated the effects of earth movement potential in all phases of the project: pipeline routing, detailed engineering design, facility construction, and ongoing operations and monitoring of the in-service pipeline facilities. Exhibits 8 and 21. The Geo-Hazard Report provides geotechnical and geo-hazard information along the pipeline route within Coos County, including the Brunschmid alternate alignment and Stock Sough alternate alignment. The Geo-Hazard Report concludes that there are no moderate or high risk shallow-rapid (aka “rapidly moving landslides” or “RML”) hazards for this segment of the pipeline. In addition, all moderate or high-risk deep-seated landslides were also avoided. The Geo-Hazard Report constitutes substantial evidence that the risk of landslides damaging a pipeline is low.

Regarding earthquakes, the applicant notes that the Geo-Hazard Report (Section 3.3, entitled Seismic Settings) states:

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

Regarding other forms of earth movement that may cause displacement to the pipeline, Appendix A and Appendix B of the Geo-Hazard Report identify the locations along the pipeline alignment where a geo-hazard exists, what risk level the hazard presents to the pipeline, and, where avoidance is not possible, if mitigation measures will be required at those locations. Additionally, Table 3 of the Geo-Hazard Report gives a summary of potential liquefaction and lateral spreading hazards. Table 3 shows that the risk of liquefaction and lateral spreading for Stock Slough is low, and that the risk of liquefaction and lateral spreading for the Coos River has been mitigated by avoidance of areas where landslides are likely.

In her letter dated Sept. 20, 2013, at p. 3, Ms. Johnson argues that “deep-seated landslides pose the greatest threat to buried pipelines.” Rec. Exhibit 12. In her letter, she provides two small maps where were basically unreadable. Nonetheless, the applicant addresses this issue extensively in the Geo-Hazard Report prepared by GeoEngineers. See Rec. Exhibits 8 & 21, at pp. 11-20. Table A-2 of this report documents where the pipeline route was altered to avoid identified landslides. Table A-3a and A-3b of this report documents were re-routes were proposed to avoid moderate and high risk RML hazards. Oregon Shores never even addresses this testimony, let alone rebuts it with substantial evidence. The hearings officer finds that the GeoEngineers Report constitutes substantial evidence on the issue of landslides causing harm to the proposed pipeline, particularly in light of the fact that there is no expert testimony directly to the contrary.
5. Coordination with Native American Tribes (CCZLDO SECTION 3.2.700)

The applicable county requirements governing archaeological resources are CBEMP Policy #18 and CCZLDO §3.2.700, which directly implements Policy #18.

Pacific Connector testified that it has consulted with the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians and the Coquille Indian Tribe regarding cultural resource issues throughout the life of the project. Throughout all of the archeological and historical studies necessary for this project, Pacific Connector states that it will continue to consult with appropriate tribes, Oregon SHPO and the FERC regarding the proposed alternate segment alignments to ensure their continuing cooperation and concurrence.

Pacific Connector proposes that Condition No. 24 to the Prior Decisions be imposed as a condition of approval to this application. Staff addresses this issue on page 13 of the Staff Report:

FINDING: This area is in a potential archeological site. As a condition of approval that applicant is required to confer with the affected local tribe(s) prior to the issuance of a zoning compliance letter. The applicant will be required to comply with the procedures in the following condition:

At least 90 days prior to the issuance of a zoning compliance (verification) letter for building and/or septic permits under LDO 3.1.200, the County Planning Department shall make initial, contact with the Tribe(s) regarding the determination of whether any archaeological sites exist within the area proposed for development, consistent with the provisions of LDO 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of LDO 3.2.700, the county shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources on the site have been identified, the county may approve and issue the requested zoning compliance (verification) letter for the related development proposal; (2) if the Tribe(s) and the applicant reach agreement regarding the measures needed to protect the identified resources, the development can be approved with any additional measures the county believes are necessary to protect those resources; or (3) if the county finds that there will be adverse impacts to identified historical, cultural or archaeological resources on the site and the applicant and Tribe(s) have not reached agreement regarding protection of such resources, then the County Board of Commissioners shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archeological values of the site. For purposes of this condition, the public hearing shall be
subject to the provisions of LDO 5.8.200 with the Board of Commissioners serving as the Hearings Body, and the related notice provisions, of LDO 5.0.900(A).

The hearings officer finds that as conditioned, the application will ensure the preservation of significant historical, cultural and archeological resources that may be present at the alternate alignment segments sites. The imposition of the condition is consistent with prior approvals and will ensure compliance with this Plan Policy.

Plan Policy 18 can be met with the aforementioned condition of approval.

6. Request for Stay.

Oregon Coastal Alliance, Rogue Riverkeeper, Sierra Club, Cascadia Wild, Food & Water Watch and Bob Barker request that the County stay these land use proceedings pending the outcome of the FERC process that is currently underway. See Letter from Sean T. Malone dated Sept. 20, 2013, at p. 5. Rec. Exhibit 13. The Malone letter does not cite any legal authority for the County to “stay” a land use application over the objection of the applicant, and the hearing officer is not aware of any such authority. See ORS 215.428 et seq. The hearings officer recommends that the request for a stay be denied.

B. Coos Bay Estuary Management Plan (CBEMP)

One of the two segments of the PCGP at issue in this case will cross through two CBEMP zoning districts: 20 RS and 20 CA. Generally speaking, compliance with the standards and policies applicable in those districts was previously addressed in HBCU 10-01, as well as in the following documents submitted by the applicant in that prior proceeding:

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

These documents are not in the record of this proceeding, but were discussed in the final opinion in HBCU 10-01.

As discussed below, the CBEMP standards can be met. The hearings officer’s sole concern, after reviewing the evidence, is the HDD issue for the Coos River crossing, which was discussed supra.
1. **CCZLDO Section 4.5.100.**

Some opponents raised CCZLDO §4.5.100 as a potentially applicable approval standard. However, CCZLDO §4.5.100 is a purpose statement stating general objectives, and is not an approval criterion for this application. *Standard Insurance Co. v. Washington County*, 16 Or LUBA 30, 34 (1987) (descriptions of characteristics of a zoning district are not approval criteria); *Bennett v. City of Dallas*, 17 Or LUBA 456, aff’d, 96 Or App 645 (1989); *Slotter v.City of Eugene*, 18 Or LUBA 135, 137 (1989); *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990) (Purpose statement stating general objectives only is not an approval criterion.)

2. **CCZLDO Section 4.5.150.**

Section 4.5.150 is entitled “How to Use This Article.” This Section contains specific language that implements the CBEMP. The main purpose is to clearly stipulate where, and under what circumstances, development may occur.

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

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

3. **CCZLDO Section 4.5.180(1).**

CCZLDO Section 4.5.180(1) provides as follows:

**SECTION 4.5.180. Riparian Protection Standards in the Coos Bay Estuary Management Plan.** The following standards shall govern riparian corridors within the Coos Bay Estuary Management Plan:

1. Riparian vegetation within 50 feet of a estuarine wetland, stream, lake or river, as identified on the Coastal Shoreland and Fish and Wildlife habitat inventory maps, shall be maintained except that:
   a) Trees certified by the Coos Soil and Water Conservation District, a port district or U.S. Soil Conservation Service posing an erosion or safety hazard may be removed to minimize said hazard; or
   b) riparian vegetation may be removed to provide direct access for a water-dependent use; or
   c) Riparian vegetation may be removed in order to allow establishment of authorized structural shoreline stabilization measures; or
d) Riparian vegetation may be removed to facilitate stream or streambank clearance projects under a port district, ODFW, BLM, Soil & Water Conservation District, USFS stream enhancement plan; or

e) Riparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose; or

f) Riparian vegetation may be removed in conjunction with existing agricultural operations (e.g., to site or maintain irrigation pumps, to limit encroaching brush, to allow harvesting farm crops customarily grown within riparian corridors, etc.) provided that such vegetation removal does not encroach further into the vegetation buffer except as needed to provide an access to the water for the minimum amount necessary to site or maintain irrigation pumps.

2. The 50’ riparian vegetation setback shall not apply in any instance where an existing structure was lawfully established and an addition or alteration to said structure is to be sited not closer to the estuarine wetland, stream, lake, or river than the existing structure and said addition or alteration represents not more than 100% of the size of the existing structure’s “footprint”. (Emphasis Added).

In his letter dated September 20, 2013, Mr. Sean Malone points out that this standard requires that “[r]iparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose[.]” He goes on to argue that “the applicant has not demonstrated that the riparian vegetation that will be removed to install the pipeline will be the minimum necessary.”

This issue is not raised with sufficient specificity to enable a response. PCGP submitted a detailed Erosion Control and Revegetation Plan dated June 2013. Mr. Malone does not address this report or explain why it is insufficient to comply with CCZLDO Section 4.5.180(1). The hearings officer has read the Erosion Control and Revegetation Plan in detail and finds that it constitutes substantial evidence.

4. **20-Rural Shorelands (20-RS)**

CCZLDO Section addressing the 20-RS zone states the following pertaining to the boundary of the zone:

**SPECIFIC BOUNDARIES:** This district consists of the majority of both shores of the Coos-Millicoma Rivers, plus Daniels and Lillian Creeks, from the mouth to above the heads-of-tide. The district does not include the Harbor Barge and Tug site, the barge site at the river forks or the log sorting sites at Allegany and Dellwood. Western Boundary - The north shore boundary begins at the eastern edge of the Christianson Ranch dike. The south shore boundary begins at the junction of East Catching Slough Road and Gunnell Road. Eastern Boundary - The district ends 1000-feet above heads-of-tide of the Coos and Millicoma Rivers.
The proposed alternative pipeline route crosses the 20-RS zoning district. This segment of the pipeline is located on the south bank of the Coos River. Section 4.5.546(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

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

The project will not impact mitigation sites, U-17(a) and (b). Once installed, the pipeline will not prohibit rural uses or recreational access. Additionally as discussed above, the temporary access road areas within the 20-RS district will be returned to their previous condition following construction. In this area on the south side of the Coos River, the area is pastureland and may continue be used as pastureland following construction. The applicant submitted into the record an “Erosion Control and Revegetation Plan” (ECRP), dated June 2013, which outlines the Best Management Practices (BMPs) the project will use for temporary and permanent erosion control along the project right-of-way to prevent land movement. Exhibit 8. The ECRP relates to the entire PCGP Project, and it provides useful information on erosion control and revegetation procedures that Pacific Connector will utilize during and after construction of the alternate alignment segments proposed in this application. The hearings officer finds that the ECRP constitutes substantial evidence on the issue of whether the management objective of the 20-RS zone is met.

The applicant proposes to use the HDD crossing method for the Coos River. This crossing method, if successful, will avoid impacts to the river its banks, and riparian vegetation and will provide the maximum protection to wildlife habitat within and adjacent to the river. The only risk to this zone is a possibility of a hydraulic fracture and unplanned release of drilling muds from the HDD bore. This issue is discussed in Section II A(3), supra. For the reasons set forth in that discussion, the hearings officer finds that it is feasible to conduct HDD boring operations in an environmentally safe manner if the applicant follows the BMPs it has proposed to FERC, including those set forth in the HDD Contingency Plan that was discussed in HBCU 10-01. The hearings officer has proposed a condition of approval, as discussed supra.

Ms. McCaffree also appears to argue that Special Conditions 1 and 3 for “Activities” apply to this case. See McCaffree letter dated October 7 2013. Record Exhibit 18. However, the applicant is not proposing a “stream alteration,” nor is the applicant conducting “dredging” activities. The Special Conditions 1 and 3 for “Activities” do not apply.

The management objective for the 20-RS zone is met.

§ 4.5.546. Uses, Activities and Special Conditions. Table 20-RS sets forth the uses and activities which are permitted, which may be permitted as conditional uses, or which are prohibited in this zoning district. Table 20-RS also sets forth special conditions which may restrict certain uses or activities, or modify the manner in which certain uses or

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activities may occur. Reference to “policy numbers” refers to Plan Policies set forth in the Coos Bay Estuary Management Plan

CCZLDO 4.5.546(15)(a) lists low intensity utilities use as permitted subject to CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51 located in Appendix 3.

5. **20-Conservation Aquatic (20-CA)**

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

The CCZLDO section addressing the 20-CA zone states the following pertaining to the boundary of the zone:

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

**SPECIFIC BOUNDARIES:** This district extends from the banks to the shallow-draft channel on both sides of the Coos and Millicoma Rivers from River Mile 0 of the authorized channel to the heads-of-tide past Allegany and Dellwood. The district does not include the aquatic areas directly in front of the Harbor Barge and Tug facility, the barge site at the forks or the log sorting sites at Allegany and Dellwood. It does include the tidal portions of Lillian Creek and Daniels Creek.

**SECTION 4.5.551. Uses, Activities and Special Conditions.** Table 20-CA sets forth the uses and activities which are permitted, which may be permitted as conditional uses, or which are prohibited in this zoning district. Table 20-CA also sets forth special conditions which may restrict certain uses or activities, or modify the manner in which certain uses or activities may occur. Reference to “policy numbers” refers to Plan Policies set forth in the Coos Bay Estuary Management Plan.

Pacific Connector states that will use a horizontal directional drilling (HDD) method to install the pipeline below the Coos River. Using this crossing method, the PCGP will be installed approximately 40+ feet beneath the bottom of the Coos River and will not impact log transport and will not impact fish habitat. Upon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided. The hearings officer has suggested a condition of approval intended to ensure that the County can provide adequate oversight of the HDD operation.

As conditioned, the management objective is met.
C. **Overlay Zones (CCZLDO Article 4.6).**

1. **CCZLDO Section 4.6.210 and CCZLDO Section 4.6.215.**

CCZLDO Sections 4.6.210 and 4.6.215 provide as follows:

**CCZLDO SECTION 4.6.210. Permitted Uses.**

In a district in which the /FP zone is combined, those uses permitted by the underlying district are permitted outright in the /FP FLOATING ZONE, subject to the provisions of this article.

**CCZLDO SECTION 4.6.215. Conditional Uses.**

In a district with which the /FP is combined, those uses subject to the provisions of Article 5.2 (Conditional Uses) may be permitted in the /FP FLOATING ZONE, subject to the provisions of this article.

As detailed above, the PCGP is permitted either outright or conditionally in each of the base zones that it crosses. As described in the applicant’s narrative supporting its application, the pipeline is also satisfies each of the applicable Floodplain overlay standards. Therefore, it is also a permitted use in the Floodplain Floating zone.

2. **SECTION 4.6.230. Procedural Requirements for Development within Special Flood Hazard Areas.**

SECTION 4.6.230 provides as follows:

**SECTION 4.6.230. Procedural Requirements for Development within Special Flood Hazard Areas.** The following procedure and application requirements shall pertain to the following types of development:

4. **Other Development.** “Other development” includes mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of a special flood hazard, but does not include such uses as normal agricultural operations, fill less than 12 cubic yards, fences, road and driveway maintenance, landscaping, gardening and similar uses which are excluded from definition because it is the County’s determination that such uses are not of the type and magnitude to affect potential water surface elevations or increase the level of insurable damages.

Review and authorization of a floodplain application must be obtained from the Coos County Planning Department before “other development” may occur. Such authorization by the Planning Department shall not be issued unless it is established, based on a licensed engineer’s certification that the “other development” shall not:

a. result in any increase in flood levels during the occurrence of the base flood discharge if the development will occur within a designated floodway; or,

b. result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.
Compliance with CCZLDO §4.6.230 is raised by Veneita and Duffy Stender in a letter dated September 20, 2013, but without any substantive analysis. Record Exhibit 14.

A natural gas pipeline is not specifically included in the specified list of “other development.” However, because the PCGP construction process will involve the removal and replacement of soil and recontouring activities that are similar to the listed development activities, the applicant submitted documentation demonstrating that the PCGP is consistent with the “other development” standards. Staff addresses this issue as follows:

The overlay zone in this case will not prohibit the development but there are criteria under “other development” that needs to be addressed. The pipeline is considered as “other development” because it requires such activities as drilling, removing and filling and is not defined as a structure. The PCGP alternate alignments will be installed below existing grades [using HDD crossing methods], and no permanent structures will be placed above existing grades within the floodplain. In addition, at the completion of the installation, all construction areas will be restored to their pre-construction grade and condition. The applicant will use installation methods and mitigation measures to avoid or minimize flotation, collapsing, or lateral movement. A floodplain application addressing the requirements of other development must be obtained from the Coos County Planning Department before the start of the project. Pursuant to CCZLDO § 4.6.285 the county may issue a permit on the condition that all applicable local permits are or will be obtained; therefore, this is a suggested condition of approval.


The purpose of CCZLDO §4.6.230 is to ensure that floodplains are not altered in a manner that increases the flood elevation levels. In this case, a pipeline does not alter flood elevation levels because it will be buried underground using the HDD crossing method. While it is true that the HDD bore will result in some spoils being removed from beneath the river, those spoils will not be deposited within the floodplain. Record Exhibit 10 (Exhibit C to Letter From Randy Miller dated Sept 18, 2013, at p. 7). Therefore, it is easy to conclude that the pipeline is a “similar use” which can be excluded from definition of “other development” because is not “of the type and magnitude to affect potential water surface elevations or increase the level of insurable damages.”

Furthermore, the PCGP will be installed below existing grades and no permanent structures will be placed above existing grades within the FEMA 100-year floodplain. In addition, at the completion of the PCGP installation, all construction areas will be restored to their pre-construction grade and condition. Flood plain compliance will be verified prior to construction and the issuance of a zoning compliance letter. The applicant will use installation methods and mitigation measures to avoid or minimize flotation, collapsing, or lateral movement. A floodplain application addressing the requirements of other development must be obtained from
the Coos County Planning Department before the start of the project. Pursuant to CCZLDO § 4.6.285, the county may issue a permit on the condition that all applicable local permits are or will be obtained; therefore, the hearings officer has added a suggested condition of approval.

3. **CCZLDO Section 4.6.235 (Sites within Special Flood Hazard Areas).**

CCZLDO Section 4.6.235 provides as follows:

**SECTION 4.6.235. Sites within Special Flood Hazard Areas.**

1. If a proposed building site is in a special flood hazard area, all new construction and substantial improvements (including placement of prefabricated buildings and mobile homes), otherwise permitted by this Ordinance, shall:

   [remainder of text omitted here, but set forth below]

Compliance with CCZLDO §4.6.235 is raised by Veneita and Duffy Stender in a letter dated September 20, 2013. Record Exhibit 14. This section applies to structures that will be built within the 100 year floodplain. It is not obvious to the hearings officer how these standards apply to an interstate gas pipeline that will be buried three to six feet underneath the ground. In the absence of a more focused argument, the hearings officer finds that CCZLDO §4.6.235 does not apply to this case. Nonetheless, the applicant erred on the side of caution and addressed these criteria as follows:

   a. be designed (or modified) and adequately anchored to prevent flotation, collapse, or lateral movement and shall be installed using methods and practices that minimize flood damage. Anchoring methods may include, but are not limited to, use of over-the-top or frame ties to ground anchors (Reference FEMA “Manufactured Home Installation in Flood Hazard Areas” guidebook for additional techniques);

   b. be constructed with materials and utility equipment resistant to flood damage;

   c. be constructed by methods and practices that minimize flood damage; and

   d. electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.
The subsurface PCGP does not include electrical, heating, ventilation, plumbing, or air conditioning components. Therefore, this criterion is not applicable.

The hearings officer finds that CCZLDO §4.6.235 is met to the extent it applies here.

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

1. **CCZLDO §4.8.300(F).**

The two (2) proposed alternate alignment segments will cross approximately 1.7 miles of Forest-zoned lands within Coos County. See Applicant’s Final Argument dated Nov. 8, 2013. All 1.7 miles of these Forest lands are located on private property.

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

"New electric transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width." OAR 660-006-025(4)(q).9

Opponents argue that the proposed pipeline use is a gas ‘transmission line,” which they assert is not allowed in the Forest zone due to CCZLDO §4.8.300(F). They argue that only gas “distribution” lines are allowed, and a distribution line is one that distributes gas to homes in Coos County. The opponents seek to differentiate the proposed Pacific Connector pipeline on the grounds that it does not “distribute” gas to residents or businesses within Coos County, but is instead one that “transmits” gas to foreign locations.10

The hearings officer concludes that the interstate gas pipeline proposed here is a

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

10 The issue had previously been raised in HBCU 10-01. For example, in a letter dated June 8, 2010, one opponent stated the concern as follows:

Because the provision mentions “electrical transmission lines” separately from “distribution lines,” which, by the given list of examples, include more than just electrical lines, it is not clear that non-electrical transmission lines are allowed under the provision. The definitions section of the county code makes no distinction between transmission lines and distribution lines, though it does define utility “service lines” to include “distribution lines” for both electrical and non-electrical utility services. In any event, the applicant has the burden of showing how the proposed natural gas pipeline, which seems to be merely transmitting natural gas through the county (from the proposed LNG import facility to the main north-south interstate pipeline that transmits natural gas though multiple western states between the Canadian and Mexican borders), rather than distributing it to any Coos County users, falls within the defined administrative conditional use.
“distribution line” within the meaning of OAR 660-006-0025(4)(q). In any event, the hearings officer further concludes that even if the application is proposing an interstate gas “transmission” line, and even if CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) could be read to bar such gas transmission lines in a Forest zone, those laws would be preempted by the Natural Gas Act.

Another issue stemming from CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) concerns the fact that the applicant is proposing a temporary construction corridor that exceeds 50 feet. This issue was discussed extensively in the Board of Commissioner’s decision in HBCU 10-01, Final Decision and Order No. 10-08-045PL, Findings at p. 87-91. These findings were upheld by LUBA in Citizens Against LNG v. Coos County, 63 Or LUBA 162 (2011). The findings found on Pages 87-91 of Final Decision and Order No. 10-08-045PL, dated March 13, 2010 are hereby incorporated by reference. See Record at Exh. 8.

2. SECTION 4.8.400.

CCZLDO §4.8.400 is entitled “Review Criteria for Conditional Uses in Section 4.8.300.” It is similar to, and derived from, state law found at ORS 215.296. This statute states:

(1) A use allowed under ORS 215.213 (Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993) (2) or (11) or 215.283 (Uses permitted in exclusive farm use zones in nonmarginal lands counties) (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:

(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

CCZLDO §4.8.400 is worded in a slightly different manner, as follows:

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

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

However, CCZLDO §4.8.400 applies to applications proposed to be sited on forest land, whereas ORS 215.296 applies to farm land. For this reason, LUBA has held that CCZLDO §4.8.400 does not implement ORS 215.296(1). Comden v. Coos County, 56 Or LUBA 214, 221 (2008). Notably, the reference to “on surrounding lands” is absent in CCZLDO §4.8.400. So presumably, CCZLDO §4.8.400 looks out farther than merely “surrounding lands.” Since the County’s approval standard lacks any particular geographic reference, and so long as all properties that are potentially affected by the proposed conditional use are considered, the
The Staff Report for this case states:

**FINDING:** Due to the fact that the farm and forest criteria are similar they are reviewed in one section. This review is only for about 3.7 miles of pipeline of which 1.7 is FMU and 1.2 will be in EFU which is minimal in comparison to the entire project which was found to be meet this criteria in the Board of Commissioners Final Decision and Order No. 10-08-045PL, dated September 8, 2010, as ratified by Final Decision and Order No. 12-03-018PL, dated March 13, 2012.

The applicant must show that the use will not force a significant change in, or significant increase in cost of accepted farming or forest practices on agricultural or forestlands. Accepted forest practices can best be defined as the propagation, management and harvesting of forest products, consistent with the Oregon Forest Practices Act; however, by inclusion of listed uses in LDO there are other uses that can co-exist with these practices such as a gas distribution line.

The prior Board adopted language that would mitigate for a loss of income and the current Board may choose to adopt the same method to mitigate the loss of income from forest practices.

The applicant submitted testimony in the prior review from an expert (see attached pages 97 and 98 of Final Decision of Coos County Board of Commissioners Order No. 10-08-045PL) that stated that incremental increase to cost to timber operator generally amount to a range of 1 to 2 percent and staff finds that analysis applies to this application as well. The applicant will include any loss of forest production as part of the compensation paid to landowners by the pipeline operator; therefore, alleviating any cost of the property owners.

In summary the applicant has shown that there will be no significant increased cost in accepted forest practices.

Accepted farm use can be defined as means of current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry of any combination thereof. “Farm use” includes the preparation and storage of the products raised on such land for
human use and animal use and disposal by marketing or otherwise. However, by inclusion of listed uses in the LDO there are other uses that can co-exist with these practices.

The only impact will be at the time of construction and the property owners will be compensated for that loss. Once the construction is completed the property will be re-vegetated and can be utilized for pasture land. Therefore, there will be no significant impact to accepted farm and forest practices.

The applicant will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel or equipment. The pipeline itself will be located underground and shall be maintained to conform with or exceed US Department of Transportation (DOT) requirements found in Title 49 Code of Federal Regulation (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. In the upland areas, vegetation within the permanent easement will periodically be maintained by mowing, cutting and trimming either by mechanical or hand methods. The permanent easement will be maintained in a condition where trees or shrubs greater than six feet tall will be controlled (cut or trimmed) within 15 feet either side of the centerline (for a total of 30 cleared feet). This will limit the overall fuel load within the corridor while discouraging the growth of “ladder fuels” that otherwise could allow fire to reach the lower limbs of mature trees.

In the prior decision the applicant was required at least six months prior to delivery of any gas to the Jordan Cove Energy Project (LNG) import terminal, to; (1) submit a project-specific Public Safety Response Manual to the County, and (2) in order to comply with federal safety regulations, coordinate with local emergency response groups, meet with local responders, including fire departments, to review plans, and communicate specifics about the pipeline. If requested, Pacific Connector will also participate in an emergency simulation exercises and provide feed-back to the emergency responders.

The Board of Commissioners has already adopted the interpretation that the pipeline (distribution line) does not meet the definition of a structure which is a walled and roofed building including a gas or liquid storage tank that is principally above ground. This is a linear pipe that is completely located underground and the pipe is connected to a structure but cannot itself be defined as a structure. The Board made this interpretation in the Board of Commissioners
Final Decision and Order No. 10-08-045PL, dated September 8, 2010, as ratified by Final Decision and Order No. 12-03-018PL, dated March 13, 2012. § 4.8.600, § 4.8.700, § 4.8.750, § 4.9.600 and §4.9.700 only applies to structures and are not relevant to this review. Therefore, all of the criteria have been satisfied.

In interpreting CCZLDO § 4.8.400 and § 4.9.400, there are a couple of preliminary points that must be addressed. As the hearings officer previously noted, there are several important limitations on the “significant impact” standard. First, it is important to note that this criterion relates to significant impacts on farming and forest practices and significant cost increases. The applicant is not required to demonstrate that there will be no impacts on farming or forest practices, or even that all impacts that may force a change or increase costs have been eliminated through mitigation or conditions of approval. See generally Rural Thurston, Inc. v. Lane County, 55 Or LUBA 382, 390 (2007).

Secondly, LUBA has affirmed the county's determination that CCZLDO 4.8.400 is limited in its scope and only applies to potential impacts on commercial farm and forest practices, as opposed to hobby farms or residential lands. Comden v. Coos County, 56 Or LUBA 214 (2008).

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

The analysis set forth below only applies to the Brundschild alternative route. The Stock Slough alternate alignment segment crosses pasture land and, therefore, will have no impact on forested timber land.

a. The PCGP Alternate Alignment Segments Will Not Force a Significant Change in Accepted Farm and Forest Practices.

Opponents have asserted that the two alternate alignment segments will improperly force a significant change in accepted farm and forest practices and increase the cost of fire suppression for various reasons.

As an example, attorney Sean T. Malone argues that the likelihood of a pipeline rupture / incident must be factored into the “significant effects” analysis. See Letter from Sean T. Malone, dated Sept. 20, 2013, at p. 2-3. To support his argument, Mr. Malone references an “Exhibit A,” which apparently contains a list of 120 pipeline ruptures within the United States over the past three years. Exhibit A was not actually provided in the record. Without the supporting exhibit being present in the record, the hearings officer can give the testimony little, if any, weight. However, the hearing officer is willing to accept, as both a matter of common knowledge and from discussions set forth in the Final Opinion and Order 10-08-045PL, that gas pipelines do
occasionally rupture, and cause death and serious to persons who happen to be in the vicinity at the time of the accident. See Discussion from HBCU 10-01, at p. 43-44.

However, the vast majority of these ruptures occur on older pipelines that were built without the benefit of modern technology. Id. Mr. Malone’s argument is akin to pointing out that many cars from the 1950s are unsafe because they have poorly designed brakes, lack seatbelts and airbags, and tend to explode upon impact. Like modern cars, modern gas pipelines are subject to more exacting safety requirements that will significantly minimize the risk of a fire caused by the pipeline itself. Specifically, modern pipelines and all associated facilities are 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. Given the technology used in modern pipelines, Mr. Malone’s argument about pipeline ruptures tends to support the conclusion that it presents overall sound policy to be replacing older gas pipelines with newer lines. However, it does not necessarily suggest that proposed pipeline projects should be denied due to impacts upon Forest lands.

As another example, attorney Courtney Johnson argues that “the permanent easement across forest lands will force a significant change in accepted forest practices by eliminating the ability to grow trees on that portion of the property.” See Letter from Courtney Johnson, dated Sept. 20, 2013, at p. 2. However, the hearing officer does not believe it makes any sense to apply CCZLDO §4.8.400 to the applicant’s property (as opposed to neighboring property), at least in the manner suggested by Ms. Johnson. The Code has made the “utility” use at issue a “conditional use” in the zone. It would always be the case that the siting of a “utility” on Forest land will preclude the use of that particular land for forest uses. The code should not be interpreted to prohibit through the back door that which is allowed via the front door. If the drafters of the Code (and ultimately, the state legislature) had intended such analysis to prevail, they would have simply denied the ability to site utilities on lands zoned for Forest Uses. Moreover, if the applicant decides it wants to make use of his or her land in that manner, then it is not up to the County to second guess that choice at this juncture. Rather, the purpose of conditional use review is to ensure that the proposed use is compatible with neighboring uses, not to revisit whether it is good policy to allow the proposed use conditionally in the zone. Presumably, the typical impacts that a proposed land use has on the remainder of the applicant’s property is a burden that the applicant voluntarily accepts. For these reasons, CCZLDO §4.8.400 should only apply to impacts on neighboring properties and beyond, but not the property that is subject to the land use application.

In this case, the applicant is not the underlying landowner. Nonetheless, neither the creation of the permanent right-of-way nor the associated work in construction areas will increase the cost of accepted forest practices for the land on which the pipe is located. The applicant testifies as follows:

The cost of clearing the right-of-way and construction areas will be borne solely by Pacific Connector. In other words, the property owner will not pay for tree removal, pipeline construction, or restoration and revegetation activities. Additionally, pursuant to federal law, the underlying landowner will be compensated for both
the permanent and temporary easement rights and the fair market value of the timber removed temporarily (the construction areas and the outer 10 feet on each side of the permanent right-of-way) and permanently (the 30 foot clearing), either through a negotiated agreement with Pacific Connector or through a formal condemnation process if an agreement cannot be reached. Timber cruises would be conducted in accordance with industry standards prior to vegetation clearing in order to determine timber volumes, values, and species composition. All timber cleared would be cut and cleared in accordance with landowner requirements whenever practicable, and merchantable timber would be removed and sold according to landowner stipulations.

See Letter dated Sept. 16, 2013 from Rodney P. Gregory and Bob Peacock, Williams Pipeline Co., at p. 12. The hearings officer finds that this testimony constitutes substantial evidence, and adopts it as findings on this issue.

As discussed in detail in the letter from Bob Peacock and Rodney Gregory at Williams, dated September 16, 2013, the alternate alignment segments will have effects on the timbered areas located in the Forest zone both during and after construction in the form of a 30-foot cleared corridor directly over the pipeline, which is necessary for safety purposes to protect the pipe from potential root damage and allow for ground and aerial surveillance inspections of the pipeline. However, the remaining 20 feet of permanent right-of-way, as well as the temporary constructions areas, will be reforested following construction in areas that were forested prior to construction, in a manner consistent with the ECRP. Once the restoration occurs, the landowner will be able to continue accepted forest practices in those areas.

Additionally, surrounding forestry operators will also be able to cross the right-of-way for the alternate alignments with heavy hauling and logging equipment, provided they coordinate those crossings with the pipeline operator and safety precautions are implemented to protect the integrity of the alternate alignments. For example, it may be necessary to provide additional cover directly over the areas of the alternate alignments to provide equipment crossing areas and logging roads. If a landowner demonstrates a need to cross areas of the alternate alignments in order to conduct forestry operations, Pacific Connector has stated that it “is committed to working with that property owner to develop an alternate alignment crossing plan that allows the access points to be constructed and used in a safe manner.” See Letter dated Sept. 16, 2013 from Rodney P. Gregory and Bob Peacock, Williams Pipeline Co., at p. 13. The property owner will generally be compensated for any additional cost created by compliance with the pipeline crossing plan as it relates to the proposed alternate alignments. While the requirement to coordinate with the pipeline operator may be an inconvenience for some forest operators, it does not constitute a significant change in forestry operations, because the operator will be able to continue to cross the pipeline area in order to access or haul timber. Additionally, timber operators generally develop and carefully consider future harvesting and access plans. The need to consult with the pipeline operator if those plans include future crossings of the pipeline right-of-way is not a significant imposition or significant change in normal planning activities. The coordination requirement will also not significantly increase the cost of conducting forestry operations, as the operator will be compensated for any increase in cost created by the presence of the pipeline or any of the proposed alternate alignments.
For the reasons set forth above, the alternate alignments will not cause a significant change in accepted farming or forest practices, nor will they cause a significant increase in the cost of farm or forest practices on either surrounding farm or forestlands, or on farming or forest practices within the permanent right-of-way itself.

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

The opponents assert that approval of the pipeline will increase both the risk or fire and the cost of suppressing forest fires. The County previously found that the installation of the pipeline would not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel. See Final Decision and Order No. 10-08-045PL (HBCU 10-01), at page 104-8, which is incorporated herein by reference.

In HBCU 10-01, the hearings officer agreed with the applicant that the risk of a fire caused by pipeline rupture is remote, but also noted that the if such a fire did occur, that there is a high likelihood that such a fire would be severe problem for local volunteer firefighters. In HBCU 10-01, the applicant submitted a “Reliability and Safety Report dated March 2010 that detailed how the applicant would coordinate and, if requested, train local fire departments on issues related to emergency response to pipeline mishaps. An update to that report, dated June 2013, is provided at Record Exhibit 9 (See report labeled “Exhibit H,” attached to letter from Rodney Gregory and Bob Peacock dated Sept. 18, 2013). The applicant provided a sample of A Public Safety Response Manual that will be distributed to first responders. See Id. at “Exhibit I.”

In this case, the most pointed testimony was provided by Mr. Jan Vankort, who is a director at the Green Acres Fire Department. Mr. Vankort’s written testimony appears to be written on his own behalf, and not on behalf of the Green Acres Fire Department. At the hearing, Mr. Vankort stated that he was not testifying on behalf of the Green Acres Fire District.

Mr. Vankort complained that “the local volunteer Fire Departments have not had proper notification of hearings, so no Fire Chiefs have been present at these hearings to make their opinions on these matters heard.” Mr. Vankort lists the following fire districts as being affected by the proposal: Millington, Green Acres, Sumner, and Fairview. The hearings officer understands from the record that Sumner and Fairview Fire Districts were provided notice of this application. Going strictly by the code, the other mentioned fire departments are not entitled to formal notice of this conditional use permit, because they are not located within the geographic area for which notice is required.

Mr. Vankort also testifies that the volunteer fire departments are “woefully understaffed and incapable of fighting any kind of large gas fire.” See email dated Sept. 20, 2013 from Jan Vankort to Jody McCaffree, at p.1. He further argues that there are numerous reasons why firefighting would be made more difficult:

• High cost of fire trucks,
• No equipment to fight a gas fire,
• Lack of adequate rural roads,
- Unstable land,
- Presence of open coal seams,
- Low areas are too soft and high ground too rugged,

Although the hearings officer believes that Mr. Vankort raised some legitimate concerns, the hearings officer also did not find Mr. Vankort to be a particularly credible witness for four reasons. First, very little of Mr. Vankort’s testimony was related to the two alternative segments being proposed in this application. His testimony was more broadly focused on Coos County in general, which lessens the strength and value of the testimony to this particular case. As an example, Mr. Vankort mentions the presence of coal seams, but makes no effort to explain where these seams are located or why coal seams exacerbate fire suppression efforts for this particular segment of the pipeline route.

Second, some of the Vankort testimony seems overblown and exaggerated. If the hearings officer is to believe all aspects of Mr. Vankort’s testimony, then it would appear that Coos County would be utterly ill-prepared for any kind of forest fire. Given that there already exists a 12-inch natural gas pipeline running through Coos County, it stands to reason that efforts have already been made (or should have been made) to prepare for emergencies related to that pipeline. Furthermore, whatever can be said about the likelihood of a pipeline failure causing a forest fire, it seems obvious that there is a much greater risk of fire caused by lightning strikes, ATVs, logging operations, or camp fires, among other common causes of forest fires. Many of the factors that Mr. Vankort cites (i.e. rugged mountainous terrain and soft lowland terrain) would be a factor when fighting any sort of rural forest fire, regardless of the cause. If anything, the pipeline will increase access to these remote areas, and will create a natural fire break.

Third, Mr. Vankort further lowers his credibility when he makes flip statements such as stating that ‘the 3 waitresses added at the Mill and the 20 hookers in town are the only we know will profit.” See email dated Sept 20, 2013 from Jan Vankort to Jody McCaffree, at p.1. Record Exhibit 19. Add to that the fact that his testimony ventured into a myriad of issues unrelated to fire-suppression indicates that his strong personal opinion on the topic of LNG clouds his professional judgment on issues of fire suppression. Mr. Vankort’s testimony would have been much more credible if he had simply stuck to the fire suppression issues and left all the hyperbole and extraneous comments at home. As it is, his testimony seems to fall more in line with highly partisan layperson testimony as opposed to professional expert testimony.

Finally, the hearings officer questions why Mr. Vankort is the only fire-fighting professional to express concerns over these issues. Putting aside any potential defects in the notice, the hearings officer finds it difficult to believe that the local fire chiefs have generally been unaware of the LNG pipeline issues in Coos County. If it is indeed the case that the current fire chiefs are so unaware of current events in the community, then perhaps some new fire chiefs are needed. It seems much more likely that the lack of participation by nearby fire chiefs indicates either a lack of concern or perhaps even support for the project. For all of these reasons, the hearings officer assigns little weight to the Vankort testimony.

Attorney Courtney Johnson, arguing on behalf of Oregon Shores and other parties, notes that the difficult terrain and geologic hazards will create an “increased risk of fire.” See Letter from Courtney Johnson, dated Sept. 20, 2013, at p. 2. It is not clear to the hearing officer how “difficult terrain” and “geologic hazards” increases the likelihood that a gas pipeline will cause a
forest fire. Reading between the lines, the hearings officer assumes that Ms. Johnson is really arguing that difficult, mountainous terrain can impede efforts to extinguish a fire caused by a pipeline, should one occur. Stated another way, the argument appears to be that a fire occurring in difficult, mountainous terrain will likely result in a larger area being burned due to the fact that it is more difficult to extinguish.

Ms. Johnson cites anecdotal evidence of fires caused by pipeline ruptures in other areas. These anecdotal examples are of little assistance from an analytical standpoint, because Ms. Johnson does not describe the circumstances under which these fires took place. Forest fires are caused by a number of reasons, ranging from lightning strikes, camp fires, ATV exhaust sparks, logging operations, and other causes. Utsey v. Coos County, 38 Or LUBA 516, 535 (2000), rev dismissed 176 Or App 524, 32 Pd 933 (2001), rev dismissed 335 Or 217 (2003) (atv’s). There is no information in the record which indicates that fires caused by pipeline ruptures are a statistically significant problem, or that a fire can reasonably be expected to occur over the life of the pipeline. The hearings officer cannot simply assume that a land use which is not intended to cause a fire will in fact increase fire suppression costs.

In the event a forest fire does occur in the vicinity of the completed pipeline, the presence of the pipeline will not increase the fire hazard, and the fire will not cause the pipe to explode. As explained in Section 1.1 of the applicant’s Reliability and Safety Report, fires on the ground surface are not a direct threat to underground natural gas pipelines because of the insulating effects of soil cover over the pipeline. See Exhibit 8 (Containing an exhibit attached to the letter from Bob Peacock and Rodney Gregory, dated Sept. 16, 2013. The Safety Report cites a study conducted in North Carolina that measured both surface and subsurface temperatures during a prescribed burn. Fire temperatures on the surface approached 1,500 degrees Fahrenheit, while soil temperature at a depth of approximately 2.5 inches was recorded at 113 degrees Fahrenheit during the burn. The Safety Report acknowledges that specific fuel, climate, geographic, and geological conditions at the study area likely differ from those surrounding the PCGP area. Despite those expected differences, the study illustrates the order of magnitude a potential fire may have on subsurface temperatures. The PCGP will have a minimum of 3 feet of cover within forested areas. Therefore, any risks associated with fires on the surface above the pipeline are eliminated by the depth to the subsurface pipeline.

In addition, Pacific Connector has developed a plan for treatment and disposal of forest slash in coordination with the BLM and USFS fuel load specifications. See letter from Rodney Gregory at Williams, dated October 21, 2013. Exhibit 26. As explained in ECRP Section 3.3.2 regarding treatment of forest slash, and ECRP Section 10.2 regarding fuel loading specifications and disposal of slash, these fuel loading specifications are developed specifically for the PCGP project based on the amount of woody material expected to be encountered during construction. According to the Forest Service, dead and downed woody material greater than 16 inches in diameter does not contribute to fire hazard and will be maintained on site. Slash may also be chipped and scattered across the right-of-way provided that the average depth of wood chips covering the area does not exceed one inch following application. This chip depth will be sufficient to stabilize the soil surface from erosion, while allowing grass seed to germinate and seedlings to develop, and is not expected to significantly increase fuel hazards so long as the maximum tonnage for fuel loading does not exceed 12 tons per acre. The Forest Service has also noted that wood chips can be the most effective means to protect soils from surface and fluvial erosional processes. During right-of-way clean-up and reclamation, slash materials will be spread

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across the right-of-way at a rate that does not exceed these fuel load specifications. The fuel loading standards will also apply to slash materials that may be generated during periodic right-of-way maintenance activities that will likely occur about every five years along the pipeline.

In her letter dated October 14, 2013, at p. 4, Ms. McCaffree argues that the addition of slash from pipeline easement maintenance activities will increase the fire hazard. Although she attempts to refute the expert testimony submitted by the applicant on the issue of slash disposal, the hearings officer rejects these arguments. Maintenance of both electrical transmission wire easements and gas pipeline easements are routine in Oregon. The applicant submitted a discussion of how slash would be addressed in its Erosion Control and Revegetation Plan. Exhibit 8. There is no reason to think that the applicant is not capable of adequately managing this slash so as to not create fire hazards.

One opponent argues that “the applicant has not demonstrated how it would be able to identify a gas leak or puncture in the pipeline if it is not evident on the surface.” See Letter from Sean T. Malone, dated Sept 20. 2013, at p. 2-3. This testimony assumes, as a premise, that a pipeline leak could exhibit no visible or audible clues or otherwise not reveal itself for some indefinite period of time. The hearings officer questions the validity of the premise, as it is not supported by any evidence in the record. Small leaks would obviously generate sound and/or scarring on the surface, and larger leaks would cause a noticeable loss of pressure. See Reliability and Safety Report, at p. 8. It seems highly unlikely that a significant leak could occur without creating some indication at the ground surface of its presence. The hearings officer rejects any suggestion to the contrary as being unsupported by the record.

With regard to the 1.2 miles of EFU-zoned land, the alternate alignment segments will have short-term impacts on farming practices within the temporary construction areas and permanent right-of-way during construction activities. However, traditional farming activities may continue both within the temporary construction areas and across the permanent right-of-way. In agricultural areas, the pipeline will be installed so that there will be at least five feet of soil cover over the pipeline. This will ensure that heavy farming equipment can cross the pipeline area and tilling can occur within the pipeline easement without impacting the structural integrity of the pipeline. More importantly, for purposes of considering the effects on "surrounding farmlands," the PCGP alternate alignments will have no long term impacts on farming activities on lands surrounding the permanent right-of-way and temporary construction areas following alternate alignment construction, and will have limited impacts during construction activities. Traditional farming activities and farm uses, including crop lands and grazing pastures, may continue in areas surrounding the construction areas both during and following construction.

Additionally, each landowner impacted by the alternate alignment segments will be compensated for any temporary and permanent impacts associated with the alternate alignments. Any landowner requirements will be added as stipulations in the landowner agreements, and Pacific Connector will employ land agents during construction of the alternate alignments to ensure the stipulations are implemented. In addition to landowner compensation, a variety of measures will be implemented to ensure that construction activities associated with the alternate alignments will not impact the ability of landowners to continue normal farming operations following construction. Specific steps will be taken to eliminate or mitigate agricultural impacts.
First, topsoil segregation will be performed over the trench line in croplands, hayfields, and pastures. Pacific Connector will stockpile soil from the trench pile separately from all subsoil and will replace the two horizons in the proper order during backfilling and final grading. The purpose of the topsoil segregation is to prevent the potential loss of soil fertility or the incorporation of excess rock into the topsoil. Pacific Connector will also remove any excess rock from the top 12 inches of the soil to the extent practicable in croplands, hayfields, and pastures. In cases where additional topsoil must be imported into agricultural areas, an independent environmental investigator will ensure that the imported topsoil is free of noxious weeds or other deleterious materials, such as rock.

Second, steps will be taken to avoid soil compaction during and after construction activities. Pacific Connector will test for soil compaction in agricultural areas. If deemed appropriate, corrective measures will be employed (including deep scarification or ripping to an average depth of 18 inches where feasible) using appropriate earthworking equipment. In addition to ensuring that long-term impacts to soil productivity do not occur, the corrective measures will also minimize or eliminate the potential for increases in surface water runoff, soil erosion, and sediment delivery. In areas where appropriate, scarifying the subsoil will also promote water infiltration and improve soil aeration and root penetration.

Third, steps will be taken by Pacific Connector to control noxious weeds and soil pests in areas within and adjacent to the right-of-way for the alternate alignments, including agricultural lands. As noted, Pacific Connector consulted with the Oregon Department of Agriculture, as well as BLM and the Forest Service, for recommendations to prevent the introduction, establishment, or spread of weeds, soil pests, and forest pathogens. As recommended, Pacific Connector has conducted initial reconnaissance weed surveys and those surveys will be mapped once complete. Pacific Connector will also conduct pretreatment, primarily through mechanical operations, by mowing to the ground level. Other mechanical methods include disking, ripping, or chopping. Hand pulling methods may also be utilized in appropriate areas. Infested areas will be cleared in a manner to minimize transport of weed seed, roots, and rhizomes or other vegetative material and soil from the site down the construction right-of-way. While Pacific Connector will not engage in widespread herbicide applicable along the route of the alternate alignments, spot treatments with appropriate herbicides may be conducted where required, depending upon the specific weed and site-specific conditions using integrated weed management principals. In most cases, if an herbicide is used for control, it would be used in combination with other weed control methods. Spot herbicide treatment would only be applied with permission from the landowner or the land managing agency on public lands, and permits for use of herbicides would be obtained prior to any application on federal lands. Any herbicide treatment would be conducted by a licensed applicator using herbicides labeled for the targeted species.

Final grading and permanent erosion control measures of upland areas, including agricultural areas, will be completed within 20 days after the trench is backfilled, weather and soil conditions permitting. During cleanup and initial reclamation, Pacific Connector will complete permanent repairs of any fences, gates, drainage ditches, or other structures removed or damaged during construction. All drain tiles crossed by the pipeline will be inspected by a qualified specialist to check for damage. Any damaged drain tiles will be repaired to their original condition or better before backfilling. Pacific Connector will work with individual landowners to address specific restoration of active agricultural areas. The specific reclamation procedures will
be determined during those discussions with individual landowners to ensure that the reclamation actions are appropriate for each specific crop type or land use.

Pacific Connector will take appropriate measures to make certain that agricultural land is returned as closely as possible to its pre-construction condition. All graded areas associated with the construction of the alternate alignments will be re-graded and recontoured as feasible to blend into the surrounding landscape and to reestablish natural drainage patterns. The emphasis during recontouring will be to return the entire right-of-way, as well as any temporary construction areas, to their approximate original contours, to stabilize slopes, control surface drainage, and to aesthetically blend into surrounding contours. Ruts and other scars will be graded and all drainage ditches will be returned to their preconstruction condition.

For the reasons set forth above, the proposed alternate alignments in Forest-zoned lands will not significantly increase fire hazards or increase costs associated with farm or forestry operations.

3. Section 4.8.600, Section 4.8.700 and Section 4.8.750

   a. CCZLDO §4.8.600 (Siting Standards Required for Structures).

   Mandatory Siting Standards

   The following siting criteria shall apply to all dwellings, including replacement dwellings, and structures in the Forest and Mixed Use zones. ** ** **.

   The previous application narrative dated April 14, 2010 explains how the proposed pipeline will meet the siting standards at CCZLDO §4.8.600, .700, and .750. The Board adopted that portion of the April 14, 2010 application as findings as if fully set forth in its final Opinion and Order. That same discussion is herein incorporated herein by reference. The hearings officer also incorporates by reference the discussion contained in Final Decision and Order No. 10-08-045PL (HBCU 10-01), at p. 114-5.

   b. CCZLDO Section 4.8.700 (Fire Siting Safety Standards).

   The hearings officer incorporates by reference the discussion contained in Final Decision and Order No. 10-08-045PL (HBCU 10-01), at p. 114.

   c. CCZLDO Section 4.8.750 (Development Standards).

   The hearings officer incorporates by reference the discussion contained in Final Decision and Order No. 10-08-045PL (HBCU 10-01), at p. 114-5.

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

   The applicant notes that the two (2) proposed alternative pipeline segments will cross approximately 1.2 miles of property in Coos County which are zoned Exclusive Farm Use (EFU). All of this property is privately owned. The hearings officer concludes that the pipeline is
consistent with the requirements of ORS Chapter 215, OAR 660, Division 33, and the applicable approval criteria of the CCZLDO.

1. **CCZLDO Section 4.9.300**

CCZLDO §4.9.300 provides as follows:

*Administrative Conditional Uses.* The following uses and their accessory uses may be allowed as administrative conditional uses in the “Forest” zone subject to applicable requirements in Section 4.8.400 and applicable siting criteria set forth in this Article and elsewhere in this Ordinance. § 4.9.300(F) New electrical transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal) with rights-of-way 50 feet or less in width.

As staff notes in its Staff Report dated Sept 13, 2013, this application proposes a “distribution line” as defined in OAR 660-006-0025(4)(q) for the purpose of transporting natural gas. See discussion at II A (2), supra. The CCZLDO lists this use as an administrative conditional use. However, because the pipeline crosses both balance of County zoning districts and CBEMP districts which require a different review process, the application shall be reviewed under the more intensive review procedure.

2. **CCZLDO Section 4.9.450 Additional Hearings Body Conditional Uses and Review Criteria.**

CCZLDO §4.9.450 is more or less a direct codification of ORS 215.283(1)(c). CCZLDO §4.9.450 provides:

The following uses and their accessory uses may be allowed as hearings body conditional uses in the “Exclusive Farm Use” zone and “Mixed Use” overlay subject to the corresponding review standard and development requirements in Sections 4.9.600 and 4.9.700.13

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11 ORS 215.283(1) provides, in relevant part:

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

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

12 CCZLDO 4.9.600 Siting Standards for Dwellings and Structures in the EFU Zone.

13 CCZLDO 4.9.700 Development Standards for dwellings and structures (CCZLDO 2.1.200 defines “Structure: Walled and roofed building includes a gas or liquid storage tank that is principally above ground.” The proposed pipeline is not a "structure" under this definition and therefore the siting standards do not apply.
C. Utility facilities necessary for public service…. A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided.

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

Under state law, utility facilities sited on EFU lands are subject to ORS 197.275, as well as the administrative rules adopted by LCDC.\(^{14}\) ORS 215.275 provides:

\(^{14}\) OAR 660-033-0130(16) provides as follows:

(16)(a) A utility facility is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service. To demonstrate that a utility facility is necessary, an applicant must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
(A) Technical and engineering feasibility;
(B) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
(C) Lack of available urban and nonresource lands;
(D) Availability of existing rights of way;
(E) Public health and safety; and
(F) Other requirements of state and federal agencies.
(b) Costs associated with any of the factors listed in subsection (16)(a) of this rule may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities and the siting of utility facilities that are not substantially similar.
(c) The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.
(d) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on surrounding farmlands.
(e) In addition to the provisions of subsections 16(a) to (d) of this rule, the establishment or extension of a sewer system as defined by OAR 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of OAR 660-011-0060.
(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.

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

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

(a) Technical and engineering feasibility;
(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
(c) Lack of available urban and nonresource lands;
(d) Availability of existing rights of way;
(e) Public health and safety; and
(f) Other requirements of state or federal agencies.

(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.

(4) The owner of a utility facility approved under ORS 215.213 (1)(c) or 215.283 (1)(c) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c) or 215.283 (1)(c) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.
(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

As previously discussed in Section II A (2), supra, the exception in Subsection 6 states that subsections 2-5 do not apply to “interstate natural gas pipelines.” This appears to be a legislative recognition of federal preemption on the issue of route selection for interstate gas pipelines.

The negative inference created by the stated exceptions to subsections 2 through 5 is that an applicant for an interstate natural gas pipeline is, technically speaking, supposed to be subject to ORS 215.275(1). This subsection contains the requirement that the applicant show that the proposed facility “is necessary for public service.” According to subsection 2, the “necessary for public service” requirement is met if the applicant demonstrates that “the facility must be sited in an exclusive farm use zone in order to provide the service.” Of course, given that the determination of whether something is “necessary” is dependent on analysis which is set forth in subsections 2 through 5, it remains unclear exactly what an applicant proposing a natural gas pipeline is required to do to demonstrate that its facility is “necessary.” LCDC seems have recognized this in their administrative rule implementing ORS 215.275, as they exempt FERC-regulated pipelines from the “necessary for public service” test. See OAR 660-03300139(16).15

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

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

(A) Technical and engineering feasibility;

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

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

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

(c) The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.
Given the nature of ORS 215.275(2)-(5), the hearings officer concludes that ORS 215.275(1) contains no substantive standards applicable to interstate natural gas pipelines, but even if it did, those requirements would be preempted by federal law.

As the County pointed out in HBCU 10-01, 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 CCZLOD §4.9.450. Sprint PCS v. Washington County, 186 Or.App. 470, 63 P.3d 1261 (2003); Dayton Prairie Water Ass’n v. Yamhill County, 170 Or.App. 6, 11 P.3d 671 (2000).

F. CBEMP Policies – Appendix 3 Volume II

1. Plan Policy #5

#5 Estuarine Fill and Removal

I. Local government shall support dredge and/or fill only if such activities are allowed in the respective management unit, and:

a. The activity is required for navigation or other water-dependent use that require an estuarine location or in the case of fills for non-water-dependent uses, is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing and recreation, as per ORS 541.625(4) and an exception has been taken in this Plan to allow such fill;

b. A need (ie., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights;

c. No feasible alternative upland locations exist; and

d. Adverse impacts are minimized.

e. Effects may be mitigated by creation, restoration or enhancement of another area to ensure that the integrity of the estuarine ecosystem is maintained;

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

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

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).
f. The activity is consistent with the objectives of the Estuarine Resources Goal and with other requirements of state and federal law, specifically the conditions in ORS 541.615 and Section 404 of the Federal Water Pollution Control Act (P.L.92-500). (Emphasis added).

Several opponents to the project raised the issue of compliance with CBEMP Plan Policy 5 and the “Public Trust Doctrine.” Jody McCaffree’s two letters dated Sept. 27, 2013 and Oct. 7, 2013, at p. 7 best articulate the argument.

In her letter dated Sept. 27, 2013, Jody 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.” Ms. McCaffree does not explain why a policy involving dredging and/or removal or filling applies to this particular project, and it is not apparent to the hearings officer why it would apply to this case.

CBEMP Plan Policies are made applicable to a project by cross reference to the zoning standards applicable to the zone. In this case, only the 20-RS and 20-CA zones are applicable, and neither demand compliance with Policy No. 5.

Although Ms. McCaffree does not cite to it, the code language 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 Code 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.

In this case, the applicant is neither proposing “dredging” or “filling” as those terms are used in the Zoning Code. Instead, the applicant has chosen to avoid dredging or filling operations over the Coos River by the use of more expensive and time consuming HDD technique. By drilling 40+ feet under the river, a successful HDD bore will avoid any impacts to the river itself.

Even if Ms. McCaffree’s argument were to survive that hurdle, it is not clear that her argument could survive further legal scrutiny in any event. She argues that there is no public benefit in the pipeline because the export of natural gas will increase domestic natural gas prices by reducing the supply, which, she alleges will have broad impacts on the citizens in Oregon and the United States, including loss of jobs, etc. She argues that PCGP has “failed to make a finding that the public need for their proposed project ‘outweighs’ the detriment their project would cause to the use and impacts of multiple waterbodies and conservation aquatic zoning districts in Coos County.” In this regard, Ms. McCaffree seems to view the Public Trust Doctrine as providing local government decision-makers some sort of trump card to deny any land use that the Board views to not be in the public interest based on a simple balancing test between public need and damage to resources. Compare Morse v. Division of State Lands, 285 Or. 197, 590 P2d 709, 713-14 (1978). The hearings officer believes that these sorts of broad policy concerns go well beyond the county’s regulatory authority, and extend far within the realm of FERC’s authority. See Hearing Officer’s Recommendation on HBCU 13-02, which is incorporated herein by reference.


Under English common law, title to lands underlying tidal waters was held by the king as an element of sovereignty. After the American Revolution, each of the original colonies became
states and assumed their own sovereign powers. One aspect of such sovereignty was ownership of all submerged and submersible lands underlying navigable waters.\textsuperscript{16} Title to such land was not surrendered to the federal government upon adoption of the U.S. Constitution. Rather, by virtue of the Tenth Amendment, it was reserved to the states, subject only to limitations imposed by expressly conferred federal powers, such as the regulation of interstate commerce.\textsuperscript{17} By the terms of the Oregon Admission Act, Oregon entered the union "on an equal footing with the other states **" Thus, upon its admission in 1859, title to submerged and submersible lands underlying navigable waters devolved upon the state as sovereign. As a result, the state of Oregon owns all navigable waters within the state as well as the land underneath such waters.

There are two elements to the state’s interest, known by the Latin terms \textit{jus privatum} and \textit{jus publicum}. See \textit{Shively v. Bowlby}, 152 U.S. 1, 11, 14 S Ct 548, 38 L Ed 331 (1894). The \textit{jus publicum} aspect of the state's ownership is rooted in a philosophical conception of natural law. The principle that the public has an overriding interest in navigable waterways and lands underlying them is traceable at least to the Code of Justinian in the Fifth Century A.D. \textit{Brusco Towboat}, 30 Or App at 517. The right of the public to use the waterways for these purposes has always been recognized at common law. Navigable waterways are a valuable and essential natural resource and, as such, all people have an interest in maintaining them for commerce, fishing and recreation.

Unlike the state's \textit{jus privatum} interest, the \textit{jus publicum} cannot be completely alienated by the trustee (i.e. the state government). That hasn’t stopped various states from trying, however, and lawsuits have sometimes arisen over a state’s attempt to give away or sell the \textit{jus publicum} interest in its waterways. The landmark case of \textit{Illinois Central, supra}, involved an attempt by a local government to alienate the \textit{jus publicum} by giving exclusive usage rights of a portion of Lake Michigan to a private corporation. The City of Chicago and the State of Illinois had granted the right to a railroad to the bed of Lake Michigan for an area a mile in length along the shore and a mile out into the lake, which encompassed substantially the entire lake bed available for the harbor of the City of Chicago. Because of the public interest, the \textit{jus publicum}, in the use of the waters, the court held that the governmental authorities had exceeded their power in granting the use of the bed of the lake to the railroad which could, for all practical purposes, impede navigation except as desired or permitted by the railroad. At the same time, it confirmed the right of the railroad to fill and destroy the shallow part of the harbor, which was not fit for practical navigation, and even went so far as to send the case back to the lower court for a determination whether certain areas had sufficient depth to be navigable.

Professor Joseph Sax discussed \textit{Illinois Central} in his seminal law review article on the Public Trust Doctrine. He noted:


\textsuperscript{17} \textit{United States v. Holt Bank}, 270 U.S. 49, 46 S Ct 197, 70 L Ed 465 (1926); \textit{Scott v. Lattig}, 227 U.S. 229, 33 S Ct 242, 57 L Ed 490, 44 LRA (ns) 107 (1913); \textit{Shively v. Bowlby}, 152 U.S. 1, 14 S Ct 548, 38 L Ed 331 (1894).
"The Supreme Court upheld the state's claim and wrote one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of a state legislature. It is that result which has made the decision such a favorite of litigants. But the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited. What a state may not do, the Court said, is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power; to grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation."

The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH L REV 473, 489 (1970). The article states, after a review of the cases, that:

"* * * what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use. * * *,

"* * *.

"These traditional cases suggest the extremes of the legal constraints upon the states; no grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses." (Emphasis added.)

Traditionally, the Public Trust Doctrine was used to protect navigation, fishing, and commerce. Beginning in the 1970s, environmentalists began to view the Public Trust Doctrine more broadly as a duty upon the state to protect ecological values associated with a water resource. They began to argue that the states, as trustees for the people, must exercise active vigilance to prevent decay or “waste,” (i.e. permanent damage to the asset). They argue that if the asset is wasted in the interest of one generation of beneficiaries over future generations, it is in effect an act of generational theft.

Entire books as well as a plethora of law review articles have been written on the subject, but to date acceptance by courts of this ecological component of the Public Trust Doctrine has been somewhat limited. As noted in the law review article cited by Ms. McCaffree, “there is little modern case law on the Oregon PTD, giving rise to substantial questions about the extent of the doctrine and its effects on public and private rights in Oregon’s natural resources.” See Michael C. Blumm and Erica Doot, Oregon’s Public Trust Doctrine, Public Rights in Water, Wildlife, and Beaches, 42 ENVIRONMENTAL LAW 375, 377-8 (2012). Examples of cases where courts found the PTD to be applicable include Just v. Marinette County, 201 N.W.2d 761, 768 (1972) (duy to clean up and prevent pollution); National Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 721 (1983) (duty to prevent over-appropriation of water from rivers).
This discussion brings us back to the point asserted by Ms. McCaffree. In her letter dated October 7, 2013, she quotes a sentence out of Professor Michael Blumm’s 2012 law review article, cited above, as follows:

The state has a duty under the PTD to protect public water resources for public uses consistent with “no-diminishment” trust principles, and statutes may help define when the state has failed to meet its duty and owes compensation to the trust.

In this section of his law review article, Professor Blumm discusses the case of Morse v. Division of State Lands, 285 Or. 197, 590 P2d 709, 713-14 (1978), which involved the City of North Bend’s efforts to obtain from the Division of State Lands a permit to fill 32 acres of Coos Bay for the purpose of extending a runway at its municipal airport. Professor Blumm cites Morse as authority supporting the conclusion that the PTD applies to limit the type of fill activities that can occur on state-owned lands under “no diminishment” principles.

However, Professor Blumm appears to read too much into the Morse case. It is true that the Oregon Court of Appeals in Morse held that “the permit was beyond the authority of the Director because the public trust doctrine was intended to be incorporated into the statute and that the doctrine prohibited fills for non-water-related uses.” Id. at 200. However, the Oregon Supreme Court reversed the Court of Appeals on this point, holding that the common law Public Trust Doctrine had no application under the facts of the case. The Supreme Court held that the Public Trust Doctrine did not limit “fills” of the kind here present “to those for water-related uses.” Id. at 203.

Rather than frame the key issue as being defined by the “Public Trust Doctrine,” the Supreme Court framed the key issue as relating to the “extent of the [statutory] authority granted to the Director to approve permits for fills” under the Fill and Removal law. Id. at 203. The Court determined that the purpose statement of Oregon’s Fill and Removal law was as follows:

The legislature expressed its policy in ORS 541.610 [now ORS 196.810], as follows:
“(1) The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for game and food fish, avenues for transportation and sites for public recreation, are vital to the economy and well-being of this state and its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. Unregulated filling in the waters of this state may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Division of State Lands, and implement control of the removal of material from the beds and banks or filling of the waters of this state.”
Id. at 203-4. The Supreme Court went on to read ORS 541.610 in conjunction with ORS 541.625(2) [now ORS 196.825(3)] and concluded:

[The language in ORS 541.625(2)] demonstrates that the legislature intended to allow some interference with the preservation of navigation, fishing and public recreation. It suggests it was not intended to limit permits to water-related uses because it allows interference with such uses as long as the interference is not unreasonable. Whether or not the interference with water-related uses is unreasonable necessarily depends upon the extent of public need for the use which so interferes. The only way this can be determined is by weighing the extent of the public need for the fill against the interference with the named water-related uses. This, we believe, is how the statute was intended to be read.

Id. at 205. However, the Supreme Court ended up finding that the Fill and Removal statute imposed a duty upon the state to adopt findings balancing the public need against “the detriment to the use of the waters in question for navigation, fishing, and recreational purposes.” Id. at 207. The Supreme Court found that the Director did not adopt such findings, and instructed that the case be remanded to accomplish the necessary fact finding:

The extent of the need must be evaluated by the Director before he can balance it against the detriment to navigation, fishing and recreational uses of the water in question. This he failed to do. He also failed to make any ultimate finding of fact that the public need for the airport extension outweighed the detriment to such water-related uses.

Id. at 209. So Morse is really a fairly run-of-the-mill case pertaining to the statutory requirements of Oregon’s Fill and Removal Fill statute, as opposed to being a lofty expansion of the common law Public Trust Doctrine.

In this case, the Fill and Removal law is not an approval standard for this land use case, so the standards set forth in ORS 196.825 and the Morse case do not apply. Although the hearings officer has not researched the issue, it may be the case that the applicant will be required to obtain Removal/Fill permits from the Division of State Lands before commencing HDD operations under the Coos River. If that is the case, those standards will presumably apply at that time.

Furthermore, the discussion of the Fill and Removal law brings up a final point related to the Public Trust Doctrine. It is the State of Oregon, not Coos County, that owns the jus publicum in the navigable waters. See ORS 196.825(1) & (2). Since the county does not own the lands subject to the Public Trust Doctrine, it is unclear why the county would seek to independently enforce the doctrine on a landowner. It is true that the county, in an effort to comply with Goal 16, added an approval standard for Fill and Removal in an estuary which requires that the use or alteration does not unreasonably interfere with public trust rights. That requirement is not an absolute prohibition on interference with public trust rights, but does seem to establish some
limits based on the reasonableness of such interference. Nonetheless, it is ultimately a question for DSL (i.e. the state agency tasked with implementing the Fill and Removal law) to resolve. Statewide Planning Goal 16 Implementation Requirement 3 states:

3. State and federal agencies shall review, revise, and implement their plans, actions, and management authorities to maintain water quality and minimize man-induced sedimentation in estuaries. Local government shall recognize these authorities in managing lands rather than developing new or duplicatory management techniques or controls. Existing programs which shall be utilized include:

* * * * *

d. The Fill and Removal Permit Program administered by the Division of State Lands under ORS 541.605 - 541.665. (Emphasis Added).

In light of the fact that DSL enforces the Fill and Removal, it seems that Coos County enforcement of this CBEMP provision is satisfied by a condition of approval which makes County approval contingent on DSL approval of Fill and Removal permits, to the extent they are needed.

Finally, nothing about the conditional use permit at issue authorizes the exclusive use of trust lands in the way prohibited by the public trust doctrine. Certainly, there is nothing in the public trust doctrine as espoused by Illinois Central, Shively or Morse which limits the ability of a local government to grant zoning authorization for an interstate gas pipeline project. Since there is no grant here to a private party which results in such substantial impairment of the public’s interest as would be beyond the power of the legislature to authorize, the hearings officer does not believe that there is a violation of the Public Trust Doctrine.

Plan Policy 5 does not apply.

#5a Temporary Alterations

I. Local governments shall support as consistent with the Plan: (a) temporary alterations to the estuary, in Natural and Conservation Management Units provided it is consistent with the resource capabilities of the management units. Management unit in Development Management Units temporary alterations which are defined in the definition section of the plan are allowed provided they are consistent with purpose of the Development Management Unit. b) alterations necessary for federally authorized Corps of Engineers projects, such as access to dredge material disposal sites by barge or pipeline or staging areas, or dredging for jetty maintenance.

II. Further, the actions specified above shall only be allowed provided that:

a. The temporary alteration is consistent with the resource capabilities of the area...
(see Policy #4);

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

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

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

Mitigation shall not be required by this Plan for such temporary alterations.

This Policy shall be implemented through the administrative conditional use process and through local review and comment on state and federal permit applications.

This Policy is based on the recognition that temporary estuarine fill and habitat alterations are frequently legitimate actions when in conjunction with jetty repair and other important economic activities. It is not uncommon for projects to need staging areas and access that require temporary alteration to habitat that is otherwise protected by this Plan.

In her letter dated October 7, 2013, at p. 4, Ms. Jody McCaffree argues that Plan Policy No. 5a (Temporary alterations) applies to this case. Plan Policy 5a applies to bridge crossings located in the 20-CA zone, but it is not apparent to the hearings officer how or if it applies in the 20-RS zone. In any event, Policy #5a is an attempt to recognize that some temporary alterations of riparian habitat may be necessary to install pipelines or other uses allowed in the Natural Management Units and Conservation Management Units, and so to the extent it applies, it hurts, rather than assists, Ms. McCaffree’s position.

Plan Policy No. 5a is either met or does not apply.

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

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

e. Water-dependent commercial and industrial uses, water-related uses, and other uses only upon a finding by the Board of Commissioners or its designee that such uses satisfy a need which cannot be accommodated on uplands or shorelands

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in urban and urbanizable areas built upon or irrevocably committed to nonresource use.

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

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

Staff notes that this plan policy applies to the 20-RS CBEMP zoning district. The pipeline is a permitted use in this district. Staff states as follows:

The Board of Commissioners has already found in Final Decision and Order No. 10-08-045PL, dated September 8, 2010 as ratified by Final Decision and Order No. 12-03-018PL, dated March 13, 2012 and previous Final Decision and Order Nos. 07-11-289PL and 07-12-309PL that “The proposed LNG terminal is an industrial and port facility that is water-dependent and consistent with the uses allowed in the 6-WD zoning district. The proposed use satisfied a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in other rural areas built upon or irrevocably committed to non-resource use.” The North Spit was determined to be the only site possible to accommodate the LNG facility. The pipeline cannot be located solely on the upland locations or urban or urbanizable areas because it must transport natural gas to the LNG terminal. This is a listed use in forest and farm and all of the resources identified in the CCCP will be protected. Therefore, these criteria have been met.

Staff Report dated September 13, 2013, at p. 16.

Policy #14 was previously interpreted and applied by the Board of County Commissioners in both the application of Jordan Cove Energy Project, L.P. (Coos County Department File No. #HBCU-07-04, Coos County Order No. 07-11-289PL) and in the application of the Oregon International Port of Coos Bay (Coos County Planning Department File No. #HBCU-07-03, Coos County Order No. 07-12-309PL). Regarding the Board's decision approving JCEP's LNG terminal application, the Policy #14 finding appears at page 13 and states:

"The proposed LNG terminal is an industrial and port facility that is water-dependent and consistent with the uses allowed in the 6-WD
zoning district. The proposed use satisfies a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in other rural areas built upon or irrevocably committed to non-resource use. The Board relies upon and adopts the conclusions of the hearings officer regarding consistency with Policy #14. The applicant has provided evidence sufficient to establish that [the] proposed site on the North Spit is the only site available below the railroad bridge with sufficient size and the necessary water-dependent characteristics for the proposed facility, including access to one of the only three deep-draft navigation channels in the State of Oregon."

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

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

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

Under Policy #14, the pipeline must be considered a necessary component of the primary industrial and port facilities use, at least in zoning district 6-WD, where the pipeline segment situated within the boundaries of JCEP's LNG terminal is connected to the LNG terminal meter station at MP00.00, and where other LNG terminal components were described in the decision approving the LNG terminal as "associated facilities." Compare how that same term is utilized in
ORS 215.275(6): “The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.

In other locations, the pipeline is described as an "other use" as that term is used in Policy #14 I.e. As an "other use", the PCGP would be reviewed in each CBEMP zoning district as a low-intensity utility. In either event, Policy #14 I.e requires "a finding by the Board of Commissioners or its designee that such uses satisfy a need which cannot be accommodated on uplands or shorelands in urban or urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use," a finding that was already made by the Board of Commissioners in the prior decisions approving JCEP's LNG terminal and, again, approving the Port's Oregon Gateway Marine Terminal.

In light of these prior findings, the hearings officer finds that the pipeline, as a necessary component of the approved industrial and port facilities use (the LNG terminal), and/or as a Policy #14 "other use," being the low-intensity utility use identified in the CBEMP zoning districts, satisfies a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use. Specifically, the various alternative analyses above described conclude that the proposed LNG terminal and its associated facilities (as necessary components of the approved industrial and port facilities use, including the first segment of the pipeline connected to the LNG terminal), and the resulting pipeline alignment extending to the east across upland zoning districts 6-WD, 7-D and 8-WD, are uses that satisfy a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use.

Ms. Jody McCaffree argues that “it is not sufficient to find that the pipeline is a ‘necessary component’ of the approved LNG facility. The county must find that for each rural shoreland management unit impacted by the application, the pipeline cannot be re-routed to non-shoreland areas or shoreland areas committed to non-resource use.” See McCaffree letter dated Oct. 7, 2013, at p. 17.

In response to this comment, it is important to understand two points. First, it is FERC that can consider alternative pipeline routes, not the county. Second, the scope of the land use application before the County is quite limited. In this case, the county has not been presented with an entirely new pipeline proposal. Rather, the applicant is simply asking for approval of two alternative routes along a small segment of the pipeline. Whether one considers Plan Policy 14 in the context of the approved route or the proposed alternative, the pipeline will cross the Coos River in the vicinity of graveyard point, or a mile or so upstream. In either case, there is no opportunity to accommodate the use at other upland locations or in urban or urbanizable areas. Certainly, Ms. McCaffree suggests one alternative route, which would travel north from the LNG terminal and then cut to the North to avoid the Coos Bay estuary. While this alternative route perhaps should be considered by FERC to the extent it has not already been studied and/or rejected, it is beyond the scope of this land use process.

Furthermore, even to the extent that the hearings officer were to agree with Ms. McCaffree that, as a general matter, that the applicant has the burden to demonstrate that “for each rural shoreland management unit impacted by the application, the pipeline cannot be re-routed to non-
shoreland areas or shoreland areas committed to non-resource use,” the result would not change. By any reasonable interpretation of Policy 14, it seems apparent that linear pipeline features will need to cross rural shoreland management units in order to get from the coast to and across the inland portions of Coos County. Given the number of rivers and waterbodies in Coos County, it is apparent that it would not be physically possible to completely avoid any water crossings. Ms. McCaffree’s sole alternative in support of this argument is that the County should have considered a route that went North from the LNG terminal, as opposed to a route that went directly to the East. The hearings officer is not convinced that such an alternative would be a feasible alternative that would avoid other rural shoreland management units.

This plan policy is met.

3. Plan Policy #17 Protection of “Major Marshes” and “Significant Wildlife Habitat” in Coastal Shorelands.

Local governments shall protect from development, major marshes and significant wildlife habitat, coastal headlands, and exceptional aesthetic resources located within the Coos Bay Coastal Shorelands Boundary, except where exceptions allow otherwise.

I. Local government shall protect:

   a. "Major marshes" to include areas identified in the Goal #17, "Linkage Matrix", and the Shoreland Values Inventory map; and

   b. "Significant wildlife habitats" to include those areas identified on the "Shoreland Values Inventory" map; and

   c. "Coastal headlands"; and

   d. "Exceptional aesthetic resources" where the quality is primarily derived from or related to the association with coastal water areas.

This policy applies to CBEMP zones 20-CA and 20-RS. As discussed in detail below, the proposed route seeks to cross the Coos River roughly 1½ miles upstream of the current crossing location. Unlike the approved crossing location located further downstream, the proposed crossing location will not impact wetlands which have been identified as significant wildlife habitats on the inventory maps. Furthermore, based on Coos County’s maps and Linkage Matrix, the 20-RS zone does not contain any identified major marshes, coastal headlands, or exceptional aesthetic resources.

II. This strategy shall be implemented through:
   a. Plan designations, and use and activity matrices set forth elsewhere in this Plan that limit uses in these special areas to those that are consistent with protection of natural values; and

   b. Through use of the Special Considerations Map, which identified such special areas and restricts uses and activities therein to uses that are consistent with the protection of natural values. Such uses may include propagation and selective harvesting of forest products consistent with the
Oregon Forest Practices Act, grazing, harvesting wild crops, and low-intensity water-dependent recreation.

c. Contacting Oregon Department of Fish and Wildlife for review and comment on the proposed development within the area of the 5b or 5c bird sites.

This strategy recognizes that special protective consideration must be given to key resources in coastal shorelands over and above the protection afforded such resources elsewhere in this Plan.

Policy #17 applies to inventoried resources requiring mandatory protection within each of the CBEMP zoning districts. Staff addresses this Policy as follows:

Although the Linkage Matrix has identified that the 20-RS zoning district contains significant wildlife habitat, the plan maps for the area where proposed alternate is located show no significant wildlife habitat inventoried. Therefore, this criterion does not apply to the request.

See Staff Report dated Sept. 13, 2013, at p. 11. Attorney Sean T. Malone argues that the lack of significant wildlife habitat on the plan maps is an “apparent error,” and argues, implicitly, that the linkage matrix controls over the plan maps. See Record Exhibit 13, at p. 3. He argues that “the criterion still applies to the area identified as significant wildlife habitat and the special protective considerations must be given to the key resources in coastal shorelands over and above the protection afforded such resources in the CBEMP.” Id. at p. 4.

Mr. Malone’s argument is difficult to follow, and appears to stem from a misunderstanding as to how the Zoning Code operates. This is somewhat understandable, as the Code is a very complex document and utilizes a regulatory approach which is both unique and difficult to follow.

Nonetheless, the hearings officer agrees with staff. Coos County has inventoried all known significant habitat areas on resource maps which are part of the inventory document which accompanies the Plan. Appendix C of the Code, which is entitled “Volume II, CBEMP Policies,” sets forth how the maps are to be utilities in conjunction with the Plan Policies. As the hearings officer understand the facts, there originally existed two sets of maps. The first was the “Coos Bay Estuary Special Considerations Map,” which was a large hand-drawn map consisting of a series of color mylar overlays which designated the general location of boundaries of specific types of land, including sensitive beach and dune areas, major marches, significant wildlife habitat, and similar resources. The second was the Coos Bay Estuary Management Plan’s Inventory Maps, which were smaller-scale maps containing more detail and more specific boundary locations. Thus, the “Coos Bay Estuary Special Considerations Map” was a more general map that was to be used as an index to the more detailed inventory maps.

Over the years, however, the “Coos Bay Estuary Special Considerations Map” was either lost or destroyed, and now Coos County relies directly on the detailed inventory maps to determine the location of specific resources.
The Linkage Matrix is another type of index document. Contrary to Mr. Malone’s assertions, it does not state that every square foot of land zoned 20-RS contains “significant wildlife habitat” or “historic & archaeological sites.” Rather, it merely recognized that lands with those features exist within the boundary of the 20-RS zone. At this point, the only place where the “significant wildlife habitat” and “historic & archaeological sites” are inventoried is in the Coos Bay Estuary Management Plan’s Inventory Maps. Thus, the specific location of those features is only found on the inventory maps.

In this case, a review of the inventory maps does not reveal “significant wildlife habitat” or “historic & archaeological sites” in the specific location where the proposed crossing is to take place. The maps do show other areas which are labelled as containing significant wildlife habitat. Thus, Mr. Malone is incorrect when he states that “the plan maps for the plan area containing the proposed alternative pipeline crossing omit identification of the acknowledged significant wildlife habitat.”

Finally, the hearing officer does not agree that that “the potential impact area associated with the pipeline” should include any area that could potentially be affected by a rupture of the pipe. Although the opponents have presented examples of gas pipelines rupturing in the past, the record makes clear that these incidents are highly infrequent and generally caused by older, obsolete pipes. The hearings officer is not aware of any situation where zoning laws require the County to presume that an accident will occur when evaluating the impact of a proposed use under applicable approval criteria. In fact, it would seem to be highly speculative on the hearings officer’s part to simply assume that the pipeline will fail over its lifetime. While it is reasonable to require contingency planning and emergency preparedness as part of an approval, Mr. Malone has cited no case law which suggests that his novel approve to this issue is required, much less practical or reasonable. For this reason, the hearings officer rejects the argument.

This plan policy is met.

4. Plan Policy #18 Protection of Historical, Cultural and Archaeological Sites

Plan Policy 18 applies to CBEMP zones 20-CA and 20-RS. This Plan Policy provides, in relevant part:

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

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

II. The development proposal, when submitted shall include a Plot Plan, showing, at a minimum, all areas proposed for excavation, clearing and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify the Coquille Indian Tribe and Coos, Siuslaw, Lower Umpqua Tribe(s) in writing, together
with a copy of the Plot Plan. The Tribe(s) shall have the right to submit a written statement to the local government within thirty (30) days of receipt of such notification, stating whether the project as proposed would protect the cultural, historical and archaeological values of the site, or if not, whether the project could be modified by appropriate measures to protect those values.

The applicant is conducting a cultural resources survey for the project as required under state and federal law. Prior to issuance of a zoning compliance (verification) letter under CCZLDO Section 3.1.200 in order to obtain development permits, Policy #18 requires the applicant to submit a "plot plan" under Section 3.2.700, which then triggers the requirement to coordinate with the Tribe to allow for comments when the development is in an inventoried area of cultural concern. The Tribe has 30 days to comment and suggest protection measures. Policy #18 allows for a hearing process should the Tribe and the developer not agree on the appropriate protection measures. In the prior land use approvals related to the LNG project, the Board of Commissioners imposed a condition to ensure compliance with this Plan Policy. The applicant and staff suggest that the same condition be imposed for this application. The hearings officer agrees.

In a section of a letter containing the heading “CBEMP Policy 18,” attorney Sean Malone argues that the “applicant has not demonstrated that the riparian vegetation that will be removed to install the pipeline will be the minimum necessary.” See letter dated September 20, 2013, at p. 4. The hearing officer is unsure as to what “riparian vegetation” has to do with Plan Policy 18. Mr. Malone’s argument is not developed well enough to enable a response. The hearings officer suspects that the argument was intended to be addressed in response to Policy 23, and will address it there.

This plan policy is met, as conditioned.

5. Plan Policy #22 Mitigation Sites: Protection Against Preemptory Uses

Plan Policy 22 States:

Consistent with permitted uses and activities:
~ "High Priority" designated mitigation sites shall be protected from any new uses or activities which could pre-empt their ultimate use for this purpose.
~ "Medium Priority" designated mitigation sites shall also be protected from uses which would pre-empt their ultimate use for this purpose.

However, repair of existing dikes or tidegates and improvement of existing drainage ditches is permitted, with the understanding that the permitting authority (Division of State Lands) overrides the provisions of Policy #38. Wetland restoration actions designed to answer specific research questions about wetland mitigation and/or restoration processes and techniques, may be permitted upon approval by Division of States Lands, and as prescribed by the uses and activities table in this Plan.

~ "Low Priority" designated mitigation sites are not permanently protected by the Plan. They are intended to be a supplementary inventory of potential sites that could be used at the initiative of the landowner. Pre-emptory uses shall be allowed on these sites, otherwise
consistent with uses and activities permitted by the Plan. Any change in priority rating shall require a Plan Amendment.

Except as provided above for research of wetland restoration and mitigation processes and techniques, repair of existing dikes, tidegates and improvement of existing drainage ditches, "high" and "medium" priority mitigation sites shall be protected from uses and activities which would pre-empt their ultimate use for mitigation.

I. This policy shall be implemented by:

a. Designating "high" and "medium" priority mitigation sites on the Special Considerations Map; and

According to Coos County’s maps, the PCGP would cross the following mitigation sites:

<table>
<thead>
<tr>
<th>Designated Mitigation Site</th>
<th>Priority</th>
<th>Approximate MP</th>
<th>CBEMP Zoning District</th>
</tr>
</thead>
<tbody>
<tr>
<td>M-8(b) ¹</td>
<td>Low</td>
<td>2.70 R</td>
<td>11-NA</td>
</tr>
<tr>
<td>U-12 ²</td>
<td>High</td>
<td>10.90 R</td>
<td>18-RS</td>
</tr>
<tr>
<td>U-16(a) ²</td>
<td>High</td>
<td>11.10 R</td>
<td>18-RS</td>
</tr>
<tr>
<td>U-22</td>
<td>Low</td>
<td>10.10</td>
<td>21-RS</td>
</tr>
<tr>
<td>U-24</td>
<td>Low</td>
<td>10.97</td>
<td>21-RS</td>
</tr>
</tbody>
</table>

1 This mitigation site is associated with the Hwy 101 Causeway.
2 PCGP will also cross CBEMP dredged Material Disposal Site 30(b), which is in the same location as mitigation site U-12 and just to the north of mitigation site U-16(a). The PCGP installation will be a temporary disturbance to this dredged material disposal site. According to the Management Objectives of 18-RS, the dredge disposal is considered a higher priority than mitigation for this area. CCZLDO Section 4.5.480 Management Objective provides, “The development of the disposal site would preclude mitigation use, and vice versa. Use of this site for dredged material disposal is the higher priority because of the scarcity of suitable sites (see Policies #20 and #22).”

None of these sites are relevant to this particular segment of the pipeline.

b. Implementing an administrative review process that allows uses otherwise permitted by this Plan but proposed within an area designated as a "high" or "medium" priority mitigation site only upon satisfying the following criteria:

Of the 5 designated mitigation areas crossed by the PCGP, 2 are high priority (U-12 and U-16(a)). However, the designated dredge disposal site (30(b)) is the higher priority in this area (see responses to Policy #20 above).

1. The proposed use must not entail substantial structural or capital improvements (such as roads, permanent buildings or non-temporary water and sewer connections); and

2. The proposed use must not require any major alteration of the site that would affect drainage or reduce the usable volume of the site (such as extensive site grading/excavation or elevation from fill); and

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3. *The proposed use must not require site changes that would prevent the expeditious conversion of the site to estuarine habitat; or*

This plan policy does not apply to this segment of the pipeline.

6. **Plan Policy #23 Riparian Vegetation and Streambank Protection**

The 20-RS zone is the only zoning districts through which the PCGP crosses requiring compliance with Policy #23. Plan Policy 23 states:

**I.** Local government shall strive to maintain riparian vegetation within the shorelands of the estuary, and when appropriate, restore or enhance it, as consistent with water-dependent uses. Local government shall also encourage use of tax incentives to encourage maintenance of riparian vegetation, pursuant to ORS 308.792 - 308.803.

Appropriate provisions for riparian vegetation are set forth in the CCZLDO Section 4.5.180 (OR 92-05-009PL).

**II.** Local government shall encourage streambank stabilization for the purpose of controlling streambank erosion along the estuary, subject to other policies concerning structural and non-structural stabilization measures.

This strategy shall be implemented by Oregon Department of Transportation (ODOT) and local government where erosion threatens roads. Otherwise, individual landowners in cooperation with the Oregon International Port of Coos Bay, and Coos Soil and Water Conservation District, Watershed Councils, Division of State Lands and Oregon Department of Fish & Wildlife shall be responsible for bank protection.

This strategy recognizes that the banks of the estuary, particularly the Coos and Millicoma Rivers are susceptible to erosion and have threatened valuable farm land, roads and other structures.

Staff addresses Policy 23 as follows:

Section 4.5.180 Riparian Protection Standards in the Coos Bay Estuary Management Plan requires riparian vegetation protection within 50-feet of an inventoried estuarine wetland, lake, or river with the following exception: (e) Riparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose…The pipeline is a public utility project, and therefore is not subject to the 50-foot riparian vegetation protection. Riparian vegetation may be removed in order to site the pipeline pursuant to the exemption cited above, so long as it is the minimum necessary to accomplish the purpose. Also, the applicant must comply with all FERC requirements for
wetland and water bodies protection and mitigation both during and after construction, and will restore riparian vegetation 25 feet from the streambanks on either side of water bodies on private lands where riparian vegetation existed prior to construction, consistent with the applicant’s erosion control and re-vegetation plan.


Most of Policy 23 is framed in aspirational, hortatory, and non-mandatory language. Compare Neuenschwander v. City of Ashland, 20 OR LUBA 144 (1990) (Comprehensive plan policies that “encourage” certain development objectives are not mandatory approval standards); Bennett v. City of Dallas, 96 Or.App 645, 773 P2d 1340 (1989). However, Plan Policy 23 states that “appropriate provisions for riparian vegetation are set forth in the CCZLDO section 4.5.180.” Although it is far from clear that the phrase “appropriate provisions for riparian vegetation” is intended to make CCZLDO §4.5.180 an approval standard, the parties have previously all seem to treat it as such.

CCZLDO §4.5.180 is entitled “Riparian Protection Standards in the Coos Bay Estuary Management Plan.” This standard requires riparian vegetation protection within 50-feet of an inventoried wetland, lake, or river with the following exception:

(e) Riparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose...

The BCC previously held that the pipeline is a “public utility” project, and therefore is not subject to the 50-foot riparian vegetation protection. Riparian vegetation may be removed in order to site the pipeline pursuant to the exemption cited above, so long as it is the “minimum necessary to accomplish the purpose.”

The BCC also held in HBCU 10-01 that the applicant must comply with all FERC and DSL requirements for wetland and waterbody protection and mitigation both during and after construction, and will restore riparian vegetation 25 feet from the streambanks on either side of waterbodies on private lands where riparian vegetation existed prior to construction, consistent with the erosion control and revegetation plan. The hearings officer agrees that the public utility exception does apply. In addition, subsection II does not apply to this case. While Pacific Connector will restore areas disturbed during construction to their pre-construction condition, the PCGP does not include independent streambank stabilization projects.

In a section of a letter containing the heading “CBEMP Policy 18,” attorney Sean Malone argues that the “applicant has not demonstrated that the riparian vegetation that will be removed to install the pipeline will be the minimum necessary.” See letter dated September 20, 2013, at p. 4. Record Exhibit 13. The hearings officer assumes that the argument is intended to be directed at Plan Policy 23. In its Erosion Control and Revegetation Plan, the applicant said that it will only remove as much vegetation as is needed to construct the pipeline, and has provided plans to re-vegetate disturbance areas. The applicant has previously agreed to a condition making it
responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the utility facility. Mr. Malone does not address those plans or otherwise explain why they are deficient, and it is not apparent that they are lacking in any way.

This plan policy is met.

7. Plan Policy #27 Floodplain Protection within Coastal Shorelands

Plan Policy 27 provides as follows:

The respective flood regulations of local government set forth requirements for uses and activities in identified flood areas; these shall be recognized as implementing ordinances of this Plan.

This strategy recognizes the potential for property damage that could result from flooding of the estuary.

This Plan Policy applies to CBEMP 6-WD, 7-D, 8-WD, 18-RS, 19-D, 21-RS and 36-UW, and is implemented by the Floodplain Overlay Zone provisions of CCZLDO Article 4.6. While the pipeline is not specifically addressed under the development options of Section 4.6.230, certain proposed activities are identified as “other development” requiring a floodplain review.

The applicant addresses this policy by showing compliance with the provisions of Article 4.6. The county has indicated that the Flood Insurance Rate Map (FIRM) is consistent with the Federal Emergency Management Agency’s (FEMA) flood hazard map for Coos County. As in the applicant’s narrative, the PCGP is consistent with the applicable floodplain approval criteria for all areas identified on the FEMA flood hazard map/FIRM as a designated flood area. The FEMA maps identify the 100-year floodplain, which is typically a larger area than the floodplain and floodway areas defined in the Floodplain Overlay standards. In order to be as conservative as possible, the applicant has designed the PCGP so that any portion of the PCGP that crosses an area identified on the FEMA 100-year floodplain map satisfies the more stringent floodway standards.

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18 “Floodplain” is defined by the Coos County Zoning and Land Development Ordinance (CCZLDO) as “the area adjoining a stream, tidal estuary or coast that is subject to periodic inundation from flooding.”

19 “Floodway” is defined by the CCZLDO as “the normal stream channel and that adjoining area of the natural floodplain needed to convey the waters of a regional flood while causing less than one foot increase in upstream flood elevations.” Pursuant to CCZLDO Sections 4.6.205 and 4.6.270 “floodways” are identified as special flood hazard areas in a Federal Insurance Administration report entitled “Flood Insurance Study for Coos County, Oregon and Incorporated Areas” and accompanying maps.
8. Plan Policy #28 Recognition of LCDC Goal #3 (Agricultural Lands)  
Requirements for Rural Lands within the Coastal Shorelands Boundary

Plan Policy 28 provides as follows:

Unless otherwise allowed through an Exception, Coos County shall manage all rural lands designated within the Coastal Shorelands Boundary as being suitable for "Exclusive Farm Use" (EFU) designation consistent with the “Agricultural Use Requirements” of ORS 215. Allowed uses are listed in Appendix 1, of the Zoning and Land Development Ordinance.

This policy shall be implemented by using the Special Considerations Map (Policy #3) to identify EFU suitable areas, and to abide by the prescriptive use and activity requirements of ORS 215 in lieu of other management alternatives otherwise allowed for properties within the "EFU-overlay" set forth on the Special Considerations Map, and except where otherwise allowed by exceptions for needed housing and industrial sites.

The "EFU" zoned land within the Coastal Shorelands Boundary shall be designated as "Other Aggregate Sites” inventories by this Plan pursuant to ORS 215.298(2). These sites shall be inventoried as "IB" resources in accordance with OAR 660-16-000(5)(b). Coos County will re-evaluate these inventoried sites pursuant to the requirements of said rule at, or before, County’s periodic review of the Comprehensive Plan (OR 92-08-013PL 10/28/92).

This policy applies to CBEMP zones 18-RS and 20-RS. These two CBEMP zones list the pipeline as a permitted use. Staff addressed this criterion as follows:

This policy is implemented by using the statutory provisions governing uses in the EFU zones and plan map to identify EFU suitable areas. Portions of the properties have been identified as Agricultural Lands in the CBEMP. EFU uses may be impacted during the construction phase of the project. The applicant anticipates that construction (including restoration) will be complete in approximately 3 years. Farm use within the permanent and temporary rights-of-way will be able to resume after construction. Once the construction is completed the site will be re-vegetated and returned back to pasture land. The pipeline is a “utility facility necessary for public service,” which is a permitted use under the agricultural provisions of ORS 215.283(1)(c) and ORS 215.275(6). As explained in the EFU portion of the staff report, “Farm use” includes the preparation and storage of the products raised on such land for human use and animal use and disposal by marketing or otherwise. However, by inclusion of listed uses in LDO there are other uses that can co-exist with these practices and that has clearly been identified by the LDO and ORS. The property will continued to be managed as agricultural land.
Therefore, this criterion has been met.


This policy is implemented by using the Special Considerations Map to identify EFU suitable areas. Certain property along the PCGP alignment is designated as “Agricultural Lands”. As described in detail in the EFU section of the application narrative, the PCGP is allowed as a utility facility necessary for public service under the agricultural provisions of ORS 215.283(d) and ORS 215.275(6). Therefore, the PCGP is consistent with the Policy #28 requirements for mapped Agricultural Lands.

In addition to referencing ORS Chapter 215, the Policy states that allowed uses are listed in Appendix 1 of the CCZLDO. However, Appendix 1 is entitled “CCCP” and does not apply within the CBEMP boundaries and does not provide a list of uses permitted within agricultural zones. Therefore, it is understood that the reference is intended to be to Appendix 4, Agricultural Land Use, which does describe uses allowed within exclusive farm use zones.

Subsection 1 of Appendix 4 states, “Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213.” ORS 215.213 describes uses permitted in exclusive farm use zones. ORS 215.213(1)(c) permits the following use allowed outright in any area zoned for exclusive farm use: “utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275.”

As discussed in the EFU zone section of this narrative, the PCGP is a utility facility necessary for public service pursuant to ORS 215.275. Therefore, the PCGP is also an allowed use in those areas identified as Agricultural Lands on the CBEMP Special Considerations Map.

EFU uses will be impacted during the construction phase of the project. The applicant anticipates that construction (including restoration) will be complete in approximately 3 years. Farm use within the temporary 95-foot will be able to resume post-construction. Compliance with state and county land use requirements regarding agricultural lands is addressed in the EFU section of this recommendation.

Attorney Sean Malone argues that “the impacts associated with a [pipeline] rupture / accident have not been addressed.” See letter dated September 20, 2013, at p. 4. Record Exhibit 14. As discussed elsewhere in this recommendation, the pipeline will be constructed to meet or exceed Federal construction standards for pipelines. The pipeline is designed so that it will not rupture. The opponents have not provided the hearing officer with any substantial evidence that would suggest that a rupture is likely or even possible under expected conditions. Furthermore, even if that were not the case, it is not apparent to the hearings officer how a gas pipeline rupture would prevent nearby land from being used for farm uses. As a worst-case scenario, a gas rupture would cause a fire but it would not contaminate soil in the same way that an oil pipeline leak.

\[20\] The County is not one of the two “marginal lands” counties and so the provisions of ORS 215.213 do not apply. The parallel provisions of Oregon law applicable to marginal lands counties (set forth in ORS 215.283) do apply. ORS 215.283(1)(c) is identical to ORS 215.213(1)(c).
might do. Obviously, an explosion and resulted fire could burn buildings that are nearby, but that
does not necessarily prevent the land from being used for farms uses.

Mr. Malone also argues that while the construction of the pipeline has been addressed, the
useful life of the pipeline and likelihood and risk of problems associated with an aging pipeline
has not been addressed.” Id. at p. 4. However, land use planning does typically concern itself
with long-term maintenance issues. A review of LUBA and Oregon case law turned up no cases
where a local government was faulted for not considering long term (50 year+) impacts that could
be caused by a lack of maintenance. Likewise, the hearings officer is not aware of any LUBA or
Oregon case that approved of a local government’s denial of a land use application based on the
assumption that the project would fail at the end of its lifetime. While the hearings officer agrees
that pipelines can fall into disrepair if the landowner fails to maintain them, the same could be
true of virtually every utility, from bridges to sewers. It is speculative to suggest that the
applicant or the operator in this case will fail to maintain and test their pipes.

Finally, the hearings officer agrees that in most cases, it would be appropriate to add
condition of approval to the approval to ensure that the pipes will be adequately maintained.
However, it is not certain that such a condition is enforceable. Congress has expressly pre-
empted a state or local government’s ability to regulate issues related to the safety of pipelines.
The Natural Gas Pipeline Safety Act of 1968 directs the Secretary of Transportation to establish
minimum federal safety standards for the design, installation, inspection, testing, construction,
extension, operation, replacement, and maintenance of pipeline facilities used for the
transportation of gas. The pipeline company is bound to abide by these safety standards. “The
'Natural Gas Pipeline Safety Act of 1968' . . . has entered the field of 'design, installation,
inspection, testing, construction, extension, operation, replacement and maintenance of pipeline
facilities.' . . . As applied to interstate transmission pipelines, the Safety Act must prevail over and
1138, 1139 (E.D.La. (1970), aff’d 445 F.2d 301 (5th Cir. 1971). See also generally Northern
Safety Act of 1968 barred a condition on a construction permit requiring that the gas line be
buried a minimum of six feet); Williams Pipe Line Co. v. City of Mounds View, 651 F Supp. 551

This plan policy is either met or is unenforceable to the extent it conflicts with federal law.

9. Plan Policy #34 Recognition of LCDC Goal #4 (Forest Lands) Requirements
   for Forest Lands within the Coastal Shorelands Boundary

This policy applies to CBEMP zones 20-RS, and 21-RS and addresses forest operations in
areas of coastal shorelands. There are no identified forest lands in these CBEMP zones, therefore,
the policy does not apply.

10. Plan Policy #49 Rural Residential Public Services

This policy applies to CBEMP zone 20-RS, and addresses acceptable services for rural
residential development. This policy does not apply to the proposal.
11. Plan Policy #50  Rural Public Services

Coos County shall consider on-site wells and springs as the appropriate level of water service for farm and forest parcels in unincorporated areas and on-site DEQ-approved sewage disposal facilities as the appropriate sanitation method for such parcels, except as specifically provided otherwise by Public Facilities and Services Plan Policies #49, and #51. Further, Coos County shall consider the following facilities and services appropriate for all rural parcels: fire districts, school districts, road districts, telephone lines, electrical and gas lines, and similar, low-intensity facilities and services traditionally enjoyed by rural property owners. This strategy recognizes that LCDC Goal #11 requires the County to limit rural facilities and services.

This policy applies to CBEMP zone 20-RS and addresses acceptable rural serves. Staff states that “[t]his policy does not apply to the proposal.” Staff notes that “[t]here are no rural public services requested with this application. Therefore, this criterion is not applicable.” See Staff Report dated Sept. 13, 2013, at p. 18.

Various opponents cited CBEMP Plan Policy 50 as a reason for denial. Plan Policy 50 states that “Coos County shall consider the following facilities and services appropriate for all rural parcels: *** electrical and gas lines, and similar, low-intensity facilities and services traditionally enjoyed by rural property owners.”

Oregon Shores argues that a natural gas line intended to transport natural gas through Coos County for export to other countries does not provide a “service,” and even if it did so, it would not be a service that is “traditionally enjoyed by rural property owners.” See letter from Courtney Johnson, dated Sept 20, 2013. Presumably, Oregon Shores thinks it is appropriate for a County to deny, on the basis of Plan Policy 50, any utility that does not have local connections to rural property owners.

The hearings officer finds this argument to be incorrect. As an initial matter, Plan Policy 50 does not require a finding that a gas utility is “traditionally enjoyed by rural property owners” in order to be allowed in the CBEMP. Rather, the phrase “traditionally enjoyed by rural property owners” is only intended to further define the characteristics of non-enumerated facilities: i.e. “similar low-intensity facilities and services.” It is intended to recognize that urban level “public services” are not intended to be sited on CBEMP lands. There is no purposeful intent to allow or prohibit gas pipelines on the basis of whether they are “traditionally enjoyed by rural property owners.”

Even if the intent had been to prohibit gas pipelines, such a zoning code provision is contrary to the Natural Gas Act. For example, in Northern Border Pipeline Co. v. Jackson County, Minnesota, 512 F. Supp. 1261 (D. Minn. 1981), the district court enjoined the Jackson County Board of County Commissioners from attempting to regulate a natural gas pipeline facility through the use of its zoning power. Id., 512 F. Supp. 1261 (D.C. Minn. 1981). In that case, the court ruled, “We hold that the County lacks statutory authority to exercise its zoning power over interstate gas pipelines.”

Similarly, courts have held that local regulation of a county or municipality's streets,
alleyways, and other public rights of way are preempted under the NGA. See e.g., Guardian Pipeline, L.L.C. v. 529.42 Acres of Land, 210 F. Supp. 2d 971 (N.D. Ill. 2002) (the court rejected arguments by governmental entities that land held by them could not be condemned because the NGA gave the natural gas company "the overriding authority to obtain easements from the governmental authorities and any state law to the contrary was preempted); USG Pipeline Co. v. 1.74 Acres In Marion County, 1 F. Supp. 2d 816 (E.D. Tenn. 1998) (the court found that Tennessee law which provided that streets, alleys, squares, or highways of a municipality could not be condemned without the consent of the municipality was preempted under the NGA).

Having said that, it may end up being the case that FERC determines that there is no “public necessity” for a natural gas export terminal. However, that call is ultimately one for FERC to make, not Coos County.

This plan policy is met.

12. Plan Policy #51 Public Services Extension.

   I. Coos County shall permit the extension of existing public sewer and water systems to areas outside urban growth boundaries (UGBs) and unincorporated community boundaries (UCB’s) or the establishment of new water systems outside UGB’s and UCB’s where such service is solely for: [additional language not shown].

This policy applies to CBEMP zone 20-RS, and addresses extension of water and sewer outside of UGBs when necessary for certain development including industrial and exception land development. Staff notes that “[t]he proposal is not for public water or sewer; therefore, this criterion is not applicable.” See Staff Report dated Sept. 13, 2013, at p. 18. The hearings officer agrees that this policy does not apply to the proposal.

G. Miscellaneous Concerns Unrelated to Approval Criteria.

   1. The Opponent’s “Alternative Route” Arguments Must Fail Because Only FERC has Jurisdiction to Regulate the Route of a Gas Pipeline or to Control Safety Standards Related to Gas Pipelines.

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

   The hearings officer pointed out in HCBU 10-01, the Board does not have the ability to propose major changes to the proposed route. Such action is within the purview of FERC, and it is the hearings officer’s understanding that the two route changes are being proposed at FERC’s request. Nonetheless, comments which express support for the so-called “Blue Ridge” route or
other alternative routes cannot be considered as part of this land use review process. Opponents should raise these types of issues to FERC.

As previously mentioned, the Board of Commissioners does have the ability to approve minor detours (< 400 feet off centerline), according to the applicant.

2. NEPA Is Not Applicable to this Proceeding.

Several opponents to the project made impassioned and vitriolic arguments at the September 20, 2013 public hearing seeking to have this process put on hold pending the results of the National Environmental Policy Act (“NEPA”) process currently being processed by FERC.

The gist of the argument is that the land use proceeding is premature because Section 7 of the Natural Gas Act (“NGA”) requires FERC to issue “certificate[s] of public convenience and necessity” for the construction and operation of natural gas facilities for the transportation of gas in “interstate commerce.” The opponents note, correctly, that the standard for evaluating an application for a certificate of public convenience and necessity is stringent: the FERC must find that the proposed project is “necessary or desirable in the public interest.” The opponents further note, correctly, that the applicant has not yet obtained a certificate of public convenience and necessity. In the opponent’s view, the land use proceeding is therefore premature.

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).

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. Interim action prejudices 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.
Thus, under 40 CFR §1506.1(3)(d), .

In a letter dated Oct 7, 2013, Ms. Jody McCaffree questions whether land use permits can be issued in advance of the Record of Decision (“ROD”) in the FERC process. See McCaffree Letter at p. 3. She asks rhetorically: “how can Oregonians be expected to objectively evaluate the range of alternatives that would be provided in a valid EIS, if in fact, Coos County and Oregon state agencies have already issued permits and certifications for one of the alternatives beforehand.”

Of course, the answer is quite simple: 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, there do 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.

As the hearing officer stated at the public hearing, the County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. The opponents have identified 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 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

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21 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.
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.

In light of this legal framework, Ron Sadler is not correct when he states the following:

> “By making this request at this time, Jordan Cove apparently believes that the route described in the vacated import terminal EIS will essentially be the preferred route in the export terminal EIS. Were the BOC to act on this request, they would essentially be agreeing with this premise.”

*See* Letter from Ron Sadler dated Sept 9 2013. In this case, the applicant has submitted a land use application seeking approval for a particular pipeline route. Unlike the question before FERC, the question before the Board is not whether the applicant’s requested route is the “best” route amongst competing alternatives. Rather, the question is whether the requested route meets land use approval criteria contained in the code. Approval or denial of this land use approval says absolutely nothing about what route is the “best.” Only FERC can answer that question.

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 this case (or the prior approval in HBCU 10-01) 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.

As it turns out, most – if not all - zoning codes are written in a manner that makes it difficult to legally justify an outright denial of a land use application seeking approval of a public utility facility – particularly when the applicant agrees to mitigate impacts caused by the proposal. Utility facilities are either permitted outright or conditionally in virtually every zone, and the standards that govern them are typically geared towards mitigating their impacts, as opposed to deciding they should be allowed at all.
3. Evidence of Past Misdeeds by Pipeline Companies Is Not a Basis for Denial Unless Evidence Shows Impossibility of Performance, as Opposed to a Propensity Not to Perform.

Some opponents have submitted testimony discussing past environmental damage caused by Williams Pipeline Company and other unrelated pipeline companies. Perhaps the most relevant of this testimony is found at Exhibit 5 of Jody McCaffree’s materials submitted on October 14, 2013. Record Exhibit 23. Exhibit 5 is a 3-page list of various pipe explosions at William’s and Transco owned facilities, various fines imposed and/or paid by Williams for violations of laws, and other alleged environmental problems with Williams facilities. While this type of testimony is intended to create doubt about whether the applicant can conduct its construction and operation activities as promised, it can seldom form a basis for denial because it requires the decision-maker to speculate about future events and it seeks to punish an applicant for previous acts for while penalties have already been paid.

As an example, Ms. McCaffree’s Exhibit 5 testimony contains 10 bullet points concerning a spill of liquid natural gas (NGL) in Parachute Colorado. The testimony is not very specific about what actually happened, and although internet links are provided, the actual sources are not included in the record for the hearings officer to review. One bullet point vaguely notes that the “Benzene levels rise in Parachute Co. Creek” but there is no supporting documentation to verify the amount and extent of the contamination. The bullet points make the situation in Parachute Creek seem pretty bad, but the last entry notes that Williams expects to treat as many as 26 million gallons of groundwater, and that about 155,000 gallons of tainted ground water was removed in March of 2013 and disposed of in an injection well. Given that an Olympic sized swimming pool contains roughly 650,000 gallons of water, the disposal of 155,000 gallons of water is roughly a ¼ of the size of an Olympic pool. In the overall scheme of things, that’s a relatively minor incident. And this type of clean up often occurs even though the spill is just over, or even under, clean drinking water standards. This testimony provides a good example of why layperson presentation of anecdotal evidence can often be difficult to rely on as substantial evidence: it simply does not provide enough facts or perspective to be relied upon by a decision-maker to support a conclusion.

Moreover, even if the point is well taken that Williams caused contamination to a creek in Colorado, it does not necessarily provide a basis to deny the land use application. In a land use case, the decision-maker cannot simply assume that the applicant will fail to live up to its promises. A decision-maker cannot simply speculate that the applicant will fail to maintain his equipment or that it will not follow federal safety and inspection requirements, particularly based on anecdotal evidence of past events, often associated with unrelated actors. See Champion v. City of Portland, 28 Or LUBA 618 (1995) (“Illegal acts, such as those alleged by petitioner, might provide the basis for a code enforcement proceeding. However, petitioner fails to show that the alleged illegal activity by the applicants is relevant to any legal standard applicable to the approvals granted by the city in the decision challenged in this appeal.”); Canfield v. Lane County, 16 Or LUBA 951, 961 (1988) (“Petitioner's view that the conditions will be violated is speculation. We do not believe the county is obliged to assume future violations of the condition.”). Gann v. City of Portland, 12 Or LUBA 1, 6 (1984).

The case of Stephens v. Multnomah County, 10 Or LUBA 147 (1984) provides a good example of how LUBA views this type of “prior violations” testimony. The applicant in Stephens
was a business that rented out portable toilets. The applicant was seeking a permit to store empty Port-a-Johns on a site. Opponents cited the company’s prior history of DEQ violations as a reason for denial. LUBA responded as follows:

Petitioner also alleges evidence should have been considered that DEQ had charged the applicant with violation of DEQ regulations at other places regarding handling of waste. Petitioner asserts that evidence is relevant to show DEQ regulations will not be followed in the future by the applicant. In land use permit applications, evidence of prior land use violations is not generally considered as grounds for a denial, at least where there are no specific standards authorizing denial for such reasons. See generally 3 Anderson, American Law of Zoning, Section 19.24 (1977). Such evidence of prior violation does not show there will be repeated violations nor is it proper to punish the applicant for previous acts if an enforcement agency has already done so. Pokoik v Silsdorf, 390 NYS2d, 49, 358 NE2d 874 (1976). Such evidence of DEQ enforcement actions, particularly at other locations, was properly excluded by the Board.

In a footnote, LUBA provided dicta setting forth an exception to the general rule:

We do not mean to hold evidence of prior violations should be disregarded in all cases. Where such evidence shows impossibility of performance as distinguished from propensity to not perform, there may be a basis for consideration. (Emphasis added).

Thus, if a pipeline company has a track record of non-compliance with applicable law, those facts can be relevant in some circumstances. But the opponents here have not provided sufficient evidence to convince the hearings officer that impossibility of performance is likely in this case. The testimony related to prior acts by Williams falls far short of what would be required to prove impossibility of performance.

As the applicant’s attorney, Mr. Mark Whitlow, points out in his final argument dated November 8, 2013, the applicant has prepared a “Reliability and Safety Report” for the PCGP, which details the extensive construction, maintenance, monitoring, and education safety measures that will be implemented to significantly reduce the risk of a release. See Letter from Bob Peacock and Rodney Gregory of Williams, dated September 16, 2013. The contents of the Reliability and Safety Report are equally applicable to the proposed Brunschmid and Stock Slough alternate alignments. For example, the Safety Report describes the Integrity Management Program that will be developed to maintain and improve pipeline safety and reliability for the entire PCGP system. The Safety Report also describes the pipeline safety monitoring program.

As explained in Section 1.5 of the Safety Report, the first step in Pacific Connector’s safety monitoring process is to make certain that the pipeline is constructed properly. During construction, the integrity of the coatings designed to protect against corrosion are checked and any imperfections are immediately repaired. Pacific Connector will also conduct non-destructive inspection of the pipeline welds and strength test the pipeline to meet or exceed federal pipeline
regulations prior to the pipeline being placed in service to ensure integrity of materials and construction.

Once the pipeline is in service, Pacific Connector will implement a number of routine monitoring measures including land and aerial patrols, inspection of river crossings, and conducting leak surveys at least once every calendar year as required by federal law. As detailed in the Safety Report, in addition to routine monitoring, potentially affected portions of the pipeline will be inspected immediately following any major natural disturbance event, such as an earthquake, flood, or wildfire. In addition to the federally required surveys, Pacific Connector will monitor and control the pipeline system using a supervisory control and data acquisition system (SCADA).

In addition to internal safety protocols and plans, as described in Safety Report Section 1.5, Pacific Connector will comply with an industry Recommended Practice for pipeline operators to develop a public awareness program. The public awareness program will provide information to landowners, excavators, and emergency responders. It will also identify the target audiences that should receive regular correspondence from the pipeline company such as the general public, landowner, local public officials, and one-call centers. The overall goal of the program is to increase and maintain public and landowner awareness of the pipeline to avoid the type of third party activities that could damage the pipe, and to make those parties aware of appropriate response actions and contacts.

Furthermore, a land use approval is not a guarantee of success of a project. Nor is it a guarantee that no environmental harm will be done during the course of construction. At best, a land use approval process can simply verify that an applicant has both a “plan” as well as a set of contingencies to deal with potential problems. During the land use process, Coos County can verify that those plan are both feasible and likely to succeed. However, as Coos County learned from a past pipeline case, having a plan is not always enough. Problems can occur during construction, and it is only with vigilance, monitoring, supervision, and oversight can the County put itself in a good position to ensure both the success of the project and compliance with promises the applicant has made.

4. “Public Need” or “Public Benefit”.

Some opponents asserted the belief that the alternative alignment should be approved because there is no “public need” for the project or a “public benefit” to the community. For example, Ms. McCaffree dedicates 3 pages of her October 14, 2013 letter and the lack of “need” for the pipeline in her final submittal. See e.g., McCaffree Letter dated October 7, 1013, at p. 7-8; McCaffree Letter dated October 14, 1013, at p. 1-3. In these letters, Ms. McCaffree raises a host of policy arguments pertaining to the “public need” for LNG exports, resulting higher fuel costs in North America, and similar arguments. While all of these issues may be relevant to FERC, public “need” is simply not an approval criterion for this decision. The only thing close to a “public need” requirement in the Coos County Zoning and Land Development Code is found in CBEMP Plan Policy #5, and the hearings officer has already determined that this policy does not apply.

Furthermore, there is no general “public need” or “public benefit” standard applicable to land use proceedings. Compare Hale v. City of Beaverton, 21 Or LUBA 249 (1991) (Public need
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is not an approval criterion) with Ruef v. City of Stayton, 7 Or LUBA 219 (1983) (Code standard required that a “public need” for a project be established). Although “public need” became a common code standard after the landmark Fasano case, it is no longer a generally applicable criterion in quasi-judicial land use proceedings. Neuberger v. City of Portland, 288 Or 155, 170, 603 P2d 771 (1979).

Moreover, as the applicant points out in its final argument dated November 8, 2013, the pipeline has already been approved by the County. The current application is for approval of two (2) alternate alignment segments, which total approximately 3.7 miles of pipeline. These alternate alignment segments are not determinative of the “need” for the pipeline as a whole. As previously mentioned, the alternate alignments are proposed in order to avoid the Brunschmid Wetland Reserve easement and to avoid multiple crossings of Stock Slough near rural residences.

5. Compliance with CCZLDO 1.1.200(2).

Jody McCaffee argues that the application must comply with CCZLDO 1.1.200(2). According to Ms. McCaffree, this code provision requires the County to find that the application is “in the public’s best interest” and that “it promote and protect the convenience and general welfare of the citizens of Coos County. See Letter dated October 7, 2013, at p.3. However, CCZLDO 1.1.200(2) is a general purpose statement for the zoning code and states general objectives only. It does not purport to apply as an independent approval standard to any specific land use application. Bennett v. City of Dallas, 17 Or LUBA 450, 456, aff’d 96 Or App 645 (1989); Stotter v. City of Eugene, 18 Or LUBA 135, 157 (1989).


Ms. Mary Metcalf wrote a letter to the hearings officer seeking to have the County order PCGP to relocate the pipeline away from property where water well is located. She gives her address but provides no map to help the hearings officer understand where exactly her home is located in relation to the proposed pipeline. The hearings officer has the ability to take notice of maps officially adopted by the local government decision-maker. ONRC v. City of Oregon City, 29 Or LUBA 90 (1995). The hearings officer made some reasonable effort to find her address on the County zoning maps but was unsuccessful.

Nonetheless, Ms. Metcalf’s concern is that the pipeline will destroy her water well. However, the hearings officer is relatively certain that the location of the well is not in the area for which the alternative route is sought, and therefore is not relevant to the case. The hearings officer notes, however, that PCGP has previously explained that it has some flexibility to alter the precise location of the pipeline a few hundred feet to either side of any the FERC-approved route. Without knowing the specific facts related to the location of the pipe in relation to the well, it does seem reasonable, at least in the abstract, for PCGP to work in good faith with the landowners to avoid high-impact locations such as water wells serving five homes.
7. Some of the Opponent’s Arguments Were Not Made with Specific Specificity to Enable a Response.

The hearings officer experienced a high degree difficulty understanding some of the arguments made by opponents, because the arguments were not made with sufficient specificity to enable a response. For example, in a letter dated October 7, 2013, Ms. Jody McCaffree discusses at a length a number of “impacts” that will occur to local rural communities as a result of the influx of construction workers. See McCaffree letter dated Oct 7, 2013 at p. 21-23. Ms. McCaffree makes no attempt identify an approval standard to which this testimony is relevant, and it is not obvious to the hearing officer that such testimony is relevant.

In her letter dated October 7, 2013, at p. 21, Ms. Jody McCaffree argues that Plan Policy 5.11 and Statewide Planning Goal 7 (3-b) applies to this case. Her argument is difficult to follow, and the hearings officer is at a loss to understand how these Comprehensive Plan Policies and Statewide Planning Goals would apply to a conditional use permit. Once zoning codes are acknowledged, the Goals and Comprehensive Plan provisions do not apply directly unless the zoning code says that they apply.22

As another example, Mr. Mark Sheldon, writing on behalf of Blue Ridge LNG Route 2013, argues that the alternative alignment crosses “historic tide land.” He goes on to argue that “[t]his violates existing County, State, and Federal land use for these lands and it causes the loss of over 2 linear miles of this tide land without any mitigation by Williams.” As if this were not vague enough, Mr. Sheldon goes on to argue:

“Note: the land use regulations related to farm land on historic tide land are very specific and the construction of a pipeline through these lands clearly violates existing land use regulations.”

It is not clear to the hearings officer exactly is meant by the term “historic tide land,” or why a pipeline buried six feet underground and 40+ feet under the Coos River would cause the “loss of 2 lineal miles of this tide land.” It is further unclear why Mr. Sheldon makes the presumption that “Williams” will not perform any mitigation in tidelands that are disturbed. Nonetheless, these arguments do not raise any legal issues with sufficient specificity to enable a response, and therefore whatever the point was supposed to be, the issues are waived.

Similarly, there are two letters in the record from Jean Stalcup that refer to “unmitigated tidelands.” See, e.g., Letter from Jean Stalcup dated Sept. 6, 2013. It is not clear to the hearings officer what is meant by the term “unmitigated tidelands.” She goes on to state that the route change will “threatens native coho habitat and cause[s] other environmental problems. Again, it is unclear how a proposal to bore under Coos River using HDD will threaten Coho habitat. If anything, HDD is a crossing method that seeks to protect such habitat. The Stalcup testimony

22 As part of a conditional use process, many zoning codes in Oregon require an applicant to demonstrate that “the proposal is consistent with the goals and objectives of the Comprehensive Plan * * *.” The effect of such a provision is to make certain plan policies in the comprehensive plan mandatory approval criteria applicable to individual land use decisions, depending on their context and how they are worded. See Stephan v. Yamhill County, 21 Or LUBA 19 (1991), Von Lubken v. Hood River County, 19 Or LUBA 404 (1990). Coos County has such a standard for zone changes, but not for conditional use permits.
appears to be neither credible nor sufficiently knowledgeable of the actual project being considered to warrant a detailed response.

Generally speaking, an issue is raised with sufficient specificity if either the specific approval criterion or its operative terms are cited, along with some statements or evidence to explain the issue. Conversely, failing to mention either the specific criterion at issue or its operative terms will usually result in a LUBA finding the issue waived. For example, in *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993), LUBA held that an issue was waived because there was no discussion of the specific code provisions or its operative terms. *See also Yontz v. Multnomah County*, 34 Or LUBA 367, 376 (1998) (raising general concerns about “equal protection” locally is not enough to preserve a legal challenge at LUBA based on Art I, Section 20 of the Oregon Constitution or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution); *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003); *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001); *Bruce Packing Co., Inc. v. City of Silverton*, 45 Or LUBA 334, 350-352 (2003); *Craven v. Jackson County*, 29 Or LUBA 125 (1995), aff’d, 135 Or App 428, rev den., 321 Or 512 (1995). *See also Hale v. City of Beaverton*, 21 Or LUBA 249 (1991). Cf. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996) (a person can sometimes raise an issue sufficiently without specifically relating that issue to the precise criterion cited to LUBA).

Even when a party has identified the correct criterion locally, it is possible that LUBA will find an issue waived if the party focused its arguments below on other particular aspects contained in the same criterion. For example, in *DLCD v. Coos County*, 25 Or LUBA 158 (1993), LUBA held that when a standard requires that a proposed dwelling be both “necessary for” and “accessory to” a proposed forest use, raising issues concerning the “necessary” requirement while making only passing mention of the “accessory” requirement does not suffice to preserve a more detailed / sophisticated argument concerning the accessory prong at LUBA.

Raising generalized concerns regarding a specific criterion is often not enough to preserve more specific, focused arguments under that same criterion. For example, in *Lett v. Yamhill County*, 32 Or LUBA 98 (1996), LUBA held that a petitioner who raised general issues concerning the “stability” standard is not sufficient to make a focused challenge at LUBA against the specific ½ mile study area radius used by the County to justify a non-farm dwelling. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999). *Hendrix v. Benton County*, 40 Or LUBA 362 (2001)

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23 In *Hale*, LUBA discussed the waiver issue as follows:

Petitioner contends the issues she seeks to raise in this assignment of error were raised in the local proceedings in a statement that she submitted at the city council hearing. Record 261-65. However, this statement, while recognizing that the city originally approved the Murrayhill PUD for a maximum of 2,649 housing units, concentrates on the difference between (1) the number of single family versus multifamily housing units actually built in the PUD, and (2) the numbers of single family versus multi-family housing units which the developer's information packets told prospective buyers would be built in the PUD. Record 261-62. No mention is made in petitioner's statement of the “intent of the original PUD.” This statement does not raise the issues of consistency of the proposed modification with the intent of the original PUD approval, or the propriety of city's criteria for determining such consistency, sufficiently to have allowed the other parties to respond to these issues in the proceedings below. Accordingly, we conclude petitioner may not raise these issues before this Board.
(raising issue under ORS 215.284(2)(d) that the proposed facility would not be operated primarily for the rural residents of the area is not sufficient to raise an issue to LUBA regarding whether the facility is operated primarily by the rural residents of the area.).

Other examples could be cited, but in the interest of brevity and cost, the hearings officer has simply not responded to issues that were not raised with sufficient specificity.


In her letter dated October 7, 2013, at p. 21, Ms. Jody McCaffree recommends that the “Coos County Commission and Hearings Officer * * * require * * * an independent review before considering approval of this permit for these alternative pipelines routes.” It is certainly beyond the scope of the hearings officer’s authority to review an independent review of a land use application. Given the statutory time limits set forth in Oregon statutes, it seems that such a review would be impractical in any event. Having said that, Clatsop County did apparently hire an engineering and land use planning firm to assist their in-house staff processing the LNG application proposed by Oregon Pipeline Company. See Exhibit B to Jody McCaffree’s October 21, 2013 letter. Exhibit 25. While it is certainly too late in this process to make such assistance from a civil engineer a feasible proposition here, the BCC could do so in future cases were it deemed to be either necessary or desirable to have such assistance. Furthermore, the hearings officer is of the opinion that, if financially feasible, it would be beneficial for the County to seek the assistance of an engineering firm to monitor the applicant’s construction activities. The County may be able to seek the assistance of state and federal agencies in these efforts as well.


In her letter dated October 14, 2013, at p. 4, Ms. McCaffree argues that the construction of the pipeline easement will “negatively impact out timber industry and flood the market with timber during construction which will negatively impact prices.” This argument is perhaps most notable for its sheer silliness and desperation. In general, this type of far-fetched “parade of horribles” argument lowers the credibility of its author, and participants in land use are well-advised to refrain making unsubstantiated assertions of this variety, especially when they do not relate to an approval criterion.

10. Requirement for Bonds.

In her letter dated October 7, 2013, at p. 21, Ms. Jody McCaffree argues that “the pipeline company should be made to put up a bond that would cover any worse case scenario involving the PCGP pipeline, including decommissioning of the pipe.” There is some merit to the suggestion, although the scope of any construction bond may not as broad as Ms. McCaffree envisions. The County Counsel will be in a good position to advise the County on bond-related issues.

III. CONCLUSION AND RECOMMENDATION

For the above stated reasons, the hearings officer concludes that the applicant has met its
burden of proof to demonstrate that it has satisfied all applicable approval standards and criteria, or that those standards or criteria can be satisfied through the imposition of conditions of approval.

A. Staff Proposed Conditions of Approval

1. [Intentionally deleted by BCC in Final Decision and Order No. 10-08-045PL.]

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

3. The facility will be designed, constructed, operated and maintained in accordance with U. S. Department of Transportation requirements.

4. [Condition excluded from HBCU 13-04 because it relates to a portion of the approved alignment (MP 13.8 to MP 14.4) not at issue in this proceeding.]

5. The proceedings for the condemnation of such lands shall be the same as that provided in ORS chapter 35, provided that any award shall include, but shall not be limited to, damages for destruction of forest growth, premature cutting of timber, diminution in value to remaining timber caused by increased harvesting costs, and loss of product value due to blow-downs. Whatever incremental costs and value losses to timber lands can be identified and demonstrated to result from the granting of the pipeline easement will be reflected in the company’s appraisal of damages payable to the owner. Therefore, the landowner should not experience any uncompensated logging or access costs.

6. Pacific Connector shall not begin construction and/or use its proposed facilities, including related ancillary areas for staging, storage, temporary work areas, and new or to-be-improved access roads until:

   Pacific Connector files with the Secretary remaining cultural resource survey reports and requested revisions, necessary site evaluation reports, and required avoidance/treatment plans;

   Pacific Connector file with the Secretary comments on the reports and plans from [SHPO], appropriate land management agencies, and interested Indian tribes;
   The [ACHP] has been afforded an opportunity to comment, and a Memorandum of Agreement has been executed; and

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

7. Intentionally deleted by BCC in Final Decision and Order No. 10-08-045PL.

8. [Condition excluded because the proposed Brunschmid and Stock Slough alternative alignments are not in close proximity to residences].

9. Coos River Highway is part of the State Highway system, under the authority and control of the Oregon Transportation Commission. Evidence that the applicant has the appropriate state authorization to cross Coos River Highway shall be provided to the Planning Department prior to zoning clearance authorizing construction activity.

10. Temporary closure of any county facility shall be coordinated with the County Roadmaster. Evidence of Roadmaster approval and coordination of any detour(s) shall be provided to the County Planning Department.

11. Each county facility crossing will require a utility permit from the County Road Department. Construction plan showing pullouts and permits for work within the right-of-way for monitoring sites will also require Roadmaster approval.

12. An analysis of construction impacts shall be provided to the County Roadmaster, which will include a pavement analysis. The analysis must identify the current condition of County facilities and include a determination of the project’s impact to the system and the steps that will be necessary to bring back to current or better condition. Prior to issuance of a zoning compliance letter for the project, the applicant shall file a bond, surety, irrevocable letter of credit, cash or other security deposit agreement in the amount of 120% of the estimated cost of necessary improvements to bring County road facilities impacted by pipeline construction back to current or better condition. After five (5) years, the security shall either be forfeited to the County if the applicant does not complete required improvements or be refunded to the applicant if applicant has completed required improvements or there are no improvements to complete.

13. Should any part of the project involve permanent structural streambank stabilization (i.e. riprap), the applicant must contact the Planning Department for a determination of the appropriate review, if any.

14. All necessary federal, state and local permits must be obtained prior to commencement of construction, including any required NPDES 1200-c permits. Prior to the commencement of construction activities, Pacific Connector shall provide the County with a copy of the “Notice to Proceed” issued by FERC. [See Letter from Mark Whitlow, dated June 24, 2010, at p. 52.]

15. Floodplain certification is required for “other development” as provided in CCZLDO 4.6.230 occurring in a FEMA flood hazard area. The applicant must coordinate with the County Planning Department.

16. [Intentionally deleted by BCC in Final Decision and Order No. 10-08-045PL.]
17. (a). The pipeline operator shall maintain an emergency response plan in compliance with 49 CFR 192.615.

17(b). At least six months prior to construction of the HDD bore under the Coos River, the applicant shall submit, for approval by the County Board of Commissioners or its designee, a report detailing the qualifications and work history of the contractor selected to perform the HDD operations. The contractor shall demonstrate to the satisfaction of the County Board that it has sufficient experience conducting successful HDD bores of a similar scale and under similar conditions without significant hydraulic fractures or inadvertent surface returns so as to harm aquatic or wetland resources. The report shall include a detailed summary of the means and method that the contractor will use to ensure that inadvertent surface returns are avoided, including a discussion of how it will clean cuttings from the pilot and reamed holes, and how it will maintain adequate drilling fluid returns. The report shall include a contingency plan explaining how inadvertent surface returns will be mitigated. The Board of Commissioners may require the applicant to post a bond to adequately protect against damage to the natural resources sought to be protected.

2. **Construction**

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

19. [Condition excluded from HBCU 13-04 because it relates to a portion of the approved alignment (Hayes Inlet) not at issue in this proceeding.]

3. **Post-Construction**

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

21. Evidence shall be provided to demonstrate that all temporary construction and staging areas have been abandoned and that those areas have been replanted, re-vegetated and restored to their pre-construction agricultural use, consistent with the requirements of this approval, the FERC Order, and the applicant's ECRP.

22. In order to minimize cost to forestry operations, the applicant agrees to accept requests from persons conducting commercial logging operations seeking permission to cross the pipeline at locations not pre-determined to be “hard crossing” locations. Permission shall be granted for a reasonable number of requests unless the proposed crossing locations cannot be accommodated due to technical or engineering feasibility-related reasons. Where feasible, the
pipeline operator will design for off-highway loading at crossings, in order to permit the haulage of heavy equipment. If technically feasible, persons conducting commercial logging operations shall, upon written request, be allowed to access small isolated stands of timber by swinging logs over the pipeline with a shovel parked stationary over the pipeline, subject to the requirement that, if determined by the applicant to be necessary, the use of a mat or pad is used to protect the pipe. The pipeline operator will determine the need for additional fill or a structure at each proposed hard, and shall either install the crossing at its expense or reimburse the timber operator / landowner for the actual reasonable cost of installing the crossing.

23. The pipeline operator will conduct routine vegetation maintenance clearing on the 30-foot strip every 3-5 years.

24. In order to discourage ATV / OHV use of the pipeline corridor, the applicant shall work with landowners on a case-by-case basis to reduce ATV / OHV impacts via the use of dirt and rock berms, log barriers, fences, signs, and locked gates, and similar means. Such barriers placed in key locations (i.e. in locations where access to the pipeline would otherwise be convenient for the public) would be an effective means to deter ATV / OHV use.

B. Applicant's Proposed Conditions Of Approval

1. Environmental

1. [Intentionally deleted by BCC in Final Decision and Order No. 10-08-045PL.]

2. [Intentionally deleted by BCC in Final Decision and Order No. 10-08-045PL.]

3. [Intentionally deleted by BCC in Final Decision and Order No. 10-08-045PL.]

4. The applicant shall submit a final version of the Noxious Weed Plan to the county prior to construction in order to address concerns raised regarding invasive species in farm and forest lands.

5. The applicant shall employ weed control and monitoring methods consistent with the Weed Control and Monitoring sections of the ECRP. The applicant shall not use aerial herbicide applications.

6. Any fill and removal activities in Stock Slough shall be conducted within the applicable Oregon Department of Fish and Wildlife in-water work period, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife.

7. [Excluded because condition relates to Haynes Inlet, which is not part of the alternative alignments proposed in this application].

8. Petroleum products, chemicals, fresh cement, sandblasted material and chipped paint or other deleterious waste materials shall not be allowed to enter waters of the state. No wood treated with leachable preservatives shall be placed in the waterway. Machinery refueling is to occur off-site or in a confined designated area to prevent spillage into waters of the state. Project-
related spills into water of the state or onto land with a potential to enter waters of the state shall be reported to the Oregon Emergency Response System at 800-452-0311.

9. [Excluded because condition relates to Haynes Inlet, which is not part of the alternative alignments proposed in this application].

10. If any archaeological resources and/or artifacts are uncovered during excavation, all construction activity shall immediately cease. The State Historic Preservation Office shall be contacted (phone: 503-986-0674).

11. When listed species are present, the permit holder must comply with the federal Endangered Species Act. If previously unknown listed species are encountered during the project, the permit holder shall contact the appropriate agency as soon as possible.

12. The permittee shall immediately report any fish that are observed to be entrained by operations in Coos Bay to the OR Department of Fish and Wildlife (ODFW) at (541) 888-5515.

13. Pacific Connector will comply with all federal and state requirements during the fire season that mandate the amount of water required on the right-of-way for adequate fire suppression during timber removal and construction activities.

2. Safety


15. The pipeline operator shall conduct public education in compliance with 49 CFR 192.616 to enable customers, the public, appropriate government organizations, and persons engaged in excavation related activities to recognize a gas pipeline emergency for the purpose of reporting it to the gas pipeline operator. Such public education shall include a "call before you dig" component.

16. The pipeline operator shall comply with any and all other applicable regulations pertaining to natural gas pipeline safety, regardless of whether such regulations are specifically listed in these conditions.

17. The pipeline operator shall provide annual training opportunities to emergency response personnel, including fire personnel, associated with local fire departments and districts that may be involved in an emergency response to an incident on the Pacific Connector pipeline. The pipeline operator shall ensure that any public roads, bridges, private roads and driveways constructed in conjunction with the project provide adequate access for fire fighting equipment to access the pipeline and its ancillary facilities.

18. The pipeline operator shall respond to inquiries from the public regarding the location of the pipeline (i.e., so called "locate requests").

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

3. Landowner

20. This approval shall not become effective as to any affected property in Coos County until the applicant has acquired ownership of an easement or other interest in all properties necessary for construction of the pipeline, and/or obtains the signatures of all owners of the affected property consenting to the application for development of the pipeline in Coos County. Prior to this decision becoming effective, the County shall provide notice and opportunity for a hearing regarding compliance with this condition of approval and the property owner signature requirement. County staff shall make an Administrative Decision addressing compliance with this condition of approval and LDO 5.0.150, as applied in this decision, for all properties where the pipeline will be located. The County shall provide notice of the Administrative Decision as provided in LDO 5.0.900(B) and shall also provide such notice to all persons requesting notice. For purposes of this condition, the public hearing shall be subject to the procedures of LDO 5.8.200 with the Board of Commissioners serving as the Hearings Body.

21. The permanent pipeline right-of-way shall be no wider than 50 feet.

22. [Intentionally deleted by BCC in Final Decision and Order No. 10-08-045PL.]

23. The applicant shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the utility facility.

4. Historical, Cultural and Archaeological

24. At least 90 days prior to the issuance of a zoning compliance (verification) letter for building and/or septic permits under LDO 3.1.200, the County Planning Department shall make initial contact with the Tribe(s) regarding the determination of whether any archaeological sites exist within the area proposed for development, consistent with the provisions of LDO 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of LDO 3.2.700, the county shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources on the site have been identified, the county may approve and issue the requested zoning compliance (verification) letter for the related development proposal; (2) if the Tribe(s) and the applicant reach agreement regarding the measures needed to protect the identified resources, the development can be approved with any additional measures the county believes are necessary to protect those resources; or (3) if the county finds that there will be adverse impacts to identified historical, cultural or archaeological resources on the site and the applicant and Tribe(s) have not reached agreement regarding protection of such resources, then the County Board of Commissioners shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the
development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of LDO 5.8.200 with the Board of Commissioners serving as the Hearings Body, and the related notice provisions, of LDO 5.0.900(A).

25. Prior to beginning construction, the applicant shall provide the County Planning Department with a licensed engineer’s certification that the “other development” shall not:
   a. result in any increase in flood levels during the occurrence of the base flood discharge if the development will occur within a designated floodway; or,
   b. result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.

5. Miscellaneous

The hearings officer recommends Condition 25 in HBCU 10-01 be renumbered and modified to be consistent with the recommendation in HBCU 13-02, as follows:

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

Respectfully submitted this 17th day of December, 2013.

ANDREW H. STAMP, P.C.

Andrew H. Stamp

AHS:ahs
Exhibit 1: Map of Proposed Route.
Exhibit 2: Map of Proposed Route.
File: HBCU-13-02/04
Applicant/Owner: Perkins Coie LLP
Date: 8/27/2013
Location: See Attached List
Proposal: Modification of amendment of the land use approval for Pacific Connector Gas Pipeline by deleting Misc Condition #25 / County approval of alternative segment alignments for the Pacific Connector Gap Pipeline (PCGP)
File: HBCU-13-02/04
Applicant: Perkins Coie LLP
Owner: Pacific Connector Gas Pipeline, LP
Date: 8/27/2013
Location: See Attached List
Proposal: Modification of amendment of the land use approval for Pacific Connector Gas Pipeline by deleting of Misc Condition #25 / County approval of alternative segment alignments for the Pacific Connector Gap Pipeline (PCGP)