February 15, 2012

TO: Board of Commissioners

FROM: Patty Evernden, Planning Director

RE: PACIFIC CONNECTOR GAS PIPELINE REMAND REM-10-01

On June 7, 2011, the Board directed staff to draft new findings and conditions of approval to address the issues identified by LUBA in Assignment of Error Two regarding property owner consent. At that time, the Board appointed the hearings officer to hear the matter and consider new testimony and evidence regarding potential impacts to the Olympia oyster in Haynes Inlet, as addressed by LUBA in Assignment of Error Four.

Staff addresses Assignment of Error Two below.

ASSIGNMENT OF ERROR TWO

When considering PCGP's conditional use application the Board addressed the application consent requirements of Coos County Zoning and Land Development Ordinance (LDO) Section 5.0.150, by including Conditions 20(a) and (b). LUBA found that the language of the conditions would require staff to exercise discretion and legal judgment to determine compliance without providing notice and an opportunity to be heard on the issue. To comply with LUBA's instructions, staff recommends that the Board amend Condition 20(a) as follows:

> (a) This approval shall not become effective as to any affected property until the Applicant has acquired ownership of an easement or other interest in the property necessary for construction of the pipeline, and/or obtains the signatures of all owners of the affected property consenting to the application for development of the pipeline.~~, and obtains either: (i) the signature of all owners of property consenting to the application, or (ii) an order of a court in condemnation of the property interest required for the pipeline that operates to obviate the need to consent of owners of property other than the applicant. In the alternative, should this condition 20(a) be deemed insufficient on appeal to satisfy applicable code, requirements, the applicant shall instead be subject to the alternative condition 20(b) immediately below.~~ 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.

Also, as instructed by LUBA, staff recommends that the prior version of Condition 20(b) be deleted in its entirety:

~~In the alternative to the above condition 20(a), in the event that condition 20(a) is deemed invalid on appeal, this approval shall not become effective as to any affected property until the applicant has acquired an ownership interest in the property and the signatures of all owners of the property consenting to the land use application for development of the pipeline, unless the signature requirement of LDO 5.0.150 is preempted or otherwise invalid under another provision of law including without limitation federal statutes, regulations, or the United States Constitution.~~

The Board can find that, as revised and conditioned, the application satisfies the requirements of Section 5.0.150 addressing Assignment of Error Two.

ASSIGNMENT OF ERROR FOUR

Assignment of Error Four involves the "protection" standard required by the Management Objectives for Coos Bay Estuary Management Plan (CBEMP) aquatic zones 11-Natural Aquatic (11-NA) and 13A-Natural Aquatic (13A-NA). LUBA held that in order to ensure that Olympia oysters will be "protected" under that standard, the county may find that impacts from construction of the pipeline will be temporary and insignificant.

As instructed by the Board, the applicant submitted new evidence into the Record that includes site specific information provided by the applicant regarding the specific location of Olympia oysters in Haynes Inlet.

To protect the resource, the applicant proposes a "Protection Plan" where Olympia oysters existing within the pipeline right-of-way will be relocated to similar habitat adjacent to the construction area. The applicant further offers a "Mitigation Plan" once construction is completed where new additional habitat will be placed within the pipeline right of way to attract larval settlement and colonization of Olympia oysters.

The hearing officer has provided a very detailed recommendation that addresses how the applicant has met their burden of providing substantial credible evidence that demonstrates compliance with this standard.

AUTHORIZATION OF WITNESSES TO TESTIFY

The final issue addressed by the Hearings Officer was raised by Jody McCaffree concerning compliance with LDO 5.7.300(4)(B) "Quasi-Judicial Land Use Hearings Procedures." In her written testimony (letter) dated October 10, 2011, Ms. McCaffree states:

"Finally, I would also like to note that it does not appear the record contains proper authorizations for written and oral testimony by Randy Miller, Vladimir Shepsis or Robert Ellis on behalf of the Pacific Connector Gas Pipeline, L.P,..."

LDO 5.7.300 Subsection (4) generally describes who may appear on behalf of parties and organizations in county land use proceedings and requires written evidence that certain individuals are authorized to testify on behalf of parties where such parties are not represented by an attorney. The purpose of this code provision is to ensure that persons who claim to be appearing on behalf of another individual, group, or company are actually authorized to speak on behalf of the individual, group or company.

Adopting a very cautious approach, the hearings officer recommended that the Board reopen the record in order to allow the applicant to submit a letter stating that the witnesses who appeared on behalf of the applicant were authorized to do so. However, because that is not the intent of the code, staff and county counsel do not believe that it is necessary to reopen the record. Rather, the Board may expressly interpret the code in a way that is consistent with its intent, which does not require an applicant to provide written authorizations in these circumstances.

In this matter, the applicant was represented by legal counsel who authorized and coordinated all testimony on behalf of the applicant in their capacity as legal representatives of the applicant. Also, representatives and employees of PCGP were present at the hearing, and actively participated in the hearing, and clearly supported and authorized all testimony that was submitted on the applicant's behalf. There is no basis on which the Board could find that the applicant did not consent to the testimony being presented by its attorneys and witnesses.

The hearings officer states that the language of LDO 5.7.300(4) is somewhat vague, and could be read to require that all persons who provide testimony on behalf of a company must provide a letter from the company stating that they are authorized to appear on behalf of the company, regardless of circumstances. As addressed in more detail below, the Board may find that there is no need to reopen the record, because the applicant is not required to provide written authorizations under these circumstances. Also, this is an issue that could have been raised by the opponents in the initial proceedings prior to remand. Because it was not raised previously before the county or at LUBA, the opponents are barred from raising this issue at this late stage in the remand proceedings.

1. Failure to Raise in LUBA Appeal

LUBA cases are very clear that, when a decision is back before the county on remand, opponents may not raise issues that "could have been raised, but were not raised" in the first LUBA appeal. *Wetherell v Douglas County*, 60 Or LUBA 131, 137 (2009) (citing *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992)). This issue could have been raised by the opponents in the prior proceedings before the hearings officer, where the applicant had even more employees and consultants who testified on its behalf, and could have been raised and resolved by LUBA. Because the opponents failed to raise this issue at the time when they could have done so, they have waived the issue and cannot raise it for the first time on remand. LUBA's Order on remand is very narrow, and limits the county's review to two narrow issues; those issues do not include authorization of the applicant's witnesses under LDO 5.7.300(4).

2. Interpretation of Authorization Requirement

As described above, the obvious purpose of the authorization requirement in LDO 5.7.300(4) is to prevent situations where consultants or other individuals appear at the land use hearing and claim to be representing a group or company when they have no authority to do so. This provision was added to the LDO in 2006 after this situation occurred several times at county hearings.

This code provision is not intended to apply where, as in the present case, the applicant is not only represented by attorneys who coordinate the submittal of all testimony, but the applicant's representatives are also present at the hearing and provide direct oral testimony to the hearings officer. In other words, PCGP obviously consented to the individuals who were testifying on its behalf because those individuals were identified in PCGP's attorneys in their written materials and introduced by PCGP's attorneys at the outset of the hearing. Further, the senior management of PCGP was present at the hearing and PCGP's Project Manager and Staff Environmental Scientist Randy Miller was one of the individuals who provided testimony on behalf of the company.

The interpretation being urged by the opponents is not the outcome intended by the county when this code provision was adopted. Reopening the record would only result in further delay and a pointless round of letter writing by the applicant and rebuttal by the opponents. Clearly the individuals who appeared and testified on behalf of the applicant were authorized to do so, and the opponents have not attempted to explain how the failure to include the letters from the applicant has harmed their rights to a full and fair hearing.

An analysis of the language of LDO 5.7.300(4) reveals that the more plausible interpretation of that section is that, where a party to the proceeding is represented by an attorney, that attorney may provide any necessary authorization regarding individuals who submit evidence on behalf of the represented party. LDO 5.7.300(4) provides, in relevant part:

4. Representatives
   A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.
   B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:
      (1) Be written on the group, company, or organization's official letterhead;
      (2) Name the person authorized to appear on behalf of the group, company organization;
      (3) Specify the scope of the authorization; and
      (4) Contain the signature of a person with authority to grant the authorization.

First, section (A) expressly provides that a party may represent themselves or be represented by an attorney. In the present case, at the hearing the applicant both represented itself (via the testimony of Project Manager Randy Miller) and was also represented by attorneys (Mark Whitlow and Roger Alfred). One week prior to the hearing, the applicant's attorneys submitted a letter to the hearings office dated September 14, 2011 that identified certain individuals who would appear at the hearing on behalf of the applicant and also attached and summarized written testimony from those individuals. At the hearing, the attorneys also introduced each individual who would be providing direct oral testimony to the hearings officer.

As addressed above, because the project manager for PCGP was present at the hearing and provided direct testimony to the hearings officer, and because PCGP was represented by legal counsel at the hearing, there is no basis to challenge the authority of other witnesses who appeared at the hearing on behalf of the applicant. If someone without authority attempted to testify, obviously the attorneys or the project manager would have objected.

Nonetheless, to the extent that subsection (B) creates a requirement for written authorization under these circumstances, the Board may find that such written authorization was provided by the attorneys for the applicant in their correspondence dated September 14, 2011, October 10, 2011, October 17, 2011, November 14, 2011, and November 28, 2011. Those letters expressly identify the individuals who are authorized to present testimony on behalf of the applicant and describe the scope of their testimony.

Staff recommends the Board find the issues on remand have been adequately addressed with the imposition of the supplemental conditions of approval listed below, all of which were recommended by the hearings officer. All other conditions of approval of the conditional use remain in full force and effect.

CONDITIONS OF APPROVAL

(1) Oyster Mitigation Plan

No. ___. The applicant shall comply with the terms and conditions of the applicant's proposed Olympia oyster mitigation plan prepared by Bob Ellis of Ellis Ecological Services, Inc. dated October 7, 2011 (the "Mitigation Plan"), as supplemented and modified by the following mitigation measures:

a) The applicant's compliance with the Mitigation Plan will be administered through permits pursuant to the Clean Water Act Section 404 by the Army Corps of Engineers (Corps), pursuant to Section 401 of the Clean Water Act by the Oregon Department of Environmental Quality (DEQ), and pursuant to Oregon's Removal-Fill Law (ORS 196.795-990) by the Oregon Department of State Lands (DSL). These permitting agencies will be provided with copies of the Mitigation Plan, as modified by this condition, and approval of the permits issued by the Corps, DEQ and DSL may, as appropriate, incorporate the terms of the Mitigation Plan.

b) As part of the state permitting process for the pipeline discussed in subsection (a) above, the applicant shall consult with ODFW on the specific details regarding how best to accomplish the actual placement of Pacific oyster shells addressed in Section 4.2.1 of the Mitigation Plan in order to ensure success of the project, including ideal depth and breadth of coverage of new hard substrate, specific methods for dispersal (*e.g.*, bagged vs. loose), and best locations for placement of substrate within the pipeline right of way .

c) Unless modified under the direction of ODFW during the consultation described above, the applicant will establish appropriate baseline conditions for the Olympia oyster mitigation effort in Haynes Inlet using the following guidelines for a before-after control impact study design:

i. The "Before" conditions shall be determined by field surveys of the distribution, abundance, status, and condition of existing Olympia oysters: (a) within the "Impact Area," *i.e.*, the 250-foot pipeline right of way within the intertidal portion of Haynes Inlet; and (b) within an appropriate "Control Area" in another portion of Coos Bay that will not experience any influence from construction of the pipeline. The precise location of the Control Area will be selected in consultation with ODFW.

ii. The surveys of the Control and Impact Areas shall be conducted immediately prior to construction of the pipeline (Before), and repeated over a period of five years following construction of the

pipeline (After) to encompass the lifespan of individual Olympia oysters.

d) Monitoring of the "Relocation Area" shall be undertaken as described in Section 4.3 of the Mitigation Plan.

(2) In-Water Work Periods

No. ___. If the applicant's mitigation plan is approved by other regulatory agencies, the dispersal of Pacific oyster shells within the pipeline right of way will be effectuated either in late July or early August following the construction season.

No. ___. Based on the potential for the larval settlement peak in October, the applicant should avoid, if possible, conducting dredging operations between Milepost 2.6 to MP 3.2 during the month of October.

(3) Turbidity

No. ___. The applicant must comply with all DEQ regulations and requirements regarding turbidity. The applicant shall employ turbidity curtains and/or other appropriate control measures to assure that turbidity does not exceed the levels specified in the applicant's DEQ water quality permit.