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Mr. Andrew Stamp
Coos County Land Use Hearings Officer
c/o Coos County Planning Department
225 N Adams Street
Coquille, OR 97423

Re: Pacific Connector Gas Pipeline Time Extension Application
Coos County File No. EXT-18-012 (AP-19-002)
Applicant's Final Written Argument

Dear Mr. Stamp:

This office represents Pacific Connector Gas Pipeline, LP ("PCGP"), the applicant requesting a time extension ("Application") from Coos County ("County") to the approval period for the conditional use permit authorizing the Blue Ridge Alignment of the Pacific Connector Gas Pipeline ("Pipeline"). This letter constitutes PCGP's final written argument in support of the Application. It does not include any new "evidence," as that term is defined in ORS 197.763(9)(b). I have asked County Planning staff to place a copy of this submittal before you and in the official record for this matter. Please consider this letter and PCGP's additional submittals before making a decision on the Application.

As explained below, the Application satisfies the limited approval criteria in Coos County Zoning and Land Development Ordinance ("CCZLDO") 5.2.600 that apply to a permit extension request. Opponents' contentions to the contrary lack merit and ignore LUBA's recent decision to affirm the County's plausible interpretations of CCZLDO 5.2.600 in the Pipeline extension context. *Williams et al. v. Coos County*, __ Or LUBA at __ (LUBA Nos. 2018-141/142, April 25, 2019). For the reasons set forth in the record and in this letter, the Hearings Officer should deny opponents' contentions and should recommend approval of the Application.

I. The Application is not barred due to a change in applicable criteria.

The requested extension would be the third extension for the underlying permit for the Blue Ridge Alignment. As a result, the County must find that, for that portion of the alignment located on resource land, "applicable criteria for the decision have not changed." CCZLDO 5.2.600.1.a.(4). As explained at page 11 of the Planning Director's May 24, 2019 staff report in this matter, the applicable criteria for the decision have not changed.

A. Natural Hazard Provisions.

Several provisions identified by opponents do not constitute "applicable criteria for the decision" that have changed. For example, although the County has recently amended its comprehensive plan and land use regulations to adopt provisions pertaining to natural hazards, these provisions are not "applicable criteria for the decision."

First, as to the comprehensive plan provisions, the Board previously determined that they were not "approval criteria" for a Pipeline permit. *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004 ("2017 Extension Decision") at 19-21. Opponents do not identify any errors in the Board's previous determination. Therefore, there is no basis for the Hearings Officer to reach a different conclusion about the comprehensive plan natural hazard provisions in the present case.

The Board also concluded that the CCCP and CCZLDO natural hazard provisions are not approval criteria that would apply to the Pipeline "decision" because the CCZLDO includes a "grandfather" clause that exempts the Pipeline from compliance with these provisions: "Hazard review shall not be considered applicable to any application that has received approval and [is] requesting an extension to that approval * * *." CCZLDO 4.11.125.7. Thus, pursuant to CCZLDO 4.11.125.7, the natural hazard provisions are not "applicable approval criteria" that have changed.

Although opponents contend that the "grandfather" clause reflects poor public policy, that contention is well outside the scope of this proceeding.

Further, although opponents contend that the "grandfather" clause is inconsistent with OAR 660-033-0140, which is a state administrative rule regulating permit extensions on resource land, opponents' contention lacks merit. Once implemented by acknowledged local ordinances, these state rules no longer directly apply to local land use decisions. *See Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983) (land use decisions made by local jurisdictions with acknowledged comprehensive plans and land use regulations are not reviewable for compliance with the Statewide Planning Goals and their implementing rules). *See also Gould v. Deschutes County*, 67 Or LUBA 1 (2013) (fact that local jurisdiction had acknowledged land use regulation that slightly differed from OAR 660-033-0140 did not make OAR 660-033-0140 directly applicable to the local land use decision). In the present case, the "grandfather" provision is final and acknowledged. Accordingly, regardless of any inconsistency with state law, it (and not OAR 660-033-0140) applies to the Application. In its recent decision affirming the County's decision to grant extensions to two other alignments of the Pipeline, LUBA expressly concurred with this analysis and conclusion. *Williams*, __ Or LUBA at __ (slip op. at 13).

In that decision, LUBA also adopted alternative findings that, on the merits, the "grandfather" clause was not inconsistent with the rule:

> "However, even if we assume for purposes of this opinion that in this appeal, petitioners could challenge the grandfather clause as inconsistent with the administrative rule that implements Goal 3, we would reject that argument. The grandfather clause is not inconsistent with the rule. Nothing in the rule prohibits a local government from adopting new criteria and exempting issued permits from those new criteria. Accordingly, the board of commissioners correctly concluded that, pursuant to the grandfather clause, the standards at LDO 4.11.125.7., including the fuel break standards at LDO 4.11.125.7.f., do not apply to the extension requests."

Id. Opponents do not even discuss the *Williams* opinion in their submittals in this proceeding, let alone offer legal argument explaining how LUBA erred in deciding this issue. As a result, the Hearings Officer should follow LUBA's reasoning and deny opponents' contention on this issue.

Although opponents also contend that applicable approval criteria changed because the County adopted new standards pertaining to geologic assessments, the Hearings Officer should find, for two reasons, that these geologic assessment standards would not be "applicable" to the Blue Ridge Alignment. First, the geologic assessment standards are only triggered by the existence of natural hazards, and pursuant to the "grandfather" clause discussed above, the natural hazard provisions do not constitute "approval criteria" for existing approvals such as the Blue Ridge Alignment. Second, geologic assessments are only required for structures, and the Pipeline is not a structure.

B. CCZLDO 5.0.175.

Opponents also contend that CCZLDO 5.0.175 constitutes an "applicable criteri[on]" that has changed; however, this contention lacks merit because this provision is an alternative to the traditional requirement that an application must include the landowner's signature. CCZLDO 5.0.150. As such, even if CCZLDO 5.0.175 could be an application requirement, it is not necessarily "applicable" because an applicant could always opt to file its application pursuant to CCZLDO 5.0.150 rather than CCZLDO 5.0.175. For the same reason, CCZLDO 5.0.175 is not mandatory in nature. As such, it is not properly construed to be a "criteri[on]." In its 2018 decision approving time extensions for both the original alignment and the Brunschmid/Stock Slough alignment, the County adopted findings to this effect. Although two opponents appealed those decisions to LUBA, they did not challenge this finding by the County; therefore, LUBA found that there was no basis to reverse or remand the County's decision pertaining to this criterion:

> "As intervenor points out, petitioners' argument does not address the board of commissioners' alternative finding that, even if LDO 5.0.175 could constitute an 'approval criterion,' it is not an 'applicable' approval criterion within the meaning of LDO 5.2.600.1(c) because it merely provides an alternative, optional pathway for certain entities to apply for a permit. We agree with intervenor that absent any challenge to that finding, petitioners' argument provides no basis for reversal or remand."

Williams, __ Or LUBA at __ (slip op. at 16). Opponents' contentions in the present appeal appear to continue to assume that CCZLDO 5.0.175 is an "applicable approval criterion;" however, they do not even attempt to explain why the County's findings on

this issue in 2018, which they did not even challenge before LUBA, are erroneous. The Hearings Officer should follow the lead of the Board and conclude that CCZLDO 5.0.175 is not applicable.

For these reasons, the Hearings Officer should find that the "applicable criteria for the decision" have not changed.

II. PCGP was not able to commence and continue development within the approval period for reasons for which PCGP was not responsible.

A. Applicant's explanation.

In order to approve the request, the County must find that PCGP was not able to commence and continue development of the Pipeline for reasons for which PCGP was not responsible. CCZLDO 5.2.600.1.a.(2)(c), (d). PCGP was prevented from beginning or continuing development within the approval period because, despite PCGP's reasonable efforts, the Pipeline has not yet obtained federal authorization to proceed. The Pipeline is an interstate natural gas pipeline that requires pre-authorization by the Federal Energy Regulatory Commission ("FERC"). PCGP has requested a FERC certificate for this alignment and has diligently responded to FERC's requests for additional information in support of the certificate request. *See* record of applicant submittals in the 12-month FERC docket in Exhibit 7 to the Application. Until PCGP obtains a FERC certificate authorizing the Pipeline, PCGP cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. As of the date PCGP filed this request with the County, FERC had not yet authorized the Pipeline. As a result, PCGP cannot begin or continue development of the Pipeline.

The County previously accepted this reasoning as a basis to grant an extension of approvals for the Pipeline:

> "In this case, the applicant needs federal approval for the gas pipeline project, and the project cannot commence until those federal approvals are forthcoming. Even the primary opponent to the project, Ms. Jody McCaffree, admits the facts that caused the applicant to be unable to begin or continue development during the approval period, i.e., that [FERC] vacated the federal authorization to construct the pipeline."

See County Final Order No. 14-09-063PL, ACU-14-08/AP 14-02 at 9. Likewise, in granting a previous extension of this permit, the County Planning Director stated:

> "The fact that the project is unable to obtain all necessary permits to begin prior to the expiration of a conditional use approval is sufficient to grant the applicant's requested extension."

See Director's Decision for County File No. ACU-16-013 at 13. This 2016 decision was not appealed.

In the 2017 Extension Decision, the Board elaborated on how the standard in *former* CCZLDO 5.2.600.1.b.iv applies to an instance when an applicant must obtain a permit from a third-party agency:

> "* * * [B]ecause PCGP was required to obtain a discretionary permit from another agency as a prerequisite to implementing the permit, PCGP necessarily was not in sole control, i.e., was not the 'primary cause,' over whether or when FERC issued that permit."

2017 Extension Decision at 10. In reaching this conclusion, the Board rejected opponents' request that the County must make a deep dive into FERC's administrative proceedings to assess PCGP's actions and inactions and draw conclusions about whether PCGP was "responsible" for FERC's ultimate decisions. 2017 Extension Decision at 9. The Board stated that the opponents were "asking the County to get into too much detail about the reasons for the FERC denial." *Id.*

As an alternative, the Board concluded that an applicant for a time extension request must demonstrate reasonableness in its permitting actions:

> "In this case, it is sufficient to conclude that because the Applicant has thus far been unsuccessful in obtaining permits from FERC despite the Applicant's reasonable efforts to obtain same, the Applicant is therefore not at fault for failing to begin construction on the pipeline."

Id. Notably, in opponents' recent appeal of the County's decisions to grant extensions for the original and Brunschmid/Stock Slough alignments, LUBA affirmed this same finding by the Board, reasoning that the Board's interpretation of its own code was not

inconsistent with the plain language of the code. *Williams*, ___ Or LUBA at __ (slip op. at 10). In this proceeding, opponents do not even acknowledge LUBA's decision, let alone explain how it is unlawful in substance.

The Board also endorsed PCGP's contention that the relevant inquiry was "'whether PCGP had exercised steps within its control to implement the Approval.'" *Id.* The Board concluded that, in that case, PCGP presented unrebutted evidence that it had exercised these steps.

B. Opponents' contentions to the contrary lack merit.

Notwithstanding the Board's careful consideration and resolution of the FERC denial issue in the 2017 Extension Decision, opponents nevertheless attempt to resurrect it in the current proceedings. The Hearings Officer should deny opponents' attempt to do so for two reasons. First, opponents' actions is a blatant and impermissible collateral attack on the 2017 Extension Decision. *See Noble Built Homes, LLC v. City of Silverton*, 60 Or LUBA 460, 468 (2010) (a party "cannot, in an appeal of one [local land use decision], collaterally attack a different final [local] land use decision."). Although opponents attempt to frame the question as one of issue preclusion (not collateral attack), they are mistaken. There is simply no authority—and opponents do not cite to any—that permits someone to utilize one land use proceeding to challenge a previous, final, unappealed land use decision.

Second, and in the alternative, if the Hearings Officer reaches the merits of whether PCGP is responsible for FERC's 2016 denial, the Hearings Officer should deny opponents' contention based upon the sound reasoning and analysis adopted by the Board in the 2017 Extension Decision. Opponents have not cited any new facts in support of their position that PCGP caused the FERC denial. They also have not identified any legal errors in the Board's earlier decision. There is simply no basis to sustain opponents' contention on this issue.

Opponents' related contentions also fail. For example, although opponents contend that PCGP must demonstrate that it can cure the "reasons" that prevented implementing the permit within the new 12-month extension period, LUBA has rejected this reading of the code:

> "Finally, we reject petitioners' argument that LDO 5.2.600.1(b)(iii) requires an applicant to demonstrate that the 'reason' can be 'cured' within the extension period. Nothing in the express language of that provision, or any other provision of LDO 5.2.600 cited by petitioners, supports that interpretation."

Williams, __ Or LUBA at __ (slip op. at 9).

For these reasons, the Hearings Officer should deny opponents' contentions raised under CCZLDO 5.2.600.1.a.(2)(c), (d) and recommend that the Board find that the extension request is consistent with these provisions.

III. Responses to Additional Issues.

A. Potential impacts caused by operation of the Pipeline are not relevant.

The Application requests a time extension of an already approved County land use permit authorizing the Pipeline. That previously approved permit decision fully analyzed the impacts associated with the Pipeline and imposed conditions of approval to mitigate these impacts. The approval criteria applicable to the extension request are limited in nature and do not require or allow a re-evaluation of the potential impacts of the Pipeline or the conditions imposed to mitigate same. Therefore, the Hearings Officer should find that the concerns expressed about potential Pipeline impacts are outside the scope of this proceeding.

B. Opponents' contention that the permit expired in 2017 lacks merit and cannot be raised at this time.

For two reasons, the Hearings Officer should deny opponents' contention that the permit expired in 2017. First, the contention is not timely because it pertains to whether the County erred by approving the previous extension request for the Blue Ridge Alignment. As such, the contention is an improper collateral attack on the County's final 2017 decision. *See Noble Built Homes, LLC*, 60 Or LUBA at 468. For this reason alone, the Hearings Officer should deny the opponents' contention. Second, on the merits, the contention fails because opponents refer to incorrect facts. The record reflects that, in 2017, PCGP filed an application for an extension of the Blue Ridge

Alignment permit and paid the required fee, and the County received these materials on November 9, 2017, prior to the expiration date on November 11, 2017. *See* bulleted items in cover letter dated November 17, 2017, attached to end of County Exhibit 1. Although PCGP did not make that application complete until November 17, 2017, it does not take away from the application being filed on November 9, 2017. Therefore, the facts do not support opponents' contention on this issue. For this additional reason, the Hearings Officer should deny opponents' contention.

C. The fact that FERC's Draft Environmental Impact Statement ("DEIS") does not recommend the Blue Ridge Alignment is not relevant to these proceedings.

In March 2019, FERC issued the DEIS, which recommended that PCGP eliminate the Blue Ridge Alignment from the project in favor of another alignment. *See* Draft EIS at 3-20 and 3-21 (included as attachment to County Exhibit 1). FERC made this recommendation despite the fact "many additional private parcels" are affected by the favored alignment. *Id.*

Although opponents contend that FERC's recommendation to eliminate the Blue Ridge Alignment should dispense with any need for this extension request, opponents are mistaken. The DEIS is a draft document, and only a recommendation at that. As stated at the hearing, PCGP disagrees with FERC's recommendation to eliminate the Blue Ridge Alignment in part due to the significant number of additional private property owners that will be affected by the FERC-recommended alternative. PCGP has submitted comments responding to FERC's recommendation. FERC will issue a Final EIS and Record of Decision for the Application that will identify FERC's decision regarding the Pipeline and its alignment. Until that occurs, FERC has not officially eliminated the Blue Ridge Alignment from further federal review. That FERC decision will likely not preclude PCGP from filing an application to amend its certificate to include the Blue Ridge Alignment.

In any event, as has been exhaustively discussed in this and previous proceedings, no local criterion requires a pre-approval by FERC in order for the County to approve the Application. The Hearings Officer should deny opponents' contentions pertaining to the DEIS.

D. There is no basis to apply CCZLDO 5.2.600 (2013) to the Application because it was not in effect when the Application was submitted.

Although opponents contend that the County should apply the 2013 version of CCZLDO 5.2.600 to the Application, the Hearings Officer should deny this contention. The County is required to review the Application for compliance with the standards and criteria in effect when the Application was first submitted, ORS 215.427(3)(a), and the County amended CCZLDO 5.2.600 in 2018, prior to submittal of the Application. Therefore, the 2018 version of CCZLDO 5.2.600 applies to the Application. Opponents offer no cognizant explanation or authority to the contrary. Moreover, opponents fail to explain how either the County's analysis or decision would be different if the 2013 standards applied to the Application instead of the 2018 version. For these reasons, the Hearings Officer should deny opponents' contentions on this issue.

E. Norman's Notice of Tort Claim is not relevant to this proceeding.

County Exhibit 6 is a Notice of Tort Claim from Cary Norman, which alleges that the County's approval and continued extension of the Pipeline interferes with the use and enjoyment of the Norman property. The notice alleges potential claims, including inverse condemnation, intentional deprivation of civil rights, and intentional emotional distress. The issues raised in the Notice of Tort Claim are not directed at any of the approval criteria applicable to the Application but instead pertain to potential future litigation. Therefore, this is not the appropriate forum to address the substance of the Notice of Tort Claim. Further, because it is not directed at any approval criteria, it does not provide a basis to deny or condition the Application.

IV. Conclusion.

For the reasons set forth in this letter and in the record for this matter, the Hearings Officer should approve the Application.

Thank you for your careful consideration of the Application and PCGP's testimony in this matter.

Very truly yours,

Seth J. King

cc: Ms. Jill Rolfe (via email)
Client (via email)
Mr. Steve Pfeiffer (via email)