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# STAFF REPORT

Friday, May 24, 2019

**APPLICANT:** Seth King, Perkins Coie LLP on behalf of Pacific Connector Gas Pipeline, LP.

**APPELLANTS:** Katy Dodds, Natalie Ranker, The Elk Lake Corporation and Cary Norman, Represented by Tonia Moro, Attorney at Law, P.C.

**TYPE OF APPLICATION:** Appeal of an Extension (EXT-18-012) of a Conditional Use Application Authorization.

**FILE NUMBER:** AP-19-002

## I. RELEVANT CRITERIA:

Coos County Zoning and Land Development Ordinance (CCZLDO)

- Article 5.8 Appeal Requirements
- § 5.2.600 Expiration and Extensions of Conditional Uses.
  - OAR 660-033-0140 Agricultural Land
    - Division 33 AGRICULTURAL LAND

      660-033-0010 Purpose

      The purpose of this division is to preserve and maintain agricultural lands as defined by Goal 3 for farm use, and to implement ORS 215.203 through 215.327 and 215.438 through 215.459 and 215.700 through 215.799.

## II. PROPERTY LOCATION:

The original conditional use application was approved for a natural gas pipeline alternative segment of the original route referred to as the Blue Ridge Alignment. The subject properties are shown on the vicinity map and further described in the original authorization.

## III. BACKGROUND:

On October 21, 2014, the Board of Commissioners adopted and signed Order No. 14-09-062PL, File No. HBCU-13-06, approving the Applicant's request for a conditional use permit to authorize development of the Blue Ridge alternative alignment for a portion of the pipeline and to authorize associated facilities, subject to conditions of approval.

This approval became effective on the date the appeal period for the approval expired pursuant to Coos County Zoning and Land Development Ordinance § 5.0.250.5, on November 11, 2014. Section 5.0.250 is based on ORS 215.427 Final action on permit and 215.417 Time to act under certain approved permits. Coos County's acknowledged an ordinance calculates the appeal period date all appeals have been exhausted. Therefore, the permit became final once the 21 days

appeal expired and 21 days after October 21, 2014 is November 11, 2014. The following application have been filed and reviewed:

1. The applicant filed for an extension to that decision on November 9, 2016 and staff issued a decision on December 28, 2016 to extend the decision out to November 11, 2017.
2. The applicant filed for an extension to extend the November 11, 2017 final action date on November 9, 2017 and staff issued a decision on January 2018 to extend the application to November 11, 2018.
3. The applicant filed the current extension on November 8, 2018 prior to the expiration date.

All applications were submitted electronically and then paper copies followed in the mail. Staff accepted the applications through a completeness process. The owner signature was not required on the form prescribed by the county and there was a condition of approval that addressed the signature issue in the decision. The applications were deemed completed for the purpose of review within the 30 days of electronical submittal. The signature requirement has been addressed by the Board of Commissioners prior decision and in another approval (Attachment "C").

The County has issued other approvals for the pipeline project, including approving and extending the original pipeline approval and the alternative pipeline route referred to as the Brunschmid/Stock Slough alignment. The other applications that have been approved are subject to different timelines and are not being reviewed as part of this extension request.

This application was set to expire on November 11, 2018 but the applicant requested this extension prior to that date (received on November 8, 2018). Staff reviewed this application and mailed out a notice of decision but then issued a reconsideration to respond to new information received from opponents. The reconsideration was done so that staff could make some important clarifications and address some of the objections. The County Administrative process does not provide for a comment period; however, comments may be made and are included in the record.

Also, Coos County recently updated the zoning ordinance to incorporate extension language to follow OAR 660-033-0140 permit expiration dates for any permit that is subject to Farm and Forest Zones. This language is under appeal at LUBA and has not been acknowledged at this time; however, it is applicable as the Farm and Forest updates are based on OAR 660-033-0140. Staff has been reviewing the history and intent of the OAR 660-033-0140 due to the appeal and has included relevant background information that has been included in this report.

OAR 660-033-0140 appears to have been adopted to implement portions of requirements of ORS 215.416, 215.417 and 215.427 (in part) regarding final land use permit actions, expiration of permits, and extensions to certain approved permits pertaining to Agricultural Lands and certain residential uses that can be sited on Forest Lands.

> ***ORS 215.417 Time to act under certain approved permits; extension.***
> ***(1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.***
> ***(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.***

*(3) For the purposes of this section, "residential development" only includes the dwellings provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3).*

Staff has determined that notice should be provided under the administrative land use process. The County has no legal authority or responsibility to make findings that LCDC's language in OAR 660-033-0140 "this is not a land use decision" (effective 1993) is unlawful or inconsistent with other statutory requirements or rules. The County does have a responsible, if discretion was used to make a decision to send a notice with an opportunity for an appeal. The County has erred on the side of caution in this matter and made the determination that notice of decision is appropriate. The issue of language in the rule is beyond the scope of this request and should have been raised at the time the rule was adopted in 1993.

*660-033-0140*
*Permit Expiration Dates*
*(1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.*
*(2) A county may grant one extension period of up to 12 months if:*
*(a) An applicant makes a written request for an extension of the development approval period;*
*(b) The request is submitted to the county prior to the expiration of the approval period;*
*(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and*
*(d) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.*
*(3) Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.*
*(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.*
*(5)(a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.*
*(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.*
*(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).*

This OAR incorporates rules for all "*proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438*"

The only exemption is provided for ORS 215.294 to ORS 215.316 and anything beyond 215.438

- *215.294 Railroad facilities handling materials regulated under ORS chapter 459 or 466*

- *215.296 Standards for approval of certain uses in exclusive farm use zones; violation of standards; complaint; penalties; exceptions to standards*
- *215.297 Verifying continuity for approval of certain uses in exclusive farm use zones*
- *215.298 Mining in exclusive farm use zone; land use permit*
- *215.299 Policy on mining resource lands*
- *215.301 Blending materials for cement prohibited near vineyards; exception*
- *215.304 Rule adoption; limitations*
- *215.306 Conducting filming activities in exclusive farm use zones*
- *(Temporary provisions relating to guest ranches are compiled as notes following ORS 215.306)*
- *(Temporary provisions relating to alteration, restoration or replacement of dwellings are compiled as notes following ORS 215.306)*
- *215.311 Log truck parking in exclusive farm use zones; dump truck parking in forest zones or mixed farm and forest zones*
- *215.312 Public safety training facility*
- *(Marginal Lands)*
- *215.316 Termination of adoption of marginal lands*
- *PERMITTED USES IN ZONES*
- *215.438 Transmission towers; location; conditions*
- *215.439 Solar energy systems in residential or commercial zones*
- *215.441 Use of real property for religious activity; county regulation of real property used for religious activity*
- *215.445 Use of private property for mobile medical clinic*
- *215.447 Photovoltaic solar power generation facilities on high-value farmland*
- *215.448 Home occupations; parking; where allowed; conditions*
- *215.451 Cider business; conditions; permissible products and services; local government findings and criteria*
- *215.452 Winery; conditions; permissible products and services; local government findings and criteria; fees*
- *215.453 Large winery; conditions; products and services; local government findings and criteria*
- *215.454 Lawful continuation of certain winery-related uses or structures*
- *215.455 Effect of approval of winery on land use laws*
- *215.456 Siting winery as commercial activity in exclusive farm use zone*
- *215.457 Youth camps allowed in forest zones and mixed farm and forest zones*
- *215.459 Private campground in forest zones and mixed farm and forest zones; yurts; rules*
- *215.501 Accessory dwelling units in rural residential zones****

***Note: The list does continue

OAR 660 Division 33 regulates Agricultural Uses and does incorporate certain dwellings addressed under OAR 660 Division 6[1] as they could be sited in either Agricultural or Forest Zones. OAR 660 Division 6

[1] As authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-006-0025 and 660-006-0027, subject to the requirements of the applicable section, may be allowed in any agricultural/forest zone. The county shall apply either OAR chapter 660, division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993.

is silent in regards to an extension of time or expiration of permits. Due to the fact that there are no other statutory authority or rules to rely upon regarding expiration of permits, with the exception of ORS 92 that controls Land Divisions, staff shall rely on the acknowledged comprehensive plan and implementing ordinance. Staff finds that all other extension provisions that are beyond what are regulated in ORS 92, ORS 215.417 and OAR 660 Division 33 are within the County's discretion to create a process if they choose. This is consistent with the recent LUBA decision (see Attachment "C") The CCZLDO only has jurisdiction to govern land use outside of the incorporated boundaries of the cities located within the boundary of Coos County.

Appellants in the current appeal and in past appeals have continued to raise an issue with changes to the location of the pipeline. CCZLDO Section 1.1.300 states, "[i]t shall be unlawful for any person, firm, or corporation to cause, develop, permit, erect, construct, alter or use any building, structure or parcel of land contrary to the provisions of the district in which it is located. No permit for construction or alteration of any structure shall be issued unless the plans, specifications, and intended use of any structure or land conform in all respects with the provisions of this Ordinance, unless approval has been granted by the Hearings Body". This is a compliance issue that falls under enforcement but this is not an issue to be considered under an extension as it is limited to the criteria for extensions.

Furthermore, the county has no control over applications that are submitted to a different agency by applicants. Staff does participate through a process referred to as "Coastal Consistency" review or through Land Use Compatibility Statements (LUCS). Staff reviews the other agency permits in most cases and can mark if an application has been completed. This is the appropriate time to decide if changes require additional applications to be submitted but it does not invalidate prior final permits that are on file.

Oregon's land use planning program is integrated with other regulations. The land use program is locally regulated by cities and counties, with plans that meet Oregon's shared goals and guidelines; these are Oregon's Statewide Planning Goals. Coos County is within the Coastal Zone Management Area which adds some additional layers of review that other counties outside the management area do not have, and that is the reason that Coos County is allowed to apply their local comprehensive plan and implementing ordinance to a review only to the extent required under the Oregon Coastal Management Program. Coos County is a partner in this program which will help DLCD determine Federal Coastal Consistency.

The Oregon Coastal Management Program (OCMP) is regulated and managed under Department of Land Conservation and Development (DLCD). DLCD has the responsibility and authority to make federal consistency decisions. Decisions agree or object to the proposed federal activity based on an analysis of how 'consistent' the project is with the state's management program. The National Oceanic and Atmospheric Administration (NOAA) approved management program contains specific policies that have been selected from existing state law, the statewide planning goals, and local comprehensive plans and ordinances. Together, these specific policies are called enforceable policies.

OCMP is made up of 40 partners at the county and city level and 11 state agency partners. Each local entity has documents governing how they operate and guiding how they administer land use in their community. Each state agency has chapters of statutes guiding operations and helping them administer state law. These documents include comprehensive plans and land use regulations, state statutes, and statewide planning goals. DLCD incorporates the documents in their entirety into the Program.

Within the various statutes, goals, plans, and ordinances only certain elements meet the criteria to be used for federal consistency review.

Federal consistency does not authorize a local jurisdiction to exceed the authority given to them through Statute or Rule. The local jurisdiction does not have authority to make determination using federal laws unless that federal law expressly provides for the local government to apply it directly or has been incorporated into a Statewide Planning Goal. Oregon Statewide Planning Goals, Oregon Revised Statutes and Oregon Administrative Rules regulate land use in Oregon and implemented through acknowledged local comprehensive plans, ordinances or codes. The local jurisdictions do have some local control absent a mandatory ORS, OAR or Planning Goal as long as the language is not in conflict and that is why it may not have been incorporated into the local comprehensive plans.

Coos County strives to ensure that all regulations are updated but has to balance staffing and funding. Staff has worked with Department of Land Conservation and Development on grants to allow updates to continue. Staff has been working over the past few years on updating natural hazards, housing, readability issues, mapping digitization and estuary management. However, the opposition to the Liquefied Natural Gas project has continued to hinder updates by appealing amendments and raising issues outside of the scope of the amendments including the current extension language that staff attempted to include requiring additional hazards review. However, due to the fact that the County's current language is under appeal at the Land Use Board of Appeals staff has been working with Counsel to ensure the appeal to LUBA does not affect the current review. Staff is required to apply the provisions in place at the time the application was submitted.

Staff has attached the latest LUBA decision of an appeal an extension on another section of the pipeline.

## IV. FINDINGS TO THE CRITERIA:

### SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

1. ***Permit Expiration Dates for all Conditional Use Approvals and Extensions :***
    a. ***On lands zoned Exclusive Farm, Forest and Forest Mixed Use:***
        ***(1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.***

**FINDING:** The applicant made a written request for the extension of the Pacific Connector Gas Pipeline Blue Ridge route development. The applicant submitted the application for an extension on November 8, 2018, via email, including proof of payment, prior to the expiration date of November 11, 2018. The applicant provided a hard copy to the Planning Department as well to conform to the submittal requirements. The applicant found the need to submit the extension and staff assumes that is to protect the development right given in the original approval rather than to make the argument if the development action has been initiated.

As a matter of discussion staff has explored if a applicant is required to continue to request extensions. As explained in the background Coos County has adopted criteria to govern local extension provisions based on OAR 660 Division 33. The County adopted the language that states if a "development action is not initiated in that period" an extension may be granted. In looking at the criteria the first thing to consider is if permit request is still valid, and the terms to consider "development action" and "initiated". In researching the ORS and OAR and land use case law relevant to extensions, staff was unable to find a definition. Staff has contacted LCDC to legislative in regards to this issue. Staff received the minutes from the 1992 meeting regarding the adoption of the OAR 660-033-0140. The minutes from the

adoption of the rule regarding extensions are vague and offer some suggestions about the intention of the term "development". The discussion was a distinction between "development" and "use" the issue was how to set the terms apart. There does not appear to be a follow-up discussion or a definition that was included. Therefore, Staff has reviewed the local definitions to make a conclusion. CCZLDO Section 2.2.200 defines development as, the act, process or result of developing. There was no definition of *action* or *initiated* to consider. Staff originally did provide additional definitions regarding *action* and *initiated* but withdraws that discussion as the opponents seem to misunderstand that this was just a discussion and not what the decision was ultimately based upon. The relevant criterion states that proposed development is void two years from the date of the final decision[2] "if the development action is not initiated in that period". Staff does believe that the applicant has started or initiated the development action plan by applying for permits to other agencies as stated in Condition 14 of Final and Decision Order 14-09-062PL. Even though staff believes this to be a valid argument the county did not discourage the applicant from requesting an extension. In fact the county has accepted the extension and reviewed it for consistency with the applicable law regarding extensions based on the evidence in the record. The applicant has requested an extension to continue securing other permits to allow the project to move forward.

> 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.*]

The applicants have been submitting applications for permits to other agencies as required by the conditions of the permit. This permit is only for small segments of the pipeline and may not be part of the final selected route. This is why it is important for the applicant to secure the federal permit prior to commencement of construction. The opponents in this case have confirmed that the applicant is still seeking federal permits. The applicant has not only initiated the development action but they have consistently complied with local provisions regarding permit time frames and extension. Therefore, the permit is not void and is found to comply with both CCZLDO 5.2.600.a.(1) and OAR 660-033-0140(1). There may be other conditions of approval the applicant has started or continued to start but staff does not have that information in the record[3]. Again, this does not mean that the applicant does not need to apply for this extension but this argument is available. The applicant has continued to ensure compliance and permit authorizations have been maintained to apply for extension.

The opposition raised the following issue:

[2] Final Decision ORS 215.427 and CCZLDO Section 5.0.250

[3] The record for this application starts on the day the application is submitted. If other information is considered or relied upon to make the decision such information shall be included as part of the official record. Contents of the official record are described in 661-010-0025

a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development **on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period**. [Now (1)(a)(1)]

***The original approval by the Board of Commissioners of the Blue Ridge Route Alternative alignment was on Oct 21, 2014 [HBCU-13-06]. Pacific Connector requested an extension [EXT-17-015] for this CUP on November 20, 2017 which puts it past the two years allowed under OAR 660-033-0140 for a CUP on Farm and Forest lands outside of the Urban Growth Boundary. The application window for the extension had lapsed. Thus, a current extension is not warranted due to the permit application extension being out of time in November of 2017. The County erred in giving the Applicant additional CUP extensions on Non-Resource lands after the permit had expired and also beyond 2 years from the date of the original extension.***

Staff Response:
The appellant, in this case, references the prior ordinance that regulated extension; however, the current revision to the CCZLDO regarding extensions the language was very similar. It prior ordinance stated:

1. ***Extensions on Farm and Forest (Resource) Zoned Property shall comply with OAR 660-033-0140 Permit Expiration Dates which states:***

    a. ***Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.***
    b. ***Coos County may grant one extension period of up to 12 months if:***

        i. ***An applicant makes a written request for an extension of the development approval period;***
        ii. ***The request is submitted to the county prior to the expiration of the approval period;***
        iii. ***The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and***
        iv. ***The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.***

    c. ***Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.***
    d. ***If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years. An extension of a permit described in subsection (e) of this section shall be valid for two years.***
    e. ***For the purposes of subsection (e) of this section, "residential development" only includes the dwellings provided for under in the EFU and Forest zones in Chapter 4.***
    f. ***Extension requests do not apply to temporary use permits, compliance determinations or zoning compliance letters.***

This language is almost the same as the current language especially the language the opponent cites to and states the county did not have authority to grant additional extensions. However, a final decision was made with an opportunity to appeal the decision made in 2017 that extended the date. Staff understands that the criteria did change but not substantially and not the portion that specifically refers to OAR 660-

033-0140. In order for the opponent to argue this it should have been raised at the time the prior decision was made but to the extent that it was raised staff has addressed it below. The appellant miss understand that the applicable language to calculating a final decision is located in CCZLDO Section 5.0.250 and has not been amended since the time that original approval was given in 2014.

"[D]ate of final decision" is calculated from the date all appeals of been exhausted. This is consistent with ORS 215.427 and CCZLDO Section 5.0.250. The Board of Commissioners adopted the final decision on October 14, 2014 and factoring in the 21 day appeal period set the expiration of a final decision at November 11, 2016. The applicant filed for an extension of this application prior to the November 11, 2016 and staff issued a decision with the opportunity to appeal on December 28, 2016. The applicant filed and paid by electronic means on November 9, 2017 and was confirmed by email that the application was accepted. The applicant filed supplemental paper materials on November 20, 2017. If you read the letter from the applicant it references the electronic submission. Staff accepted the electronic application. This decision was not appealed and is a final land use decision that extended the deadline to November 11, 2018. The current application was filed and received electronically on November 8, 2018 prior to the expiration date.

Therefore, the application is valid and the extension has met the criteria and is found to be in compliance with both the OAR 660 Division 33 and CCZLDO Section 5.2.600.1(a).

> ***(2) A county may grant one extension period of up to 12 months if:***
> ***(a) An applicant makes a written request for an extension of the development approval period;***
> ***(b) The request is submitted to the county prior to the expiration of the approval period;***
> ***(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and***
> ***(d) The county determines that the applicant was unable to begin or continue development during the approval period[4] for reasons for which the applicant was not responsible.***
>
> ***Coos County has and will continue to accept reasons for which the applicant was not responsible as, but limited too, financial hardship, death or owner, transfer of property, unable to complete conditions of approval and projects that require additional permits. The County's Ordinance does not control other permitting agency processes and the* County shall only consider if the applicant has requested other permits as a valid reason and to show they are attempting to satisfy conditions of approval. This is a different standard then actually showing compliance with conditions of approval. This also, does not account for other permits that may be required outside of the land use process.**

Finding: The applicant filed with the County the required application for requesting an extension. The application included the appropriate application fee. Staff finds that this is a valid permit but in this case

[4] The approval period is the time period the original application was valid or the extension is valid. If multiple extensions have been filed the decision maker may only consider the time period that the current extension is valid. Prior approval periods shall not be considered. For example, if this is the third extension request up for review the information provided during the period within last extension time frame shall be considered and not the overall time the application has been approved. This prevents a collateral attack on the original authorization.

the permit application would potentially expire and to cover any ambiguity in the extension criteria, the applicant submitted a request for an extension request to extend the date of approval for the original application.

The opponents raised objections to this application and made unfounded arguments about the County's process and prior decisions led to staff reconsidering the original extension decision in this matter. One of the issues raised, as in numerous other pipeline appeals, is that the county failed to adequately determine that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible. The opponents assert that it is the County's responsibility to consider processes that are not within the local review authority, specifically the FERC process. Instead of rearguing this matter staff is going to rely LUBA decision that covers this argument that can be found at Attachment "C".

The applicant has provided the reason that prevented the applicant from beginning or continuing development within the approval period to the extent that further analysis is required the applicant has addressed all of the applicable criteria within the jurisdiction of the county. The county has amended the criteria to follow OAR 660-033-0140 for resource lands (Agriculture and Forest). This language does state this review is not a land use decision because this is an extension of a land use review and not a review to determine consistency for a "new or pending" application. However, staff agrees that there may be some discretionary standards applied in this review so it has been processed as a land use decision.

The criteria states the County shall make the determination if the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not "responsible". There have been arguments in prior cases before the county that asked staff to look at the reasons that caused the delay. To the extent this may be a valid review criteria staff has incorporated the hearings officer's recommendation. The Webster's Third New International Dictionary (1993) defines the term "responsible" as *"answerable as the primary, cause, motive, or agent whether of evil or good."* In a prior permit extension decision for the pipeline, the Board of Commissioners interpreted the word "responsible" to mean *"beyond the applicant's control."* Stated another way, the question is whether the applicant is "at fault" for not exercising its permit rights in a timely manner. The aim of the criterion is to not reward applicants that do not actively pursue their development, while at the same time providing some measure of sympathy and assistance to applicants who are diligently trying to effectuate their permit but who run into unexpected problems that they are not in full control to correct or fix.

The applicant has explained that the reason that the project has not continued is because the applicant has not yet obtained federal authorization to proceed which is not only a requirement under federal law but is a condition of approval (#14). This project has various layers of permitting and they have different time lines and criteria. The pipeline is an interstate natural gas pipeline that is required to obtain authorization from the Federal Energy Regulatory Commission ("FERC"). Until the applicant obtains a FERC certificate authorizing the pipeline, the Applicant cannot begin construction or operation of the facilities. However, working toward securing the permits is part of the instating or implementing the permit by obtaining permits. This is part of the action plan which is what the OAR references.

Therefore, the application as presented meets the criteria.

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

Finding: The applicant has requested that the County process this application as a discretionary administrative land use decision and the County has agreed.

> ***(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.***
> ***(5) (a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.***
> ***(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.***
> ***(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).***
> ***(7) There are no limit on the number of extensions that can be applied for unless this ordinance otherwise allows.***

Finding: The current ordinance allows for an additional one-year extensions where applicable criteria for decisions have not changed. None of the *applicable criteria for the decision* have changed since the last extension was granted in February 2018. The emphasis in this case is on "applicable criteria for the decision".

The following were identified as the criteria that were applicable to the Farm and Forest Zone. Remember that OAR 660 Division 33 only covers Agricultural Lands and some Forest (Mixed Use) Lands: *LDO § 4.8.300(F) New distribution lines with rights-of way 50-feet or less in width LDO § 4.8.400 Review Criteria for Conditional Uses in § 4.8.300 and § 4.8.350 LDO § 4.8.600 Mandatory Siting Standards Required for Dwellings and Structures in the Forest Zone. LDO § 4.8.700 Fire Siting and Safety Standards LDO § 4.8.750 Development Standards LDO § 4.9.450(C) Additional Hearings Body Conditional Use and Review Criteria LDO § 4.9.600 Siting Standards for Dwellings and Structures in EFU LDO § 4.9.700 Development Standards.* Since the approval was received the criteria was renumbered and reformatted but all of the standards remain the same. Therefore, the "applicable" criteria still remain "applicable" for the purposes of an extension subject to OAR 660-033-0140.

Therefore, staff has not found that the applicable criteria have changed. There are no limits regarding the number of extensions that may be applied. This language adopted is consistent with OAR intent as shown in the LCDC minutes.

> b. ***On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:***
> ***(1) All conditional uses for residential development including overlays shall not expire once they have received approval.***
> ***(2) All conditional uses for non residential development including overlays shall be valid for period of four (4) years from the date of final approval.***
> ***(3) Extension Requests:***
> ***a. For all conditional uses subject to an expiration date of four (4) years are eligible for extensions so long as the property has not been:***
> ***i. Reconfigured through a property line adjustment or land division; and***
> ***ii. Rezoned to another zoning district.***
> ***(4) An extension shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.***

(5) *An extension shall be received prior the expiration date of the conditional use or the prior extension.*

Finding: This portion of the CCZLDO is within the discretion of the local code and not governed by the statute or the rule. A portion of the alignment is located on non-resource zones. The staff has addressed these criteria in a prior portion of the staff report. The applicant is not applying for residential development but is eligible for an extension. The application, fee and criteria were addressed. The application was received prior to the expiration of the conditional use.

2. ***Changes or amendments to areas subject to natural hazards[5] do not void the original authorization for a use or uses, as they do not determine if a use can or cannot be sited, but how it can be sited with the least amount of risk possible. Overlays and Special Development Considerations may have to be addressed to ensure the use can be sited with an acceptable level risk as established by Coos County.***

Finding: The applicant acknowledges this provision and if it applies in the future they will comply. Therefore, this has been addressed.

## V. OTHER ISSUED RAISED:

**A. The Applicant has proposed significant changes to the entire pipeline route and configuration in applications to other governmental agencies, including the Federal Energy Regulatory Commission. There are even changes proposed along the Blue Ridge alignment, including changes in the temporary work areas. The new pipeline route and the changes to the Blue Ridge alignment have not been approved and it is not compliant with the applicable criteria.**

Response: The application request is for an extension to an approved final decision. This does not authorize the applicant to site anything beyond the approval. The issue raised is a compliance issue as addressed in ORS 215.190 and through the violation process set out in CCZLDO Chapter 1. This is not a valid argument. This is included in the LUBA discussion as well.

**C. The County violated SECTION 5.0.150 (1) as the applicant does not have the private right to property, and SECTION 5.0.175 (1) as the applicant does not have private right of property acquisition pursuant to ORS Chapter 35. This is also a new criteria that prevents approval of the extension application.**

Response: *SECTION 5.0.150 APPLICATION REQUIREMENTS (Language that was in place at the time the original application was applied)*

*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:*

[5] Natural hazards are: floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires.

*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.*

*An application for a variance to the requirements of the Airport Surfaces Overlay zone may not be considered unless a copy of the application has been furnished to the airport owner for advice as to the aeronautical effects of the variance. If the airport owner does not respond to the application within twenty (20) days after receipt, the Planning Director may act to grant or deny said application.*

The current language reads: *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:*

1. *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.*

2. *An application for a variance to the requirements of the Airport Surfaces Overlay zone may not be considered unless a copy of the application has been furnished to the airport owner for advice as to the aeronautical effects of the variance. If the airport owner does not respond to the application within twenty (20) days after receipt, the Planning Director may act to grant or deny said application.*

3. *One original and one exact unbound copy of the application or an electronic copy shall be provided at the time of submittal for all applications.*

*An application may be deemed incomplete for failure to comply with this section.*

Staff Response: The highlighted language which is what the opposition is referencing is exactly the same language so this is not a changed in criteria that would apply. Even if it did apply it is part of the procedure for deeming an application complete and would not be review criteria. This was also addressed in a prior decision. The application for an extension references "applicant" and not "property owner". There is a condition of approval that was drafted to specifically address this provision. A condition of approval is required to be addressed unless it is modified through a land use procedure under CCZLDO. Therefore, this is not a valid issue and was also covered in the LUBA decision that is attached.

**D. The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the application pending FERC approval.**

Response: Section CCZLDO 5.0.500 states:

***Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency.***

***Such revocation shall not be cause for refund of any previously submitted application fees.***

Staff Response: First, the language actually states applications for a land use or land division "under this ordinance", which means an application would have to be subject to review by the CCZLDO and would have to be pending. An extension of a prior submitted application is not applying for a specific use but to extend a use. If a final decision has been issued it is no longer considered "pending". A "pending" application is waiting to receive a final decision, see Section 5.0.250.5 for timetable for final decision. The CCZLDO has no authority over other regulatory agencies. Staff explained how agency coordination is handled earlier in this report.

Example: If an applicant filed for a property line adjustment and it was under review and a final decision had not been issued it would be considered a "pending application". Then the applicant filed a land division prior to a final decision on the property line adjustment this is cause to revoke the first permit as it would be inconsistent. However, staff may choose to just deem the application incomplete. This provision pre-dates the completeness review process.

The opponents do not have legal authority to interpret local land use law; the Board of Commissioners have the discretionary authority or deference to make the determination. Therefore, this is not a valid argument and is not supported by any legal argument.

**F. The applicable criteria has changed or the County has purposely avoided applying amended and new land use criteria to zones within the County to benefit the applicant which is beyond its authority. The additional criteria include but are not limited to CCZLDO §4.11.125 (Special Development Considerations) and CCZLDO §§5.11.100 - 5.11.300(Geologic Assessments) adopted pursuant to Ordinance Ord. 17-04-004PL dated May 2, 2017, effective July 31, 2017 and those amendments adopted in AM-18-005.**

Response: The applicant should have raised any objections to Ord. 17-04-004PL on appeal but that opportunity has passed. Besides, staff has explained why this would not have been a valid criteria in the context of an extension granted under OAR 660-033-0140. The other amendment that is listed (AM-18-005) is under appeal and that is the appropriate time to raise that issue. The opponent has no authority to raise this argument for an extension application. The county's amendments do not constitute ***"reasons for which the applicant was not responsible"*** and goes beyond the scope of the limited review. See the attached LUBA decision.

**G. The Amendment to 5.2.600(2) – what is now (1)(b) is not applicable to the extension request. It did not exist to govern the county's discretion when the CUP application was filed and is not an applicable goal post. The extension of the permit on non-resource lands has exceeded the applicable time limit of 2 years and, for that matter, the new limit of 4 years.**

Response: The opponent in this case does not seem to realize the there are no applicable statute or rule that govern extensions beyond ORS 92, OAR 660 Division 33 and ORS 215.417; therefore, it is fully within the discretion of the county to create standards or simply state that any permit outside of Farm and Forest zoned are regulated by OAR 660 Division 33 and ORS 215.417 never expire with the exception of land divisions that are governed under ORS 92. This is a local decision and it is inappropriate to bring up through the extension process. The appropriate place to argue this is through the amendment process. This amendment is under appeal; therefore, the opponent should have raised this argument at that time. Even if the appellant was correct. The applicant would still meet the prior review criteria.

**H. Application of Section 5.2.600(2) (as amended) is beyond the scope of the County's authority. As understood it is an attempt to avoid the application of hazard related criteria that are applicable and would have been applicable at the time the CUP application was filed.**

Response: The applicant should have raised any objections to Ord. 17-04-004PL on appeal but that opportunity has past. In addition, staff has explained why this would not have been a valid criteria in the context of an extension granted under OAR 660-033-0140. The other amendment that is listed (AM-18-005) is under appeal and that is the appropriate time to raise that issue. The opponent has no authority to raise this argument for an extension application. The county's amendments do not constitute ***"reasons for which the applicant was not responsible"*** and goes beyond the scope of the limited review.

Furthermore, the hazard review was not adopted until 2015 with standards following in 2017. This application was approved in 2014 so staff finds that argument "[a]s understood it is an attempt to avoid the application of hazard related criteria that are applicable and would have been applicable at the time the CUP application was filed." This does not make logical or legal sense as the criteria was adopted after the CUP applicable was final. If the criteria were in place at the time the CUP application was filed it would not be seen as "new" criteria. There are no hazard criteria that would apply in any way because hazards criteria would, at most, apply to structures. The pipeline is not a "structure". Remember this is the alternative pipeline "route". Also, for reasons stated in this report hazards are not regulated under OAR 660 Division 33. This is argument is addressed in the attached LUBA decision.

## VI. CONCLUSION:

The conditional use authorizes the Pipeline to be developed on both resource-zoned and non-resource zoned land. Therefore, the applicant has taken the conservative approach and requested a one-year extension for the conditional use. Staff found that applicant met the burden of approval for an extension and provided notice on the issue. An extension does not change the original approval in any for and all conditions remain in effect unless otherwise amended.

The Hearings Officer should find that the arguments raised are not valid and the appeal should be denied and the extension found to be valid.

*Jill Rolfe*, Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner II
Crystal Orr, Planning Specialist
Sierra Brown, Planning Specialist

Attachment "A" Record
Attachment "B" Current Appeal
Attachment "C" LUBA decision (LUBA Nos. 2018-141/142)
Attachment "D" LCDC Minutes

# Attachment "A"

# Application

PERKINSCOIE

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November 8, 2018

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**VIA EMAIL AND OVERNIGHT DELIVERY**

Ms. Jill Rolfe
Planning Director
Coos County Planning Department
225 N Adams Street
Coquille, OR 97423

**Re: Pacific Connector Gas Pipeline Blue Ridge Alternate Alignment**
**County Order No. 14-09-062PL/County File No. HBCU-13-06**
**Applicant's Request for Extension of Approval Period**

Dear Jill:

This office represents Pacific Connector Gas Pipeline, LP, the applicant requesting an extension of the approval period for the Pacific Connector Gas Pipeline Blue Ridge alternate alignment (County Order No. 14-09-062PL, County File No. HBCU-13-06). Enclosed with this letter please find the following materials:

- The original completed and signed Coos County "Extension of a Land Use Approval" application form;
- Check payable to "Coos County" in the amount of $561.00 for the application fee; and
- Narrative explaining how request satisfies all applicable approval criteria, with eight exhibits.

We are also providing the County an electronic copy of these materials. We are hopeful that, upon receipt of these materials, the County will deem the application complete and process it as a Type II application.

I am the applicant's representative in this matter. Please copy me on all notices, correspondence, staff reports, and decisions in this matter.

If you have any questions, do not hesitate to contact me. We look forward to working with the County toward approval of this request. Thank you for your courtesies in this matter.

Very truly yours,

Seth J. King

SJK:rsr
Enclosures

cc: Client (via email) (w/encls.)
Mr. Steven L. Pfeiffer (via email) (w/encls.)

# *EXTENSION OF A LAND USE APPROVAL*

*SUBMIT TO: COOS COUNTY PLANNING DEPARTMENT AT 225 N. ADAMS ST. COQUILLE*
*MAIL TO: COOS COUNTY PLANNING 250 N. BAXTER, COQUILLE OR 97423*

*EMAIL PLANNING@CO.COOS.OR.US* ***PHONE: 541-396-7770***

*Date Received:*_____ *Fee Received* _____ *Receipt #:* _____ *Received by:* _____
*Please be aware if the fees are not with the included the application will not be processed.*

**File # EXT -** ____-_____ **Prior Application #** HBCU_13_06 **Expiration Date:** November 11, 2018

**Land Owner(s)**

(print name): Multiple
Mailing address: _____
Phone: _____ Email: _____
Signature: _____

**Applicant(s) If different from Property Owner**

(print name): Pacific Connector Gas Pipeline, LP
Mailing address: C/O Perkins Cole LLP, Attn: Seth King, 1120 NW Couch Street, Portland, OR 97209
Phone: 503-727-2024 Email: Sking@perkinscole.com
Signature: _____

**PROPERTY LOCATION:**

_____ See original application materials in County File No. HBCU-13-06.
Township Range Section Tax lot(s)

_____
Site address

**Please provide the reason(s) that prevented the applicant from beginning or continuing development within the approval period. The applicant must provide a sufficient reason in order for staff to determine if the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible:**

See attached.

**CRITERIA:**

**SECTION 5.2.600 EXPIRATION AND EXTENSION of Conditional Uses**

Any conditional use not initiated within the time frame set forth in subsection (3) of this section may be granted an extension provided that an applicant has made a request and provided the appropriate fee for an extension prior to the expiration of the conditional use permit approval. Such request shall be considered an Administrative Action and shall be submitted to the Director.

1. Extensions on Farm and Forest (Resource) Zoned Property shall comply with OAR 660-033-0140 Permit Expiration Dates which states:
    a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.
    b. Coos County may grant one extension period of up to 12 months if:

        i. An applicant makes a written request for an extension of the development approval period;
        ii. The request is submitted to the county prior to the expiration of the approval period;
        iii. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
        iv. The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

    c. Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.
    d. If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years. An extension of a permit described in subsection (e) of this section shall be valid for two years.
    e. For the purposes of subsection (e) of this section, "residential development" only includes the dwellings provided for under in the EFU and Forest zones in Chapter 4.
    f. Extension requests do not apply to temporary use permits, compliance determinations or zoning compliance letters.

2. Extensions on all non-resource zoned property shall be governed by the following.
    a. The Director shall grant an extension of up to two (2) years so long as the use is still listed as a conditional use under current zoning regulations.
    b. If use or development under the permit has not begun within two (2) years of the date of approval and an extension has not been requested prior to the expiration of the conditional use then that conditional use is deemed to be invalid and a new application is required.
    c. If an extension is granted, the conditional use will remain valid for the additional two years from the date of the original expiration.

3. Time frames for conditional uses and extensions are as follows:
    a. All conditional uses within non-resource zones are valid four (4) years from the date of approval; and
    b. All conditional uses for dwellings within resource zones outside of the urban growth boundary or urban unincorporated community are valid four (4) years from the date of approval.
    c. All non-residential conditional uses within resource zones are valid (2) years from the date of approval.
    d. For purposes of this section, the date of approval is the date the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.
    e. Additional extensions may be applied.

4. Extensions are subject to notice as described in § 5.0.900(2) and appeal requirements of 5.8 for a Planning Director's decision.

**BEFORE THE PLANNING DIRECTOR**

**FOR COOS COUNTY, OREGON**

| | |
|---|---|
| **In the Matter of a request for a time extension of the County Board of Commissioners' Approval, with conditions, of a Conditional Use Permit (County Order No. 14-09-062PL, County File No. HBCU 13-06) to authorize the Blue Ridge Alignment for a segment of the Pacific Connector Gas Pipeline in the Exclusive Farm Use, Forest, and CBEMP 20-RS Zoning Districts.** | **NARRATIVE IN SUPPORT OF THE REQUEST FILED BY PACIFIC CONNECTOR GAS PIPELINE, LP** |

## I. Introduction and Request

Pacific Gas Connector Gas Pipeline, LP, a Delaware limited partnership ("Applicant"), submits this application ("Application") requesting that Coos County ("County") extend, by 12 months, the Board of Commissioners' approval with conditions ("Approval") of a conditional use permit (Order No. 14-09-062PL, County File No. HBCU-13-06) to authorize the Blue Ridge alternate alignment of the Pacific Connector Gas Pipeline ("Pipeline"). For the reasons explained below, the Application satisfies the limited approval criteria that apply to the request. Therefore, the County should approve the Application.

## II. Background

On October 21, 2014, the County Board of Commissioners adopted and signed the Approval, authorizing Applicant's request for a conditional use permit for development of the Blue Ridge alternate alignment for the Pipeline and associated facilities, subject to conditions. A copy of the Approval is attached as Exhibit 1. No one filed a timely appeal of the Approval. Pursuant to *former* Coos County Zoning and Land Development Ordinance ("CCZLDO") 5.2.600.3.d, the date of approval for a conditional use permit is the date the appeal period for the approval expires with no appeal filed, or if a timely appeal is filed, the date all appeals have been exhausted and final judgments are effective. Accordingly, the approval period for the Approval commenced on November

11, 2014 after the County approved the Pipeline in Order No. 14-09-062PL, and the ensuing 21-day appeal expired with no appeal being filed. Applicant applied for one-year extensions of the Approval on November 9, 2016 and November 9, 2017. The County approved Applicant's applications for one-year extensions of the Approval on December 28, 2016 (EXT-16-007) and February 26, 2018 (EXT-17-015), respectively.[1] A copy of the most recent extension is attached as Exhibit 2 to this narrative.

The County has issued various other approvals for the Pipeline project, including approving and extending the original Pipeline alignment ("Original Alignment") and approving and extending another alternate alignment, the Brunschmid/Stock Slough alignment. This Application concerns only the Blue Ridge alignment; the other approvals are not at issue and are not affected by this request.

## III. Responses to Applicable CCZLDO Provisions

### 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

**1. Permit Expiration Dates for all Conditional Use Approvals and Extensions:**

**a. On lands zoned Exclusive Farm Use, Forest, and Forest Mixed Use:**

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

RESPONSE: A portion of the alignment authorized by the Approval crosses resource-zoned property (Exclusive Farm Use and Forest). The approval period for the Approval is scheduled to expire on November 11, 2018. As further explained below, the County is authorized to extend the approval period if certain criteria are met, and the Application satisfies these criteria.

[1] Although the County approved these extensions after the Approval expired, Applicant applied for each extension before the Approval expired.

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

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

RESPONSE: Applicant filed with the County a completed, signed application form requesting an extension of the development approval period for the Approval and the applicable $561.00 application fee. Therefore, Applicant has properly initiated this request. The County should find that Applicant's action satisfies this standard.

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

RESPONSE: The approval period for the Approval is scheduled to expire on November 11, 2018. Applicant filed its request with the County on November 9, 2018. The County should find that Applicant has submitted this request before the expiration of the approval period.

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

**(d) The county determines that the applicant was unable to begin or continue development during the approval period[3] for reasons for which the applicant was not responsible.**

**Coos County has and will continue to accept reasons for which the applicant was not responsible, as, but limited to, financial hardship, death of owner, transfer of property, unable to complete conditions of approval and projects that require additional permits. The County's Ordinance does not control other permitting agency processes and the County shall only consider if the applicant has requested other permits as a valid reason and to show they are attempting to satisfy conditions of approval. This is a different standard than actually showing compliance with conditions of approval. This also does not account for other permits that may be required outside of the land use process.**

**[3] The approval period is the time period the original application was valid or the extension is valid. If multiple extensions have been filed the decision maker may only consider the time period that the current extension is valid. Prior approval periods shall not be considered. For example, if this is the third extension request up for review the information provided during the period within the last extension time**

**frame shall be considered and not the overall time the application has been approved. This prevents a collateral attack on the original authorization.**

RESPONSE: Applicant was prevented from beginning or continuing development within the approval period because 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"). Until Applicant obtains a FERC certificate authorizing the Pipeline, the Applicant cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. As of the date of this Application, FERC has not yet authorized the Pipeline. Therefore, Applicant cannot begin or continue development of the Pipeline along the alignment that the Approval authorizes.

The County previously accepted this reasoning as a basis to grant a time extension for the Pipeline. First, the County found that the lack of FERC approval meant Applicant could not begin or continue development of the project:

> "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, Exhibit 3 at 13. Likewise, in granting a previous extension of an approval for a different alignment of the Pipeline, 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, Exhibit 4 at 13.

Further, the delay in obtaining FERC approval of an alignment for the Pipeline has caused other agencies to also delay their review and decision on Pipeline-related permits. The Pipeline is a complex project that requires dozens of major federal, state, and local permits, approvals, and consultations needed before Applicant and the developer of the related Jordan Cove Energy Project can begin construction. *See* permit

list in Exhibit 5 hereto. The County has previously accepted this explanation as a basis to find that a Pipeline-related time extension request satisfies this standard. *See* County Final Order No. 17-11-064PL, File No. AP 17-00/EXT 17-005, Exhibit 6 hereto at 11. Therefore, Applicant has identified reasons that prevented Applicant from commencing or continuing development within the approval period.

In addition, Applicant is not responsible for FERC not yet approving the Pipeline. Applicant has worked diligently and in good faith to obtain all necessary Permit approvals. For example, FERC previously approved Applicant's original application for a certificate for an interstate natural gas pipeline in the County. Later modifications to the project nullified that approval, and Applicant applied for a new authorization, which FERC denied. The Board has previously determined that Applicant was not "responsible" for this denial. *See* Exhibit 6 at 9-12.

FERC's denial was *without prejudice*, and Applicant has reapplied for FERC authorization. Applicant has *at all times* since the County issued the Approval, and regardless of FERC's conduct, which the Applicant cannot control, continued to seek the required FERC authorization of the Pipeline. For example, during the 12-month period of the current extension (November 2017-November 2018), Applicant took steps in furtherance of the FERC permitting process. Applicant 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. The certificate request is still pending before FERC. *Id.*

Applicant was, therefore, prevented from beginning or continuing development during the Approval period and was not responsible for the circumstances that prevented it. These approval criteria are satisfied.

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

RESPONSE: Applicant requests that the County process this request pursuant to the County's Type II procedures in order to provide notice and an opportunity for public comment.

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

RESPONSE: This request is Applicant's third request for an extension of the Approval.

The approval criteria applicable to a conditional use permit to construct this segment of the Pipeline have not changed since the County issued the Approval on October 21, 2014. In a recent decision recommending an extension of the Brunschmid/Stock Slough Alignment of the Pipeline, the County's Hearings Officer agreed with this conclusion and adopted detailed findings regarding same. *See* Exhibit 8 at 28-33. On October 24, 2018, the County Board of Commissioners tentatively approved the Hearings Officer's recommendation, subject to minor changes to the decision (that do not alter the underlying conclusion on this issue) to be presented to the Board of Commissioners on November 20, 2018.

Therefore, the approval criteria applicable to the Pipeline have not changed since the County issued the Approval. This criterion is satisfied.

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

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

RESPONSE: The Approval did not authorize any residential development on agricultural or forest land outside of an urban growth boundary. The County should find that this provision is not applicable.

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

RESPONSE: The Approval did not authorize any residential development. The County should find that this provision is not applicable.

**(7) There are no limits on the number of extensions that can be applied for unless this ordinance otherwise allows.**

RESPONSE: This provision permits the County to grant multiple extensions of the Approval.

**b. On lands not zoned Exclusive Farm Use, Forest, and Forest Mixed Use:**

**(1) All conditional uses for residential development including overlays shall not expire once they have received approval.**

**(2) All conditional uses for non-residential development including overlays shall be valid four (4) years from the date of final approval.**

RESPONSE: A portion of the alignment authorized by the Approval crosses resource-zoned property (Exclusive Farm Use and Forest). The approval period for the Approval is scheduled to expire on November 11, 2018. As further explained below, the County is authorized to extend the approval period if certain criteria are met, and the Application satisfies these criteria.

**(3) Extension Requests:**

**a. For all conditional uses subject to an expiration date of four (4) years are eligible for extensions so long as the property has not been:**

**i. Reconfigured through a property line adjustment or land division; and**

**ii. Rezoned to another zoning district.**

RESPONSE: The Approval does not involve property that has been reconfigured through a property line adjustment or land division nor does it involve property that has been rezoned since the date the County granted the Approval. Therefore, the Approval is eligible for an extension.

**(4) An extension shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.**

RESPONSE: Applicant has included a completed and signed County extension application form and the required $561.00 fee with this request. The County should find that the request meets the requirements of this provision.

**(5) An extension shall be received prior to the expiration of the conditional use or the prior extension.**

RESPONSE: The County will receive the extension request on November 9, 2018, which is before the expiration of the Approval period. Therefore, the Application meets the requirements of this provision.

**2. Changes or amendments to areas subject to natural hazards[4] do not void the original authorization for a use or uses, as they do not determine if a use can or cannot be sited, but how it can be sited with the least amount of risk possible.**

**Overlays and Special Development Considerations may have to be addressed to ensure the use can be sited with an acceptable level of risk as established by Coos County.**

[4] **Natural hazards are: floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires.**

RESPONSE: Applicant acknowledges this provision, which provides that changes or amendments to areas subject to natural hazards do not void the Approval.

## IV. Conclusion

For the above reasons, the Application meets the requirements of the CCZLDO. Therefore, the County should grant a 12-month extension of the Approval.

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

| | |
|---|---|
| IN THE MATTER OF A CONDITIONAL USE APPLICATIONS HBCU-13-06 SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE, L.P. | FINAL DECISION AND ORDER NO. 14-09-062PL |

WHEREAS, Pacific Connector Gas Pipeline, L.P. applied for approval of portions of a pipeline to supplement the already approved route as adopted 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; and

The Board of Commissioners invoked its authority under the Coos County Zoning and Land Development Ordinance (CZLDO) §5.0.600, to: (1) call up the applications; and (2) appoint a Hearings Officer to conduct the initial public hearing for the applications and then make a recommendation to the Board. The Board appointed Andrew H. Stamp to serve as the Hearings Officer.

Hearings Officer Stamp conducted a public hearing on this matter on May 30, 2014, and at the conclusion of the hearing the record was held open to accept additional written evidence and testimony. The record closed with final argument from the applicant received by July 8, 2014.

Hearings Officer Stamp issued his Amended Analysis, Conclusions and Recommendations to the Board of Commissioners to approve the application on September 13, 2014.

The Board of Commissioners held a public meeting to deliberate on the matter on September 30, 2014. The Board of Commissioners, all members present and participation,

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unanimously voted to accept the Hearings Officer's recommended approval with two modifications to the conditions of approval and corrections to the timeline.

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

ADOPTED this 21st day of October 2014.

BOARD OF COMMISSIONERS

COMMISSIONER

COMMISSIONER

COMMISSIONER

ATTEST:

Recording Secretary

APPROVED AS TO FORM:

Office of Legal Counsel

# FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(BLUE RIDGE ALTERNATIVE ROUTE)
COOS COUNTY, OREGON

FILE NO. HBCU-13-06
OCTOBER 21, 2014

EXHIBIT A

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## I. Summary of Proposal and Process

### A. Summary of Proposal.

Pacific Connector Gas Pipeline, L.P. ("Pacific Connector," "PCGP," or "applicant") originally applied to the Federal Energy Regulatory Commission ("FERC") to construct, install, own, operate and maintain an interstate natural gas pipeline ("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 changed its request to allow for *exportation* of natural gas. This request triggered a new review through FERC, which is currently pending. As part of that review, FERC has requested that the applicant request approval for an "alternative" segment for the pipeline known as the "Blue Ridge route." *See* Maps attached as Record Exhibit 1. There is no approved FERC order for this pipeline request yet, and if FERC further modifies the route, the applicant may be required to go through additional land use reviews.

If approved, the Blue Ridge route would retain the first segment of the Brunschmid alternative route, thereby allowing PCGP to avoid the Brunschmid Wetland Reserve. The Blue Ridge route would eliminate all crossings of Stock Slough, and would reduce the number of miles of crossing on private timberlands. It would place a large portion of this 14 mile segment of the pipeline on a ridgeline, which keeps the pipe away from sensitive wetlands and riparian habitat. Despite these changes, the new segment crosses the same type of zoning that the original segments crossed, and therefore the issues are similar to issues that have previously been addressed.

If approved, the alternative segment would not technically, from the County's perspective, replace the existing segment of the route which the new segments seeks 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 segment and the Blue Ridge alternate segments. Thus, it is the County Board of Commissioners' ("Board's") understanding that the applicant would, prior to construction, commit to the Blue Ridge alternative and forego any portion of the approval in HBCU 10-01 for the segment of the originally approved route replaced by the Blue Ridge route, or forego any portion of the Blue Ridge alternative and instead construct the route originally approved in HBCU 10-01.

As discussed herein, the applicant has shown that the applicable criteria are met.

### B. Process.

The review timeline for this application is as follows:

- December 5, 2013: Application submitted.
- January 3, 2014: Application deemed incomplete.

- May 2, 2014: Application deemed complete
- May 9, 2014: County Mailed Public Notice for Hearing
- May 23, 2014: County Planning Director issued Staff report
- May 30, 2014: Public hearing before the Hearings Officer
- June 17, 2014: Second Open Record Period Closed (Rebuttal Testimony)
- July 1, 2014: Third Open Record Period Closed (Surrebuttal Testimony)
- July 8, 2014: Jody McCaffree's Motion to Strike surrebuttal evidence submitted by the applicant.
- July 8, 2014: Applicant's Final Argument
- July 10, 2014: Applicant's Response to Motion to Strike
- July 14, 2014: Hearings Officer's Order on Motion to Strike
- September 13, 2014: Hearings Officer Recommendation issued
- September 19, 2014: Amended Hearings Officer Recommendation issued
- September 30, 2014: Board of Commissioners Deliberation and Tentative Decision
- October 21, 2014: Adoption of Final Decision by Board of Commissioners

### C. Scope of Review.

When addressing the criteria and considering evidence, the Board 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 Board applied the *PGE v. BOLI* methodology to arrive at what it 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 Board 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. To be clear, however, the Board does not adopt any interpretational changes at this time.

The Board has reviewed the Hearing Officer Recommendation, recognizing that the Board is not obligated to accept the factual or legal conclusions of the hearing officer. The Board has the authority to modify or overturn the hearing officer's recommended interpretations and reach different legal conclusions. While the Board's findings and conclusions herein generally parallel the Hearing Officer Recommendation, the findings, conclusions, and ultimate decision are the Board's own.

### D. Procedural Issues.

#### 1. Content of the Record: Record of 2010 and 2012 Proceedings Not Part of Record in this Proceeding

Ms. Jody McCaffree, a vociferous opponent to the Pipeline and LNG terminal who has been involved in every aspect of the project since at least 2010 and perhaps even earlier, requested in writing that the record of the 2010 proceeding for the Pipeline, and possibly the record for the 2012 remand proceeding, be made a part of the record for the review of the current application for the Blue Ridge alternate alignment. In her letter dated June 17, 2014, she states:

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

Apparently, the Planning Department staff did not add to the record the thousands of pages of material from those past proceedings. According to the applicant, "[t]o do so would needlessly complicate the proceedings while providing little benefit or clarity regarding factual matters raised in *this* case." The Board agrees with the applicant that it is incumbent upon the parties to comb through records of previous cases and pull the evidentiary submittals they want the County to review and physically place them before the decision-maker. LUBA has often stated that is incumbent on the parties to a land use proceeding to submit the evidence on which their respective arguments rely. *See Rhinhart v. Umatilla County*, 53 Or LUBA 601, 603 (2006) (request to incorporate a document in the record does not automatically make it part of the record, unless county specifically grants the request). The Board has emphasized this point to the parties as well in past cases.

In subsequent written testimony, Ms. McCaffree apparently assumed that the record *had* been supplemented to accommodate her request. For example, in her written testimony she refers to "Fred Messerle's 2010 comments that are in the record ...." McCaffree letter dated July 1, 2014, at p. 9. Ms. McCaffree, however, appears to have submitted only very limited portions of those materials into the record in this proceeding. *See* McCaffree letter dated June 17, 2014, at Ex. A.

However, following LUBA precedent, only the evidence that has been physically placed before the decision-maker is a part of the record. The term "placed before" is a term of art, and "does not merely describe the act of setting documents in front of the decision maker." *Witham Parts & Equip. Co. v. ODOT*, 42 Or LUBA 589, 593 (2002). Rather, it refers to documents that were actually submitted for consideration by the parties *in this proceeding* in the manner provided by staff. The applicant is correct to object to other parties, including Ms. McCaffree, citing or relying on materials that are extrinsic to the record on this application for the Blue Ridge alternate alignment. For this reason, the Board sustains these objections.

**2. Evidence Found Only at Website Addresses Referenced in Materials Submitted in this Proceeding Are Not Part of the Record**

In several cases, opponents' record submissions attempt to incorporate materials found on the internet simply by referencing website addresses. However, web-based materials are not part of the "record" when a party simply references a website address but does not submit the actual content in its record filings. LUBA has often cautioned that to merely refer to a document does not make the contents of that document part of the record in the proceeding. *See, e.g., Mannenbach v. City of Dallas*, 24 Or LUBA 618, 619 (1992) (simply referring to documents in testimony does not place such documents before the local decision maker.). As the applicant notes:

> Web-based content is neither fixed nor permanent; rather, the content of a website can be changed or deleted without any notice. It is possible that web-based material could change, or be

> deleted, prior to consideration by [the hearing officer], or after [the hearing officer] make[s] [his] recommendation to the Board of Commissioners. Similarly, a party attempting to rebut website content based on a website address would have no certainty that the web-based content to which they are responding is the same content the other party intended to reference.

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

For these reasons, neither the hearings officer nor the Board made any effort to view links to websites listed by the parties. If a party only supported an asserted factual point with a link to the evidence intended to provide the foundation for that asserted fact, the Board does not necessarily accept that point as being supported by substantial evidence. In contrast, however, the Board did look at cases cited by the parties, and would have looked at legal reference materials that were referenced in support of *legal* points, had those been offered. For example, in a prior case, Ms. McCaffree cited to a law review article written by Lewis & Clack Law School Professor Mike Blum. The Board did read that law review article to gain a better understanding of the *legal* issue Ms. McCaffree was presenting. However, such an article would not be used as a basis for establishing the truth of *factual* assertions presented therein.

## II. Legal Analysis.

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

#### 1. Issue of Whether a Pipeline Is still a "Utility" if it is Only Used for Exporting Natural Gas.

In Case File HBCU-10-01, the Board concluded that the proposed import-only 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, the county found that gas "distribution" lines are classified as a "low intensity utility" in the Forest zone.

The issue resurfaced in both Case Files HBCU 13-04 and HBCU 13-02, but this time with a twist. By this time, markets had changed and Pacific Connector was seeking to convert the planned pipeline and LNG terminal into export facilities, so it could ship natural gas to overseas markets (presumably places such as Hawaii, South Korea, Japan, India, etc). This prompted a series of new arguments from opponents in HBCU 13-04. For example, Oregon

Shores Conservation Coalition ("OSCC") and others argued that, unlike an LNG import terminal which brings natural gas into the country for use 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, opponents argued that since the proposed gas pipeline used for export, it no longer complies with CCZLDO §4.9.450. Ultimately, the County rejected these and similar arguments, finding that the pipeline constituted both a "utility" and a gas "distribution line" within the meaning of state and local law. *See* Final Opinion and Order 14-01-007PL (HBCU 13-04); Final Opinion and Order 14-01-006PL (HBCU 13-02).

Opponents appealed HBCU 13-02 to LUBA. *See McCaffree v. Coos County*, __ Or LUBA ___ (LUBA No. 2014-022, July 15, 2014). At LUBA, opponents continue to advance their argument that change from import to export results in the reclassification of the pipe from a "distribution line" to a "transmission line." LUBA rejected that argument, finding that it was not preserved in the record. (Ironically, the issue had been sufficiently raised in HBCU 13-04, but that case was not appealed.) Despite finding the issue to have been waived, LUBA went out of its way to address the argument on its merits, and found that the "transmission line" argument had no merit.

At the time the hearings officer held the public hearing on this case (May 30, 2014), LUBA had not yet issued its Final Opinion and Order. For this reason, the question was still an open one from a legal standpoint. Opponent Jody McCaffree raised the "transmission line" argument in her submittal dated June 17, 2014 and in her letter dated July 1, 2014, at p. 7. She also raised the issue at the public hearing, going so far as to tell the hearing officer that "he was wrong" in the way he had decided the issue in HBCU 13-04 and HBCU 13-02. At the request of the hearings officer, the applicant extensively addressed the issue in a letter dated June 17, 2014. The applicant's argument features the favored *PGE v. BOLI* methodology for statutory construction, and largely tracks point by point with the legal analysis set forth in the hearing officer's previous recommendations. The Board agrees with the applicant's analysis.

Of course, whatever doubt still existed with regard to this issue has vanished now that LUBA issued its Final Opinion and Order pertaining to the appeal of HBCU 13-02. *See McCaffree v. Coos County*, __ Or LUBA ___ (LUBA No. 2014-022, July 15, 2014). In its opinion dated July 15, 2014, LUBA confirmed that the County was correct in the way it addressed the issue in previous decision. LUBA's analysis is sound, and it is highly unlikely that a higher court would arrive at a different conclusion.

Nonetheless, in light of the fact that the LUBA case could be appealed to the Court of Appeals and beyond, the Board hereby incorporates by reference the Board's findings from HBCU 13-04 beginning on page 6 (under the heading "Issue of Whether the Pipeline is still a "Utility" if it is Only used for Export Use.") up to and including the first paragraphs of page 17. *See* Attachment B Exhibit 21.

Ms. McCaffree argues that the export pipeline can no longer be considered a "utility public service structure" since "it serves no public service as it was classified to do in the original 2012 Pacific Connector CUP." This issue was extensively debated in HBCU 13-04, and the Board addressed the issue in detail in the above-referenced findings, at page 6-17. Ms.

McCaffree makes no effort to demonstrate that those findings are incorrect in any way, and the Board does not see any reason to revisit or alter those findings here.

In her letter dated July 1, 2014, Ms. McCaffree points to two other sources for a distinction between "distribution" and "transmission" lines: OAR 860-024-0020 and 49 C.F.R. § 192.3. McCaffree Surrebuttal at p. 4-6.

OAR 860-024-0020, promulgated by the Oregon Public Utility Commission ("OPUC"), simply adopts by reference the natural gas pipeline safety rules of the Pipeline and Hazardous Materials Safety Administration ("PHMSA") of the U.S. Department of Transportation, including the rules in 49 C.F.R. Part 192. Citation to the OPUC and PHMSA regulations does nothing more than establish the definitions used in the federal rules, which are incorporated by reference in the OPUC rules. Ms. McCaffree provides no evidence that the terminology in the Goal 4 rule, and therefore in the CCZLDO provisions implementing Goal 4, were patterned after the PHMSA definitions. Absent such evidence, the OPUC and PHMSA rules provide no insight into the meaning of the term "new distribution line" in the Goal 4 rules CCZLDO.

The two rules cited by Ms. McCaffree do not constitute relevant "context" for interpreting the Goal 4 rules. As the applicant points out, LUBA has held that statutes and rules broadly dealing with the same subject matter as a provision applied in a land use proceeding are not relevant context for purposes of interpreting the intent of the agency that enacted the land use rule if the statutes and rules were adopted for a different regulatory purpose by a different body and were not known to or considered by the agency when it adopted the applied provision.

The applicant cites *Schnitzer Steel Industries Inc. v. City of Eugene*, __Or LUBA __ (LUBA No. 2013-038, September 17, 2013), *aff'd w/o opinion*, 260 Or App 562, 318 P3d 1146 (2014), in support of this proposition. The Code at issue in *Schnitzer* provided that a "scrap and dismantling yard" ("SADY") is a "permitted use" in the city's Heavy Industrial (I-3) zone. The City of Eugene adopted a code interpretation concluding that a SADY use category may include a metal shredder. The petitioner appealed to LUBA, arguing, among other things, that certain statutes and rules that regulate dismantling facilities and exclude the function performed by a metal shredder:

> ". A 'dismantler' is defined as a person who is engaged in the business of '(1) Buying, selling, dealing in or processing, except for processing into scrap metal, motor vehicles for the purpose of destroying, salvaging, dismantling, disassembling, reducing to major component parts, crushing, compacting, recycling or substantially altering in form; or (2) Buying, selling, dealing in or processing motor vehicle major component parts that are stocked in the inventory of the business, if the buying, selling, dealing in or processing of major component parts is not part of a business selling new vehicles or repairing vehicles." ORS 801.236 * * * *Also see* OAR 735-152-0000(7).
>
> ". To 'dismantle' means 'one or more major component parts are removed from a motor vehicle acquired by a dismantler.' OAR 735-152-0000(8).
>
> ". 'Major component part' includes 'significant parts of a motor vehicle such as engines...doors...hoods...' etc. and expressly excludes 'cores or parts of cores that

require [*26] remanufacturing or that are limited in value to that of scrap metal' ORS 822.137. *Also see* OAR 735-152-0000(13)."

*Schnitzer Steel Industries, Inc.*, __ Or LUBA at __ (slip op. at __). Petitioner contended these statutes and rules are relevant context and support their reading of the scope of the term "SADY." LUBA determined that while these statutes and rules deal with similar subject matter, absent some reason to believe these statutes and rules adopted for different regulatory purposes were known to and considered by the city council when it enacted EC Table 9.2450, they are not contextually relevant and shed no light on what the city council may have intended when it authorized SADYs in the I-3 zone.

Like the petition in *Schnitzer*, Ms. McCaffree cites to authority that merely addresses loosely the same subject matter (natural gas pipelines) as the provision being interpreted. The authorities cited by Ms. McCaffree – federal administrative rules and Oregon PUC rules that adopt the federal rules by reference – do not provide "context" for the DLCD rule. These rules were not adopted by the Land Conservation and Development Commission ("LCDC"), the body that adopted the Goal 4 rules. The federal and state rules cited by Ms. McCaffree do not implement Goal 4, do not mention (and are not mentioned by) the Goal 4 rules, and do not address land use issues. Finally, there is no indication that LCDC was aware of and considered the PHMSA or OPUC rules when it adopted the Goal 4 rules. In fact, the Board previously expressly rejected the contention that gas line classifications under federal law are relevant context for interpreting the Goal 4 rules because the Goal 4 rules do not implement federal law and were not enacted with federal law in mind.[1]

Ms. McCaffree has offered no basis for departing from that conclusion.

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

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 June 17, 2014, at p. 20. She asserts that these potential future 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.

This argument appears to be a cut-and-paste from her previous submittals, and it does not appear that much thought has been put into the argument, because the steep terrain referred to in the "Resource Report 10," was on *the other side* of the Coos River. There are sufficient maps in the record to allow the Board to conclude that location of the HDD bore on the east side

[1] *See* Final Decision of Coos County Board of Commissioners, No. 10-08-04PL, HBCU-10-01, at p. 81-87. *See* Attachment A to Exhibit 21.

of the Coos River is not in an area where landslides are a concern. *See* Exhibit 4 (Sheet 1 of 14). Ms. McCaffree's argument is not well-taken.

In her June 17, 2014 letter, 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. These pictures are not correlated or authenticated to any specific location or map, and therefore, the photos are of limited value to the Board. Furthermore, there is no expert testimony explaining the circumstances of these alleged frack-outs. Nonetheless, because of other testimony submitted in this case, the Board 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 Board does not 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 J to McCaffree Letter dated June 17, 2014. Record Exhibit 17. Although the news article says that "crews contaminated streambeds with drilling spoils," the Board is 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.

**3. Potential for Mega Disasters (Earthquakes, Landslides, etc).**

Opponents continue to express the concern that a gas pipeline would create secondary problems such as explosions and fire if the County is hit by an earthquake, or if a landslide rips out a section of pipe. For its part, the applicant argues that "opponents have not identified any applicable local land use standards relevant to the alleged risk of landslides, and the applicant knows of no such applicable approval standard." However, earthquakes could lead to landslides, which, in turn, could lead to potential fires and other secondary effects, and therefore implicate various criteria as it relates to Forest zones.

Indeed, a landslide does present a potential risk factor. To address the concern, the applicant attached two reports prepared for the applicant by registered geologists at GeoEngineers, Inc. – the *Geologic and Mineral Resources Report* (GMRR) and *Geologic*

*Hazards Evaluation Report* (GHER) for the Blue Ridge alternative (Attachments D and E, respectively). The Geo-Hazard Report provides geotechnical and geo-hazard information along the Pipeline route within Coos County, including the Blue Ridge route. It 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. As the GMRR describes, the Pipeline alignment was modified numerous times during the route selection process, to avoid existing landslides and areas susceptible to landslides. All of the moderate-and high-hazard deep-seated landslides identified along the alignment were avoided where feasible during final route selection. Furthermore, as indicated in the two reports, the Blue Ridge alternative route crosses less total length of landslide hazards than the previously-approved route. GHER, at 4 tbl. 1 (indicating 6,929 lineal feet of landslides crossed by the Blue Ridge route, as compared to 8,580 lineal feet crossed by the originally proposed route). The Geo-Hazard Report constitutes substantial evidence that the risk of landslides damaging the 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 (United States Geological Survey [USGS], 2002 interactive fault website)."

*See* Attachment D to the applicant's July 1, 2014 letter (Exhibit 20). Regarding other forms of earth movement that may cause displacement of 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.

Further, an Erosion Control and Revegetation Plan (ECRP),[2] including BMPs, has been prepared to reduce the potential for construction to adversely affect slope stability. Identified high-risk landslide hazards have been avoided in planning the Pipeline alignment, and mitigation of high-risk areas is not anticipated at this time. If required in the future, mitigation measures may include special construction methods, site stabilization and/or long-term monitoring. Section 11 of the applicant's ECRP, "Steep and Rugged Terrain," describes the measures, including construction techniques, that will be utilized to ensure safe and feasible construction; minimize overall construction disturbance; and ensure the long-term safety, stability, and integrity of the Pipeline. These measures include:

[2] Applicant Rebuttal, Attachment B.

- routing the Pipeline to ensure safety and integrity of the Pipeline;
- identifying adequate work areas to safely construct the Pipeline;
- utilizing appropriate construction techniques to minimize disturbance and to provide a safe working plane during construction (i.e., two-tone construction; *see* Drawing 3430.34-X-0019 in Attachment C [of the ECRP]);
- Spoil storage during trench operations on steep slopes (greater than the angle of repose) will be completed using appropriate BMPs to minimize loss of material outside the construction right-of-way and temporary extra work areas. Examples of BMPs that may be used include the use of temporary cribbing to store material on the slope or temporarily end-hauling the material to a stable upslope area and then hauling and replacing the material during backfilling;
- optimizing construction during the dry season, as much as practicable;
- utilizing temporary erosion control measures during construction (i.e., slope breakers/waterbars);
- installing trench breakers in the Pipeline trench to minimize groundwater flow down the trench which can cause in-trench erosion;
- backfilling the trench according to Pacific Connector's construction specifications;
- restoring the right-of-way promptly to approximate original contours or to stable contours after pipe installation and backfilling;
- installing properly designed and spaced permanent waterbars;
- revegetating the slope with appropriate and quickly germinating seed mixtures;
- providing effective ground cover from redistributing slash materials, mulching, or installing erosion control fabric on slopes, as necessary; and
- monitoring and maintaining right-of-way as necessary to ensure stability.

ECRP, at 46.

In the 2010 Decision (HBCU 10-01), the Board found these measures to be "adequate to address the risk of landslides." 2010 Decision, at p. 26. The Board finds that these measures are sufficient to demonstrate that the Blue Ridge alternative alignment can be safely constructed as to avoid or mitigate for potential landslide hazards.

While Ms. McCaffree raises concerns regarding potential landslides and the buildability of the "Landowner Amended Route," *See* McCaffree letter dated June 17, 2014, at p. 20, these concerns are not germane to the *modified* Blue Ridge alternative alignment proposed by the applicant. The proposed route is a modification of the originally proposed Blue Ridge alternative and is specifically designed to avoid the ridgeline above the steep slopes that posed landslide risks and construction challenges.[3]

Finally, Pacific Connector states that it intends to implement a similar level of landslide and Pipeline easement monitoring currently performed on existing Williams-owned pipeline facilities in southwestern Oregon. Monitoring consists of weekly air patrol, annual helicopter survey, quarterly class location 3 land patrol including leak detection, semi-annual class 1 and

[3] *See* Applicant Rebuttal, Attachment D (topographical map including comparison of original vs. modified Blue Ridge routes).

class 2 location land patrol, and annual cathodic protection survey. Observed areas of third-party activities such as logging or development and areas affected by unusual events such as landslides, severe storms, flooding, earthquake or tsunami may require additional inspection and monitoring determined on an individual basis.

In conclusion, the applicant has demonstrated that the risk of landslides has been sufficiently examined and that BMPs are in place to minimize and mitigate for any such risk. This issue was also previously discussed in the County's decision in Final Decision and Order No. 10-08-045PL, pages 22-26. *See* Attachment A to Exhibit 21. That discussion is incorporated herein by reference, beginning on the 2nd full paragraph of page 22 and ending after the sentence that concludes that "[t]he Board finds that these BMPs are adequate to address the risks of a landslide."

With regard to earthquakes, the applicant also submitted substantial evidence to demonstrate the risks are exceedingly low. The applicant states:

> The primary seismic hazards to pipelines include potential strong ground shaking, surface fault rupture, soil liquefaction (and related lateral spreading), earthquake-induced landslides and regional ground subsidence. The degree of risk to the proposed pipeline from these hazards varies and depends on several factors, including the magnitude (or size) of the earthquake, the distance of the earthquake origin from the pipeline facilities (lateral and vertical), soil/rock conditions and slope angle of the ground.
>
> The seismic hazard evaluation provided by the applicant included surface rupture from faulting, liquefaction potential and lateral spreading. These geologic hazards were fully assessed based on the risks associated with a large Cascadia-type subduction earthquake (GMRR, at 16-17). The applicant's evaluation of available data indicates that the seismic hazard risk to the Pipeline is generally low. The Blue Ridge alignment does not cross any mapped Quaternary-age faults. GHER, at 3.
>
> Any localized risks in areas with the potential for liquefaction may be adequately mitigated through proper engineering and design; however, such detailed engineering issues are beyond the scope of the land use review at issue in this proceeding. Pacific Connector will further analyze all locations where mitigation measures were recommended by GeoEngineers to engineer the best type of mitigation to protect the public, the environment, and the integrity of the system. Suffice it to say that the applicant will construct the pipeline to meet all applicable building code and engineering standards, including U.S. Department of Transportation (DOT) requirements, Title 49 CFR, Part 192, *Transportation of Natural and Other Gases by Pipeline: Minimum Safety Standards*; 18 CFR § 380.15, *Site and Maintenance Requirements*; and other applicable federal and state regulations.

While coastal areas of Oregon, including Coos Bay, could experience the effects of tsunamis, which can be generated by strong ground motions associated with offshore earthquakes or submarine landslides, Ms. McCaffree's description of an alleged tsunami risk again fails to demonstrate an understanding of the limited scope of the current application. The Jordan Cove facility is not part of the current application, so Ms. McCaffree's assertions regarding the potential risk a tsunami poses to that facility are simply irrelevant in this proceeding. *See* McCaffree Letter, at 22–23 With respect to the Pipeline itself, the GMRR indicates there may be some risk of tsunami-induced scouring at the proposed Pipeline crossing of the Haynes Inlet, but the pipeline will be buried below the temporary scour depth associated with a possible tsunami event. GMRR, at 42. Further, the Haynes Inlet crossing is not a part of the Blue Ridge alternative alignment at issue in this proceeding.

While there is an inundation risk for a small segment of the Blue Ridge alignment beginning on the south side of the Coos River, GHER, Fig. B-1, the pipeline will be buried to sufficient depth and encased in four inches of concrete so as to avoid any potential for tsunami damage to the Pipeline. As noted previously, the Blue Ridge route begins south of the Coos River, so the Coos River crossing is not a part of the current application. In any event, there is no indication that scouring would occur in this area due to a tsunami, and inundation of land above the buried Pipeline does not pose any significant risk to the Pipeline's structural integrity.

The Pipeline route, including the Blue Ridge alignment, has been sufficiently analyzed for potential geologic hazards, including earthquakes and tsunamis. Where avoidance of such hazards through route selection has not been possible, design, engineering, and construction measures will be adopted to ensure the long-term safety of the Pipeline.

Particularly in light to the lack of expert testimony to the contrary, the Board finds that the applicant's testimony constitutes substantial evidence demonstrating feasibility of complying with any approval standard that hinges on the need to plan for mega-disasters such as earthquakes, landslides, etc.

**B. Coos Bay Estuary Management Plan (CBEMP)**

The Blue Ridge alternative alignment will, at one location, cross a small portion of a CBEMP zoning district: the 20 RS. Generally speaking, compliance with the standards and policies applicable in those districts was previously addressed in the decisions approving HBCU 10-01 and HBCU 13-04, as well as in the following documents submitted by the applicant in those prior proceedings:

- 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 No. 10-08-045PL, HBCU 10-01, a copy of which is contained in this record at Attachment A to Exhibit 21, and in Final Decision and Order No. 14-01-007PL, Attachment B to Exhibit 21.

**1. CCZLDO Section 4.5.100.**

One opponent cited CCZLDO 4.5.100(2) as a requirement that land use rules are for the benefit of United States citizens only or creates a requirement that one may only sell to "people from America." However, Section 4.5.100(2) is only a "purpose statement" for the CBEMP zoning districts. Section 4.5.100(2) states:

> **Section 4.5.100. Purpose.** The purpose of this Article is to provide requirements pertaining to individual zoning districts in accordance with the Coos Bay Estuary Management Plan.
>
> Such requirements are intended to achieve the following objectives:
> (2) To facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, and other public requirements.

Purpose statements are not approval criteria, which is to say that an applicant is not required to demonstrate compliance with purpose statements to gain approval of a land use application. *See Anderson v. City of Grants Pass*, 64 Or LUBA 103, 110 (2011) (purpose statements that set out objectives to be achieved through other provisions in a chapter, or that contain language that is merely aspirational, are not mandatory approval criteria); *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 392 (2008) (purpose statements which are an expression of goals or objectives in the local governments adoption of land use regulations do not play a role in reviewing applications). *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). Because CCZLDO 4.5.100(2) is part of a purpose statement that is a general expression of the objectives of the County and because purpose statements are not applicable criteria, CCZLDO 4.5.100(2) is not applicable to the Blue Ridge alignment application.

Moreover, the objective of CCZLDO 4.5.100(2) is to signal the County's intent that the applicable criteria of the CBEMP districts will ensure that there are adequate facilities to serve a development, not that a development is limited to serving only United States citizens. The purpose statement of CCZLDO 4.5.100(2) is not implemented by any approval criterion limiting who may benefit from development within the area of the CBEMP (which as relevant to this application only includes several hundred feet in the 20-RS zone). The opponent has simply misconstrued CCZLDO 4.5.100(2) as an approval standard, and reads into it a purpose that it is not supported by the text of the provision or the context of the applicable criteria of the CBEMP zoning districts.

In light of the above, the Board finds that CCZLDO 4.5.100(2) does not apply to this application because CCZLDO 4.5.100(2) is not itself an approval criterion.

**2. CCZLDO Section 4.5.150.**

CCZLDO 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.

CCZLDO 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. CCZLDO 4.5.150(5)(b) states that to determine whether and under what circumstances a use is allowable certain symbols denote whether the use is permitted or allowed subject to conditional use review. The symbol "P" means the use or activity is permitted outright subject only to the management objective. The symbol "G" indicates the use may be allowed subject to "General Conditions" which provide a convenient cross-reference to applicable CBEMP Policies.

As discussed elsewhere in this decision, the proposed 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 in the 2010 approval for the Pipeline, and as relevant to this application, are addressed below. Also, for each of the CBEMP zones, the applicable "General Conditions" are identified. The applicable CBEMP Policies are addressed separately in this decision.

**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).

The proposed route does not alter riparian vegetation within 50 feet of a river, and therefore, CCZLDO Section 4.5.180(1) does not apply. CCZLDO Section 4.5.180(1) was addressed in the context of HBCU-13-04 as it relates to the Coos River, and this case does not change any aspect of that decision as it relates to this approval standard.

## 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 Blue Ridge alternative pipeline route crosses the 20-RS zoning district at one location. This segment of the Pipeline is located on the south bank of the Coos River. For the most part, the route in this location is the same as the route approved in 2010. However, the "Sheet 2" map does show some deviation in the route from what was previously approved.

CCZLDO 4.5.545 identifies the management objective for the 20-RS zoning district.

> ***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 Blue Ridge alignment 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 Pipeline, 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 Board finds that the ECRP constitutes substantial evidence that supports the conclusion that the application satisfies the management objective of the 20-RS zone.

Although not part of this application, the applicant does propose 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. The Board previously determined that an HDD bore was feasible at this location and does not revisit that determination in this case (because it is outside the scope of this application).

Ms. McCaffree argues that although a low intensity utility is allowed in the 20-RS district, that the proposed HDD bore technique is an "activity" that requires a finding of need. *See* McCaffree letter dated June 17, 2014, at p. 6-7. Ms. McCaffree is confused. An HDD bore is not listed as an "activity" in the 20-CS district, but it is something that can be a considered to be a construction technique for the installation of a utility, which is a permitted use. Under Ms. McCaffree's theory, a permitted use such as "mining/ mineral extraction" would also need to have corresponding activities listed, such as "borehole drilling," "blasting," and "rock

crushing." The correct interpretation is to assume that the provision for a "use" also includes whatever construction techniques are typically employed to build / execute / operate that use.

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 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.

**C. Overlay Zones (CCZLDO Article 4.6).**

**1. CCZLDO 4.6.210 and CCZLDO 4.6 215.**

CCZLDO 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 Pipeline 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. CCZLDO 4.6.230. Procedural Requirements for Development within Special Flood Hazard Areas.**

CCZLDO 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 was raised by opponents in previous cases, but without any substantive analysis. In this case, opponents have advanced no arguments pertaining to this approval standard. As discussed in HBCU-13-04, 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 addressed this issue in HBCU 13-04, 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.

*See* Final Opinion and Order 14-01-007PL (HBCU 13-04), at p. 31. Attachment B to Exhibit 21.

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, the 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. 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 Pipeline 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 Pipeline installation, all construction areas will be restored to their pre-construction grade and condition. Floodplain 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 Board has added a condition of approval to ensure compliance with this standard.

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

CCZLDO 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 was raised by opponents in previous cases, but without any substantive analysis. In this case, opponents have advanced no arguments pertaining to this approval standard. CCZLDO 4.6.235 applies to structures that will be built within the 100 year floodplain. The Board 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);*

Installation methods and mitigation measures will avoid and/or minimize flotation, collapse, or lateral movement hazards and flood damage.

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

The entire Pipeline will be constructed with corrosion-protected steel pipe. Where deemed necessary, the Pipeline will be installed with a reinforced concrete coating to protect against abrasion and flood damage.

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

The Pipeline will be constructed by methods and practices that minimize flood damage.

*d. electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.*

The subsurface Pipeline does not include electrical, heating, ventilation, plumbing, or air conditioning components. Therefore, this criterion is not applicable.

The Board 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 proposed "Blue Ridge" alternate alignment segments will cross approximately 12 miles of Forest-zoned lands within Coos County. Of these, 5.3 miles of the pipeline will traverse forestlands located on private property, and the remainder (7.64 miles) will traverse forest lands owned by the Federal government and state of Oregon.

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).[4]

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 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.

[4] Identical language is included in CCZLDO 4.8.300(F) regarding conditional uses in the County Forest zone.

As in past cases, the Board concludes that the Pipeline is a "distribution line" within the meaning of OAR 660-006-0025(4)(q). *See McCaffree v. Coos County* __ Or LUBA __ (LUBA No. 2014-022, July 14, 2014), slip op. at 10-11. There is no need to revisit that interpretation and findings in this case.

In any event, the Board finds 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.

**2. CCZLDO 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 <u>on surrounding lands</u> devoted to farm or forest use; or***
>
> ***(b) Significantly increase the cost of accepted farm or forest practices <u>on surrounding lands</u> 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 standard can be met.

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. In prior decisions the applicant has shown they meet these criteria. The Coos County Board of Commissioners have found in two different decisions that the pipeline will not force a significant change in, or significant increase in the cost of accepted farming or forest practices on agricultural or forestlands.
>
> This alternative route would reduce the miles of private timber lands crossed from 9.32 miles to 5.31 miles and will increase the number of BLM timber lands crossed from 1.43 miles to 7.64 miles. 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 the LDO there are other uses that can co-exist with these practices such as a gas distribution line.
>
> The Coos County Board of Commissioners adopted language that would mitigate for a loss of income from forest practices. These numbers are based on the maximum removal from forest production to account for the entire right-of-way; however, approximately 20 feet of that right-of-way will be replanted and could become part of the production which would further lessen any impacts.
>
> The applicant submitted testimony in the prior review from an expert who stated that an incremental increase in costs to timber operators generally amounts to a range of 1 to 2 percent and Staff finds that analysis to be accurate based on the highest amount of production (2%) that would be removed if all of the properties zoned forest are managed as forestlands. 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 to the property owners.
>
> In summary the applicant has shown that there will be no significant change in or increase in cost of accepted forest practices.
>
> Accepted farm use means the 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 CCZLDO there are other uses that can co-exist with these practices.

The impacts to agricultural lands are even smaller than the impacts to the forestlands and they are not significant to the overall farming operations. Again, the only impact will be at the time of construction and the property owners will be compensated for lost production during construction. Once the construction is completed the property will be 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. 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 regulation, 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 emergency simulation exercises and provide feed-back to the emergency responders.

The Board of Commissioners has already adopted the interpretation that the pipeline 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. The pipe is connected to a structure but cannot itself be considered 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, 2013. CCZLDO § 4.8.600, § 4.8.700, § 4.8.750, § 4.9.600 and §4.9.700 only apply to structures and are not relevant to this review. Therefore, all of the criteria have been satisfied.

*See* Staff Report dated May 23, 2014, at pp. 8-9.

In interpreting CCZLDO 4.8.400 and 4.9.400, there are a couple of preliminary points that must be addressed. As the Board previously noted, there are several important limitations on the "significant impact" standard. First, 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.*

Specific issues related to this criterion are discussed below.

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

Ms. Jody McCaffree asserts that the Blue Ridge alternate alignment segment will improperly force a significant change in accepted farm and forest practices and increase the cost of fire suppression for various reasons.

As an intitial matter, there does not appear to be any Forest-zoned land crossed by the proposed Blue Ridge alternate alignment that is in "farm use." Although Ms. McCaffree contends that this application will impact farm use in violation of CCZLDO 4.8.400, she does not identify any lands subject to CCZLDO 4.8.400 that are in farm use. *See* McCaffree Letter dated July 1, 2014, at p. 8-9. The Environmental Alignment Sheets submitted by the applicant (Exhibit 4 in the record) show only three areas of the proposed alignment that are not forested. *See* Sheets 1, 4 and 13. Those areas, all in pasture, correspond to the EFU zone, not the F zone, on the zoning map (Application, Sheet 2 "Amended Blue Ridge Route"). Thus, there does not

appear to be any potential that the proposed Blue Ridge alternate alignment will alter farming practices within the Forestry zone.

The same cannot be said for the impact of the pipeline on forest practices being undertaken on lands zoned "Forest." As discussed in detail in the findings supporting HBCU 13-04, 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, the applicant 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." The property owner will 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.

As previously explained, the only part of the 95-foot construction easement, temporary work areas, and permanent right-of-way that will not be returned to timber production will be a 30-foot corridor centered over the Pipeline:

> On Forest-zoned land, a 30 foot corridor directly over the pipeline would be kept clear of large vegetation, 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 construction 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.

*See* Applicant Rebuttal dated June 17, 2014. at p. 18 (Exhibit 15). *See also* Final Decision and Order No. 10-08-045PL (HBCU-10-01) at p. 94 (Attachment A to Exhibit 21). Ms. McCaffree, however, insists that "the Jordan Cove / Pacific Connector Gas Pipeline Project" would increase energy costs for forestry operations, result in a permanent loss of timber in the right-of-way, and alter forestry practices. *See* McCaffree letter dated July 1, 2014, at p 8-9. Her arguments miss the mark. The applicant addressed these issues point by point, as follows:

**Energy costs:** Ms. McCaffree offers no evidence that the proposed Blue Ridge alternate alignment will increase energy costs for forestry operations. The Pipeline transports natural gas within Oregon – it does not buy, sell or export natural gas. Even assuming for purposes of argument that the export of natural gas from the Jordan Cove Energy Project could be attributed to the Pipeline, Ms. McCaffree does not indicate what the likely impact on natural gas prices will be, let alone the degree to which the costs of forestry operations and equipment are tied to natural gas prices. Ms. McCaffree's speculation is not evidence of a "significant" increase in costs.

**Loss of timber:** The property owner will be compensated for loss of timber value within the temporary and permanent right-of-way. The amount of compensation is decided by agreement with the landowner or, if necessary, through judicial proceedings – not in a land use proceeding. Further, the permanent removal of timber along the thirty-foot strip cleared above the pipeline does not constitute a significant change in forest practices. Since natural gas pipelines necessarily require a cleared corridor, the decision by LCDC in the Goal 4 rules and by Coos County to permit such uses in the Forest zone reflects a legislative determination that such effects do not constitute a significant change in forest practices.

**Alteration of forestry practices:** Ms. McCaffree's contention that the proposed alignment will significantly change – and increase the costs of – forestry practices is raised for the first time on surrebuttal and appears to rely entirely on testimony from Fred Messerle in 2010.[5] *See* McCaffree Surrebuttal at 9. Mr. Messerle's 2010 testimony, however, is not part of the record in

[5] Ms. McCaffree also briefly mentions "statements" from "Yankee Creek Forestry." McCaffree Surrebuttal at p. 9. She does not indicate when or in what form those statements were made. In any event, they are not part of the record in this proceeding.

> this proceeding. It was submitted in response to a different alignment that does not overlap the proposed Blue Ridge alternate alignment. Moreover, Mr. Messerle testified in support of the application for the Blue Ridge alternate alignment at the hearing on May 30, 2014, despite the fact that the alignment proposed in the current application crosses land owned by Fred Messerle & Sons, Inc. and zoned for Forest (F) use. *See* Staff Report at 1.

The Board agrees with the applicant, and finds that Ms. McCaffree's arguments are unsupported by substantial evidence and are therefore without merit.

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

Pursuant to CCZLDO 4.8.400, conditional use review in the Forest zone requires the applicant to demonstrate the following:

> The proposed use will not significantly increase fire hazard or significant increase fire suppression costs or significantly increase risks to fire suppression personnel.[6]

The County has previously found on two occasions 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 under the heading "ii. Fire Suppression Costs and Personnel"), (Attachment A to Exhibit 21), and Final Decision and Order No. 14-01-007PL (HBCU 13-04), at pages 40-45, under the hearing "b. The PCGP will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel." (Attachment B to Exhibit 21).

In HBCU 10-01, the Board 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, was provided in HBCU 13-04. In HBCU 13-04, the applicant also provided a sample of a "Public Safety Response Manual" that will be distributed to first responders. The reports and manual, labeled "Exhibit H" and "Exhibit I," were attached to a letter from Rodney Gregory and Bob Peacock dated Sept. 18, 2013, but neither the aforementioned letter, the report, or the manual are included in the record of this case. *See Simpson v. City of Lake Oswego,* 15 Or. LUBA 283 (1987) (city's "judicial notice" of prior city approvals does not encompass supporting evidence submitted during the prior proceedings). Nonetheless, the letter, report and manual are all referenced in the Board's findings in HBCU 13-04, and those findings are in

[6] The wording for this criterion is taken directly from the Goal 4 rule at OAR 660-006-0025(5).

the record and constitute substantial evidence in their own right, particularly when no new substantial evidence to the contrary has been submitted into this record.[7]

The Board also previously imposed a condition of approval related to fire suppression issues. The Board adopts a similar condition in this case.

As described in the applicant's Reliability and Safety Report dated June 2013 ("Safety Report"),[8] the Pipeline, including the Blue Ridge alignment, will be subject to exacting safety requirements that will minimize the risk of a fire caused by the Pipeline itself. Specifically, the Pipeline and all associated facilities will be designed and maintained to conform with or exceed U.S. Department of Transportation (DOT) requirements, Title 49 CFR, Part 192, *Transportation of Natural and Other Gases by Pipeline: Minimum Safety Standards*; 18 CFR § 380.15, *Site and Maintenance Requirements*; and other applicable federal and state regulations.

At the May 30, 2014 public hearing, various opponents questioned how the applicant will address potential Pipeline leaks and fires. Opponents again did not identify an approval standard to which these concerns relate, and did not provide any information to indicate any increased risk associated with the Blue Ridge alignment at issue in this proceeding. However, the Board finds that this testimony was directed at CCZLDO 4.8.400 so it will be addressed at this juncture.

For the most part, the opponent testimony related to this topic was stated as layperson "opinion" testimony, which is to say that there was no effort to back up points with evidence or expert testimony. The Board gives very little, if any, weight to layperson testimony of this sort, because the testimony has invariably in this case been provided without an adequate foundation.

In stark contrast, the applicant provides expert testimony and backs it up with specific plans and proposed courses of action. In its June 17, 2014 letter, the applicant included the following discussion describing the safety measures the applicant has adopted and attached the Safety Report. *See* Attachment F to Applicant's June 17, 2014 letter. Exhibit 15. The applicant states:

> As described in the Safety Report, the first step in Pacific Connector's pipeline safety monitoring process is to make sure that the pipeline is constructed properly. During construction, the integrity of coatings designed to protect against corrosion are checked and imperfections are immediately repaired. Pacific Connector will require nondestructive testing (i.e., x-ray inspection) of 100 percent of the welds in the pipeline. In addition, the pipeline will be strength tested to a pressure of up to

[7] LUBA has often stated that a "staff report" can constitute substantial evidence in support of a local government decision, as a local government is entitled to rely on its staff to furnish it with factual information on which to base its decisions. *Grover's Beaver Electric Plumbing v. Klamath Falls*, 12 Or LUBA 61, 64 (1984). In comparison, a prior decision that recites facts and makes a determination should likewise be sufficient to constitute substantial evidence.

[8] *See* Applicant Rebuttal dated June 17, 2014, at Attachment F. (Exhibit 15).

1.5 times the maximum allowable operating pressure depending on class location prior to being placed into service.

Once the pipeline is in the ground and in service, the applicant will implement a number of routine monitoring measures including:

- Performing land patrols which involve observing surface conditions on and near the transmission line right-of-way for indications of leaks, construction activity, and any other factors which might affect safety and operation.
- Performing aerial patrols at least once per calendar year depending on class location;
- Inspecting river crossings;
- Ensuring that class location survey is current, and;
- Conducting leak surveys at least once every calendar year as required by DOT CFR 49 Part 192.

In addition to routine monitoring, potentially affected portions of the pipeline will be inspected during or immediately following any major natural disturbance events, such as an earthquake, floods, wildfires, etc.

During inspections, the applicant will look for signs of unusual activity or indications on the right-of-way. Discoloration of plants or grasses may be indicative of a small leak. Any missing or damaged pipeline markers used to identify the location of the pipeline will be promptly replaced or repaired. Any evidence of unauthorized activity will be reported and investigated. Additional testing will be conducted to verify the effectiveness of CP systems.

In addition, the applicant will monitor the pipeline system using a supervisory control and data acquisition (SCADA) system, and will provide operations control, maintenance availability, and emergency response capabilities 24 hours a day, 7 days per week. The applicant will develop emergency response plans for its entire system, operations personnel will attend training for emergency response procedures and plans prior to commencing pipeline operations, and the applicant will meet with local emergency responder groups (fire departments, police departments, federal land management agencies and other public officials) to review plans and to communicate the specifics about the pipeline facilities in the area and the need for emergency response.

A low voltage cathodic protection (CP) system will also be installed to assist in protecting the buried pipeline from corrosion. The applicant will assess cathodic protection requirements and will install ground-beds and rectifiers following final pipeline installation. Information from the assessment process will be used to determine the design requirements and locations of anode-beds and rectifiers. This work will be completed by qualified consultants.

Following the installation and balancing of the CP system, pipeline personnel will routinely check the voltage and amperage of the rectifiers, as well as the pipe-to-soil potentials. Continual adjustments will be made as conditions change. In addition to maintenance activities, annual close interval surveys will be completed to determine pipe to soil potentials in accordance with DOT requirements.

With respect to the alleged risk of fire danger, Pacific Connector has developed a plan for treatment and disposal of forest slash in coordination with the BLM and USFS fuel load specifications. 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 Pipeline 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 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.

Moreover, in the event a fire was to occur on the surface in the vicinity of the pipeline, the presence of the pipeline will not increase fire hazards. As explained in Section 1.1 of the Safety

Report referenced above, fires on the surface are not a direct threat to underground natural gas pipelines because of the insulating effects of soil cover over the pipeline. 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 Pipeline area. Despite those expected differences, the study illustrates the order of magnitude a potential fire may have on subsurface temperatures. As noted above, the Pipeline 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.

For the reasons set forth above, the applicant has addressed prevention, detection and response to leaks, and with respect to Forest-zoned lands has demonstrated that the proposed Blue Ridge alignment will not significantly increase fire hazards.

*See* letter from Marten Law dated June 17, 2014, at p. 21-3. The Board finds that this testimony constitutes substantial evidence, especially given the lack of countervailing testimony.

The presence of the buried Pipeline will also not pose an undue risk of explosion in the event of a forest fire, nor will vegetation management along the right-of-way exacerbate the risk of such a fire. The applicant testified that in the upland areas, vegetation within the permanent easement will be periodically maintained by mowing, cutting and trimming either by mechanical or hand methods. The easement will be maintained in a condition where trees or shrubs greater than six feet tall will be 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.

Since the fire risk associated with the Pipeline is low, the Pipeline will not significantly increase risks to fire suppression personnel, nor will it significantly increase suppression costs. The presence of the Pipeline will require coordination between the applicant and local fire personnel. To comply with federal safety regulations, the applicant must coordinate with local emergency response groups prior to commencing Pipeline operations, but there is no requirement that such coordination happen before land use approvals can be issued. While there will be some additional cost to local fire suppression organizations to participate in coordination efforts, the majority of the education and coordination costs will be borne by the applicant and the costs to local departments will not be significant. These efforts will also reduce the risk to fire suppression personnel that may respond to a fire in the vicinity of the Pipeline.

Further, there is no basis for requiring a detailed Emergency Response Plan at this stage of the proposal. The applicant has proposed a condition of approval requiring submittal of a pipeline-specific Public Safety Response Manual to the County as least six months prior to initiating Pipeline operations, and the maintenance of an Emergency Response Plan during operations. *See* Applicant Rebuttal (proposing to adopt with minor modifications Applicant's Proposed Conditions 14 and 19, previously adopted in the 2010 Decision).

In her final submittal dated July 1, 2014, Ms. McCaffree's asserts that the County cannot rely on documents submitted by the applicant (such as the Safety Report and the ECRP) because the FERC process is not complete and those plans are subject to FERC approval. For purposes of this land use proceeding, however, the County can rely on those documents if the County finds that they constitute substantial evidence relvant to an approval standard. As the applicant has pointed out, the [documents submitted by the applicant to the County and FERC] represent the *minimum* standards to which the applicant is committed for purposes of the proposed alignment. To the extent FERC imposes additional or more stringent requirements, the applicant will have to comply with those requirements as well. In the unlikely event that FERC were to relax any of the commitments in the applicant's submittals, they remain commitments binding on the applicant for purposes of approval of this application.

Thus, Ms. McCaffree's argument provides no basis for denial.

**3. CCZLDO 4.8.600, 4.8.700 and 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 Board's Final Decision and Order No. 10-08-045PL (HBCU 10-01) explains how the proposed Pipeline will meet the siting standards at CCZLDO 4.8.600, .700, and .750. No party raises any issue pertaining to this approval standard. The Board incorporates by reference the discussion contained in that decision beginning at p. 112-114 (under the heading "CCZLDO §4.8.600.").

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

The Board incorporates by reference the discussion contained in Final Decision and Order No. 10-08-045PL (HBCU 10-01), at p. 114 (under the heading: "CCZLDO §4.8.700.").

**c. CCZLDO Section 4.8.750 (Development Standards).**

The Board incorporates by reference the discussion contained in Final Decision and Order No. 10-08-045PL (HBCU 10-01), at p. 114-5 (under the heading: "CCZLDO §4.8.750 (Development Standards)").

**E. <u>Exclusive Farm Zone ("EFU") (CCZLDO Article 4.9)</u>**

The applicant notes that the proposed "Blue Ridge" alternative pipeline segments will cross approximately 1.2 miles of property in Coos County which are zoned EFU. All of this property is privately owned. For the reasons explained below, the Board concludes that the Pipeline is consistent with the applicable requirements of state (ORS Chapter 215, OAR 660, Division 33) and local law (CCZLDO).

### 1. CCZLDO 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. § 4.8.300(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 May 23, 2014, 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 County base zoning districts and CBEMP districts which require a different review process, the application shall be reviewed under the more intensive review procedure.

### 2. CCZLDO 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).[9] 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[10] and 4.9.700.[11]

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[9] 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.

[10] CCZLDO 4.9.600 Siting Standards for Dwellings and Structures in the EFU Zone.

* * * * * *

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.[12] ORS 215.275 provides:

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[11] 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.

[12] 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.

**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.

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(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.

(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 660-033-0139(16) and n 12 above. Given the nature of ORS 215.275(2)-(5), the Board concludes that ORS 215.275(1) contains no substantive standards applicable to interstate natural gas pipelines, but even if it did, those requirements would be preempted by federal law.[13]

## F. CBEMP Policies – Appendix 3 Volume II

### 1. CBEMP Policy #4

Opponents incorrectly assert that CBEMP Policies 4 and 4a are applicable to the application. Those policies are only applicable to aquatic zoning districts. Further, as referenced above, only those zoning districts showing a special condition noted in the applicable management unit uses/activities matrix require a resource capability consistency and impact assessment for proposed uses and activities. CBEMP zoning district 20-RS does not have a

[13] As the Board found in its Final Opinion and Order 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 CCZLDO §4.9.450. *Sprint PCS v. Washington County*, 186 Or.App. 470, 63 P.3d 1261 (2003); *Dayton Prairie Water Ass'n v. Yamhill County*, 170 Or.App. 6, 11 P.3d 671 (2000).

special condition requiring the resource capabilities test. Accordingly, neither CBEMP Policy 4 nor CBEMP Policy 4a are applicable to this application.

2. **CBEMP 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;*

*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).

Despite the County having addressed the issue in detail in HBCU 13-04, Exhibit 21, various opponents continue to insist that CBEMP Plan Policy 5 applies to the subject application. *See e.g.*, Jody McCaffree letter dated June 17, 2014, at p. 7-8. In *McCaffree v. Coos County*, __ Or LUBA __ (LUBA No. 2014-022, June 15, 2014), LUBA found that CBEMP Policy 5 did not apply to the decision modifying Condition of Approval 25. However, LUBA's analysis was arguably specific to that case, and does not necessarily translate over to this set of facts. We therefore continue to address the issue as if LUBA had not decided it.

In her June 17 letter, Ms. McCaffree attempts to piece together a series of arguments pertaining to CBEMP Policy 5, but her prose is so disjointed that it is virtually incomprehensible. The arguments set forth therein are simply not sufficiently developed to provide a basis for denial of the application.

Ms. McCaffree also appears to be cutting and pasting sentences from her previous submittals, including her discussion of the public trust doctrine. For example, in previous

letters submitted in HBCU 13-04, Jody McCaffree cited 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." In her June 17, 2014 letter, she again raises CBEMP Policy 5 (I)(b), but again does not explain why a policy involving dredging and/or removal or filling applies to this particular project, and the Board finds that it does not.

In HBCU 13-04, the Board previously discussed and denied Ms. McCaffree's misguided "public trust doctrine" arguments, and her new effort to revive that dead issue brings nothing new to the table. *See* Letter from Jody McCaffree dated June 17, 2014, at p. 8, 9. The public trust doctrine is simply not an approval standard for this case.

Furthermore, as explained above, CBEMP Policy 5 does not apply to the proposed Blue Ridge alignment because no dredging or filling is proposed. Because CBEMP Policy 5 does not apply, and compliance with the public trust doctrine is a component of CBEMP Policy 5, neither CBEMP Policy 5 nor the public trust doctrine apply to the proposed Blue Ridge alignment.

But even if the public trust doctrine did somehow apply, it would not create the sort of "public need" requirement that Ms. McCaffree seeks to impose on the applicant. The Board incorporates by reference herein the findings pertaining to the discussion of CBEMP Policy 5, as set forth in the decision in HBCU 13-04 dated December 13, 2013, at p. 50-57 (under the heading: "Plan Policy 5").

To reiterate the basic framework set forth in the code, the CBEMP 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 zones are applicable, and neither demand compliance with Policy No. 5.

CBEMP Policy 5, "Estuarine Fill and Removal" is not an approval criterion applicable to the Blue Ridge alignment application. To the extent that CBEMP Policy 5 has been raised as an issue by the Petitioner for Review in LUBA Case No. 2014-022, or by opponents, the plain text of the CCZLDO and CBEMP state that CBEMP Policy 5 is not applicable to the Blue Ridge alignment application.

As explained in the applicant's brief in *McCaffree v. Coos County*, __ Or LUBA __ (LUBA No. 2014-022, July 15, 2014) (Exhibit 14), CCZLDO 4.5.150 explains how to determine whether a particular use is allowed in a zone, and if so, which CBEMP policies apply. Under the County's regulatory structure, not all CBEMP policies apply to each zone, and each zone must be individually assessed to determine the applicable CBEMP policies. The CCZLDO further instructs in Section 4.5.150(5)(b) that "P" means a use is permitted, "G" means that the use is allowed subject to General Conditions, and "S" means the use is allowed subject to Special Conditions. The General and Special Conditions each provide a list of the applicable CBEMP policies.

As applied here, the only CBEMP zone within the scope of the Blue Ridge alignment application is the 20-RS zone. Thus, the 20-RS zone is the *only* zone in the Blue Ridge alignment application subject to any of the CBEMP policies. The Pipeline is a "low-intensity utility" under the County Code, as previously determined by the County. *See* 2010 Decision, at

45, 53. CCZLDO 4.5.546(A) lists "Utilities, Low-intensity" as "P-G," meaning, low-intensity utilities are permitted subject to General Conditions. The list of applicable General Conditions *only* includes Policies 17, 18, 23, 28, 34, 14, 27, 22, 49, 50, and 51. The General Conditions do not require consideration of CBEMP Policy 5; therefore, CBEMP Policy 5 is not an approval criterion for low intensity utilities such as the Pipeline in the 20-RS zone. Further, because the use is only subject to "General Conditions," the "Special Conditions" are not applicable.

Additionally, the CCZLDO expressly lists when CBEMP Policy 5 is applicable to specific uses and activities and that the subject matter of CBEMP Policy 5 is "estuarine fill and removal." For example, for the activity of "dredging" in the 6-Development Aquatic zone, Policy 5 is listed as a Special Condition. *See* CCZLDO 4.5.281(B)(2)(a), (b). Similarly, the activities of "Dredging" and "Fill" in the 5-Development Aquatic zone are subject to Policy 5. *See* CCZLDO 4.5.270(B)(2)(a), (b), and (4). Moreover, each of these instances relates to non-incidental dredging and fill, which is the subject of CBEMP Policy 5. Notably, the subject of CBEMP Policy 5 is not "Utilities, Low-intensity," such as the Pipeline.

To the extent that opponents contend that the Pipeline will also involve "Dredging" and "Fill" that would require compliance with CBEMP Policy 5, the Board denies this contention. The Board previously denied the opponents' contention in the 2010 Decision, which granted conditional use approval for the Pipeline. *See* Final Decision and Order No. 10-08-045PL, dated September 8, 2010. The County denied the argument on two grounds: (1) the applicant is not "Dredging" or "Filling" as defined by the CCZLDO; and (2) to the extent the activities constitute dredging within the meaning of the CCZLDO, the type will be "incidental dredging necessary for installation" of a pipeline and thus, no separate request for "Dredging" or "Fill" was required. *Id.* at 54–57. Nothing in the Blue Ridge alignment application affects this prior analysis and decision.

The Board further finds that a separate request for "Dredging" or "Fill" is not required for the Blue Ridge alignment and therefore Policy 5 is not triggered because the applicant is not proposing to dredge or fill as defined in the Code. Resolution of this issue requires consideration of the following definitions for dredging and fill from CCZLDO 2.1.200:

> 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. (Emphasis added.)

The applicant is not "Dredging" as defined above because the applicant will not be *removing* any sediment or other material from aquatic areas in the 20-RS zone. The Coos River crossing (in the 20-CA district) was approved as part of HBCU 13-04, and is not part of this alignment. Rather, the modified Blue Ridge alignment in this application begins in the 20-RS

zone south of the Coos River. The 20-RS zone is the only zoning district crossed by the Pipeline in this application to which CBEMP Policy 5 could potentially apply.[14] In any event, the applicant will use HDD to cross the Coos River. As explained in the May 2, 2014 letter and attachments from Randy Miller, the HDD bore is designed to achieve a minimum depth of cover of at least 43 feet below the Coos River, which means it will cross underneath the river and not require the removal of material from an aquatic area. The southern terminus of that HDD bore will be in the 20-RS zone. Because the applicant will not be "Dredging," the applicant does not need to apply for the activity of dredging.

The applicant will also not "fill" any submerged lands or wetlands in the 20-RS zone, as defined by the Code:

> FILL: The placement by man of sand, sediment, or other material, usually in submerged lands or wetlands, to create new uplands or raise the elevation of land. Except that "fill" does not include solid waste disposal or site preparation for development of an allowed use which is not otherwise subject to the special wetland, sensitive habitat, archaeological, dune protection, or other special policies set forth in this Plan (solid waste disposal, and site preparation on shorelands, are not considered "fill"). "Minor Fill" is the placement of small amounts of material as necessary, for example, for a boat ramp or development of a similar scale. Minor fill may exceed 50 cubic yards and therefore require a permit.

The applicant is not proposing to "fill" – create uplands or raise the elevation of land – within submerged lands or wetlands in the 20-RS zone. The applicant therefore does not need to apply for the activity of fill. CBEMP Policy 5 is not triggered.

The plain text of the CCZLDO and the CBEMP do not require consideration of Policy 5 for low-intensity utilities in the 20-RS zone, and the applicant is not proposing to "Dredge" or "Fill" any areas. The Board finds that CBEMP Policy 5 does not apply to the proposed alignment.

### 3. CBEMP Policy 5a Does Not Apply to the Proposed Alignment

*#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.*

[14] The other zones crossed by the modified Blue Ridge alignment are Exclusive Farm Use and Forest, both of which are under the Balance of County and not subject to the CBEMP policies.

*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 June 17, 2014, at p. 7-8, Ms. Jody McCaffree argues that CBEMP Policy 5a applies to this case. For the same reasons explained above in response to CBEMP Policy 5, the Board finds that CBEMP Policy 5a is not an approval criterion for "Utilities, Low-intensity," such as the Pipeline. As noted above, the list of General Conditions for the use of "Utilities, Low-intensity" includes *only* Policies 17, 18, 23, 28, 34, 14, 27, 22, 49, 50, and 51. The General Conditions do not require consideration of CBEMP Policy 5a, so Policy 5a is not an approval criterion for low intensity utilities in the 20-RS zone.

In addition, the Board has previously denied the contention that CBEMP Policy 5a applies to the Pipeline. In the 2010 decision, the Board found that the Pipeline project will not constitute "temporary alterations." *Id.* at 56–58. The Board reasoned that because the Pipeline project does not fall within any of the listed categories of the definition of "Temporary Alteration" as defined in CCLZDO 2.1.200 and the "specific definition of pipeline, with incidental dredging necessary for its installation, is a more specific use category than that of 'temporary alterations,' the pipeline use is not deemed to be a temporary alteration which would, as such, require compliance with Policy 5a." *Id.* at 58. Opponents have not identified any new aspect associated with the Blue Ridge alignment that would cause the application to involve a "temporary alteration."

For these reasons, the Board finds that CBEMP Policy 5a is not an approval criterion for the Blue Ridge alignment.

**4. CBEMP Policy 11 Does Not Apply.**

CBEMP Policy 11 is, like other CBEMP policies, a legislative direction to the County requiring coordination with state and federal agencies, rather than applicable review criteria for quasi-judicial applications such as the current application by Pacific Connector. Specifically, CBEMP Policy 11 has been implemented legislatively by the County through the enactment of CCZLDO 5.0.450 regarding the coordination with DSL regarding state/federal waterway permit reviews. CBEMP Policy 11 does not present quasi-judicial application review criteria and, therefore, is not applicable to this application.

**5. CBEMP Policy #14 General Policy on Uses within Rural Coastal Shorelands.**

CBEMP Policy 14 provides in relevant part as follows:

> *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 in urban and urbanizable areas or in rural areas built upon or irrevocably committed to nonresource use.*
>
> *g. Any other uses, including non-farm uses and non-forest uses, provided that the Board of Commissioners or its designee determines that such uses satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas. In addition, the above uses shall only be permitted upon a finding that such uses do not otherwise conflict with the resource preservation and protection policies established elsewhere in this Plan.*
>
> *This strategy recognizes (1) that Coos County's rural 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.*

CBEMP Policy 14 applies to "Utilities, Low-intensity" in the 20-RS district and the Pipeline is a "Utilities, Low-intensity" use in this district. Among the categories listed in CBEMP Policy 14(I)(a)-(g), the Pipeline is considered an "other use" because the "Utility, Low-intensity" use does not fit into any other category listed. CBEMP Policy 14(I)(g) requires

a finding 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 addressing this issue, 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 le 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 May 23, 2014, at p. 15.

As noted in the findings supporting the decision in HBCU 13-04, at pp. 59-60, the Board previously interpreted and applied CBEMP Policy 14 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). The Board's decision approving JCEP's LNG terminal application addressed CBEMP Policy 14 as follows:

> "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."

The Board's decision approving the Port's Oregon Gateway Marine Terminal application addressed CBEMP Policy 14 as follows:

> "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 trans-shipment, with related processing facilities for energy resources and cargo handling, and for marine cargo bound to the West Coast and international ports."

*See* Final Decision and Order No. 14-01-007PL, at p. 59-60. Attachment B to Exhibit 21. Accordingly, the Board previously determined that compliance with CBEMP Policy 14 was established during the legislative adoption of the CBEMP 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. The North Spit was the only site available below the railroad bridge of sufficient size and with the necessary water-dependent characteristics for the proposed facility, including access to one of only three deep-draft navigation channels in the State of Oregon. The Pipeline was found to be a necessary component of the primary industrial and port facilities use. With respect to the Pipeline, the County found that "following construction, the subsurface pipeline will not be an impediment to the uses associated with the County's rural shoreland areas." 2010 Decision, at pp. 124-126.

In addition, the alternatives analysis required under CBEMP 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 Federal Environmental Impact Statement. *See* Final Decision and Order No. 14-01-007PL, at p. 60. Attachment B to Exhibit 21.

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

In light of these prior findings, the Board finds that the Pipeline, as a necessary component of the approved industrial and port facilities use (the LNG terminal), and/or as a CBEMP 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 described above 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. McCaffree incorrectly asserts that the language in General Condition No. 4 in the 20-RS zone (which refers to CBEMP Policy 14) and, further, that the italicized language in CBEMP Policy 14 (shown bolded at page 6 of Ms. McCaffree's June 17, 2014 letter) require a finding of project need and consistency with resource preservation and protection policies of the Coos County Comprehensive Plan (CCCP). She 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 June 17, 2014, at p. 17. This argument appears to be recycled from materials she submitted in HBCU 13-04.

As an initial response, the bolded language from CBEMP Policy 14(e) and (g) referenced in the June 17, 2014 McCaffree letter to the effect that "[s]uch uses satisfy a need which cannot be accommodated at other upland locations ..." provides a legislative direction to the County to adopt zoning district use categories to accommodate the described uses. The legislative nature of this directive is underscored by the last sentence in CBEMP Policy 14 which says: "This strategy further recognizes that rural uses 'a-g' above, are allowed because of need and consistency findings documented in the 'factual base' that supports this Plan." Accordingly, any need or consistency findings required by CBEMP Policy 14 have already been accomplished in crafting the related CBEMP zoning districts.

The additional bolded language from CBEMP Policy 14(g) referenced in the McCaffree letter to the effect that "[u]ses shall only be permitted upon a finding that such uses did not

otherwise conflict with the resource preservation and protection policies established elsewhere in this Plan," is, again, a reference to legislative findings which have already occurred elsewhere in the Plan. For example, CBEMP Policy 4 (further discussed below) requires, at subsection I, that the impacts of the proposed alternate alignment have previously received a full consideration legislatively of the proposed impacts on the resource capability of the estuary. In addition, the relevant part of CBEMP Policy 4 provides that "[f]or uses and activities requiring the resource capabilities test, a special condition is noted in the applicable management unit uses/activities matrix." No special condition is noted in the 20-RS (or 20-CA) management unit which would require the resource capabilities test.

In further response to this comment, it is important to understand additional two points. First, it is FERC that can propose 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 an alternative routes along a 14-mile segment of the Pipeline. Whether one considers CBEMP 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 Board were to agree with Ms. McCaffree that, as a general matter, 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 CBEMP Policy 14, 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 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. *See* Exhibit M to McCaffree letter dated June 17, 2014. The Board has reviewed Ms. McCaffree's proposed alternative route, but finds that it too requires river crossings (including a crossing of the West Fork of the Millicoma River), and does not therefore avoid other rural shoreland management units.

As noted by the applicant, the question under CBEMP Policy 14(I)(g) is not whether there is a need for the Pipeline itself – as noted many times in proceedings regarding the Pipeline, FERC will determine whether there is a need for the Pipeline when it decides whether to issue a Certificate of Public Convenience and Necessity. The question under CBEMP Policy 14(I)(g) is *locational*: can the Pipeline provide service if – instead of crossing the 20-RS district – it is located in upland locations or in urban or urbanizable areas. In that respect, Policy 14(I)(g) is similar to the inquiry under ORS 215.275 for a "utility facility necessary for public service" on EFU land, i.e., is it necessary to locate the facility within the zone in order to provide service? To the extent opponents construe CBEMP Policy 14(I)(g) as establishing a

requirement that applicants demonstrate a local public need or benefit from their project, they have simply read into the policy language that is not there.

For the reasons listed below, the applicant has demonstrated that the Blue Ridge segment of the Pipeline is "Utilities, Low-intensity" use that satisfies a need that cannot be accommodated at other upland locations or in urban or urbanizable locations.

As the applicant notes in its letter dated June 17, at p. 14:

> The County also previously found that the alternatives analysis required under CBEMP Policy 14 has been completed through '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.'

In the present Blue Ridge alignment application, the applicant is only requesting approval for an alternative route along a segment of the Pipeline approximately 14 miles in length. Only 264 feet of the proposed Blue Ridge alignment is in the 20-RS zone. Since the 20-RS zone is the only CBEMP zone in the Blue Ridge alignment application which requires compliance with CBEMP Policy 14, this 264-foot stretch is the only segment of the Blue Ridge alignment subject to CBEMP Policy 14.

As an alternate alignment to the already approved route, the 264-foot stretch cannot be accommodated at other upland locations because it must connect with the already approved route where the HDD surfaces. The Blue Ridge alignment will connect with the already approved route at milepost 11.29 of the Pipeline.[15] The location of the HDD has been selected as part of the previously approved Brunschmid alternative alignment, which was designed to avoid an approved mitigation site on the north side of the Coos River (the Brunschmid Wetland Reserve Project).

In addition, this modified Blue Ridge alignment was proposed to the FERC by affected landowners for the purpose of reducing the number of miles of crossings of private timberlands. The Blue Ridge alignment also reduces the number of miles of EFU land crossed by 1.59 miles from the number of miles of EFU land crossed by the Pacific Connector II Brunschmid alternate.

The applicant has demonstrated that the 264-foot stretch of Pipeline proposed in the 20-RS zone "satisfies a need which cannot be accommodated at other upland locations or in urban or urbanizable lands." In addition, the Board finds that the use "Utilities, Low-intensity" does not "otherwise conflict with the resource preservation and protection policies established elsewhere in this Plan" because "Utilities, Low-intensity" are listed as a permitted use in the 20-

[15] The connection at milepost 11.29 is the only point in the 20-RS zone and the 20-RS zone is the only CBEMP zone in the Blue Ridge alignment application that requires compliance with CBEMP Policy 14. Thus, the connection at milepost 11.29 is the only portion of the Pipeline that is subject to CBEMP Policy 14. The remainder of the Blue Ridge alignment crosses the EFU and Forest zones, both of which are under the Balance of County and not subject to the CBEMP policies.

RS zone. Notably, the Board has already determined that it is a permitted use and will not conflict with resource preservation and protection.

This plan policy is met.

**6. CBEMP 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 does not alter the crossing of the Coos River that was approved in HBCU 13-04. That crossing route did 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.*

CBEMP 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 May 23, 2014, at p.11. The Board agrees, and opponents do not present a well-developed argument in opposition. Ms. McCaffree mentions CBEMP Policy 17 in her June 17, 2014 letter, at p. 20, but she does not make any coherent or focused argument in support of her conclusion that the policy is violated. Her argument is simply not developed sufficiently to enable the Board to respond.

This plan policy does not apply.

**7. CBEMP Policy #18 Protection of Historical, Cultural and Archaeological Sites**

CBEMP Policy 18 applies to CBEMP zones 20-CA and 20-RS. This 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 3.1.200 in order to obtain development permits, CBEMP Policy 18 requires the applicant to submit a "plot plan" under CCZLDO 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. CBEMP 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 imposed a condition to ensure compliance with this policy. The applicant and staff suggest that the same condition be imposed for this application. The Board agrees.

This plan policy is met, as conditioned.

**8. CBEMP Policy #22 Mitigation Sites: Protection Against Preemptory Uses**

CBEMP 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 Pipeline would cross the following mitigation sites:

| Designated Mitigation Site | Priority | Approximate MP | CBEMP Zoning District |
|---|---|---|---|
| M-8(b) [1] | Low | 2.70 R | 11-NA |
| U-12 [2] | High | 10.90 R | 18-RS |

| | | | |
|---|---|---|---|
| U-16(a) [2] | High | 11.10 R | 18-RS |
| U-22 | Low | 10.10 | 21-RS |
| U-24 | Low | 10.97 | 21-RS |

[1] This mitigation site is associated with the Hwy 101 Causeway.
[2] The Pipeline 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 Pipeline 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 4.6.480 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 located along the route of the "Blue Ridge" segment of the Pipeline. This policy does not apply.

*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 five designated mitigation areas crossed by the Pipeline, two 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*

*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.

**9. CBEMP Policy 23 Riparian Vegetation and Streambank Protection**

For this application, CBEMP Policy 23 applies to that portion of the Pipeline that crosses the 20-RS zone. CBEMP 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 CBEMP 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.

*See* Staff Report dated May 23, 2014, at p. 13.

Most of CBEMP 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, CBEMP 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 treated 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 Board 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 Board also held in HBCU 10-01 that the applicant must comply with all FERC and Department of State Lands ("DSL") requirements for wetland and waterbody protection and mitigation both during and after construction, and must 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 Board 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 Pipeline does not include independent streambank stabilization projects.

This plan policy is met.

**10. CBEMP Policy 27 Floodplain Protection within Coastal Shorelands**

CBEMP 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 CBEMP Policy applies to CBEMP 6-WD, 7-D, 8-WD, 18-RS, 19-D, 20-RS, 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 CCZLDO 4.6.230, certain proposed activities are identified as "other development" requiring a floodplain review.

The applicant addresses this policy by showing compliance with the provisions of Article 4.6. The County has indicated that the Flood Insurance Rate Map ("FIRM") is consistent with the Federal Emergency Management Agency's ("FEMA") flood hazard map for the County. As in the applicant's narrative, the Pipeline 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[16] and floodway[17] 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.

### 11. CBEMP Policy 28 Recognition of LCDC Goal #3 (Agricultural Lands) Requirements for Rural Lands within the Coastal Shorelands Boundary

CBEMP 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" inventoried by this Plan pursuant to ORS 215.298(2). These sites shall be inventoried as "1B" resources in accordance with OAR 660-16-000(5)(b). Coos County will re-evaluate these inventoried sites pursuant to the requirements of said rule at, or before, County's periodic review of the Comprehensive Plan (OR 92-08-013PL 10/28/92).*

For this application, this policy applies to the portion of the alternative alignment that crosses CBEMP zone 20-RS. Staff addressed this criterion as follows:

> FINDING: This policy is implemented by using the 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

[16] "Floodplain" is defined by the CCZLDO as "the area adjoining a stream, tidal estuary or coast that is subject to periodic inundation from flooding."

[17] "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.

be complete in approximately 3 years. Once the construction is completed then both temporary construction easements and permanent right-of-way on EFU land will be re-vegetated and returned back to pasture land. 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 continue to be managed as agricultural land. The County listed Utility facilities necessary for public service as a use in EFU lands as found in CCZLDO §4.9.450. The CCZLDO §2.1.200 definition of a "low-intensity utility facility" includes gas lines. CCZLDO § 4.9.450 is more or less a direct codification of ORS 215.283(1)(c) and the County intended to implement state law and be interpreted consistent with state law. This request meets the definition of a utility facility necessary for public service because it is necessary for the proposed pipeline to cross in the agricultural zone (EFU) in order for the service to be provided. Therefore, this criterion has been addressed.

*See* Staff Report dated May 23, 2014, at p. 14.

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(1)(c) and ORS 215.275(6). Therefore, the PCGP is consistent with the CBEMP 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 EFU 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 EFU zones. ORS 215.213(1)(c) permits the following use allowed outright in any EFU-zoned area: "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."[18] As discussed in the EFU zone section of this narrative, the PCGP is a utility facility necessary for

[18] 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).

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-wide construction area 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 decision.

Finally, the Board agrees that in most cases, it would be appropriate to impose a condition of 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 pre-empt any state (law).' *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F.Supp. 1138, 1139 (E.D.La. (1970), *aff'd* 445 F.2d 301 (5th Cir. 1971). *See also generally Northern Border Pipeline Co. v. Jackson County,* 512 F.Supp. 1261 (D.Minn.1981) (Natural Gas Pipeline 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 (1987).

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

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

For this application, this policy applies to the portion of the Pipeline alternative alignment that crosses CBEMP zone 20-RS. This policy addresses forest operations in areas of coastal shorelands. There are no identified forest lands in this CBEMP zone that would be crossed by the Pipeline alternative alignment; therefore, the policy does not apply.

**13. CBEMP Policy 49 Rural Residential Public Services**

For this application, this policy applies to the portion of the Pipeline alternative alignment that crosses CBEMP zone 20-RS. This policy addresses acceptable services for rural residential development. The application does not propose rural residential development. This policy does not apply to the proposal.

**14. CBEMP 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*

For this application, this policy applies to the portion of the Pipeline alternative alignment that crosses CBEMP zone 20-RS. This policy addresses acceptable rural services. 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 May 23, 2014, at p. 17.

Based upon its plain language, CBEMP 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 modify 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 ("NGA"). 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).

The Board acknowledges that FERC may determine that there is no "public necessity" for a natural gas export terminal. However, that call is ultimately one for FERC, not the Board, to make.

This plan policy is either inapplicable or is met.

**15. CBEMP 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].*

The CCZLDO provides that this policy applies to lands located in the CBEMP 20-RS zone. This policy addresses extension of water and sewer outside of UGBs when necessary for certain development including industrial and exception land development. The proposal is not for public water or sewer; therefore, this criterion is not applicable.

**G. Special Regulatory Considerations / Inventory Maps**

| | |
|---|---|
| Table 4.7a | Special Regulatory Consideration Prescribed by the Coos County Comprehensive Plan (Appendix I Balance of County) |

TABLE 4.7a

| PHENOMENON | SPECIAL REGULATORY CONSIDERATIONS SUMMARY | Appendix I | |
|---|---|---|---|
| | | Page | Strategy No. |
| *1. Mineral &Aggregate* | *1a. Preserve these in their original character until mined* | *1-12* | *1* |
| | *b. Agriculture & forestry uses are acceptable per zone and use district requirements.* | *1-12* | *1* |
| | *c. Allow new conflicting uses within 500 ft. subject to ESEE findings through the conditional use process.* | *1-12* | *1* |
| | *d. Non-exploratory mining operations are conditional uses, where allowed* | *1-13* | *2* |

**1. Mineral & Aggregate – Appendix I, Pages12-13, Strategy Nos. 1 & 2**

*Plan Implementation Strategies*

*Strategy No. 1: Coos County shall manage its identified mineral and aggregate resources (except black sand prospects) in their original character until mined, except where conflicting uses are identified during implementation of the Plan, and such uses are justified based on consideration of the economic, social, environmental and energy consequences of the conflicting uses, or where existing uses have been grandfathered.*

*Conflicting uses include dwellings and any other structures within 500 feet of the resource site.*

*Where no conflicts are identified, agriculture, forest or similar open space zoning shall be used to implement this strategy.*

*When a conflicting use is proposed at a given site, the decision about allowing development of the proposed use or the development or protection of the aggregate resource shall be made through a conditional use process where findings are developed which address the economic, environmental, social and energy consequences of allowing the proposed conflicting use, development of the aggregate resource, or both at the site. The following guidelines must be considered as part of the conditional use process:*

> *Economic consequences: payroll, jobs, taxes, economic opportunity costs associated with developing or not developing each conflicting use, and other pertinent factors.*
> *Environmental consequences: the impacts on air, land and water quality, and on adjacent farm and forest resources associated with developing each conflicting use, and other pertinent factors.*
> *Social consequences: the effect of the proposed uses on public service delivery, the general compatibility of the proposed uses with surrounding cultural land uses, and other pertinent factors.*
> *Energy consequences: the location of the proposed resource development site in relationship to market areas, and other pertinent factors.*

*The decision to allow one or both of the conflicting uses shall be supported by findings which demonstrate that the decision will foster maximum public gain. Reasonable conditions may be imposed on any authorized development to ensure compatibility. Such conditions may include screening, setbacks and similar measures.*

*Strategy No. 2. Coos County shall regulate new recovery operations by designating such activities as conditional uses in appropriate zones, except where permitted outright in forest zones, to ensure compatibility with adjacent uses.*

*Site restoration shall conform to the requirements of ORS 517.750 to 517.900, "Reclamation of Mining Lands".*

*This strategy recognizes that project review by the Hearings Body is necessary to minimize the adverse impacts that are typically associated with mining operations, and which often make such recovery activities incompatible with adjacent uses.*

These criteria are a part of the County's Goal 5 regulatory program. As staff notes, there are no identified mineral or aggregate resources located on the properties subject to this application. The proposal does not include any mining activities. Some of the properties are located within 500 feet of certain identified coal basins. Pursuant to CCZLDO Appendix I, Section 5.5 Mineral & Aggregate Resources Plan Implementation Strategies 4, Coos County recognizes the existence and extent of the coal deposits within the County. However, due to factors concerning the coal's quantity and quality, as well as subsurface location, the resource is not expected to be commercially extracted. Therefore, the resource is classified as a "5a" resource and has not been included as an identified Goal 5 resource. Permitted or conditionally permitted uses shall not be considered conflicting with coal resources within a given zone.

Therefore, these strategies do not apply to this proposal.

TABLE 4.7a

| PHENOMENON | SPECIAL REGULATORY CONSIDERATIONS SUMMARY | Appendix I | |
|---|---|---|---|
| | | Page | Strategy No. |
| *2. Water Resources* | *2a. Prohibits new residential and commercial developments in rural areas other than committed areas when evidence or irreversible degradation by new withdrawal or septic tanks has been submitted.* | 1-21 | 1 |

**2. Water Resources – Appendix I, Page 21, Strategy No. 1**

*Plan Implementation Strategies*

*Strategy No. 1. Coos County shall not permit further new residential and commercial development in rural areas where the Oregon State Water Resources Department (OSWRD), the Oregon State Environmental Quality commission (EQC), or the Oregon State Health Division (OSHD) has submitted compelling evidence to Coos County that water resources within that area would be irreversibly degraded by new consumptive withdrawal or by additional septic tank or other waste discharges.*

*Implementation measures in such areas may include a moratorium on construction permits for new residences or new commercial uses in the identified area. If an adequate solution to resolve the problem cannot be reached, such as extension of public water to the area in conformance with this plan, the County shall initiate a process to redesignate any undeveloped land within the area to a resource designation, and shall reallocate any other plan designations on such undeveloped land to other rural areas of the County on an acreage-by-acreage basis.*

*This strategy is based on the recognition that: (1) prediction of the maximum appropriate level of development requires detailed technical studies of each rural watershed; (2) that such information is not currently available; and (3) that reallocation of non-resource plan designations such as Rural Residential to other rural areas as an appropriate and efficient method of meeting development needs where the state agencies charged with monitoring water quality have submitted compelling evidence that irreversible water resource degradation will*

*occur in specific rural areas.*

The proposed Blue Ridge alignment is neither a residential nor commercial development. The properties are not located within an area where OSWRD, EQC or OSHD has submitted any evidence to Coos County that a water resource would be irreversibly degraded by new consumptive withdrawal or by additional septic tanks or other waste discharges. This strategy does not apply.

TABLE 4.7a

| PHENOMENON | SPECIAL REGULATORY CONSIDERATIONS SUMMARY | Appendix I | |
|---|---|---|---|
| | | Page | Strategy No. |
| *3. Historical/ Archeological Sites & Structures* | *3a. Manage these for their original resource value.*<br>*b. Develop proposals in identified archaeological areas must have a "sign-off" by qualified person(s).*<br>*c. Historical structures and sites can only be expanded, enlarged or modified if Coos County finds the proposal to be consistent with the original historical character of the structure or site.* | *1-19*<br>*1-20*<br>*1-19* | *1*<br>*3*<br>*2* |

**3. Historical/Archeological Sites & Structures – Appendix I, Pages 19-20, Strategy Nos. 1, 2 &3**

*Plan Implementation Strategies*

*Strategy No. 1. Coos County shall manage its historical, cultural and archaeological areas, sites, structures and objects so as to preserve their original resource value.*

*This strategy recognizes that preservation of significant historical, cultural and archaeological resources is necessary to sustain the County's cultural heritage.*

*Strategy No. 2. Coos County shall permit the expansion, enlargement or other modification of identified historical structures or sites provided that such expansion, enlargement or other modification is consistent with the original historical character of the structure or site;*

*This strategy shall be implemented by requiring Planning Director review of site and architectural plans to ensure that the proposed project is consistent with the original historical character of the site and structure.*

*This strategy recognizes that enlargement, expansion or modification of historical structures is not inconsistent with Coos County's historic preservation goal, provided the County finds that the proposed changes are consistent based on site and architectural standards. Further, this*

*strategy recognizes (1) that the site and architectural modification may be necessary to preserve, protect or enhance the original historical character of the structure, and (2) that the historical value of many of the county's identified historical structures is often marginal and incidental to the structure's current use as private property.*

*Strategy No. 3. Coos County shall continue to refrain from wide-spread dissemination site-specific inventory information concerning identified archaeological sites. Rather, Coos County shall manage development in these areas so as to preserve their value as archaeological resources.*

*This strategy shall be implemented by requiring development proposals to be accompanied by documentation that the proposed project would not adversely impact the historical and archaeological values of the project's site. "Sufficient documentation" shall be a letter from a qualified archaeologist/historian and/or a duly authorized representative of a local Indian tribe(s). The Coos County Planning Department shall develop and maintain a list of qualified archaeologists and historians. In cases where adverse impacts have been identified, then development shall only proceed if appropriate measures are taken to preserve the archaeological value of the site. "Appropriate measures" are deemed to be those, which do not compromise the integrity of remains, such as: (1) paving over the sites; (2) incorporating cluster-type housing design to avoid the sensitive areas; or (3) contracting with a qualified archaeologist to remove and re-inter the cultural remains or burial(s) at the developer's expense. If an archaeological site is encountered in the process of development, which previously had been unknown to exist, then, these three appropriate measures shall still apply. Land development activities found to violate the intent of this strategy shall be subject to penalties prescribed by ORS 97.745 (Source: Coos Bay Plan).*

*This strategy is based on the recognition that preservation of such archaeologically sensitive areas is not only a community's social responsibility but is also a legal responsibility pursuant to Goal #5 and ORS 97.745. It also recognizes that historical and archaeological sites are non-renewable, cultural resources (Source: Coos Bay Plan).*

As staff notes, there are no historical sites or structures identified on any of the properties to be protected. However, this area is in a potentially significant archeological site. The applicant proposes that Condition No. 24 of the original pipeline decision be imposed as a condition of approval on this application. Therefore, as a condition of approval, the applicant is required to confer with the affected local tribes 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).

TABLE 4.7a

| PHENOMENON | SPECIAL REGULATORY CONSIDERATIONS SUMMARY | Appendix I | |
|---|---|---|---|
| | | Page | Strategy No. |
| *4. Beaches & Dunes* | *4a. Permit development within "limited development suitability" only upon establishment of findings. Requires Administrative Conditional Use.* | *1-23* | *2* |
| | *b. Prohibits residential, commercial, or industrial development within areas "unsuitable for development". Permit other developments only upon establishment of findings. Requires Administrative Conditional Use.* | *1-24* | *3* |
| | *c. Cooperation with agencies to regulate: destruction of vegetation, erosion shore structures and other developments, requires Administrative Conditional Use and agency comments.* | *1-25* | *4* |

**4. Beaches & Dunes Appendix I, Pages 23-25, Strategy Nos. 2, 3 & 4**

*2. Coos County shall permit development within areas designated as "Beach and Dune Areas with Limited Development Suitability" on the Special Considerations Map only upon the establishment of findings that consider at least:*

*a. the type of use proposed and the adverse effects it might have on the site and adjacent areas;*

b. *the need for temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;*
c. *the need for methods for protecting the surrounding area from any adverse effects of the development; and*
d. *hazards to life, public and private property, and the natural environment which may be caused by the proposed use.*

*Further Coos County shall cooperate with affected local, state and federal agencies to protect the groundwater from drawdown, which would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of saltwater into water supplies.*

*Implementation shall occur through an Administrative Conditional Use process, which shall include submission of a site investigation report by the developer that addresses the five considerations above.*

*This policy recognizes that:*

a. *The Special Considerations Map Category of "Beach and Dune Areas with Limited Development Suitability" includes all dune forms except older stabilized dunes, active foredunes, conditionally stable foredunes that are subject to ocean undercutting or wave overtopping, and interdune areas (deflation plains) subject to ocean flooding.*
b. *The measures prescribed in this policy are specifically required by Statewide Planning Goal #18 for the above-referenced dune forms; and that this strategy recognizes that potential mitigation sites must be protected from pre-emptory uses.*

*3. Coos County shall prohibit residential development and commercial and industrial buildings within areas designated as "Beach and Dune Areas Unsuitable for Development" on the Special considerations Map.*

*Further, Coos County shall permit other developments in these areas only:*

a. *When specific findings have been made that consider at least:*

   i. *the type of use proposed and the adverse effects it might have on the site and adjacent areas*
   ii. *the need for temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation,*
   iii. *the need for methods for protecting the surrounding area from any adverse effects of the development, and*
   iv. *hazards to life, public and private property, and the natural environment, which may be caused by the proposed use, and*

b. *When it is demonstrated that the proposed development:*
   i. *is adequately protected from any geologic hazards, wind erosion, undercutting, ocean flooding and storm waves; or is of minimal value; and*
   ii. *is designed to minimize adverse environmental effects, and*

c. *When specific findings have been made, where breaching of foredunes is contemplated*

*that:*

i. *The breaching and restoration is consistent with sound principles of conservation, and either*
ii. *The breaching is necessary to replenish sand supply in interdune areas, or*
iii. *The breaching is done on a temporary basis in an emergency (e.g., fire control, cleaning up oil spills, draining farm lands, and alleviating flood hazards).*

*Further, Coos County shall cooperate with affected local, state and federal agencies to protect the groundwater from drawdown which would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of saltwater into water supplies.*

*This policy shall be implemented through: (1) review of the Special Considerations Map when development is proposed in these areas, and (2) an Administrative conditional use process where findings are developed based upon a site investigation report submitted by the developer which addresses the considerations set forth above.*

*This policy recognizes that:*

a. *The Special Considerations Map category of "Beach and dune Areas Unsuitable for Development" includes the following dune forms:*

   i. *Active foredunes*
   ii. *Other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, and*
   iii. *Interdune areas (deflation plains) that are subject to ocean flooding,*

b. *the measures prescribed in this policy are specifically required by Statewide Planning Goal #18 for the above referenced dune forms, and that*

c. *it is important to ensure that development in sensitive beach and dune areas is compatible with or can be made compatible with, the fragile and hazardous conditions common to such areas.*

*4. Coos County shall cooperate with state and federal agencies in regulating the following actions in the beach and dune areas described in subparagraph (iii) of Policy #1: (1) destruction of desirable vegetation (including inadvertent destruction by moisture loss or root damage), (2) the exposure of stable and conditionally stable areas to erosion, (3) construction of shore structures which modify current air wave patterns leading to beach erosion, and (4) any other development actions with potential adverse impacts.*

*This strategy shall be implemented through the processes described in Policies #2 and #3 above and through review and comment by the county on state and federal permits in beach and dune areas.*

*This strategy recognizes that regulation of these actions is necessary to minimize potential erosion.*

The proposed pipeline alignment is not located on properties inventoried Beach and Dune Areas with Development Suitability; therefore, these strategies do not apply.

TABLE 4.7a

| PHENOMENON | SPECIAL REGULATORY CONSIDERATIONS SUMMARY | Appendix I | |
|---|---|---|---|
| | | Page | Strategy No. |
| *5. Non-Estuarine Shoreland Boundary* | *5 a. Protection of major marshes (wetlands), habitats, headlands, aesthetics, historical and archaeological sites.* | *1-25* | *5* |
| | *b. Specifies allowed uses within C.S.B.* | *1-26* | *7* |
| | *c. Permits subdivision, major and minor partitions only upon findings.* | *1-27* | *8* |
| | *d. Maintain, restore or enhance riparian vegetation as consistent with water dependent uses. Requires Administrative Conditional Use.* | *1-28* | *11* |

**5. Non-Estuarine Shoreland Boundary Appendix I, Pages 25-28, Strategy Nos. 5, 7, 8 & 11**

*5. Coos County shall provide special protection to major marshes, significant wildlife habitat, coastal headlands, exceptional aesthetic resources, and historic and archaeological sites located within the coastal Shorelands boundary of the ocean, coastal lakes and minor estuaries. Coos County shall consider: (a) "major marshes" to include certain extensive marshes associated with dune lakes in the Oregon Dunes National Recreation Area and wetlands associated with New River as identified in the Inventory text and maps, and on the Special Considerations Map; (b) "significant wildlife habitat" to include "sensitive big-game range", Snowy Plover nesting areas, Bald Eagle, and Osprey nesting areas, Salmonid spawning and rearing areas, and wetlands; (c) "coastal headlands" to include Yoakum Point, Gregory Point, Shore Acres, Cape Arago south to Three-Mile Creek, Five Mile Point, and Coquille Point; (d) "exceptional aesthetic resources" to include the coastal headlands identified above, and other areas identified in the Coastal Shorelands Inventory; and (e) "historical, cultural and archaeological sites" to include those identified in the Historical, Cultural and Archaeological Sites Inventory and Assessment.*

*This strategy shall be implemented through plan designations and ordinance measures that limit uses in these special areas to those uses that are consistent with protection of natural values, such as propagation and selective harvesting of forest products, grazing, harvesting wild crops, and low intensity water-dependent recreation.*

*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.*

7. *Coos County shall manage its rural areas within the "Coastal Shorelands Boundary" of the ocean, coastal lakes and minor estuaries through implementing ordinance measures that allow the following uses:*
   *a. farm uses as provided in ORS 215;*
   *b. propagation and harvesting of forest products consistent with the Oregon Forest Practices Act.*
   *c. private and public water dependent recreation developments;*
   *d. aquaculture;*
   *e. water-dependent commercial and industrial uses and water-related uses only upon finding by the Board of Commissioners that such uses satisfy a need, which cannot otherwise be accommodated on shorelands in urban and urbanizable areas;*
   *f. single family residences on existing lots, parcels, or units of land when compatible with the objectives and implementation standards of the Coastal Shorelands goal, and as otherwise permitted by the underlying zone;*
   *g. any other uses, provided that the Board of Commissioners determines that such uses: (1) satisfy a need which cannot be accommodated at other upland locations or in urban or urbanizable areas; (2) are compatible with the objectives of Statewide Planning Goal #17 to protect riparian vegetation and wildlife habitat; and (3) the "other" use complies with the implementation standard of the underlying zone designation.*

*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 Statewide Planning Goal #17 places strict limitations on land divisions within coastal shorelands.*

8. *Coos County shall permit subdivisions and partitions within the "Coastal Shorelands Boundary" of the ocean, coastal lakes or minor estuaries in rural areas only upon finding by the governing body: (1) that such land divisions will not conflict with agriculture and forest policies and ordinance provisions of the Coos County Comprehensive Plan and would be compatible with the objectives of Statewide Planning Goal #17 to protect riparian vegetation and wildlife and either; (2) that the new land divisions fulfill a need that cannot otherwise be accommodated in other uplands or in urban and urbanizable areas; or, (3) that the new land divisions are in a documented area, "committed" area; or, (4) that the new land divisions have been justified through a goal exception.*

   *This strategy shall be implemented through provisions in ordinance measures that require the above findings to be made prior to the approval of the preliminary plat of a subdivision or partition.*

*This strategy recognizes that Coos County's rural shorelands are a valuable resource and accordingly merit special consideration under Statewide Planning Goal #17.*

*11. Coos County shall maintain riparian vegetation within the shorelands of the ocean, coastal lakes, and minor estuaries, and when appropriate, restore or enhance it, as consistent with water-dependent uses.*

*Timber harvest, if permitted in the zoning ordinance, shall be regulated by the Oregon Forest Practices Act.*

*Where the County's Comprehensive Plan identifies riparian vegetation on lands in the coastal shorelands subject to forest operations governed by the FPA, the Act and Forest Practices Rules administered by the Department of Forestry will be used in such a manner as to maintain, and where appropriate, restore and enhance riparian vegetation.*

*This strategy shall be implemented by County review of and comment on state permit applications for waterfront development.*

*This strategy is based on the recognition that prohibiting excessive removal of vegetative cover is necessary to stabilize the shoreline and, for coastal lakes and minor estuaries, to maintain water quality and temperature necessary for the maintenance of fish habitat.*

There are no non-estuarine shorelands on the effected properties. The shoreland in this case is estuarine, as it is the boundary between the CBEMP and the Balance of County Zoning, and will be addressed in the findings for Table 7c. Therefore, these strategies do not apply.

TABLE 4.7a

| PHENOMENON | SPECIAL REGULATORY CONSIDERATIONS SUMMARY | Appendix I | |
|---|---|---|---|
| | | Page | Strategy No. |
| *6. Significant Wildlife Habitat I ORD 85-08-011L)* | *6a. Conserve riparian vegetation adjacent to salmonid spawning and rearing areas; density restriction in Big Game Range.* | *1-14* | *1* |
| | *b. Protect "wet meadows" for agricultural use* | *1-18* | *4* |
| | *c. Manage riparian vegetation and nonagricultural wetland areas so as to preserve their significant habitat value, and to protect their hydrologic and water quality benefits.* | *1-17* | *2* |
| | *d. Restrict conflicting uses on "5c" bird sites except as permitted with EESE balancing. 300 ft. setback from Bald Eagle nests.* | *1-14* | *1a* |

**6. Significant Wildlife Habitat 1 ORD 85-08-011L) – Appendix I,**

**Pages 14-18, Strategy Nos. 1, 1a, 2 & 4:**

*Plan Implementation Strategies*

1. *Coos County shall consider as "5c" Goal #5 resources (pursuant to OAR 660-16-000) the following:*
   - *"Sensitive Big-game Range"*
   - *Bird Habitat Sites (listed in the following table)*
   - *Salmonid Spawning and Rearing Areas*

   *Uses and activities deemed compatible with the objective of providing adequate protection for these resources are all uses and activities allowed, or conditionally allowed by the Zoning and Land Development Ordinance, except that special care must be taken when developing property adjacent to salmonid spawning and rearing areas so as to avoid to the greatest practical extent the unnecessary destruction of riparian vegetation that may exist along stream banks. The Oregon Forest Practices Act is deemed adequate protection against adverse impacts from timber management practices.*

*This policy shall be implemented by:*

a. *County reliance on the Oregon Forest Practices Act to ensure adequate protection of "significant fish and wildlife habitat" against possible adverse impacts from timber management practices; and*

b. *The Zoning and Land Development Ordinance shall provide for an adequate riparian vegetation protection setback, recognizing that "virtually all acknowledged counties have adopted a 50 foot or greater standard" (DLCD report on Coos County, November 28, 1984); and*

c. *Use of the "Special Considerations Map" to identify (by reference to the detail inventory map) salmonid spawning and rearing areas subject to special riparian vegetation protection; and*

d. *Stipulating on County Zoning Clearance Letters that removal of riparian vegetation in salmonid spawning and rearing areas shall be permitted only pursuant to the provisions of this policy.*

e. *Coos County shall adopt an appropriate structural setback along wetlands, streams, lakes and rivers as identified on the Coastal Shoreland and Fish and Wildlife Habitat inventory maps.*

*The Oregon Department of Fish and Wildlife and the Department of Forestry are working in conjunction with the requirements of this Plan and, are deemed adequate protection against adverse impacts from timber management practices.*

1. *a. County reliance on the Oregon Forest Practices Act to ensure adequate protection of "significant fish and wildlife habitat" against possible adverse impacts from timber management practices; and*
2. *Coos County shall manage its riparian vegetation and identified non-agricultural wetland areas so as to preserve their significant habitat value, as well as to protect their*

*hydrologic and water quality benefits. Where such wetlands are identified as suitable for conversion to agricultural use, the economic, social, environmental and energy consequences shall be determined, and programs developed to retain wildlife values, as compatible with agricultural use. This strategy is subordinate to Strategy #4, below.*

*This strategy does not apply to forest management actions, which are regulated by the Forest Practices Act.*

*This strategy recognizes that protection of riparian vegetation and other wetland areas is essential to preserve the following qualities deriving from these areas:*

| | |
|---|---|
| *natural flood control flow stabilization of streams and rivers* | *environmental diversity habitat for fish and wildlife, including fish and wildlife of economic concern* |
| *reduction of sedimentation* | *recreational opportunities* |
| *improved water quality* | *recharge of aquifers* |

4. *Coos County shall protect for agricultural purposes those land areas currently in agricultural use but defined as "wet meadow" wetland areas by the U.S. Fish and Wildlife Service, and also cranberry bogs, associated sumps and other artificial water bodies.*

*Implementation shall occur through the placement of the plan designation "Agriculture" on such areas.*

*This strategy recognizes:*

a. *That agriculture is an important sector of the local economy;*

b. *That some of the more productive lands in Coos County's limited supply of suitable agricultural lands are such seasonally flooded areas;*

c. *That designation of these areas for agricultural use is necessary to ensure the continuation of the existing commercial agricultural enterprise; and*

d. *That the present system of agricultural use in these areas represents a long-standing successful resolution of assumed conflicts between agricultural use and habitat preservation use, because the land is used agriculturally during months when the land is dry and therefore not suitable as wetland habitat, and provides habitat area for migratory wildfowl during the months when the land is flooded and therefore not suitable for most agricultural uses.*

The properties have Big Game Habitat designation and Staff has provided notice to Oregon Department of Fish and Wildlife (ODFW). Big Game Habitat only regulates dwelling density. ODFW has recommended that residential development be kept to a general minimum of one dwelling per 80 acres in areas identified as sensitive big game range. ODFW intends that these recommended minimum densities be applied over a broad area.

There are no inventoried bird habitat sites or salmonid spawning and rearing areas. 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. This criteria has been addressed.

TABLE 4.7a

| PHENOMENON | SPECIAL REGULATORY CONSIDERATIONS SUMMARY | Appendix I | |
|---|---|---|---|
| | | Page | Strategy No. |
| *7. Natural Hazards* | *7a. Comply with floodplain overlay zone set forth in this Ordinance.* | *1-29* | *1* |
| | *b. Support structural protection measures for bankline stabilization projects requiring state and federal permits when the applicant establishes that non-structure measures either are not feasible or inadequate to provide the necessary degree of protection.* | *1-29* | *5* |
| | *c. Issue zoning clearance letters in known areas potentially subjected to mass movement, including earth flow, slump topography, rockfall and debris flow pursuant to the provisions of natural hazards Strategy #6 in the Comp Plan.** | *1-30* | *6* |
| | **Requires Administrative Conditional Use* | | |

**7. Natural Hazards – Appendix I, Pages 29-30, Strategy Nos. 1, 5 & 6**

*Plan Implementation Strategies*

1. *Coos County shall regulate development in known areas potentially subject to natural disasters and hazards, so as to minimize possible risks to life and property. Coos County considers natural disasters and hazards to include stream and ocean flooding, wind hazards, wind erosion and deposition, *critical streambank erosion, mass movement (earthflow and slump topography), earthquakes and weak foundation soils. This strategy shall be implemented by enacting special protective measures through zoning and other implementing devices, designed to minimize risks to life and property. This strategy recognizes that it is Coos County's responsibility: (1) to inform its citizens of potential risks associated with development in known hazard areas; and (2) to provide appropriate safeguards to minimize such potential risks.*

5. *Coos County shall promote protection of valued property from risks associated with critical streambank and ocean front erosion through necessary erosion-control stabilization measures, preferring nonstructural solutions where practical. Coos County shall implement this strategy by making "Consistency Statements" required for State and Federal permits (necessary for structural streambank protection measures) that support structural protection measures when the applicant establishes that non-structure measures*

* These hazards are addressed under policies for "Dunes and Ocean and Lake Shorelands."

*either are not feasible or inadequate to provide the necessary degree of protection. This strategy recognizes the risks and loss of property from unabated critical streambank erosion, and also, that state and federal agencies regulate structural solutions.*

6. *Coos County shall permit the construction of new dwellings in known areas potentially subject to mass movement (earth flow/slump topography/rock fall/debris flow) only:*
    a. *if dwellings are otherwise allowed by this comprehensive plan; and*
    b. *after the property owner or developer files with the Planning Department a report certified by a qualified geologist or civil engineer stipulating:*
        i. *his/her professional qualifications to perform foundation engineering and soils analysis; and*
        ii. *that a dwelling can or cannot be safely constructed at the proposed site, and whether any special structural or siting measures should be imposed to safeguard the proposed building from unreasonable risk of damage to life or property.*

*This strategy recognizes the county is responsible for identifying potential hazard areas, informing its citizens of risks associated with development in known hazard areas, and establishing a process involving expert opinion so as to provide appropriate safeguards against loss of life or property.*

*Implementation shall occur through an administrative conditional use process, which shall include submission of a site investigation report by the developer that addresses the considerations above.*

The proposed alternate segment alignment is not part of a bank line stabilization project. This application is not proposing dwellings; therefore, strategy No. 6 is not applicable. The proposed project is not subject to any of these strategies.

**H. Miscellaneous Concerns Unrelated to Approval Criteria.**

**1. Potential Bias / Goal 1 Violation.**

In her letter dated June 17, 2014, Jody McCaffree argues that "[a]llowing the [applicant] to be able to file multiple revision applications at such reduced [application] fees makes it harder for citizens to participate. Particularly since each revision has to be appealed in separate land use proceeding processes. This clearly biases the process in favor of the applicant and is not in line with the spirit and intent of Statewide Planning Goal One for Citizens Involvement." *See* McCaffree Letter at p. 2.

To the extent that Ms. McCaffree intends to raise a legal point via the above-quoted comments, the "bias" and "Statewide Planning Goal 1" argument is not sufficiently developed to enable a response. Nonetheless, if Ms. McCaffree's broader point is that the applicant should

be charged more money in order to slow them down from a financial standpoint, the Board disagrees with both the legality and the practicality of the suggestion. The Board has conducted public hearings in each one of these PCGP cases, and has consistently allowed parties to exceed their time limits when their testimony seemed relevant to the approval standards. The hearings officer held the record open for generous periods of time to enable adequate opportunity for public comment and rebuttal. The hearings officer also stated in his recommended order that he was reticent to reject evidence and arguments on procedural grounds, and has erred on granting opponents broad standing when issues of this sort have arisen. The applicant, to its credit, has also been accommodating with scheduling issues, and has given the County sufficient time to make informed and well-reasoned decisions. For this reason, the Board finds that the "spirit and intent" of Goal 1 has not only been met but in fact has been exceeded by a significant margin.

**2. Condition 25 Has been Modified in a Manner that No longer Prohibits Export.**

In her letter dated June 17, 2014, Jody McCaffree argues that an approval of the Blue Ridge route as an "export" pipeline violates Condition 25 from HBCU-10-01.[19] However, Condition 25 was modified in a manner that now allows for the export of natural gas. LUBA upheld that modification in *McCaffree v. Coos County*. Of course, the subject matter of the modification is ultimately subject to FERC approval, and it is in fact the FERC process that is the proper venue for most of the policy arguments that Ms. McCaffree raises in this regard.

Ms. McCaffree nonetheless persists in her argument that Condition 25 of the original approval is somehow applicable to the current application and that, by failing to limit the Pipeline to use only for importation of natural gas, the current application violates Condition 25. *See* McCaffree letter dated July 1, 2014, at p. 1-4. Ms. McCaffree cites no authority in support of her theory that a condition of approval for one development approval automatically becomes a condition of approval or "other requirement of law" for a new development application. Indeed, the notion that a condition of approval from one development decision can be a basis for denying a separate permit application contradicts ORS 215.416(8)(a), which provides that approval or denial must be based on standards and criteria set forth in the County's adopted ordinances and regulations:

> Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.

Ms. McCaffree cites no standard or criterion in the County's adopted ordinances that requires the denial of this application. Although Ms. McCaffree makes much of the fact that Condition 25 was not modified by the Board until after the application in the current matter was

[19] Final Decision and Order, No. 12-03-018PL (March 13, 2012).

submitted, that would be of relevance only if Condition 25 was an applicable approval standard for this new permit application. It is not.

Furthermore, as the applicant aptly points out, this application concerns only the portion of the Pipeline route located along the proposed Blue Ridge alternative alignment. Thus, this application concerns approximately 14 miles of the Pipeline. This application does not seek a modification of any of the prior approvals for the Pipeline. By approving this segment, the Board's decision will be subject to only those conditions of approval adopted by the Board in this decision, pursuant to CCZLDO 5.0.350.A:

> Conditions of approval may be imposed on any land use decision when deemed necessary to ensure compliance with the applicable provisions of this Ordinance, Comprehensive Plan, or other requirements of law. Any conditions attached to approvals shall be directly related to the impacts of the proposed use or development and shall be roughly proportional in both the extent and amount to the anticipated impacts of the proposed use or development.

Thus, Condition No. 25 from HBCU 10-01 provides no basis for denial in this case.

**3. The Application is Not Premature.**

One opponent testified that she believes this application should not be approved until other regulatory processes by FERC are completed. However, the Board has consistently denied this argument in previous cases. The County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. Additionally, opponents have cited no authority or approval standard, and the Board is aware of none, which requires this application process to be put on hold pending favorable results in related but separate processes. Given the length of time that it takes to complete the various processes, it makes sense that the applicant seeks to complete these applications concurrently, and there is no legal impediment to doing so.

**4. NEPA Is Not Applicable to this Proceeding.**

In her letter dated June 17, 2014, Jody McCaffree argues that this land use process should be put on hold pending the results of the National Environmental Policy Act ("NEPA") process currently being processed by FERC. Ms McCaffree argues that "until a final record of decision is issued, the applicant and [FERC] are not to take any action concerning the proposal which would limit the choice of reasonable alternatives addressed in the FEIS." She further argues that "the applicant is in the process of violating the NEPA regulations by taking inappropriate actions as indicated by all of these land use applications and approval decisions that are being processed prior to the NEPA process being completed." She asks, rhetorically, "[h]ow 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 Agencies have already issued permits and certifications for one of the alternatives beforehand." *Id.* at p. 4.

The answer is that the County land use approvals are all contingent on FERC approval, which, in turn, is based on the results of the NEPA EIS process. Ms. McCaffree seems to

accept, as a premise to her argument, that land use approvals are somehow binding on FERC or otherwise limit the range of alternatives considered by FERC. However, even the facts of this case bear out that Ms. McCaffree is mistaken. The applicant has previously requested land use approval for two alternative route segments in response from requests from FERC. The proposed changes in the County approved route were necessary to: (1) avoid the Natural Resources Conservation Service's (NRCS) Brunschmid Wetland Reserve Program Easement; and (2) minimize the Stock Slough crossings. The applicant is now pursuing the Blue Ridge alternative segment in response to FERC requests. It is clear that the County land use approvals are not limiting FERC's considerations of alternatives in any way. In fact, the opposite is true: the FERC process is causing the applicant to apply multiple times for land use approval of the pipeline route.

The Board incorporates by reference the findings that appear on pages 75 to 78 of Final Opinion and Order 14-01-007PL (HBCU 13-04). These incorporated findings provide additional discussion explaining why NEPA does to apply to this land use decision.

**5. "Public Need" or "Public Benefit".**

Some opponents continue to assert the belief that the alternative alignment should not be approved because there is no "public need" for the project or a "public benefit" to the community. For example, Ms. McCaffree dedicates three pages of her June 17, 2014 letter arguing that there is a lack of "need" for the Pipeline. In this letter, which appears to be largely recycled arguments from past cases hastily thrown together at the last second, Ms. McCaffree raises a host of policy arguments pertaining to the "public need" for LNG exports. She argues that the Pipeline will result in 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 local standards is found in CBEMP Policy 5, and, as noted above, the Board has determined that this policy does not apply.

In fact, Ms. McCaffree's own evidence tends to undercut the argument that the LNG pipelines are not in the "public interest," while at the same time making clear that the issue is one that gets decided at the federal level. Exhibit E to McCaffree Letter dated June 17, 2014 provides as follows:

> Section 3(a) of the Natural Gas Act of 1938 defines the process for DOE's reviews of most LNG export applications. In particular, the Secretary of Energy must approve an export application "unless after opportunity for hearing, [the Secretary] finds that the proposed exportation... will not be consistent with the public interest." Thus, there is "a rebuttable presumption that a proposed export of natural gas is in the public interest," according to DOE. This presumption must be overcome for DOE to deny an export application. For export approvals, DOE may also attach terms or conditions that it considers necessary to protect the public interest.

> The Energy Policy Act of 1992 amended the Natural Gas Act to further limit DOE's ability to deny natural gas export applications. Specifically, DOE *must* approve applications to export natural gas to the 15 countries that have free trade agreements (FTAs) with the United States covering natural gas. Such applications are automatically deemed in the public interest, and DOE cannot add any terms or conditions to approvals.
>
> In addition to DOE authorization to export LNG, companies must receive authorization from the Federal Energy Regulatory Commission (FERC) for the actual siting and development of LNG projects, as specified under Section 3 of the Natural Gas Act. FERC is also the lead agency responsible for the preparation of the analysis and decisions required under National Environmental Policy Act for the approval of new facilities, including tanker operation, marine facilities, and terminal construction and operation, environmental and cultural impacts. (Footnotes omitted).

*See* "Drill Here, Sell There, Pay More," Natural Resources Committee Democrats, at p. 7. But even if that were not the case, it should also be emphasized that the Pipeline has already been approved by the County. The current application is for approval of an alternate alignment segment, which totals approximately 14 miles of pipeline. This alternate alignment segment is not determinative of the "need" for the Pipeline as a whole. As previously mentioned, this alternate alignment is proposed at the behest of FERC, in order to reduce potential impacts to the environment and residents living in the area.

Although Ms. McCaffree contends that the applicant fails to demonstrate a "public need" for the Jordan Cove facility or the Pipeline, she fails to identify any relevant local land use standard incorporating such "public need" standard. *See* McCaffree letter, at pp. 8-9, 11–17, 31–32. The Board finds that there is no such "public need" standard applicable to these proceedings. As the Board previously explained in HBCU 10-01 approving the conditional use permit for the pipeline:

> "[N]eed" is simply not an approval criterion for this decision. *Compare Hale v. City of Beaverton*, 21 Or LUBA 249 (1991) (Public need is not an approval criterion) *with Ruef v. City of Stayton*, 7 Or LUBA 219 (1983) (code standard required that a "public need" for a project be established). Although "public need" became a common code standard after the landmark *Fasano case*, it is no longer a generally applicable criterion in quasi-judicial land use proceedings. *Neuberger v. City of Portland*, 288 Or 155, 170, 603 P2d 771 (1979).
>
> . . . Furthermore, since the pipeline is expected to transport natural gas in interstate commerce, any local zoning ordinance requiring the pipeline to serve a "need" by local customers, rather

> than the concerns of interstate commerce, is a clear violation of the Commerce Clause. The fact that Oregon law provides for eminent domain proceedings for interstate natural gas pipelines is evidence that Oregon as a state, considers interstate natural gas pipelines to be important and necessary and to serve an important need.

2010 Decision, at p. 144. *See* Attachment A to Exhibit 21.

In order to receive a Certificate of Public Convenience and Necessity from FERC, the applicant will be required to demonstrate a public need for the Pipeline. Arguments related to the public need for the Pipeline, including the Blue Ridge alignment, are properly addressed in that proceeding, not this Coos County land use proceeding, which is limited to addressing local land use approval criteria.

**6. OAR 345-023-0005 Does Not Establish a "Need" Requirement for this Application**

Ms. McCaffree also contends that OAR 345-023-0005 is an independent source of a "public need" requirement. *See* McCaffree Letter dated July 1, 2014 at p. 7 ("In addition, Oregon Administrative Rule 345-023-0005 clearly requires that the applicant must demonstrate a need for the natural gas pipeline"). The Board finds that this argument is being made for the first time in surrebuttal, and for that reason the Board rejects it as untimely.

Nonetheless, even if the issue had been raised in a timely manner, the Board denies it. Ms. McCaffree provided no discussion or analysis as to why OAR 345-023-0005 is applicable to this case. As the applicant points out in its final argument dated July 8, 2014, at p. 9-10:

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

for concluding that the application for the Blue Ridge alternate alignment of the Pipeline is subject to EFSC's "need" standard for non-generating facilities.

The applicant is correct: OAR 345-023-0005 does not apply in this case.

**7. 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 pages 25 – 31 of Jody McCaffree's letter dated June 17, 2014. Record Exh. 17. Included in that discussion is a 5-page list of various pipe explosions at Williams' and Transco owned facilities, various fines imposed and/or paid by Williams for violations of laws, and other alleged environmental problems with Williams' facilities. This testimony appears to be more-or-less recycled from materials she submitted into the record in HBCU 13-04. 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.

Moreover, most of the testimony submitted into the record on this topic seems to be aimed more at promoting the idea that natural gas is inherently unsafe and should be prohibited for public use, as opposed to addressing the issue of whether the Blue Ridge route meets land use standards. Nonetheless, as has been pointed out in previous cases, most of the problems with gas pipelines occur with a combination of unauthorized human interference (such as a construction contractor accidentally digging up a pipe), or with regard to older pipelines that are beyond their useful lifespan. With regard to the latter issue, it seems that newer pipelines can create the redundancy needed to take older pipes off line for repair or replacement.

But regardless of that point, the applicant correctly notes in its letters and materials submitted into the record that this case is not really about whether the overall pipeline should be approved or not. Rather, this case is really focused on whether the "Blue Ridge" alignment meets Coos County's land use standards. Although technically the question is not whether the Blue Ridge route is "better" than the segment of the approved route that it seeks to replace, as a practical matter, such analysis has creeped into many of the submittals. That being said, a denial of this application would merely put the applicant back in the position of seeking to develop the route approved in 2010.

Furthermore, even if the point is well taken that Williams caused accidents and deaths in other cases, 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 (aka: "Port-a-Johns"). 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 that impossibility of performance is likely in this case.

In HBCU 13-04, the applicant's attorney, Mr. Mark Whitlow, pointed out that the applicant has prepared the Safety Report, which details the extensive construction, maintenance, monitoring, and education safety measures that will be implemented to significantly reduce the risk of a release. A portion of the Safety Report referenced by Mr. Whitlow is in the record of this proceeding. Exhibit 15. The findings from HBCU 13-04 explained the contents of the report, as follows:

> "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.

*See* Attachment B to Exhibit 21 (Copy of Findings in HBCU 13-04). There has been no evidence submitted in this case that undermines these previously adopted findings. The findings themselves constitute substantial evidence in the same way as a staff report. Since there is no credible evidence to the contrary, the Board finds that the construction, maintenance, monitoring, and education safety measures proposed by PCGP are sufficient to support the conclusion that it is feasible to comply with applicable approval standards and conditions of approval.

**8. Cost of Exporting LNG.**

On page 8 of her letter dated June 17, 2014, Ms. McCaffree raises a policy issue concerning the effect that the export of natural gas will have on domestic fuel prices. The Board finds that Ms. McCaffree does not relate her issue to an approval standard. This type of "policy" based testimony may be relevant to the FERC process, but is not relevant in this local land use process.

In fact, even the evidence submitted by Ms. McCaffree underscores that the issue she raises is one that is being decided at the Federal level (i.e., at the Department of Energy). Her evidence also reveals that there exists a stark lack of LNG terminals on the West Coast of the United States, which suggest that LNG tankers in the Gulf Coast must use the circuitous route through the Panama Canal in order to deliver natural gas to markets in Korea, Japan, and India. The lack of LNG terminals on the West Coast may signal a public need for such facilities. Regardless, that is a matter for FERC to decide.

In the absence of a more focused argument related to an approval standard, the Board finds that this argument provides no basis to deny the application.

**9. Compliance with Purpose Statements.**

Tom Younker, Julie Eldridge and Christine Keenan submitted a letter dated May 16, 2014, in which they argue that the proposed pipeline is not consistent with the "Purpose" of the EFU, Forest, and Rural Residential zones. CCZLDO 4.1.100 contains general purpose statements for the various zones, and state general objectives only. These purpose statements do not purport to apply as independent approval standards 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). Therefore, the Board denies the opponents' contentions on this issue.

**10. Concerns with Regard to Daniels Creek Road Are Not Relevant in this Proceeding.**

Several opponents expressed concerns about potential impacts to Daniels Creek Road. At least two residents living along Daniel Creek Road submitted letters opposing the Blue Ridge route. However, for the most part they make no effort to identify any approval standards to which their concerns are relevant.

As the Board understands the facts, Daniel Creek Road is directly east of Blue Ridge. As the applicant stated at the May 30, 2014 public hearing:

> The proposed Blue Ridge alignment does not involve any crossing of Daniels Creek Road, and the applicant is not proposing to widen or alter Daniels Creek Road in conjunction with the proposed Blue Ridge alignment at issue in this proceeding. People with homes on Daniels Creek Road will not have their use of the road halted even temporarily due to construction of the Pipeline. It is possible that local traffic on Daniels Creek Road may increase during construction as drivers seek alternatives to roads that will be directly affected by

construction. Any such impact would be temporary. Moreover, as noted at the hearing, Daniels Creek Road is a county road, not a private facility.

Concern is raised over alleged traffic impacts, environmental degradation to stream and wildlife habitat, loss of property values, damage to "the very essence of country living," potential disruption to water wells, fire protection, and related issues. The Board finds that the concerns expressed in the letters are generalized in nature, speculative, and for the most part, do not relate to specific approval criteria. All of the concerns raised are unsubstantiated and unsupported with substantial evidence, particularly since the Pipeline will be located in excess of ½ mile away from the homes near Daniel Creek Road.

Furthermore, the few issues raised in these letters that do relate to specific approval criteria have already been discussed in the two previous Pipeline cases, HBCU 10-01 and 13-04. While the Board acknowledges the landowners' expressed desires that the pipeline be routed on someone else's land, the Board also finds that the Blue Ridge route is being proposed, at FERC's request, precisely because it affects *fewer* private landowners than the original approved route, and has far fewer environmental impacts as well. *See* Letter from Mark Sheldon, Blue Ridge LNG Route, dated June 10, 2014 (Exhibit 5). In this letter, Mr. Sheldon points out a myriad of reasons why the Blue Ridge route is a "better" route than the approved route. From the standpoint of deciding whether to approve a land use decision, the Board does not factor the relative merits of the two routes into the decision. In other words, the question the Board is tasked to answer is whether the application meets the applicable approval criteria, not whether one route is "better" than the other. Nonetheless, when considering testimony such as that provided in the two above referenced letters, it is difficult to ignore the fact that the proposed Blue Ridge route has less potential impacts than the approved route.

At least one opponent argues that the Pipeline may affect her drinking water supply.[20] However, this testimony is entirely speculative. Moreover, opponents have identified no applicable land use approval standard related to potential impacts to groundwater resources, private wells, or springs, and the Board is unaware of any such standard. Nonetheless, the applicant has previously provided information regarding the potential impacts of the Pipeline on such resources as well as measures proposed to avoid or mitigate potential such impacts. *See* Resource Report Number 2, at 77–84 (submitted with the application). The Blue Ridge alignment does not cross any EPA-designated sole source aquifers.[21] *Id.* at 77–78. The potential impacts to local groundwater resources will be avoided or minimized by the use of standard construction techniques and adherence to FERC's Wetland and Waterbody Procedures and the applicant's ECRP. *See* Applicant Rebuttal Letter dated June 17, 2014, at Attachment E.

[20] *See* Letter dated June 8, 2014 from D. Metcalf to A. Stamp, Ex. 1, at p. 1 ("Our household water comes from an underground spring approximately 400 to 450 feet above our house, so directly under the Blue Ridge/Daniels Creek access road. So just a very short distance to Blue Ridge. Working under the assumption that water flows downhill, it seems very possible that it comes from Blue Ridge. I worry that if you start tearing up the roads and forestland to buy this large pipe, that we will no longer have a source of good drinking water. And I also believe that everyone else that lives up on this end of the Creek could possibly be impacted.").

[21] While Resource Report Number 2 specifically addressed the original Pipeline route, not the Blue Ridge alignment, the report states that "[t]he nearest EPA-designated sole source aquifer is the North Florence Dunal Aquifer, which is more than 35 miles to the north of the proposed pipeline alignment in Lane County, Oregon." Resource Report Number 2, at 78.

Because pipeline construction activity is generally limited to surface disturbance and shallow trenching, is temporary, and is contained within the approved construction work areas, groundwater wells beyond 200 feet of the construction work areas should not be affected by the Pipeline. Further, the applicant has proposed monitoring and mitigation measures to prevent and/or minimize potential impacts to groundwater.[22] *See* Applicant Surrebuttal Letter dated July 1, 2014 at Attachment F: Groundwater Supply Monitoring and Mitigation Plan.

In contrast to the evidence in the record demonstrating that impacts to water supplies are unlikely and that mitigation plans are in place to address potential such impacts, opponents provide no factual evidence or testimony indicating that such impacts are likely or that the applicant's proposed mitigation measures are insufficient. Such "speculative testimony" provides no basis for denial. *See* 2010 Decision, at 44–45.

In summary on this issue, while there is no identified land use approval standard related to this issue, the applicant has provided sufficient information to address opponents' concerns regarding potential impacts to their private water supplies.

**11. The Pipeline Right-of-Way Can Be Successfully Revegetated.**

At the May 30, 2014 hearing, one opponent expressed doubt as to whether the applicant will be able to successfully revegetate the pipeline right-of-way following construction. That opponent did not identify any approval standard to which her testimony related. Nonetheless, in response to this testimony, the applicant submitted into the record the ECRP, previously submitted to FERC. Also, in its letter dated June 17, 2014, the applicant provided an additional explanation as to how it will go about revegetating areas disturbed during construction, as follows:

> On Forest-zoned land, a 30 foot corridor directly over the pipeline would be kept clear of large vegetation, 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 construction 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.
> On 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

[22] The applicant has agreed to include in this proceeding Condition of Approval No. 2 from the 2010 Decision, which provides:

> 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.

construction activities. However, traditional farming activities may continue both within the temporary construction areas and across the permanent right-of-way following construction. In agricultural areas, the pipeline will be installed so that there will be 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. 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 segregatiou 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, as well as other 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 wing tipped rippers. 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 application 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 principles. 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 probed 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 regraded 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.

*See* Letter from Richard Allen dated June 17, 2014, at p. 19-20.

There is no evidence to the contrary submitted into this record. The applicant's testimony constitutes substantial evidence and demonstrates that it is feasible to revegetate pipeline ROW. For the reasons set forth above, the Board concludes that, to the extent relevant to an approval standard, the temporary and permanent right-of-way for the Pipeline can be successfully revegetated consistent with the applicant's ECRP.

**12. The Modified Blue Ridge Alignment Does Not Face Previously Identified "Constructability" Issues**

At the May 30, 2014 hearing, several opponents noted that when the "Blue Ridge alignment" was proposed in 2010, issues were raised about the "constructability" of the alignment and the alignment ultimately was not selected by FERC. As noted in the June 10, 2014 letter from Mark Sheldon of Blue Ridge LNG Route, however, the "modified" Blue Ridge route contained in this application was developed by PCGP in 2013 in response to a request from FERC staff. It differs significantly from the Blue Ridge route previously reviewed by FERC and proposed by landowners in the original Coos County hearings on the PCGP.

In order to clarify the difference, the applicant submitted two maps (Attachment C and Attachment D to the June 17, 2014 letter) highlighting the difference between the Blue Ridge route proposed in this application and the Blue Ridge route considered in 2010. Attachment C ("Overview – Blue Ridge Route Comparison") shows the entire Blue Ridge route. The 2010 route ("2010 Landowner Suggested Route") and the current proposed route ("Amended Blue Ridge Route) are both depicted, and the area of significant difference is identified by a box. Attachment D ("Map 1 – Blue Ridge Route Comparisons") shows at a larger scale the area within that box.

As the applicant points out, the current proposed route crosses the 2010 route prior to MP 14 and remains substantially to the west of the 2010 route until rejoining it at MP 17. The current route avoids the steep and narrow ridge to the east, which raised constructability issues in 2010. In other words, the issues previously raised by the applicant with respect to the 2010

route have been addressed by the modification incorporated into the current proposed Blue Ridge route.

This issue provides no basis for denial.

**13. Issues Concerning Fish and Wildlife Impacts Do Not Provide a Factual or Legal Basis for Denial of the Application.**

At the hearings officer's request, the applicant submitted Environmental Alignment Sheets, which were made available to the public on the Planning Department's website on June 3, 2014. *See* Exhibit 4. As shown on these maps, the Blue Ridge alternate alignment will cross several streams. The Environmental Alignment Sheets also show the method of stream crossing. The applicant indicated at the May 30, 2014 hearing that the crossings will be completed during the ODFW approved "in-water" work window for these coastal streams, July 1 – September 15. The applicant also submitted (with the Application Narrative) a copy of Resource Report 2, which addresses the method of protecting water bodies. The applicant also submitted a ECRP (Applicant's Rebuttal, Attachment E).

For the first time on surrebuttal, Ms. McCaffree asserts "that vital habitat and salmon bearing streams would be impacted in the Coastal Zone by this alternative route." McCaffree Surrebuttal at 10. Because this issue is raised for the first time on surrebuttal, this "new issue" is rejected as untimely. Nonetheless, even if the issue had been raised in a timely manner, it would provide no basis for denial. As an initial matter, Ms. McCaffree does not tie her assertion to any approval criterion for this application. Moreover, she provides nothing more than her bare opinion. Ms. McCaffree has not established herself to be an expert in this field and is therefore not permitted to submit opinion testimony.[23] Stated another way, her layperson opinion testimony does not constitute "substantial evidence" on a record sufficient to undermine the expert testimony presented on behalf of the applicant, including Resource Report 2 and the ECRP.

Tom Younker, Julie Eldridge and Christine Keenan submitted a letter dated May 16, 2014, in which they discussed the presence of an inventoried Bald Eagle nest site (T25S R11W Section 32 (Morgan's Ridge) which apparently is shown on the County's adopted Goal 5 inventory. However, as the applicant points out, this nest is located several "sections" (and therefore, several miles) away from the closest (northern) portion of the proposed Blue Ridge alternate alignment. The presence of the eagle nest miles away from the pipeline route provides no basis for denial.

**14. Private Utility Standards Do Not Apply.**

[23] Ms. McCaffree's unsupported statements are mere conclusions, and do not constitute evidence. *Palmer v. Lane County*, 29 Or LUBA 436, 441 (1995) (a statement in a land use application that "a total of 500,000 to 600,000 yards of rock appears to be available at this site depending upon the unexposed rock formations" does not constitute "evidence" because there was no support for the statement.); *DLCD v. Curry County*, 31 Or LUBA (1996) (When a finding merely states that "[t]here can be no conflict with nearby permitted users on nearly lands," that finding merely states a conclusion and is unsupported by substantial evidence). Ms. McCaffree's concern is not factually substantiated and provides no basis for denial.

In the same May 16, 2014 letter mentioned above, Tom Younker, Julie Eldridge and Christine Keenan argue that the Pipeline is a "private utility" and therefore violates "the right-of-way" requirements of the CCZLDO. This argument is not sufficiently developed to allow a response.

The Board understands that the Younker letter's reference to "Coos County Zoning Land Ordinance 3-13 EFU" is a reference to "page III-13" of the zoning code, which is the section addressing Routine Road Maintenance. Page III-11 might have been the intended reference, as it is the page on which Section 3.2.500 is found ("Right of Way Enhancement"). The Younker letter then purports to quote "Review Standard 15," which is referenced in Section 3.2.500. In actuality, it quotes a document entitled "City of Portland: Encroachments in Public Right of Way." The author makes no effort to explain why the City of Portland document is applicable in Coos County, and it is not obvious how it would be applicable.

In any event, the letter concludes on this point by stating that "PCGP is a private utility facility and does not meet the right of way requirements." However, there is no Code standard that requires the County to determine if the PCGP pipeline is "publicly" or "privately" owned. Nonetheless, the pipeline does fall within the statutory definition of "public utility," ORS 757.005(1)(a)(A), and is a "utility facility necessary for public service," within the meaning of CCZLDO 4.9.450(C).

**15. Executive Order 13406 of June 23, 2006, Entitled "Protecting the Property Rights of the American People" Does Not Prohibit the Application.**

Tom Younker, Julie Eldridge, and Christine Keenan submitted a letter dated May 16, 2014, in which they assert that Executive Order 13406 prohibits the applicant from exercising the right of Eminent Domain. Executive Order 13406 was signed by President George W. Bush on June 23, 2006, in response to the *Kelo* case. *See Kelo v. City of New London*, 545 U.S. 469 (2005). It states, in relevant part:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, and to strengthen the rights of the American people against the taking of their private property, it is hereby ordered as follows:
>
> Section 1. Policy.
> It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.
>
> Sec. 3. Specific Exclusions.

> Nothing in this order shall be construed to prohibit a taking of private property by the Federal Government, that otherwise complies with applicable law, for the purpose of:
>
> * * * * *,
>
> (b) projects designated for public, common carrier, public transportation, or public utility use, including those for which a fee is assessed, that serve the general public and are subject to regulation by a governmental entity
>
> * * * * *,
>
> (g) acquiring ownership or use by a public utility;

However, by federal statute, the applicant will be granted the power of eminent domain in this case if and when it obtains the "Certificate of Public Convenience and Necessity" from FERC. In this regard, 15 U.S.C. 717(f)(2)(h) provides:

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

*See also* ORS 772.510(3). Thus, there are two bases to deny the opponents' contention. First, the Executive Order provides an exemption for public utility projects such as the Pipeline. Second, a federal statute takes precedence over an Executive Order, and therefore, Executive Order 13406 provides no basis for denial in this case.

**16. The Proposed Blue Ridge Alternative Route Does Not Cross the 20-CA District, and Therefore Arguments Directed at the 20-CA District Provide No Basis for**

**Denial.**

On page 25 of the initial application narrative, the applicant states that "the proposed Blue Ridge alternative segment alignment crosses the 20-CA zoning district." However, both the revised Application Narrative dated May 2, 2014, as well as the alignment maps accompanying the application, clearly show the Blue Ridge alternative diverging from the approved route at Mile Post 11.29, on the east bank of the Coos River. This segment does not include any portion of the 20-CA district. The 20-CA district is an aquatic district, which only includes lands submerged in whole by waters of the State (*i.e.* Coos River).

Jody McCaffree uses the applicant's first application narrative as an opportunity to argue about whether the HDD bore under the Coos River will result in a hydraulic fracture. The Board denies this contention for three reasons. First, the contention is not responsive to the *revised* application. Second, Ms. McCraffree's arguments on this topic do not provide a basis to deny the application. The Board understands Ms. McCaffree to suggest that, by allowing a "utility" in the 20-CA zoning district, the County will not necessarily allow an HDD bore under the river, but rather that the County was only allowing a pipe to be "placed * * * on the top of the tidal muds and or shorelands." However, this contention is inconsistent with the plain text of CBEMP Policy 2, which allows "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation."

Ms. McCaffree seems to be so focused on establishing that CBEMP Policy 5 applies (and presumably, the "public need" standard that she asserts goes along with it) that she is losing sight of the obvious fact that an HDD bore is a vastly more expensive operation and will *avoid* the environmental hazards associated with an open cut trench. Whatever can be said about the environmental risks associated with an accidental frack-out of bentonite slurry during an HDD bore, it should be obvious that such "worst-case" scenario impacts would be far less than the expected impacts associated with an open trench cut across the Coos River.

Third, in any event, the Board finds that the current segment does not cross the 20-CA zone. While the current segment does cross the 20-RS zone, there are no impacts caused by the HDD bore which differ from what was approved in HBCU 13-04. In fact, if anything, the applicant has made a better record in this case on the issue of HDD boring feasibility, as compared to the record created in prior cases.

## III. CONCLUSION AND RECOMMENDATION

For the above stated reasons, the Board 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. The following conditions are proposed:

### 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 files 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 Blue Ridge alternative alignment is 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.

    (b). To minimize impacts to wetlands or waterbodies at the horizontal directional drill (HDD) bore under the Coos River, the applicant must comply with a plan for the HDD crossing of the Coos River approved by FERC under FERC's Wetland and Waterbody

Construction and Mitigation Procedures referenced at 18 CFR 380.12(d)(2). The FERC Wetland and Waterbody Construction and Mitigation Procedures shall be the May 2013 version (notice of which was provided at 78 Federal Register 34374, June 7, 2013). The applicant shall submit a copy of the FERC-approved plan for the HDD crossing to the County Planning Department prior to beginning construction of the Coos River crossing.

**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

14. The pipeline operator shall maintain an emergency response plan in compliance with 49 CFR 192.615.

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**

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

Adopted this 21st day of October, 2014.

**Coos County Planning Department**
Coos County Courthouse Annex, Coquille, Oregon 97423
Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille, Oregon
(541) 396-7770
FAX (541) 396-1022 / TDD (800) 735-2900
planning@co.coos.or.us
Jill Rolfe, Planning Director

*NOTICE OF PLANNING DIRECTOR'S DECISION/PUBLIC NOTICE*

This notice is to serve as public notice and decision notice and if you have received this notice by mail it is because you are a participant, adjacent property owner, special district, agency with interest, or person with interest in regard to the following land use application. Please read all information carefully as this decision may affect you. (See attached vicinity map for the location of the project).

On Monday, February 26, 2018 the Coos County Planning Director rendered a decision to approve this applicaiton for an extension of a conditional use (see staff report for further details) file number EXT-17-015, submitted by Seth King, Perkins Coie, representing Pacific Connector Gas Pipeline, LP. The original conditional use application was approved for a natural gas pipeline and associated facilities on approximately 49.72 miles extending from Jordan Cove Energy Project's LNG Terminal upland from the Port's Marine Terminal to the alignment segment in adjacent Douglas County.

The application, staff report and any conditions can be found at the following link: http://www.co.coos.or.us/Departments/Planning/2017Applications.aspx or by visiting the Coos County Planning Department's home page.

| APPLICABLE CRITERIA<br>Coos County Zoning and Land Development Ordinance (CCZLDO) and Coos County Comprehensive Plan (CCCP) | | |
|---|---|---|
| CCZLDO | §5.2.600(1) | Extensions on Farm and Forest (Resource) zone property. |
| CCZLDO | §5.2.600(2) | Extensions on all non-resource zoned property. |

The application and all documents and evidence contained in the record, including the staff report and the applicable criteria, are available for inspection, at no cost, in the Planning Department located at 225 North Adams Street, Coquille, Oregon. Copies may be purchased at a cost of 50 cents per page. The decision is based on the application submittal and information on record.

**APPEAL INFORMATION**

Pursuant to Article 5.8 of the LDO, this decision may be appealed to the Coos County Hearings Body within 15 days of the date notice of this decision is mailed, by filing an appeal on the appropriate form, along with the required filing fee. This means appeals must be received in the Planning Department by 5:00 p.m. on **Tuesday, March 13, 2018;** otherwise, the appeal is not

timely and will not be considered. The decision on this application will not be final until the period for filing an appeal has expired. Pursuant to Oregon Revised Statutes (ORS) 197.830, the decision cannot be appealed directly to the Land Use Board of Appeals.

Further explanation concerning any information contained in this notice can be obtained by contacting the Planning Department at (541) 396-7770, or by visiting the Planning Department between the hours of 8:00 AM – 5:00 PM (closed noon – 1:00 PM), Monday through Friday. The staff report in this matter was completed by Jill Rolfe, Planning Director.

COOS COUNTY PLANNING DEPARTMENT

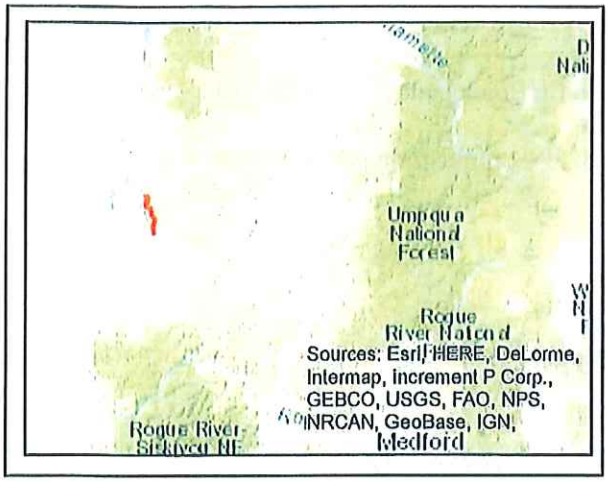
*Jill Rolfe,* Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner II
Crystal Orr, Planning Specialist
Sierra Brown, Planning Specialist

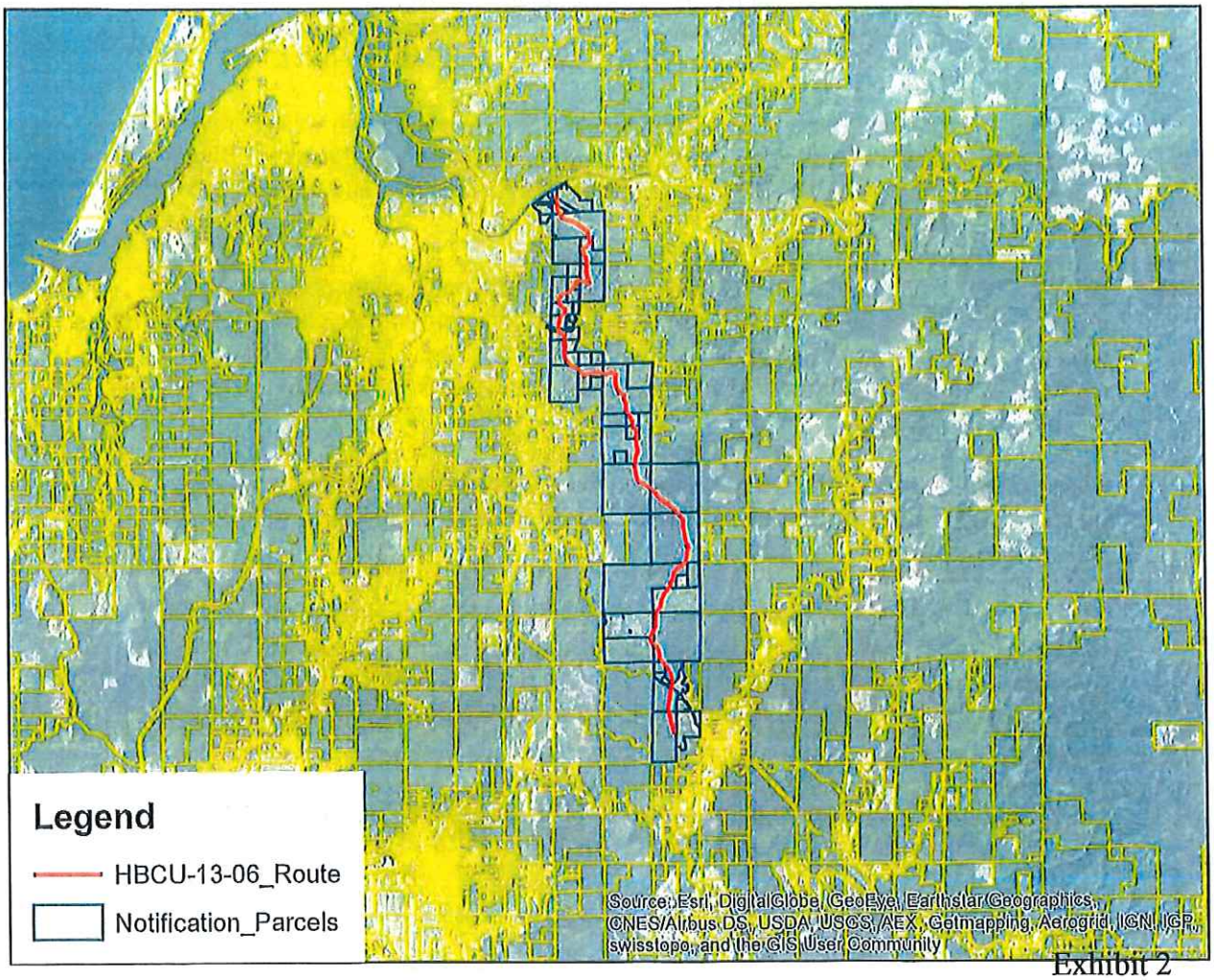
**POSTED & MAILED ON:** **Monday, February 26, 2018**
**POST THROUGH:** **Tuesday, March 13, 2018**

# COOS COUNTY PLANNING DEPARTMENT

Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille Oregon
Phone: (541) 396-7770
Fax: (541) 396-1022/TDD (800) 735-2900




| | |
|---|---|
| File: | EXT-17-015 |
| Applicant/ Owner: | Perkins Coie on behalf of Pacific Connector Gas Pipeline, L.P. |
| Date: | February 26, 2018 |
| Location: | Blue Ridge Route |
| Proposal: | Extension of a Prior Land Use Decision |



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Jill Rolfe, Planning Director

**STAFF REPORT**

Monday, February 26, 2018

**APPLICANT:** Seth King, Perkins Coie on behalf of Pacific Connector Gas Pipeline, LP.

**TYPE OF APPLICATION:** Extension of a Conditional Use Application Authorization.

**FILE NUMBER:** EXT-17-015

**DECISION:** APPROVED

**APPEAL DEADLINE** Tuesday, March 13, 2018 at 5:00 p.m.

I. **RELEVANT CRITERIA:**
Coos County Zoning and Land Development Ordinance (CCZLDO)
- § 5.2.600 Expiration and Extensions of Conditional Uses.
  - § 5.2.600(1) Extensions on Farm and Forest (Resource) zone property.
  - § 5.2.600(2) Extensions on all non-resource zoned property.

II. **PROPERTY LOCATION:** The original conditional use application was approved for a natural gas pipeline alternative segment of the original route referred to as the Blue Ridge Alignment. The subject properties are shown on the vicinity map and further described in the original authorization.

III. **BACKGROUND:** On October 21, 2014, the Board of Commissioners adopted and signed Order No. 14-09-062PL, File No. HBCU-13-06, approving Applicant's request for a conditional use permit to authorize development of the Blue Ridge alternative alignment for a portion of the pipeline and to authorize associated facilities, subject to conditions of approval.

This approval became effective on the date the appeal period for the approval expired pursuant to Coos County Zoning and Land Development Ordinance § 5.2.600.3.d, on November 11, 2014.

The County has issued other approval for the pipeline project, including approving and extending the original pipeline approval and the alternative pipeline route referred to as the Brunschmid/Stock Slough alignment. The other applications that have been approved are subject to different timelines and are not being reviewed as part of this extension request.

On January 12, 2017 this application was extended (EXT-16-007). The application was submitted prior to the expiration date of November 11, 2016. The application was

extended to November 11, 2017. The current request for extension was submitted prior the conditional use expiring.

## IV. FINDINGS TO THE CRITERIA:

### SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

Any conditional use not initiated within the time frame set forth in subsection (3) of this section may be granted an extension provided that an applicant has made a request and provided the appropriate fee for an extension prior to the expiration of the conditional use permit approval. Such request shall be considered an Administrative Action and shall be submitted to the Director.

1. Extensions on Farm and Forest (Resource) Zoned Property shall comply with OAR 660-033-0140 Permit Expiration Dates which states:

    a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.

    b. Coos County may grant one extension period of up to 12 months if:

        i. An applicant makes a written request for an extension of the development approval period;
        ii. The request is submitted to the county prior to the expiration of the approval period;
        iii. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
        iv. The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

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

**FINDING: The request covers both the resource and non-resource zoning districts. This section only covers the resources portion of the approval; however, the applicant has requested the conservative approach and requests a one-year extension to the approaval. The applicant made a written request for the extension of the Pacific Connector Gas Pipeline Blue Ridge route development. The applicant submitted the application for an extension on November 9, 2017, via email, including proof of payment, prior to the expiration date of November 11, 2016. The hard copy followed and was received on November 20, 2017.**

**Extensions are reviewed as a condition uses and pursuant to CCZLDO Section 5.2.400 - [a] conditional use may be initiated by filing an application with the Planning Department using forms prescribed by the Department. Upon receipt of a complete application, the Planning Department may take action on a conditional use request by issuing an administrative decision or scheduling a public hearing as determined by the applicable zoning. The applicant filed the appropriate application which started the process. The application was not deemed to be complete for the purpose of this review until the hard copy was received and confirmation of payment was completed on November 20, 2017.**

**The applicant has provided the reasons that prevented the applicant from beginning or continuing development within the approval period. The only potential discretionary standard in this matter is the requirement for the County to determine, for any given extension request, that the applicant was not "responsible" for the reasons that caused the delay. The Webster's Third New International Dictionary (1993) defines the term "responsible" as "answerable as the primary, cause, motive, or agent whether of evil or good." In a prior land use approval the Board of Commissioners accepted a hearings officer's interprets as their own for the word "responsible" as to be the same as "beyond the applicant's control." Stated another way, the question is whether the applicant is "at fault" for not exercising its permit rights in a timely manner. The aim of the criterion is to not reward applicants that do not actively pursue their development, while at the same time providing some measure of sympathy and assistance to applicants who are diligently trying to effectuate their permit but who run into unexpected problems that they are not in full control to correct or fix.**

**The applicant has explained that the reason that the project has not begun is because the applicant was prevented from beginning or continuing development within the approval period because the pipeline has not yet obtained federal authorization to proceed. The pipeline is an interstate natural gas pipeline that is required to obtain authorization from the Federal Emergency Regulatory Commission ("FERC"). Until the applicant obtains FERC certificate authorizing the pipeline, the Applicant cannot begin construction or operation of the facilities.**

**Therefore, the application as presented meets the criteria.**

2. Extensions on all non-resource zoned property shall be governed by the following.

    a. The Director shall grant an extension of up to two (2) years so long as the use is still listed as a conditional use under current zoning regulations.
    b. If use or development under the permit has not begun within two (2) years of the date of approval and an extension has not been requested prior to the expiration of the conditional use then that conditional use is deemed to be invalid and a new application is required.
    c. If an extension is granted, the conditional use will remain valid for the additional two years from the date of the original expiration.

**FINDING: The request covers both the resource and non-resource zoning districts. This section only covers the non-resources portion of the approval; however, the applicant** has

requested the conservative approach and requests a one-year extension for the entire conditional use.

**The applicant made a written request for the extension of the Pacific Connector Gas Pipeline development. The applicant submitted the application for an extension on November 9, 2017, prior to the expiration date of November 11, 2017.**

**The pipeline crosses both resource and non-resource zones, requiring the applicant to request an extension under both subsection one and two of CCZLDO § 5.2.600. In non-resource the extension is for up to two years as long as the use is still listed as a conditional use under the current zoning regulations. The use is still a listed conditional use in the relevant non-resource zones and the applicant requested the extension prior to the expiration. Therefore, the application request complies with the criteria the requested one-year extension shall be granted on all non-resource zoning districts the pipeline was approved to cross.**

## V. CONCLUSION:

The conditional use authorizes the Pipeline to be developed on both resource-zoned and non-resource zoned land. Therefore, the applicant has taken the conservative approach and requests a one-year extension for the condition use.

For the reasons set forth in this staff report and based on the evidence and documentation presented by the application, incorporated herein as Attachment A, the Planning Director approves the one year extension request made by the applicant. The expiration for this application is November 11, 2018.

All conditions remain in effect unless otherwise amended.

*Jill Rolfe*, Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner I
Crystal Orr, Planning Specialist
Sierra Brown, Planning Specialist

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

| | |
|---|---|
| IN THE MATTER OF AN APPEAL (AP-14-02) OF AN ADMINISTRATIVE CONDITIONAL USE (ACU-14-08) SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE, L.P. | FINAL DECISION AND ORDER NO. 14-09-063PL |

WHEREAS, Pacific Connector Gas Pipeline, L.P. originally received a Conditional Use Permit approval for the Pacific Connector Gas Pipeline on September 8, 2010. Coos County Board of Commissioners, Final Decision and Order No. 10-08-045PL dated Sept. 8, 2010. The opponents appealed the original approval to LUBA (Order No. 10-08-045PL), and eventually prevailed on one substantive issue related to the potential impact to a species of native oysters.

WHEREAS, The County reviewed the case back on remand and conducted additional hearings to address the oyster issue. The County Board of Commissioners issued a final decision on remand on April 12, 2012, Order No. 12-03-018PL. No party appealed the 2012 decision, and, as a result, it constitutes a final decision in the matter.

WHEREAS, Pacific Connector Gas Pipeline, L.P. applied for an extension to the time limitation set forth in OAR 660-033-0140(1). The Planning Director's decision on this matter was issued on May 12, 2014. The decision was followed by an appeal (AP-14-02) filed on May 27, 2014 by Jody McCaffree.

WHEREAS, the Board of Commissioners invoked its authority under the Coos County Zoning and Land Development Ordinance (CZLDO) §5.0.600, to: (1) call up the applications; and (2) appoint a Hearings Officer to conduct the initial public hearing for the applications and then make a recommendation to the Board. The Board appointed Andrew H. Stamp to serve as the Hearings Officer.

Hearings Officer Stamp conducted a public hearing on this matter on July 11, 2014, and at the conclusion of the hearing the record was held open to accept additional written evidence and testimony. The record closed with final argument from the applicant received by August 8, 2014.

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners to approve the application on September 19, 2014.

The Board of Commissioners held a public meeting to deliberate on the matter on September 30, 2014. The Board of Commissioners, all members being present and participating, unanimously voted to accept the Hearings Officer's recommended approval as it was presented.

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

ADOPTED this 21st day of October 2014.

BOARD OF COMMISSIONERS

COMMISSIONER COMMISSIONER COMMISSIONER

ATTEST:

Bobbi Brooks

Recording Secretary

APPROVED AS TO FORM:

Office of Legal Counsel

# FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS

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

FILE NO. ACU 14-08 / AP 14-02
OCTOBER 21, 2014

EXHIBIT A

## I. Summary of Proposal and Process

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

Pacific Connector Gas Pipeline, L.P. ("PCGP" or "Pacific Connector") originally received a Conditional Use Permit ("CUP") approval for the Pacific Connector Gas Pipeline ("Pipeline") on September 8, 2010. Coos County Board of Commissioners, Final Decision and Order No. 10-08-045PL (Sept. 8, 2010) ("2010 Decision"). Opponents appealed the original approval to LUBA, and eventually prevailed on one substantive issue related to the potential impact to a species of native oysters. The County took the case back on remand and conducted additional hearings to address the oyster issue. The County Board of Commissioners ("Board") issued a final decision on remand on April 12, 2012. Order No. 12-03-018PL (the "2012 Decision"). No party appealed the 2012 decision, and, as a result, it constitutes a final decision on the CUP. The 2012 decision triggered the beginning of a "clock" for implementation of the permit.

The CUP approval contained a number of contingences, not the least of which was the need for PCGP to obtain federal approval from FERC. Apparently, the decision to change the LNG terminal from an import facility to an export facility caused FREC to vacate the "Certificate of Public Necessity and Convenience" that it had previously issued back in 2009. Pacific Connector filed a new application with FERC on May 21, 2013 seeking to construct a gas pipeline to serve the proposed LNG export terminal. Presumably, FERC will issue a new decision on that application sometime in the foreseeable future.

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

The applicant requests a two-year extension. However, for reasons discussed in more detail below, this permit may be governed by OAR 660-033-0140, which generally limits individual extensions of land use approvals in EFU lands to one-year periods.

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

Thus, this application concerns two rather narrow questions:

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

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

The answer to the first question is rather complex. OAR 660-033-0140 appears to govern the time period for permits, or portions of permits, that are issued pursuant to county laws that implement ORS 215.275 and 215.283(1), among other listed statutes. Because a

portion of the pipeline is governed by ORS 215.275 and 215.283(1), it follows that at least that portion of the permit is subject to the 2-year time limitation set forth in OAR 660-033-0140(1).

However, with regard to the portions of the pipeline that are not subject to the statutes referenced in OAR 660-033-0140, it could be argued that the default four-year time period set forth in CCZLDO 5.0.700 governs. Nonetheless, in light of the fact that the parties do not argue one way or the other over this issue, the County uses a conservative approach and assumes that the entire permit is valid for only two years. This issue is discussed in more detail in the Section entitled "Legal Analysis," below.

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

- An applicant must file an extension request before the permit expires. CCZLDO 5.0.700.A.

- There must have been no substantial changes in the land use pattern of the area or other circumstances sufficient to trigger the filing of a new conditional use permit application for the use. CCZLDO 5.0.700.B.i.

- The applicant must not have been able to begin or continue development during the approval period for reasons outside of the applicant's control. CCZLDO 5.0.700.B.ii.

For the reasons discussed in the Section entitled "Legal Analysis," the Board grants applicant a one-year extension.

The Board notes that the hearings officer identified a potential issue that may arise in the future as to whether the applicant can receive more than one time extension. As the hearings officer recognized, however, "*this case* does not currently raise the issue, so there is no pressing need to deal with this issue in this proceeding." Coos County Hearings Officer Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners, No. ACU 4-08 / AP 14-02 at 3 (Sept. 19, 2014) ("Hearings Officer Recommendation"). Accordingly, the Board need not, and therefore does not decide this issue at this time.

Similarly, the hearings officer's recommendation considered whether an extension decision under CCZLDO § 5.0700 is a land use decision under OAR 660-033-0140 and ORS 197.015. The Board finds, however, that the interplay of the local ordinance, state regulation, and state statute need not be determined as part of this case. County staff has indicated that the applicant requested that the County provide notice of the Planning Director's May 12, 2014 administrative decision in the same manner as an administrative conditional use to allow for citizen involvement in the same manner as a County land use decision. Accordingly, the County has evaluated the extension request as an administrative decision subject to appeal as a "land use decision," and has provided public notice and an opportunity for all parties to be heard in accordance with the County's local procedures for "Quasi-Judicial Land Use Hearings Procedures." CCZLDO § 5.7.300.

**B. Process.**

The review timeline for this application is as follows:

- March 7, 2014: Application submitted.
- May 12, 2014: Administrative decision issued.
- May 27, 2014: Jody McCaffree files Appeal.
- July 3, 2014: County Planning Director issued Staff report.
- July 11, 2014: Public hearing before the Hearings Officer.
- July 25, 2014: Second Open Record Period Closed (Rebuttal Testimony).
- August 1, 2014: Third Open Record Period Closed (Surrebuttal Testimony).
- August 8, 2014: Applicant's Final Argument.
- September 19, 2014: Hearings Officer Recommendation issued.
- September 30, 2014: Board of Commissioners Deliberation and Tentative Decision by Board of Commissioners.
- October 21, 2014: Adoption of Final Decision by Board of Commissioners.

**C. Scope of Review.**

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

The Board of Commissioners has reviewed the Hearings Officer Recommendation, recognizing that it does not have to accept the legal or factual conclusions of the hearings officer. The Board has the authority to modify or overturn the hearings officer's recommended interpretations and reach different legal conclusions. While the Board's findings and conclusions herein generally parallel the Hearings Officer Recommendation, the findings, conclusions, and ultimate decision are the Board's own.

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

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

In *McCaffree v. Coos County*, __ Or LUBA __ (LUBA No. 2014-022 - July 14, 2014), Ms. McCaffree argued, without support in the language of the Coos County code, that the pipeline application is inconsistent with Coos Bay Estuary Management Plan ("CBEMP") Policy 5 ("Estuarine Fill and Removal"). However, LUBA disagreed with Ms. McCaffree and her co-petitioners. Specifically, LUBA denied petitioners' contention that CBEMP Policy 5 would apply to an application that proposed to remove a prohibition on exporting LNG. *McCaffree*, __ Or LUBA at __ (slip op. at 6-7). LUBA reached this conclusion for two reasons. First, LUBA concluded that petitioners' assertions constituted a collateral attack on the County's final decision approving the original conditional use permit. *Id.* Second, LUBA concluded that petitioners did not explain how CBEMP Policy 5 applied to an application to modify a condition "where no ground disturbing activity of any kind is proposed beyond the

ground-disturbing activity that was authorized in the 2010 decision." LUBA's analysis would similarly apply to this case.

Next, Ms. McCaffree argued that the pipeline application is inconsistent with CBEMP Policy 5a ("Temporary Alterations"). LUBA denied a similar contention in *McCaffree*. Specifically, LUBA denied petitioners' contention that CBEMP Policy 5a would apply to an application that proposed to remove a prohibition on exporting LNG. *McCaffree*, __ Or LUBA at __ (slip op. at 8). LUBA reasoned that CBEMP Policy 5a was not applicable because that application did not propose a "temporary alteration" of the estuary. *Id.*

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

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

*McCaffree*, __ Or LUBA at __ (slip op. at 10). Additionally, LUBA pointed out that the administrative rule's history did not indicate any intent on the part of LCDC to prohibit gas "transmission" lines. *McCaffree*, __ Or LUBA at __ (slip op. at 10-11). In addition to its own assessment of the LCDC rule, the Board relies on LUBA's analysis in *McCaffree* as support for its denial of Ms. McCaffree's contentions on the "transmission line" issue in this case.

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

**E. <u>Procedural Issue: Contents of Record.</u>**

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

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

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

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

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

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

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

In light of these concerns, the hearings officer did not, and could not investigate the website addresses provided by the parties. The content of those websites has not been placed into the record. The hearings officer based his recommendation to the Board only on the oral testimony and written materials actually submitted into the record. The Board concurs with the hearings officer's decision to decline review of website materials not placed in the record. As

the Board's review is limited to the record, the Board has also not investigated the content of website materials only provided via reference to a website address. In contrast, internet materials that were printed and placed in the record have been reviewed by the Board as part of its decision-making process.

## II. Legal Analysis.

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

> ***SECTION 5.0.700 EXPIRATION AND EXTENSION OF CONDITIONAL USES***
>
> ***All conditional uses, except for site plans, variances and land divisions, remain valid for the period set forth in ORS 215.417.[1] Any conditional use not initiated within said time frame may be granted a two year extension as specified in ORS 215.417 provided that:***
>
> ***A. An application for said extension is filed with the Planning Department prior to the expiration of the deadline. The applicant must state the reasons that prevented him from beginning or continuing development within the approval period; and***
>
> ***B. The Planning director finds:***
>
> ***i. that there have been no substantial changes in the land use pattern of the area or other circumstances sufficient to cause a new conditional use application to be sought for the same use; and***
>
> ***ii. that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.***
>
> ***Additional extensions granted are ministerial decisions and not a land use decisions as described in ORS 197.015 and are not subject to appeal as land use decisions per OAR 660-33-140(3). (OR-93-12-017PL 2-23-94) (OR-95-05-006 PL 11-29-95) (OR 05-01-002PL 3-21-05)***

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

> **215.417 Time to act under certain approved permits; extension.** (1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.
> (2) An extension of a permit described in subsection (1) of this section shall be valid for two years.
> (3) For the purposes of this section, "residential development" only includes the dwellings provided for under ORS 215.213 (1)(t), (3) and (4), 215.283 (1)(s), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3). [2001 c.532 §2]

As mentioned in an earlier section of this decision, this application concerns two rather narrow questions:

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

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

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

ORS 215.417 was enacted in 2001 and provides as follows:

> ***215.417 Time to act under certain approved permits; extension. (1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.***
>
> ***(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.***
>
> ***(3) For the purposes of this section, "residential development" only includes the dwellings provided for under ORS 215.213 (1)(t), (3) and (4), 215.283 (1)(s), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3). [2001 c.532 §2]***

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

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

> ***Permit Expiration Dates***
>
> ***(1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or***

*forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.*

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

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

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

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

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

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

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

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

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

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

*Stat. Auth.: ORS 197.040 & 215*
*Stats. Implemented: ORS 197.015, 197.040, 197.230 & 197.245*
*Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDD 1-2002, f. & cert. ef. 5-22-02; LCDD 4-2011, f. & cert. ef. 3-16-11; LCDD 6-2013, f. 12-20-13, cert. ef. 1-1-14*

It appears that OAR 660-033-0140 applies to at least that portion of the pipeline that traverses EFU zoned lands. OAR 660-033-0140 states that permits pursuant to ORS 215.275 and 215.283(1), among other listed statutes, are only valid for two years unless the County grants one or more one-year extensions. While the Board recognizes it is arguable that these time limitations do not apply to interstate gas pipelines, ORS 215.275(6), the conservative approach is to assume that they do apply. While it might be possible to break the application up in component parts and create separate time limitations period for each part, that may needlessly complicate matters. Thus, to err on the side of the more conservative approach, the Board applies an initial 2-year time period, and will then allow the applicant to apply for one or more one-year extensions for the entire permit, consistent with OAR 660-033-0140.

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

- An applicant must file a written extension request before the permit expires. CCZLDO 5.0.700.A; OAR 660-033-0140(2)(a) & (b).

- There must have been no substantial changes in the land use pattern of the area or other circumstances sufficient to trigger the filing of a new conditional use permit application for the use. CCZLDO 5.0.700.B.i;

- The applicant must not have been able to begin or continue development during the approval period for reasons outside of the applicant's control. CCZLDO 5.0.700.B.ii. OAR 660-033-0140(2)(c) & (d).

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

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

The hearings officer attempted to research whether there were any LUBA cases that addressed what type of "circumstances" would justify the denial of an extension request of an extension application. While the hearings officer did not characterize his search as exhaustive, it was sufficiently comprehensive for the Board to conclude that it is unlikely that any case precedent exists. However, as the applicant notes in its letter dated July 25, 2014, LUBA has identified one instance when an extension request would trigger reconsideration of all original approval criteria. As explained below, that instance is distinguishable from this case. In

*Heidgerken v. Marion County*, 35 Or LUBA 313 (1998), LUBA considered an appeal of Marion County's denial of an applicant's request for an extension of a conditional use permit. On appeal, the applicant contended that the county erred in its application of the local Ordinance criterion applicable to extension requests. LUBA sustained the applicant's assignment of error, in part, concluding that due to "the complete lack of standards" in the county Ordinance, "the county's exercise of discretion under [the Ordinance provision] is tantamount to a decision reapproving or denying the underlying permit." *Heidgerken*, 35 Or LUBA at 326. By contrast, in the case before the Board, CCZLDO 5.0.700 includes specific approval criteria that apply to extension requests. Thus, there is no "complete lack of standards" for such applications in the CCZLDO. Accordingly, unlike *Heidgerken*, the County's approval or denial of an extension application is not tantamount to a decision reapproving or denying the original conditional use permit. As such, the original approval criteria do not apply to this application.

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

The first consideration is whether there has been "any substantial changes in the land use pattern of the area." For example, if development had recently occurred in close proximity to the approved pipeline route, it would be prudent to require a new conditional use permit to address impacts of the pipeline on that new development. However, the parties to the case identified no such development, and staff did not identify any new construction or development that would warrant the need to revisit the pipeline CUP. For this reason, the Board finds, based on the record compiled in this case, that there are "no substantial changes in the land use pattern of the area."[2]

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

Ms. McCaffree argues that the County's approval of three identified quasi-judicial applications constitute a significant change in the Ordinance relevant to the pipeline. *See* McCaffree's letter dated July 11, 2014, at 23-24. Presumably, Ms. McCaffree is arguing that the approval of these three land use applications result in a "change in the land use pattern" that trigger the need for a new CUP. However, for the reasons discussed below, none of the three

[2] In most cases, it is necessary to define what constitutes the "area" for purposes of analyzing whether a substantial change has occurred. Here, the parties have not provided any evidence of any changes in land use patterns that are even remotely close to the pipeline route, so the precise delimitation of the "area" is not necessary.

quasi-judicial approvals referenced by Ms. McCaffree constitute any change that is either significant or relevant to the Pipeline:

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

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

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

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

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

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

possible that certain changes in facts could constitute grounds for the county to demand that the applicant submit a new application.

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

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

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

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

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

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

2010 Decision[3] at 154 (Ex. A). The County included Condition 25 when it approved the pipeline because the applicant voluntarily agreed to it, not because any applicable Oregon or Coos County land use standard distinguished between a natural gas pipeline associated with an import terminal and an otherwise identical natural gas pipeline associated with an export terminal. The Board of Commissioners adopted findings which found the direction of gas flow to be irrelevant under the land use approval standards applied by Coos County:

> Frankly, the Board fails to understand why, from a land use perspective, it matters which direction the gas is traveling, or why exporting gas is a "threat." * * * * * *. Nonetheless, if "reams of testimony" were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning Ordinance provision that requires the County to make that decision.
>
> At the hearing, the applicant agreed to a condition of approval limiting the use of the pipeline to import use. Regardless, the case law makes clear that the issue of whether new gas pipelines are

[3] The 2010 Decision is included in the record of this proceeding, AP-14-02, as Exhibit 5.

> "needed" is not relevant to any approval standard contained in ORS 215.275 or CCZLDO §4.9.450. *Sprint PCS v. Washington County*, 186 Or App 470, 63 P2d 1261 (2003); *Dayton Prairie Water Ass'n v. Yamhill County*, 170 Or App 6, 11 P3d 671 (2000).

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

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

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

The Board's Final Decision and Order was appealed to the Oregon Land Use Board of Appeals (LUBA). LUBA upheld the Board's decision in *McCaffree.*

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

Ms. McCaffree nonetheless argues that the association of the Pipeline with an LNG export terminal is somehow a "change" requiring a new application. To the extent her argument is based on the April 2012 decision by the Federal Energy Regulatory Commission (FERC) to vacate its December 17, 2009 order approving a certificate of public convenience and necessity for the Pipeline, she ignores the prior findings by the Board of Commissioners. The Board expressly stated in 2010 that the direction of gas flow does not matter from the perspective of the land use standards applied by Coos County and that the issue of "need" for a natural gas pipeline is to be decided exclusively by FERC. FERC's determination to withdraw a certificate of public convenience and necessity pending a new *federal* process does not affect the legal underpinnings of the Board's prior approval for the Pipeline. It also does not affect the ability of the County to enforce conditions of approval that were tied to FERC's prior conditions. *See* Applicant's Rebuttal dated July 25, 2014, at 11-12.

To the extent Ms. McCaffree's argument is based on a contention that the Pipeline, if associated with an export terminal, is no longer a permitted use in one or more zones, it is too late to raise that argument. It is well understood that a city cannot deny a land use application based on (1) issues that were conclusively resolved in a prior discretionary land use decision, or (2) issues that could have been but were not raised and resolved in an earlier proceeding.

*Safeway, Inc. City of North Bend*, 47 Or LUBA 489, 500 (2004); *Northwest Aggregate v. City of Scappoose*, 34 Or LUBA 498, 510-11 (1998).[4] The time to present that argument was when Pacific Connector submitted its application to modify Condition 25.

Whether the argument is framed in terms of the Pipeline no longer being a "utility facility necessary for public service" permitted in the EFU zone, or framed as an argument that the "new distribution line" is not allowed in the Forest zone[5] (*see* McCaffree Surrebuttal, at p.3), the result is the same: the decision by the Board of Commissioners to modify Condition 25 – which preceded the application in this case – removed any argument whatsoever that the Pipeline is only a "permitted" or "conditional" use if associated with an LNG import terminal.[6] Ms. McCaffree cannot use this proceeding to re-argue the case for an "import only" restriction in the Coos County land use approval – a restriction that was removed before Pacific Connector applied for a two-year extension of the original approval.

Ms. McCaffree also argues that the "import versus export" distinction is relevant to remedies available under the CCZLDO, but her citations to CCZLDO 1.3.200, 1.3.300 and 1.3.800 provide no support to her argument. Ms. McCaffree also asserts that the current application involves a "change in use" or an approval based on "false information." It does not. Pacific Connector seeks to extend its prior Coos County land use approval for a pipeline to transport natural gas. That use has not changed. She identifies no "false information or data," let alone any such information that is or was relevant to the decisions previously rendered by the Board of Commissioners with respect to the Pipeline.

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

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

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

*Id.* at 10.

[6] Testimony and a submittal by John Clarke at the July 11, 2014 hearing goes to this same issue. Mr. Clarke submitted the text of regulations from the federal Pipeline and Hazardous Materials Safety Administration (PHMSA), as well as Oregon Public Utility Commission rules adopting the PHMSA rules by reference. Mr. Clarke's testimony appeared to be directed at demonstrating that the Pipeline is a "transmission" line rather than a "new distribution line" in the Forest zone. However, this argument was rejected by the County Board of Commissioners, and the County's decision was affirmed by LUBA in *McCaffree*.

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

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

Finally, CCZLDO 1.3.800 relates to violations of the Coos County Zoning and Land Development Ordinance. In 2012, the Board of Commissioners approved the Pipeline on remand from LUBA. The County's 2012 "remand decision" was lawfully amended just months ago to change the wording of Condition 25. Ms. McCaffree does not explain how the prior approval can now be a "violation" of the very Ordinance under which the decision was made. That is the very essence of an attack that is both collateral and void of substance.

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

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

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

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

The applicant correctly points out that there are at least two potential problems with Ms. McCaffree's argument. First, the applicant argues that Ms. McCaffree does not explain how the "new evidence" is relevant to approval standards for the Pipeline. In the initial case, HBCU 10-01, the Board simply assumed, for purposes of analysis, that the issue of landslides, tsunamis, and earthquakes did in fact relate to some of the approval standards applicable in the case. The Board stated: "Since there are any number of Code criteria under which this concern could potentially be relevant, and because the conclusion is the same no matter the specific criterion at issue, the issue is addressed here." 2010 Decision at 36.

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

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

While opponents have not identified how evidence related to the potential for mega-disasters (Tsunamis, Earthquakes, etc) relates to approval criteria, the Board continues to assume that there are multiple approval standards for which a discussion of these issues may be relevant. As an obvious example, CCZLDO §4.8.400 contains a standard that requires the applicant to prove that "the proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands." With regard to the relationship between pipelines and forestry operations, it is at least arguable that pipelines could force foresters to change their forest practices in response to potential concerns over pipeline fires. Based on the record created in 2010, the County ultimately found such concerns to be overstated, but it was nonetheless a proper topic of analysis under this criterion. For this reason, the Board does not fault Ms. McCaffree for failing to link the issue of earthquakes to specific approval criteria.

However, the applicant raises a second issue that cannot be so easily overlooked. Ms. McCaffree does not demonstrate how the purported new information would alter or undermine the findings adopted in 2010. She states that "new tsunami inundation mapping was released by

the Department of Oregon Geology and Mineral Industries on February 12, 2012." *See* McCaffree Written Testimony at 21. She also notes that Oregon State University has issued "a new report entitled, '13-Year Cascadia Study Complete – And Earthquake Risk Looms Large.'" McCaffree Written Testimony at 21.

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

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

Ms. McCaffree's surrebuttal dated August 1, 2014 includes, as Exhibit A, a press release regarding a study of earthquake risk, which states, "The highest risk places have a 2 percent chance of experiencing 'very intense shaking' over a 50-year lifespan ...." This is not a change that undermines any assumptions or analysis underlying the original approval because Pacific Connector already assumed that the Pipeline would face the type of seismic and tsunami event that occurs only once in 565 years. Again, the applicant did not assume a "mega-quake" event is improbable and will not occur; rather, the applicant's experts examined what would happen if a rare seismic event *did* occur during the lifetime of the Pipeline. Nothing in Ms. McCaffree's submittals demonstrates that the applicant failed to assess that risk.

In her surrebuttal dated August 1, 2014 Ms. McCaffree also asserts that "the current proposed pipeline would no longer be underground on the North Spit but some 40+ feet in the air, subjecting it to earthquake and tsunami hazards." McCaffree Surrebuttal at 1. She references Exhibit E of her rebuttal submittal, which includes three cross-sections of the access and utility corridor for the LNG terminal – located between the South Dunes Power Plant and gas conditioning facility to the east and the LNG terminal to the west. This relates to the terminal, and is beyond the scope of this proceeding. But even assuming those cross-sections are part of the Pipeline rather than within the scope of the approvals for the Jordan Cove Energy Project, they do not show the Pipeline hanging 40+ feet in midair. Rather, the three cross-sections show the Pipeline buried adjacent to a roadway (Section B-B), secured to a pad along a roadway (Section C-C), and secured to a pad along a roadway that is elevated less than 10 feet. Again, even assuming for purposes of argument that this is a "change" from the application

reviewed by the hearings officer and Board of Commissioners in 2010 and on remand in 2011-2012, Ms. McCaffree does not identify any land use approval standard to which the change is relevant. As already stated, ORS 455.446 to 455.449 point to review of seismic risks under building code, not the CCZLDO.

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

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

In its initial approval of the Pipeline in 2010, the Board rejected arguments by opponents who "believed that [the land use approval] process should be put on hold until other regulatory processes are fully completed." 2010 Decision at 143. Ms. McCaffree again takes issue with the concurrent processing of local land use approvals and FERC approvals, and argues that the County should not make any land use decisions while the completion of the federal Environmental Impact Statement (EIS) is still pending. *See* McCaffree letter dated July 11, 2014, at 5-6. Ms. McCaffree, however, fails to identify any *local* land use approval standard that requires the completion of an EIS. This is not surprising because the EIS is a requirement under *federal* law, the National Environmental Policy Act. 42 U.S.C. § 4321 *et. seq.*; 40 C.F.R. § 1502.5.

As the Board previously noted:

> [T]his approval is not very useful to the applicant if it cannot obtain all of the other required authorizations. It makes sense that the applicant seeks to complete the various applications concurrently, given the length of time it takes to complete each process. In any event, FERC will not issue a Notice to Proceed until all of its conditions are satisfied. Accordingly, the Board adopts a condition of approval to ensure that no construction occurs until the Notice to Proceed is issued.

2010 Decision at 143.

In subsequent proceedings related to the amendment of Condition 25, opponents again attempted to raise NEPA as an issue, but the County found these arguments to be "misdirected" because NEPA-related issues were "simply not within the scope" of that proceeding. Condition 25 Decision at 5. In the Brunschmid Decision, the County rejected identical arguments offered by Ms. McCaffree. In the current proceeding, Ms. McCaffree's arguments related to NEPA remain misdirected, and she offers no new arguments to compel reconsideration of this issue.

FERC compliance with its responsibilities under the NEPA is simply beyond the scope of this local land use proceeding and has no bearing on its outcome.[7]

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.*

[7] The Board finds Ms. McCaffree's vague references to state and federal regulation by the Oregon Public Utilities Commission and U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration to be similarly misplaced in this local land use proceeding. *See* McCaffree Written Testimony, at 6.

*(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.*

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 have seen that take place here: FERC apparently did not like a portion of the applicant's preferred route, and, as a result, the applicant came back before the County seeking new land use approvals for the Blue Ridge alternative route.

Contrary to the position taken by opponents in previous cases, 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 take that into consideration to some extent. *See* 40 CFR

1506(2)(d).[8] However, the reverse is not necessarily true – land use approval does not limit FERC's evaluation in any way.

The County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. There is nothing in the county plan or implementing ordinances or in any other document which makes either NEPA 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 indicated that his own independent research revealed nothing which would either require or allow the County to put a local land use process on hold pending NEPA review by FERC. In the absence of any contrary legal authority offered by opponents, the Board accepts the hearings officer's characterization of this issue.

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, the NEPA process need not precede the land use process. *Standard Ins. Co.*, 16 Or LUBA at 724. In *Standard Ins. Co.*, LUBA recognized that even after an EIS is prepared, that local comprehensive plans are "subject to future change." *Id.* LUBA acknowledged the possibility that the adoption of a plan amendment or a series of amendments might result in the need to prepare a supplementary EIS. *Id.* (citing *Comm. for Nuclear Responsibility v. Seaborg*, 463 F. 2d 783, (D.C. Cir. 1971)). Nonetheless, LUBA noted that "there is no requirement that a new EIS precede such plan amendments."

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

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

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[8] 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.

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

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

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

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

**E. CBEMP Policies 5 and 5a Do Not Apply.**

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

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

However, CBEMP Policy 5 and 5a are inapplicable to the Pipeline application. In the County's 2010 Decision, the Board determined that, in the absence of an applicable local land use approval standard, "'need' is simply not an approval criterion for this decision," rejecting arguments from opponents, including Ms. McCaffree, who had "asserted the belief that eminent domain should not be used unless there is a local 'need' for the project." 2010 Decision at 144. Further, the County found that "since the pipeline is expected to transport natural gas in interstate commerce, any local zoning ordinance requiring the pipeline to serve a 'need' by local customers, rather than the concerns of interstate commerce, is a clear violation of the Commerce Clause." *Id.*

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

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

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

Coos County's Zoning Ordinance defines the terms "dredging" and "fill" as follows:

> *DREDGING: The removal of sediment or other material from a stream, river, estuary or other aquatic area: (1) Maintenance Dredging refers to dredging necessary to maintain functional depths in maintained channels, or adjacent to existing docks and related facilities; (2) New Dredging refers to deepening either an existing authorized navigation channel or deepening a natural channel, or to create a marina or other dock facilities, or to*

*obtain fill for the North Bend Airport runway extension project; (3) Dredging to Maintain Dikes and Tidegates refers to dredging necessary to provide material for existing dikes and tidegates; (4) Minor dredging refers to small amounts of removal as necessary, for instance, for a boat ramp. Minor dredging may exceed 50 cubic yards, and therefore require a permit.*

*FILL: The placement by man of sand, sediment, or other material, usually in submerged lands or wetlands, to create new uplands or raise the elevation of land. Except that "fill" does not include solid waste disposal or site preparation for development of an allowed use which is not otherwise subject to the special wetland, sensitive habitat, archaeological, dune protection, or other special policies set forth in this Plan (solid waste disposal, and site preparation on shorelands, are not considered "fill"). "Minor Fill" is the placement of small amounts of material as necessary, for example, for a boat ramp or development of a similar scale. Minor fill may exceed 50 cubic yards and therefore require a permit.*

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

MANAGEMENT UNIT: NATURAL

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

* * * * *

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

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

CBEMP Policy #4 provides the test for determining whether that two-part test is met:

> *a determination of consistency with resource capability and the purpose of the management unit shall be based on the following:*
>
> *i. a description of resources identified in the plan inventory;*
>
> *ii. an evaluation of impacts on those resources by the proposed use (see Impact Assessment procedure, below);*
>
> *iii. a determination of whether the proposed use or activity is consistent with the resource capabilities of the area, or that the resources of the area are able to assimilate the use and activity and their effects and continue to function in a manner to protect significant wildlife habitats, natural biological productivity, and values for scientific research and education.*[9] (Underlined emphasis added.

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

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

> **TEMPORARY ALTERATION.** Dredging, filling, or another estuarine alteration occurring over a specified short period of time which is needed to facilitate a use allowed by an acknowledged plan. Temporary alterations may not be for more than three years and the affected area must be restored to its previous condition. Temporary alterations include: (1) alterations necessary for federally authorized navigation projects (e.g., access to dredged material disposal sites by barge or pipeline and staging areas or dredging for jetting maintenance), (2) alterations to establish

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

mitigation sites, alterations for bridge construction or repair and for drilling or other exploratory operations, and (3) minor structures (such as blinds) necessary for research and educational observation.

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

Third, the pipeline use, including incidental dredging necessary for its installation, is also allowed in both the Conservation and Development management units "without special assessment of the resource capabilities of the area." Because of the specific definition of pipeline, with incidental dredging necessary for its installation, is a more specific use category than that of "temporary alternations," the pipeline use is not deemed to be a temporary alteration which would, as such, require compliance with Policy #5a. Accordingly, the Board continues to finds that CBEMP Policy #5a is inapplicable. Ms. McCaffree has offered no plausible reason for the County to reconsider this prior determination in this limited extension request proceeding.

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

On page 10 of her letter dated July 11, 2014, Ms. McCaffree presents an excerpt from the LUBA oral argument in the *McCaffree v. Coos County* case. In the provided dialogue between a LUBA administrative law judge and the applicant's attorney, the attorney for Pacific Connector appears to concede that a change from import to export would require a different analysis when addressing the "public need" question. However, there is insufficient amount of dialogue presented to understand the context of the conversation between the LUBA ALJ and the attorney. The dialogue does not make apparent what criteria they are referring to. For all we can tell, the conversation may be related to the FERC proceeding. Regardless, the Board continues to stand by its prior evaluation and approval of the analysis contained on pages 7 to 15 of the hearings officer's recommendation in HBCU 13-02 under the heading "Limits of the Police Power, A Lawful Condition Must Promote the Health, Safety, Morals, or General Welfare of the Community in Order to Be Constitutional," which is hereby incorporated by reference. In those findings, the hearings officer concludes that Pipeline that has previously received cannot be denied simply on account of the fact that the applicants proposed a change in the direction of the gas. The hearings officer's findings and recommendation in HBCU 13-02

were adopted by the Board and incorporated as the Board's decision. Coos County Final Decision and Order, No. 14-01-006PL (Feb. 4, 2014). While the police power is broad, there would be no public health, safety, morals, or general welfare nexus that would allow the local government to deny a previously approved use on zoning grounds, when there is no physical change in the structure.

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

The 2010 Decision permitted the Pipeline in the Forest zone as a "new distribution line" under the applicable Goal 4 regulations and local zoning. OAR 660-006-0025(4)(q); CCZLDO 4.8.300(F). 2010 Decision at 80–87. The issue was again raised in the proceedings regarding the amendment of Condition 25, with the County finding that the term "distribution line" as used in the applicable Goal 4 regulations was not mutually exclusive of the term "transmission line" as used in ORS 215.276. Instead, the County concluded that the proposed Pipeline, regardless of the direction of gas flowing within it, "constitutes a 'distribution line' as that term is used in OAR 660-006-0025(4)(q), and also that it constitutes a gas 'transmission line' as that term is used in 215.276(1)(c).

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

Ms. McCaffree's reliance on inapplicable definitions from unrelated federal regulations is misplaced,[10] and her attempt to raise this issue again is rejected. In any event, the County's analysis of this issue and LUBA's analysis in *McCaffree v. Coos County* are determinative of this issue.

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

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

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[10] *See* McCaffree letter dated July 11, 2014, at 13 (citing 49 C.F.R. § 192.3).

[11] CCZLDO 2.1.200:

The County has previously determined that a pipeline used to import natural gas is a "public service structure" as defined in CCZLDO 2.1.200, and is permitted in the EFU zone as a "utility facility necessary for public service." 2010 Decision at 108–12. While gas lines arguably do not qualify as "structures" under the Ordinance's current definition,[12] the County previously addressed any potential confusion arising from the inconsistent definitions of "structure" and "utilities." In the 2010 Decision, the Board analyzed the issue extensively and concluded that, as a result of 2009 amendments to the definition of the term "structure," the "Ordinance contains internal inconsistencies between the formal definition of the term 'structure' and the usage of that term throughout the Ordinance." 2010 Decision at 111. Resolving these inconsistencies based on the clear inclusion of "gas lines" within the definition of "utilities," the Board ultimately found the interstate gas pipeline to be a "utility." *Id.* at 111–12.

Interstate natural gas pipelines are recognized under state land use laws as being a 'utility facility' for purposes of rural zoning in EFU zones. *See* ORS 215.276. Because of this fact, the County cannot conclude that 'interstate natural gas pipelines and associated facilities' are not a 'utility,' notwithstanding any quirks in the zoning Ordinance's definition of 'utility.' To do so would be contrary to the legislative intent behind ORS 215.275.

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

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

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

The County comprehensively addressed compliance with CBEMP Policy 14 in the 2010 Decision. *See* 2010 Decision, at 123–26. In that decision, the County found that "[t]his plan policy is met," determining that the Pipeline, "as a necessary component of the approved industrial and port facilities use (the LNG terminal), and/or as a Policy #14 'other use,' being the low-intensity utility use identified in the CBEMP zoning districts, satisfies a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use." *Id.* at 126. Ms. McCaffree identifies no changes that would affect this analysis.

**b. CBEMP Policy 11 Does Not Apply.**

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UTILITIES: Public service structures which fall into two categories:

1. Low-intensity facilities consisting of communication facilities (including power and telephone lines), sewer, water and gas lines, and
2. High-intensity facilities, which consist of storm water and treated waste water outfalls (including industrial waste water).

[12] CCZLDO 2.1.200 ("STRUCTURE: Walled and roofed building including a gas or liquid storage tank that is principally above ground.").

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

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

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

**c. CBEMP Policy 4 Does Not Apply.**

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

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

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

On page 11 of her letter dated July 11, 2014, Ms. McCaffree attempts to explain why Plan Policy 50 applies to this case. However, the County has previously rejected arguments suggesting that CBEMP Policy 50 was applicable to the Pipeline. In response to "comments suggesting that a gas pipeline should be considered a 'high-intensity' utility facility"

inapplicable for rural parcels, the County determined that "[t]he Ordinance resolves the issue in a manner that is unambiguous and conclusive against [that] argument. Given the recognition that gas lines are a 'low-intensity' facility,' Plan Policy 50 does not assist the opponents in any way." 2010 Decision, at 138. Ms. McCaffree has identified no changes in land use patterns or zoning that would alter the County's prior conclusion that "[t]his plan policy is met." *Id.*

### I. Routine Changes to Oregon Coastal Management Program Do Not Create Circumstances that Warrant a New Application Process.

In her letter dated July 11, 2014, Ms. McCaffree argues that a "Notice of Federal Concurrence for Routine Program changes to the Oregon Coastal Management Program" ("OCMP") was issued on March 14, 2014, and that this notice includes some undisclosed changes to the Coos County Comprehensive Plan. Ms. McCaffree concedes that she does not know if these proposed changes will have any impact on the pipelines, but recommends that the extension be denied so that the County may evaluate the issue.

The OCMP implements the federal Coastal Zone Management Act ("CZMA").[13] The CZMA was enacted in 1972 and was designed to foster the development of state programs for "the effective management, beneficial use, protection, and development of the coastal zone."[14] If a state wishes to participate, it submits its program to protect the water and land resources of the coastal zone – its "coastal management program" ("CMP") – to the U.S. Department of Commerce for approval. States are not required to participate; unlike other federal regulatory programs, including the Clean Water Act and the Clean Air Act, the federal government does not administer a coastal zone program if a state elects not to participate.

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

> After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification.

[13] 16 U.S.C. § 1451 et seq.
[14] *Id.* § 1451(a).

> If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.[15]

"Enforceable policies" for purposes of the CZMA consistency determination are those portions of the CMP "which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."[16]

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

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

[15] *Id.* § 1456(c)(3)(A).
[16] *Id.* § 1453(6a); *see also* 15 C.F.R. § 930.11(h).

changes that have occurred" is incorrect. The routine changes in the State's CMP are not changes in the pipeline or in the local land use standards applicable to the Pipeline.

**J. Changes to FEMA Floodplain Mapping Do Not Constitute a Circumstance Which Warrants a New CUP Application.**

The Board of Commissioners adopted, as part of the 2010 Decision , the following "pre-construction" condition of approval:

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

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

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

b. result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.

This flood hazard review, as described in the CCZLDO, occurs prior to construction. It was not part of the land use review in the 2010 Decision or Final Decision and Order No. 12-03-018PL (Mar. 13, 2012) (the "2012 Decision").

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

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

either a "substantial change in the land use pattern of the area" or "other circumstances sufficient to cause a new conditional use application to be sought."

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

**K. Pipeline Alignment**

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

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

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

Various opponents appealed the original 2010 land use approval to LUBA. LUBA remanded the 2010 Decision for further analysis of potential impacts to native Olympia oysters. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162, LUBA No. 2010-086 (March 29, 2011). On remand, the County conducted a land use proceeding in which an extensive record pertaining to native Olympia oysters was developed. After extensive consideration of potential impacts to such native oysters, the County concluded that "the applicant has met its burden of proof to demonstrate that the proposed pipeline construction will reduce any potential harm to the Olympia Oyster population in Haynes Inlet to such a degree that there is at most a de-minimis or insignificant impact on the oyster resources that the aquatic zoning districts 11-NA and 13A-NA require to be protected." 2012 Decision at 68. As part of the remand proceedings,

the applicant has developed an Oyster Mitigation Plan and has agreed to not only relocate Olympia oysters from the Pipeline route, but also to create additional new habitat within the pipeline right of way "that will result in a significant *increase* in the numbers of Olympia oysters in Haynes Inlet." *Id.* at 29; *see also* 2012 Decision, Condition of Approval, Conditions on Remand No. 1 ("The applicant shall comply with the terms and conditions of the applicant's proposed Olympia oyster mitigation plan prepared by Bob Ellis of Ellis Ecological Services, Inc. dated October 7, 2011 (the 'Mitigation Plan'). . . ."

In her July 21, 2014 letter, Ms. Clausen states that "I did not like the tone used in telling me, at the meeting, that the whole oyster issue was settled. We the commercial oyster growers, do expect our concerns to be addressed." However, in his recommendation, the hearings officer indicated that he was "taken aback" by the lack of situational awareness evident in the Clausen Oysters' oral presentation. Neither Ms. Clausen's written nor oral testimony indicates that she or Clausen Oysters had participated in the "remand" proceedings in which oyster issued were extensively discussed and debated, and the hearings officer did not recall Ms. Clausen's or her company's participation in those proceedings. The hearings officer characterized Ms. Clausen's testimony as seeming "unprepared" and consisting merely of a recitation of a "laundry list" of questions regarding the case. Hearings Officer Recommendation, at 38-39.

The County has previously found that the applicant has demonstrated that it will not have a significant impact on oysters in Haynes Inlet, either commercially farmed or wild native oysters. The Board finds that nothing in Ms. Clausen's letters or oral testimony identifies a substantial change in land use patterns, the zoning Ordinance, or the Pipeline that would justify revisiting these prior determinations.

**M. The Record Demonstrates the County Commissioners Were Not Biased in Their Decision-Making and Did Not Have Any Impermissible *Ex Parte* Contacts**

At the beginning of the Board's deliberations on September 30, 2014, Chair Cribbins asked Commissioners whether they needed to declare any conflicts and bias. All, including the Chair, answered "no." All three commissioners also indicated that they did not need to abstain from participating in the hearing.

The Chair then asked: "Does anyone present today wish to challenge any member of the Board of Commissioners from participating in today's hearing?" The only response was from Jody McCaffree:

> McCAFFREE: You're saying that you don't have a bias when you support the project and ran your campaign on that?
>
> CRIBBINS: Who are you addressing, Ms. McCaffree?
>
> McCAFFREE: Both you and Mr. Sweet.
>
> CRIBBINS: I would challenge you to show where I've ever run my campaign on that. Thank you.
>
> SWEET: I don't think I have a bias.

McCAFFREE: You've openly supported this project though. And that is a bias. Right?

Ms. McCaffree also alleged that Commissioner Sweet had met with representatives of the Jordan Cove project:

McCAFFREE: And you've never met with the applicant privately or in meetings where you've not included opponents of the project? You were seen at the airport meeting with them. That's why I'm questioning you. But you never gave us the opportunity to meet with you.

LEGAL COUNSEL: Was it directly related to this appeal?

McCAFFREE: I have no idea. I wasn't at the meeting.

SWEET: Who was at that meeting?

McCAFFREE: You met with Jordan Cove's representatives, Michael Henricks and, um, Ray [inaudible].

SWEET: Yes, I met with them. It was pretty much social in nature. I don't recall any conversation relating to the pipeline.

CRIBBINS: I have never discussed this appeal with either party.

SWEET: I certainly have not discussed the appeal.

We understand Ms. McCaffree to have raised two allegations: (1) she alleged that Commissioner Cribbins and Commissioner Sweet had supported "this project" in campaigning for office; and (2) she alleged that Commissioner Sweet had been seen meeting with two representatives of the Jordan Cove Energy Project at "the airport." As these allegations involve different factual and legal issues, we address them separately.

With respect to the first allegation, Ms. McCaffree presented no documentation to her claim of bias: no news articles, campaign materials, transcripts of speeches, or other evidence that either Commissioner Cribbins or Commissioner Sweet had campaigned for office based on a promise to support the Pipeline generally or any application specifically. Indeed, Commissioner Cribbins specifically challenged Ms. McCaffree to "show where I've ever run my campaign" on support for the project, and Ms. McCaffree did not respond.

Consideration of this appeal by the Board of Commissioners is "quasi-judicial" in nature. Parties to quasi-judicial proceedings are "entitled to ... a tribunal which is impartial in the matter ...." *Fasano v. Bd. of Cnty. Comm'rs of Wash. Cty.*, 264 Or 574, 588, 507 P.2d 23, 30 (1975).

In the context of land use hearings, however, a Commissioner is "impartial" if he or she is able to render a decision based on the merits of the case. As the Land Use Board of Appeals (LUBA) has put it, local decision makers in quasi-judicial land use proceedings are not expected to be free of bias; rather, they are expected to put whatever positive or negative biases

they may have aside, and render a decision based on the merits. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

We note that the LUBA recently provided an extensive analysis of Oregon law on the question of bias, as it applies to disqualifying members of a county Board of Commissioners from participation in an adjudicatory land use proceeding. *Oregon Pipeline Company, LLC v. Clatsop County*, __ Or LUBA __ (LUBA No. 2013-106, June 27, 2014). Several principles are evident from LUBA's discussion:

- There is a "high bar" for disqualification of a county commissioner for bias because county commissioners, unlike judges, cannot be replaced if they recuse themselves. County commissioners, moreover, are not expected to be "neutral," given that they are elected because of their political predisposition.

- Campaign statements of support or opposition for specific land use actions are not by themselves "sufficient basis for questioning [commissioners'] representations ... that they could decide the matter impartially." *Oregon Pipeline Company* (slip. op. at 30).

As LUBA noted, the Oregon Supreme Court has spoken to how the threshold for recusals differs between judges and county commissioners:

> "[County commissioners] are politically elected to positions that do not separate legislative from executive and judicial power on the state or federal model; characteristically they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure."

*1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987).

The "actual bias" necessary to disqualify a county commissioner must be demonstrated in a "clear and unmistakable manner." *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001).

In this case, it is clear from the proceedings on September 30 that Commissioners Cribbins and Sweet did not have any direct stake in the outcome of the proceeding:

> LEGAL COUNSEL: I can read the definition of conflicts of interest to see if they apply. Do you have any direct or substantial financial interest in this?
>
> SWEET: No.
>
> LEGAL COUNSEL: Any private benefit?
>
> SWEET: No.

CRIBBINS: Just to be clear, I do not have a financial interest nor a direct interest or benefit.

There is, moreover, no "clear and unmistakable" evidence of "actual bias." At most, there is a general allegation that Commissioners Cribbins and Sweet indicated support for "the project" during their campaigns. Commissioner Cribbins denied the allegation, and no evidence to the contrary was provided by Ms. McCaffree. Ms. McCaffree's general reference to "the project" also undermines any allegation of bias. It is impossible to tell whether her allegation relates to the Pipeline, to the Jordan Cove Energy Project (i.e., the LNG terminal) or to a specific application. The only relevant question with respect to bias in this proceeding is whether each commissioner is capable of rendering a fair judgment on *this appeal*. Each commissioner stated that they could, and there is no "clear and unmistakable" evidence to the contrary.

Ms. McCaffree's second allegation – that Commissioner Sweet met privately with representatives of the Jordan Cove Energy Project – appears to be more an allegation of *ex parte* contacts than of bias. We note that Jordan Cove Energy Project is not the applicant in this case, or even a party. In any event, there is no prohibition on an individual commissioner meeting or conversing with persons – even parties – who may take an interest in matters that come before the Board of Commissioners.

Commissioner Sweet indicated that his airport meeting was "pretty much social in nature," that he didn't remember "any conversation relating to the pipeline," and that he had not discussed the appeal involved in this case. Based on Commissioner Sweet's representations and the absence of any evidence to the contrary, we find that the meeting did not involve any *ex parte* communication with respect to this appeal. To the extent that Commissioner Sweet's meeting with representatives of the Jordan Cove Energy Project might be construed as evidence of bias, we reject that conclusion. Again, there is no legal prohibition on a county commissioner meeting individually with representatives of a major project proposed in the county. The fact that such a meeting took place does not come close to providing "clear and unmistakable" evidence that Commissioner Sweet is incapable of rendering a fair judgment in this appeal.

## III. CONCLUSION.

For all of the above stated reasons, and after consideration of the applicable law and all argument and evidence in the record, the Board of Commissioners approves a one year extension to Order No. 12-03-018PL.

# NOTICE OF LAND USE DECISION BY THE COOS COUNTY PLANNING DIRECTOR

Coos County Planning
225 N. Adams St.
Coquille, OR 97423
http://www.co.coos.or.us/
Phone: 541-396-7770
Fax: 541-396-1022

Date of this Decision: April 11, 2016

File Number: ACU-16-013

Applicant: Richard Allan, Marten Law representing Pacific Connector Gas Pipeline, LP

Property Information:

| Map Number | Acreage | Landowner | Zoning |
|---|---|---|---|
| 25-13-00-200 | 191.58 | Oregon International Port of Coos Bay | 6-WD |
| 25-13-04-101 | 4.76 | Fort Chicago Holdings II U.S. LLC | 6-WD |
| 25-13-04-300 | 228.88 | Roseburg Forest Products | 6-WD |
| 25-13-04-400 | 16.25 | Fort Chicago Holdings II U.S. LLC | 6-WD |
| 25-13-04-100 | 97.11 | Fort Chicago Holdings II U.S. LLC | 6-WD, IND, 7-D |
| 25-13-03-200 | 69.17 | Fort Chicago Holdings II U.S. LLC | 7-D, 8-WD, 8-CA |
| 25-13-04-500 | 48 | Oregon International Port of Coos Bay | 8-CA, 13A-NA, 11-NA, 11-RS |
| 24-13-36B-700 | 6.85 | Donald & Carol Thompson | 11-RS, RR-2, F |
| 24-13-36B-1101 | 2.25 | Hal & Donna Blomquist | RR-2, F |
| 24-13-36B-1100 | 79.43 | Weyerhaeuser Company | F |
| 24-13-36B-100 | 36.01 | Hal & Donna Blomquist | F |
| 24-13-36-100 | 400 | Weyerhaeuser Company | F |
| 24-13-36-200 | 80 | Weyerhaeuser Company | F |
| 25-13-01-100 | 443.19 | Weyerhaeuser Company | F |
| 25-13-01D-200 | 32.57 | Jason & Christine Snelgrove | F |
| 25-13-01D-100 | 41.03 | Gary E. Smith Trust | EFU, F |
| 25-12-06C-100 | 83.19 | Fort Chicago Holdings II U.S. LLC | EFU, F |
| 25-12-06C-601 | 45.58 | Lone Rock Timber Investments I, LLC | F |
| 25-12-07-500 | 47.42 | Lone Rock Timber Investments I, LLC | F |
| 25-12-07-400 | 78.80 | Lone Rock Timber Investments I, LLC | F |
| 25-12-07-1300 | 71.74 | Lone Rock Timber Investments I, LLC | F |
| 25-12-07-1301 | 8.26 | Lone Rock Timber Investments I, LLC | F |
| 25-112-07-1301A02 | | U.S. A. Federal Aviation Administration | F |
| 25-12-07-2400 | 40 | Steven Sweet | F |
| 25-12-18-300 | 40 | Steven Sweet | F |
| 25-12-18-200 | 77.14 | Steven Sweet | F, EFU |
| 25-12-17-300 | 2.10 | Steven Sweet | EFU |
| 25-12-17-400 | 12.05 | Monte Rutherford | EFU |
| 25-12-17-600 | 16 | Jackie Shaw ETAL | EFU |
| 25-12-17-700 | 5.47 | William Edwards | EFU |
| 25-12-17-900 | 40 | Lone Rock Timber Investments I, LLC | F, EFU |
| 25-12-17-1000 | 240 | Weyerhaeuser Company | F |
| 25-12-20-100 | 440 | Weyerhaeuser Company | F |
| 25-12-29-1100 | 99.61, 2.25 | Donald Fisher 2012 Delaware Trust | F, EFU |
| 25-12-30-501 | 32.24 | Marjorie Brunschmid ETAL | EFU, 18-RS |
| 25-12-30-600 | 12.04 | Gregory Demers | 18-RS |

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|---|---|---|---|
| 25-12-30D-1501 | 7.71 | Agri Pacific Resources, INC | 18-RS |
| 25-12-30D-508 | 3.83 | Kay Kronsteiner | 18-RS |
| 25-12-30-700 | 78.78 | City of North Bend | 19-D |
| 25-12-31-100 | 107.59 | City of North Bend | 19-D |
| 25-12-32B-300 | 17.60 | City of North Bend | 19-D, 19B-DA, 20-CA |
| 25-12-32B-600 | 2.60 | Fred Messerle & Sons, INC | 20-RS |
| 25-12-32-100 | 126.85 | Fred Messerle & Sons, INC | 20-RS, EFU |
| 25-12-32-400 | 60 | Fred Messerle & Sons, INC | EFU, F |
| 26-12-05-200 | 242.89 | Fred Messerle & Sons, INC | F |
| 25-12-32-300 | 102.30 | Louis McCarthy ETAL | F |
| 26-12-05-300 | 23.66 | Solomon Joint Living Trust | F |
| 26-12-08B-100 | 16.09 | Michael & Debra Prugh | F, RR-2 |
| 26-12-08-900 | 2.10 | Jeffrey Hill | RR-5 |
| 26-12-08-1000 | 2.64 | Jeffrey & Gidgette Hill | RR-5 |
| 26-12-08-1100 | 34.06 | Alvin & Lou Ann Rode | RR-5, EFU, F |
| 26-12-08-500 | 17.32 | Mark & Melody Sheldon | RR-5 |
| 26-12-08B-1400 | 10.45 | Larry & Shirley Wheeker | F |
| 26-12-08-1102 | 22.91 | Jeffrey & Gidgette Hill | F |
| 26-12-08B-1500 | 15.75 | Michael Meginnis | F |
| 26-12-08-1601 | 10.63 | Gunnell Family Trust | F |
| 26-12-08-1700 | 25.72 | Curtis & Melissa Pallin | F, 21-RS |
| 26-12-07-700 | 196.18 | Fred Messerle & Sons, INC | 21-CA, 21-RS, F |
| 26-12-18A-100 | 77.24 | Wright Loving Trust | F |
| 26-12-18A-200 | 10.01 | Paul & Eura Washburn | RR-5 |
| 26-12-18A-201 | 4.08 | David & Emily McGriff | RR-5 |
| 26-12-18B-1900 | 2.91 | James & Archina Davenport | RR-5 |
| 26-12-18B-1700 | 25.07 | Nova & Ellen Lovell | F |
| 26-12-18C-103 | 57.27 | John & Mary Muencrath Trust 12-22-11 | F |
| 26-12-18C-300 | 4.8 | Edgar Maeyens Jr | RR-5 |
| 26-12-18C-200 | 38.78 | Roseburg Resources Co. | F |
| 26-12-19-200 | 38.66 | Roseburg Resources Co. | F |
| 26-12-19-300 | 315.54 | Roseburg Resources Co. | F |
| 26-12-30-100 | 43.57 | Victor & Arianne Elam | F |
| 26-12-30-600 | 3.5 | Robert Scoville | RR-5 |
| 26-12-30-100 | 40 | Jimmie & Carolyn Ketchum | F |
| 26-12-30A-500 | 70.99 | Lone Rock Timber Investments I, LLC | F |
| 26-12-30-1200 | 75.46 | Menasha Forest Products Corporation | F |
| 26-12-30-1400 | 77.69 | Fred Messerle & Sons, INC | F |
| 26-12-31A-100 | 34.48 | Ronald & Molly Foord | F |
| 26-12-32-400 | 39.68 | Fred Messerle & Sons, INC | F |
| 26-12-32-500 | 161.13 | Dee Willis | EFU,F |
| 26-12-31-700 | 120 | Pacific West Timber Company (Oregon) LL | F |
| 26-12-31-900 | 30 | Anna & Daniel Fox | F |
| 27-12-06-100 | 141.68 | Lone Rock Timber Investments I, LLC | F |
| 27-12-06-200 | 10.06 | Steven & Carole Stalcup | F |
| 27-12-06-300 | 470.98 | Menasha Forest Products Corporation | F |

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|---|---|---|---|
| 27-12-05-100 | 475.68 | USA (CBWRGL) | F |
| 27-12-00-1700 | 160 | Roseburg Resources Co. | F |
| 27-12-00-1600 | 9.55 | Pacificorp | F |
| 27-12-00-1500 | 470.45 | Menasha Forest Products Corporation | F |
| 27-12-00-2500 | 400 | USA (CBWRGL) | F |
| 27-12-00-2400 | 638.62 | Coos County Sheep Co. | F, EFU |
| 27-12-00-2300 | 637.56 | USA (CBWRGL) | F |
| 27-12-22-100 | 640 | Coos County Sheep Co. | F |
| 27-12-23-200 | 320 | USA (CBWRGL) | F |
| 27-12-23-100 | 183.31 | Coos County Sheep Co. | EFU, F |
| 27-12-23-300 | 117.98 | Lucky T LLC | F |
| 27-12-24C-1500 | 11.10 | John & Kara Breuer | F |
| 27-12-24C-1600 | 10.99 | Virgil & Carol Williams | RR-5 |
| 27-12-24C-1200 | 3.63 | Mary Metcalf | RR-5 |
| 27-12-24C-1700 | 11 | Virgil & Carol Williams | EFU |
| 27-12-25-200 | 64.10 | Charles & Johanna Yates | EFU |
| 27-12-24C1800 | 11.26 | Rodney Dalton | EFU |
| 27-12-24C-2100 | 10.01 | Ted L. Fife Family Trust | EFU |
| 27-12-25-201 | 11.80 | Donald & Shirley Fisher | F |
| 27-12-25-203 | 47.28 | Walter & Wendy Hazen | F |
| 27-12-25-100 | 155.19 | USA (CBWRGL) | F |
| 27-11-00-1500 | 601.60 | Menasha Forest Products Corporation | F |
| 27-11-00-1400 | 643.31 | USA (CBWRGL) | F |
| 27-11-00-1700 | 629.56 | USA (CBWRGL) | F |
| 27-11-32-1000 | 80 | Pacific West Timber Company (Oregon) LL | F |
| 27-11-32-800 | 269.90 | Menasha Forest Products Corporation | F |
| 27-11-32-1300 | 66.56 | Menasha Forest Products Corporation | F |
| 28-11-05-100 | 340.26 | USA (CBWRGL) | F |
| 28-11-05-200 | 45.99 | Windlinx Family Trust | F |
| 28-11-04-600 | 470.04 | Moore Mill & Lumber Co. | F |
| 28-11-04-800 | 40 | Menasha Forest Products Corporation | F |
| 28-11-00-400 | 640, 240 | USA (CBWRGL) | F |
| 28-11-10-1000 | 80 | Pacific West Timber Company (Oregon) LL | F |
| 28-11-10-900 | 189.67 | Lone Rock Timber Investments I, LLC | F |
| 28-11-10-901 | 1.05 | Dora Cemetery Assn. | F |
| 28-11-10-1300 | 57.25 | Cynthia Garrett | F, EFU |
| 28-11-10-1400 | 128.15 | Laird Timberlands, LLC | EFU |
| 28-11-15-100 | 7.31 | Laird Timberlands, LLC | EFU, F |
| 28-11-00-500 | 280 | Moore Mill & Lumber Co. | EFU, F |
| 28-11-00-700 | 200 | Plum Creek Timberlands, L.P. | F |
| 28-11-13-900 | 437.52 | USA (CBWRGL) | F |
| 28-11-24-100 | 639.76 | Keystone Forest Investments, LLC. | F |
| 28-11-00-1900 | 40 | Roseburg Resources Co. | F |
| 28-10-00-3500 | 34.93 | Roseburg Resources Co. | F |
| 28-10-00-3400 | 503.57 | USA (CBWRGL) | F |
| 28-10-00-3600 | 79.54 | Lone Rock Timber Investments I, LLC | F |
| 28-10-00-3300 | 160 | FIA Timber Partners II, L.P. | F |

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|---|---|---|---|
| 28-10-00-3800 | 160 | FIA Timber Partners II, L.P. | F |
| 28-10-00-4100 | 480 | USA (CBWRGL) | F |
| 28-10-00-4200 | 440 | USA (O& C) | F |
| 28-10-00-4600 | 280 | USA (CBWRGL) | F |
| 28-10-00-4500 | 160 | Lone Rock Timberland Co. | F |
| 28-10-00-5000 | 320 | Tri-W Group Limited Partnership | F |
| 28-10-00-4900 | 160 | Plum Creek Timberlands, L.P. | F |
| 28-10-00-4800 | 160 | Tri-W Group Limited Partnership | F |
| 28-10-00-5600 | 160 | USA (CBWRGL) | F |
| 28-10-00-5500 | 160 | Tri-W Group Limited Partnership | F |
| 28-10-00-5200 | 160 | Tri-W Group Limited Partnership | F |
| 28-09-00-3500 | 670.72 | USA (CBWRGL) | F |
| 28-09-00-300 | 656.61 | Plum Creek Timberlands, L.P | F |
| 29-09-00-200 | 623.72 | USA (CBWRGL) | F |
| 29-09-00-500 | 160 | Lone Rock Timberland Co. | F |
| 29-09-00-600 | 598.18 | Plum Creek Timberlands, L.P | F |
| 29-09-00-700 | 640 | USA (CBWRGL) | F |
| 25-13-04-300 | 228.88 | Roseburg Forest Products Co. | CBEMP |
| 25-13-03-200 | 69.17 | Fort Chicago Holdings II U.S., LLC | IND, CBEMP |
| 28-12-07C-101 | 17.54 | Ron Lafranchi | Q-IND |
| 28-12-07C-1000 | 17.24 | Ron Lafranchi | CREMP, CREMP IND |
| 28-12-07C-900 | 9.34 | LBA Contract Cutting, INC | CREMP, CREMP IND |
| 28-12-18B-1500 | 8.29 | LBA Contract Cutting, INC | CREMP, CREMP IND |
| 27-12-26D-1200 | 18.85 | Spencer & Truly Yates | EFU |
| 28-13-01DB-300 | 5.56, .54 | City of Coquille | City |
| 28-13-01DB-309 | 10.31 | City of Coquille | City |
| 28-13-01DB-310 | 6.59 | City of Coquille | City |
| 25-13-35-400 | 94.76 | Georgia- Pacific Wood Products Northwest | CBEMP |
| 25-13-36-1000 | 39.18 | Georgia- Pacific Wood Products Northwest | CBEMP |

This notice is to serve as public notice and decision notice and if you have received this notice by mail it is because you are a participant, adjacent property owner, special district, agency with interest, or person with interest in regard to the following land use application. Please read all information carefully as this decision may affect you. (See attached vicinity map for the location of the subject property).

**Notice to mortgagee, lien holder, vendor or seller: ORS Chapter 215 requires that if you receive this notice, it must be forwarded to the purchaser.**

The purpose of this notice is to inform you about the proposal and decision, where you may receive more information, and the requirements if you wish to appeal the decision by the Director to the Coos County Hearings Body. Any person who is adversely affected or aggrieved or who is entitled to written notice may appeal the decision by filing a written appeal in the manner and within the time period as provided below pursuant to Coos County Zoning and Land Development Ordinance (CCZLDO) Article 5.8. If you are mailing any documents to the Coos County Planning Department the address is 250 N. Baxter,

Coquille OR 97423. Mailing of this notice to you precludes an appeal directly to the Land Use Board of Appeals.

**PROPOSAL:** Request for Planning Director Approval for an extension of a conditional use to site natural gas pipeline as provided by Coos County Zoning and Land Development Ordinance (CCZLDO) § 5.2.600 Expiration and Extension of Conditional Uses.

The application, staff report and any conditions can be found at the following link: http://www.co.coos.or.us/Departments/Planning/PlanningDepartment-Applications2016.aspx . The application and all documents and evidence contained in the record, including the staff report and the applicable criteria, are available for inspection, at no cost, in the Planning Department located at 225 North Adams Street, Coquille, Oregon. Copies may be purchased at a cost of 50 cents per page. The decision is based on the application submittal and information on record. The name of the Coos County Planning Department representative to contact Jill Rolfe, Planning Director and the telephone number where more information can be obtained is **(541) 396-7770.**

This decision will become final at 5 P.M. on April 26, 2016 unless before this time a completed **APPLICATION FOR AN APPEAL OF A PLANNING DIRECTOR DECISION** form is submitted to and received by the Coos County Planning Department.

Failure of an issue to be raised in a hearing, in person or in writing, or failure to provide statements of evidence sufficient to afford the Approval Authority an opportunity to respond to the issue precludes raising the issue in an appeal to the Land Use Board of Appeals.

**Prepared /Authorized by:** _____ **Date:** April 11, 2016
Jill Rolfe, Planning Director

**EXHIBITS**

Exhibit A: Conditions of Approval
Exhibit B: Vicinity Map

**The Exhibits below are mailed to the Applicant only. Copies are available upon request or at the following website: http://www.co.coos.or.us/Departments/Planning/PlanningDepartment-Applications2016.aspx or by visiting the Planning Department at 225 N. Baxter, Coquille OR 97423. If you have any questions please contact staff at (541) 396-7770.**

Exhibit C: Staff Report
Exhibit D: Comments received (There were no comments received on this application)

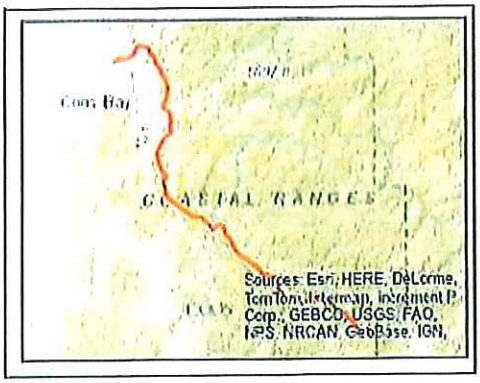
**EXHIBIT "A"**
**CONDITIONS OF APPROVAL**

1. All conditions of approval that were placed on File No. HBCU-10-01, Final Order No. 10-01-045PL as amended on remand, File No. REM-11-01, Final Order 12-03-018PL remain in effect and as modified by File No. HBCU-13-02, Final Order No. 14-01-006PL.
2. This application approval grants a one year extension to the approval. Therefore, this conditional use will expired on April 2, 2017 unless another extension is submitted prior to the expiration date.

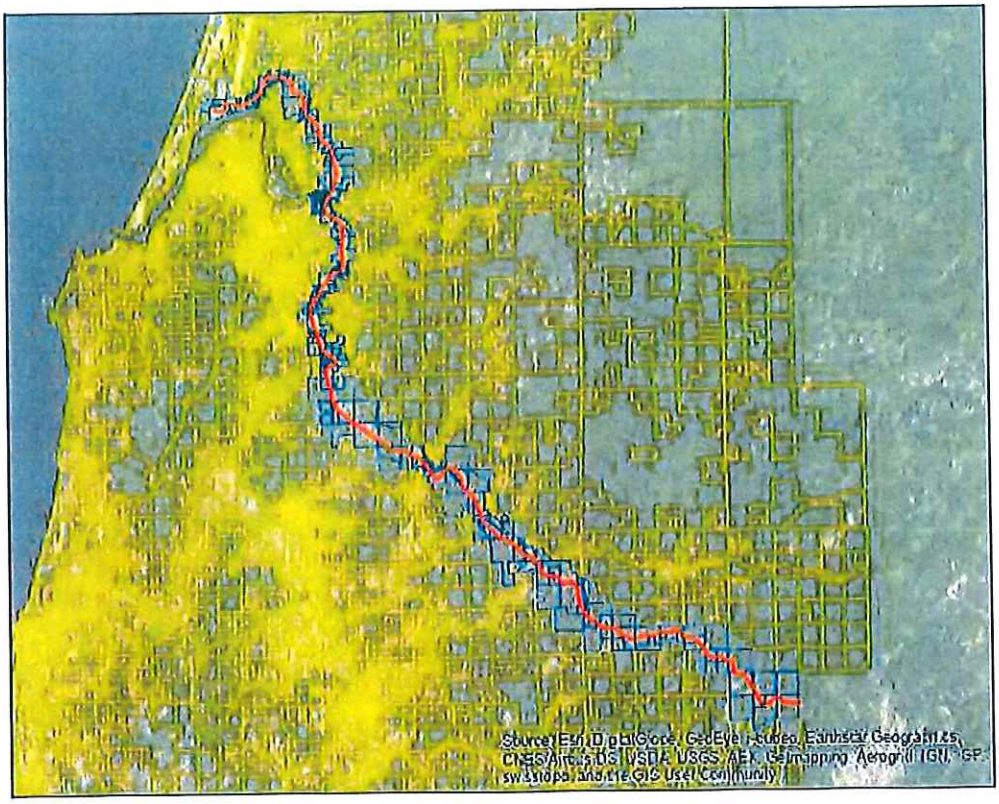
**EXHIBIT "B"**
**VICINITY MAP**

# COOS COUNTY PLANNING DEPARTMENT

Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille Oregon
Phone: (541) 396-7770
Fax: (541) 396-1022/TDD (800) 735-2900




| | |
|---|---|
| File: | ACU-16-013 |
| Applicant: | Pacific Connector Gas Pipeline, LP/ Morton Law |
| Date: | March 25, 2016 |
| Location: | See Below |
| Proposal: | Administrative Conditional Use: Extension of Previous Decision |




File Number: ACU-16-013