Coos County Planning Department
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Jill Rolfe, Planning Director

STAFF REPORT

Monday, September 23, 2019

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

APPELLANTS: Katy Dodds and Natalie Ranker, Represented by Tonia Moro, Attorney at Law, P.C.

FILE NUMBER: AP-19-004

HEARING DATE AND TIME: September 30, 2019 at 1:00 9.m. The hearing will be held in the large conference room of the Owen Building, 201 N. Adams, Coquille OR 97423.

TYPE OF APPLICATION: Appeal of an Extension (EXT-19-004) of a Conditional Use Application Authorization. For clarification the appeal references two applications in the body but due to the fact it was not filed correctly the appellants were provided an opportunity to correct and they chose to revise by only appealing one application. See background for further details.

I. RELEVANT CRITERIA FOR THE EXTENSION:

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, referred to as the "original route". The pipeline crosses many properties in Coos County.

III. BACKGROUND:

On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, approving Applicant's request for a conditional use permit authorizing development of the Pipeline and associated facilities, subject to certain conditions. The decision was subsequently appealed to, and remanded by the Oregon Land Use Board of Appeals (LUBA). On March 13, 2012, the Board addressed and resolved two grounds for remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL.

The applicant has been working toward obtaining all state and federal approvals necessary to initiate construction, however, the process is ongoing and it was found to be impossible to complete within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original land use approvals for two additional years (ACU-14-08). The Planning

Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

On local appeal, the Board of Commissioners invoked its authority under CCZLDO § 5.0.600 to appoint a hearings officer to conduct the initial public hearing for the appeal and make a recommendation to the Board. After a public hearing, an extended open record period for written evidence and testimony, and final written argument from the applicant, the Hearings Officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. In light of limitations contained in OAR 660-033-0140 applicable to extensions in farm- and forest-zoned lands, the Hearings Officer recommended approving the extension request for only one year, extending the conditional use permit approval from April 2, 2014 to April 2, 2015.

The subsequent applications were submitted:

- March 16, 2015, Pacific Connector filed a request for a second extension of the land use approvals for the original Pipeline alignment. File No. ACU-15-07. Staff reviewed the matter, deemed the application complete on April 8, 2015, and the Planning Director rendered a decision approving the extension request on April 14, 2015. The approval was appealed on April 30, 2015. File No. AP-15-01. After a hearing before a County Hearings Officer, the Hearings Officer issued a written opinion and recommendation to the Board of Commissioners that they affirm the Planning Director's decision granting the one year extension to April 2, 2016. On October 6, 2015, the Board adopted the Hearings Officer's recommended decision and approved the requested extension in Final Decision No. 15-08-039PL. The Board of Commissioners' approval of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final. See Board of Commissioners Final Decision and Order at Attachment E.
- March 16, 2016 the applicant's attorney filed for an extension and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017.
- March 3, 2017 the applicant's attorney submitted a subsequent extension as the applicant (EXT-17-05) that was approved granting an extension to the effective time to April 2, 2018.
- March 30, 2018, prior to the expiration date (EXT-18-003) another extension was filed and staff issued an approval which was appealed (County File Nos. AP-18-002/EXT-18-003). A hearing was held and a recommendation was made to the Board of Commissioners. The Board of Commissioners reviewed the recommendation and made a final decision to approve the extension to April 2, 2019 Final Decision NO 18-11-073PL (see attachment D). Opponents appealed this decision to the Land Use Board of Appeals. The County staff received the LUBA decision on April 25, 2019 affirm the county's decision. The appellant filed an appeal of the LUBA decision to the Court of Appeals and on August 7, 2019 the Court of Appeals affirmed LUBA's decision without opinion, *Williams et v. Coos County,* 298 OR App 841 (2019). Issues that have been raised in prior appeals shouldn't be raised in this current appeal. See Attachment C
- October 2, 2018, Coos County 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. The County was appealed on this text amendment. An appeal was filed to the Land Use Board of Appeals regarding the amendments. The Land Use Board of Appeals rendered a decision affirming the county's decision to amend the text of the CCZLDO, *McCaffree v. Coos County*, 2018-132. A subsequent appeal was filed with the Court of Appeals and the Court of Appeals affirmed LUBA's decision

without opinion on September 11, 2019 (see Attachment A). Therefore, any issues related to the applicable criteria should not be raised in this appeal.

- March 28, 2019, the current extension request was received by the Coos County Planning Department via email followed by a hardcopy on March 29, 2019. The applicant has requested decisions on extensions be processed as a land use decisions. The County has decided in this situation that there may be discretion applied and; therefore, chooses to be conservative in their approach and provide a notice of decision and opportunity to appeal. The application was found to be completed and met the submittal criteria on April 26, 2019 (within 30 days).

The staff decision on this matter was rendered on June 21, 2019. An appeal was received that covered two appeals but only one fee was submitted. Staff contacted the appellants in this matter and provided them the opportunity to correct the procedural issue. However, despite trying to correct the error it is not clear that the appellants understand which application they are actually appealing as Blue Ridge was not the subject of either extension. Extension 19-004 was requested for the original alignment and the Extension 19-002 was for the Brunschmid/Stock Slough alternative. Staff sent notice of this appeal under the information that the appeal was meant for EXT-19-004. However, there are arguments raised in the appeal that are not relevant to decision rendered on EXT-19-004.

Crystal Orr

From: Natalie Ranker [nattim7072@gmail.com]
Sent: Friday, July 05, 2019 3:32 PM
To: Crystal Orr
Cc: Planning Department
Subject: Re: Appeal submited

Hi Crystal and Planning,
Thanks for letting me know. Kathy Dodds has been in touch with you via email and today by phone if the office is open. We will only be appealing Blue Ridge, and the fee of $250. and
the paperwork that I turned in on Monday, 7/1, is to deal with Blue Ridge (EXT 19-004) only.

Thanks again,
Natalie Ranker

On Tue, Jul 2, 2019 at 4:29 PM Crystal Orr <corr@co.coos.or.us> wrote:

Natalie,

The appeal you submitted yesterday July 1, 2019 was submitted incorrectly. Another Appeal application needs to be submitted. You cannot appeal two applications within one appeal. You have until Monday July 8, 2019 at 12PM to submit another appeal application and another $250 fee. If you wish to only appeal one of the decisions you will need to let us know which one you would like to go forward with.

Please let me know if you have any questions.

Thank you,

Crystal Orr

An extension of the County approval for the original is the sole subject of this application and arguments regarding changes to the original route or argument beyond the criteria found in Section 5.2.600 Expiration and Extension of Conditional Uses **may be rejected** if it does not relate to the correct application.

An extension shall be received prior the expiration date of the conditional use or the prior extension.

Staff has reviewed the history and intent of the OAR 660-033-0140 due to the prior appeals just for clarification and has included the relevant background information for guidance to this decision.

Staff's opinion statements or background is not criteria or findings to applicable criteria. This is meant to provide context and guidance and is not part of the application requirements.
OAR 660-033-0140 was adopted to implement portions of requirements of ORS (in part) 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. Statutory actions, and laws created to implement statutes, can only be based upon the particular statues or rules creating them. In other words it cannot enforce or regulate other statutes or rules unless expressly stated.

> ***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 in the event that discretion has been applied even though it is not required. There is nothing in the OAR that prevents the county for taking a conservative approach and sending notice with the opportunity to appeal on the limited criteria for extensions. Staff is not legally changing the authority that LCDC had to adopt language that states under OAR 660-033-0140 is not a land use decision (effective 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 but it does incorporate certain dwellings addressed under OAR 660 Division 6[1]. OAR 660 Division 6 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 extensions 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. The Comprehensive Plan is silent on the issue which requires staff and the applicant to rely on the ordinance. 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 past have continued to raise an issue with changes to the location of the pipeline but this is not relevant to an extension. The appropriate criteria that would regulate any development beyond what is permitted is 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". Again, 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. 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

[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.

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 partners 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. Opponents continue to ask to incorporate in federal regulations such as environmental impact studies as an example. The local jurisdiction does not have authority to make a determination using federal laws unless that federal law has been incorporated into a Statewide Planning Goal. Planning Goals, Statutes and Rules that regulate land use are the basis for creating comprehensive plans. However, some language in Planning Goals, Statutes and Rules are not mandatory language 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 DLCD 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.

The background to the report is for information to guide the participants in this process. The findings to the criteria are found in the next section.

IV. ISSUES RAISED IN THE APPEAL

The following issues have been raised in the appeal filed:

a. The appellants object to the numerous errors stated in the decision's "background" statement because many statements are not true and they are not support by substantial evidence. All of the issue(s) raised in the previous proceedings on the 2018 extensions are pending resolution on appeal and have not been resolved so they may be raised again, here.

   RESPONSE: Background statements are not part of the criteria or the findings to the criteria. They only provide perspective to the reader. If the appellant would like to provide some clarification on which statements are not factual staff is happy to amend the decision. Staff did find some typo's in the decision and is happy to clarify.

The fact is that, since the time this appeal was filed, the appellants have failed to receive a favorable decision (remand or reversal) in fact both LUBA and the Court of Appeals have rendered decisions in favor of the county on both the extension and the amendments to the code. There is currently one appeal to the Supreme Court on an extension as the appellant's attorney seems to be searching for a higher court to side with her opinion on this matter. Staff does not believe this matter will resolve in a favorable decision to the appellant's but it is within their right to continue the appeal process.

b. The County violated the acknowledged CCZLDO 5.2.600 and rule it implements. The director misconstrued the applicable rule and exceeded the county's authority in changing the interpreting "the rule" to conclude, as understood, the applicant has initiated the development action by apply for other agency permits. The County misconstrued the applicable law in attempting to apply amendments to CCZLDO 5.2.600 which have been appealed and therefore are not acknowledged.

RESPONSE: This argument seems to imply the county has misconstrued and exceeded authority by changing and interpreting the rule to conclude the applicant has initiated the development action. This argument was poorly written and developed which makes it difficult for staff to respond. Staff believes this may be a recycled argument as there was no such finding made in the decision for this extension. See staff's original decision at Attachment B.

c. 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 review.

RESPONSE: The fact the appellant thinks that the CCZLDO has jurisdiction over FERC or even ability to consider FERC permits in limited scope of an extension is baseless and has been unsuccessfully raised in the past. Ms. Moro seems to think the county has the ability to pick and choose criteria that applies to an extension. Staff believes the appellants have failed to develop this argument by providing any evidence that this is applicable criteria.

Furthermore, the criteria in this section are misquoted by the appellants.

Section 5.0.500 INCONSISTENT APPLICATIONS
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. (Emphases added)***

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

There are two important sections of this provision regarding inconsistent applications. The first portion is "under this ordinance", which means it has to be land use application subject to the authority of this ordinance. This is a local regulation not based on a state law or rule and does not extend to applications reviewed under the Coos County Zoning and Land Development Ordinance. The other portion to consider is that the county would have to make a determination that a land use application applied for is inconsistent with any **pending application** and to what extent it is inconsistent. At that point only the inconsistent portion would be subject to revocation. A pending application is a land use application that does not have a final decision. Again, I would encourage the appellants to address the applicable criteria or provide valid legal arguments.

d. The County specifically violated CCZLDO 5.2.600(1)(a)(b)(ii)&(iv), 5.2.600(2), 5.0.150, 5.2.600, 5.2.600.1.c etc.

RESPONSE: Every argument under this section of the appeal is recycled from the prior appeal and was not supported by substantial evidenced or not developed in a manor sufficient to allow a decision maker to respond. Therefore, instead of rehashing these arguments staff has attached all of the prior decisions.

Staff found that Pacific Connector's application demonstrates compliance with the ordinance requirements at CCZLDO §5.2.600 for granting extension requests and staff does not find any of the arguments raised in this appeal to change the fact there has been substantial evidence and statements to meet the criteria as of the date of this report.

Again, staff is not sure if the appellants are even aware of what they are truly appealing.

Jill Rolfe, Planning Director

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

Attachment A: LUBA No. 2018-132
Attachment B: Staff Report EXT-19-004
Attachment C: LUBA No. 2018-141/142
Attachment D: Board of Commissioners Final Decision and Order No. 18-11-073PL
Attachment E: Board of Commissioners Final Decision and Order No. 15-08-039PL

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JODY McCAFFREE,
Petitioner,

vs.

COOS COUNTY,
Respondent.

LUBA No. 2018-132

FINAL OPINION
AND ORDER

Appeal from Coos County.

Tonia L. Moro, Medford, filed the petition for review and argued on behalf of petitioner.

Nathaniel Greenhalgh-Johnson, Coquille, filed the response brief and argued on behalf of respondent.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 06/06/2019

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals Ordinance 18-09-009PL (Ordinance), a county ordinance that adopts text amendments to the county's land development ordinance.

REPLY BRIEF/MOTION TO TAKE EVIDENCE

Petitioner moves for permission to file a reply brief, to respond to waiver arguments raised in the response brief. There is no opposition to the motion, and the reply brief is allowed.

Petitioner additionally moves for LUBA to consider evidence not in the record. Petitioner moves for LUBA to accept three "screen shots" of pages from the county's website taken on August 16, 2018, on October 3, 2018 and October 5, 2018. According to petitioner, LUBA may consider the evidence in response to the county's argument in its response brief that petitioner failed to object during the proceedings before the county, to the procedural errors that she raises in the third assignment of error. According to petitioner, the August 16, 2018 screen shot demonstrates that the proceedings regarding the proposed legislative action that ultimately led to the county's enactment of the Ordinance were not listed on the county's website on that date. According to petitioner, the screen shot undercuts a statement by the county's planning staff at the October 2, 2018 board of commissioners' hearing that the county's web page provided notice of

the proceedings. Petitioner's Motion to Consider Evidence Deemed Outside of the Record 1-2.

ORS 197.835(2)(b) provides, in part, that "[i]n the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations." A motion to take evidence must include a statement "explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding." OAR 661-010-0045(2). It is the movant's burden to demonstrate a sufficient basis for LUBA to take evidence outside the record. Petitioner has not established any basis under OAR 661-010-0045 for LUBA to consider the evidence she has submitted.

The motion is denied.

FACTS

In February 2018, the county introduced proposed amendments to the Coos County Zoning and Land Development Ordinance (LDO) to the county's Citizen Advisory Committee (CAC) at a CAC meeting, and in March at a planning commission meeting. Later, in July 2018, August 2018, and September 2018, the planning commission considered revised versions of the initially proposed

amendments. At its September 2018 meeting, the planning commission considred the version of the amendments that were subsequently adopted by the board of county commissioners.

Petitioner provided testimony during the board of county commissioners' October 2, 2018 meeting. At that meeting, the board of county commissioners conducted the first and only reading of the ordinance, by its title, and voted to adopt the LDO amendments. This appeal followed.

STANDARD OF REVIEW

The Ordinance is a decision that amends the local government's land use regulations. LUBA's standard of review of the challenged legislative decision is at ORS 197.835(7), which provides:

> "[LUBA] shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
>
> "(a) The regulation is not in compliance with the comprehensive plan; or
>
> "(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

In addition, ORS 197.835(9) provides that LUBA shall reverse or remand a land use decision if LUBA finds that the local government "exceeded its jurisdiction," "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner," or "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(A), (B) and (D).

THIRD ASSIGNMENT OF ERROR

In three subassignments of error under the third assignment of error, petitioner alleges that the county committed several procedural errors that warrant reversal or remand. ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a land use decision if a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

A. ORS 203.045

ORS 203.045 provides in relevant part that:

> "(3) Except as subsections (4) and (5) of this section provide to the contrary, every ordinance of a county governing body shall, before being put upon its final adoption, be read fully and distinctly in open meeting of that body on two days at least 13 days apart.
>
> "(4) Except as subsection (5) of this section provides to the contrary, and except ordinances imposing, or providing exemptions from, taxation, an ordinance necessary to meet an emergency may, upon being read first in full and then by title, be adopted at a single meeting of the governing body by unanimous vote of all its members present, provided they constitute a quorum.
>
> "(5) Any reading required by subsection (3) or (4) of this section may be by title only:
>
> > "(a) If no member of the governing body present at the meeting requests that the ordinance be read in full; or
> >
> > "(b) If, not later than one week before the first reading of the ordinance, a copy of it is provided each member, copies of it are available at the headquarters of the

governing body, one copy for each person who requests it, and notice of the availability is given by:

"(A) Written notice posted at the courthouse of the county and two other public places in the county; and

"(B) Publication at least once in a newspaper of general circulation in the county, designated by the county governing body and published in the county or, if no newspaper is so published, then in one published elsewhere.

"(6) An ordinance adopted after being read by title only may have no legal effect if it differs substantially from its terms as it is thus filed prior to the reading, unless each section incorporating such a difference, as finally amended prior to being adopted by the governing body, is read fully and distinctly in open meeting of that body."

Petitioner argues that the county violated ORS 203.045(3) in failing to conduct two readings of the proposed ordinance before adopting it.

The county first responds that petitioner failed to object to the alleged procedural error during the proceedings below, and having failed to object, may not now assign error to the county's procedure.[1] The "raise it or waive it" rule does not generally apply to issues raised in appeals challenging legislative decisions. *See* ORS 197.835(3) ("Issues shall be limited to those raised by any

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[1] The county does not argue that ORS 205.045 does not apply to the county's proceedings adopting the Ordinance and accordingly, we do not consider that issue. *See* ORS 203.045(1) ("This section does not apply to a county that prescribes by charter the manner of adopting ordinances for the county or to an ordinance authorized by a statute other than ORS 203.035.").

participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."). *See also Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126 (2004) (LUBA will not extend the ORS 197.763(1) "raise it or waive it" requirement to legislative proceedings). However, LUBA has long held that where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the resulting decision. *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980). This obligation to object to procedural errors overlaps with, but exists independently of, ORS 197.763(1) and 197.835(3). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393 (2002); *Simmons v. Marion County*, 22 Or LUBA 759, 774 n 8 (1992). While the "raise it or waive it" requirement at ORS 197.763(1) has a similar purpose to the requirement that a party with an opportunity to object to a procedural error must do so in order to seek remand based on that error, the two requirements share no antecedents and otherwise have no relationship with each other. *See Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312, 317 n 6 (1993) (the "raise it or waive it" provisions of ORS 197.763(1) and 197.835(3) do not supersede the requirement that parties raise objections to procedural errors when it is possible to do so). We have affirmed that the requirement to object to a procedural error is present in a process that culminates in a legislative decision. *Dobson v. City of Newport*, 47 Or LUBA 267, 277 (2003) (citing ORS 197.835(9)(a)(B)).

Petitioner does not point to any place in the record demonstrating that she objected to the county's procedure. The reply brief does not respond to the county's waiver argument except to argue that at the October 2, 2018 board of county commissioners hearing, petitioner objected that she did not receive emailed notice of the proceedings. Reply Brief 1. The reply brief argues that the county "should be judicially estopped from raising its [failure to object] arguments." Reply Brief 4. Accordingly, we agree with the county that petitioner has failed to demonstrate that she objected to the county's alleged failure to comply with ORS 203.045(3).

However, even if we assume petitioner objected that the county failed to conduct two readings of the Ordinance, we also agree with the county's response on the merits. ORS 203.045(4) and (5) allow an ordinance that is passed with an emergency clause to be read once only, and only by title "[i]f no member of the governing body present at the meeting requests that the ordinance be read in full." ORS 203.045(5)(b). It is undisputed that the Ordinance includes an emergency clause, and petitioner does not challenge that emergency clause. It is also undisputed that no member of the board of county commissioners requested a full reading. Accordingly, ORS 203.045(5) allowed the county to read the Ordinance a single time and by title only. Petitioner does not address ORS 203.045(5) or otherwise explain why, under that statute, the county's reading of the Ordinance by title only was insufficient to comply with ORS 203.045.

Finally. petitioner argues:

> "[B]ecause the version read by title at the planning commission hearing on September 16, 2018, differs substantially from the terms of what was considered and read only by title at the board's hearing on October 2, 2018, the ordinance [sic] 'has no legal effect' and LUBA should reverse the county's decision purporting to adopt it." Petition for Review 22-23.

We reject the argument. ORS 203.045(6) renders an ordinance void if it "differs substantially from its terms as it is thus filed prior to the reading" of the ordinance. Petitioner does not develop any argument under the language of ORS 203.045(6) explaining how the language of the Ordinance "differs substantially" from that language "filed prior to the reading" of the Ordinance by title at the October 2, 2018 board of county commissioners' hearing. Accordingly, petitioner's argument provides no basis for reversal or remand of the decision.

The first subassignment of error is denied.

B. ORS 197.610

ORS 197.610(1) requires the county to submit a proposed amendment to the LDO to the Department of Land Conservation and Development (DLCD) at least 20 days before the county holds the first evidentiary hearing on adoption of the proposed change. In relevant part, ORS 197.610(3) requires the notice to include the text of the proposed change, a brief narrative summary of the proposed change, and the date set for the first evidentiary hearing. The county submitted notice of and the text of the proposed changes to the LDO to DLCD on August 2, 2018. Record 614. The version of the proposed amendments submitted to DLCD did not include later revisions to LDO 5.2.600 that were

proposed after August, and ultimately adopted by the board of county commissioners. As explained above, further revisions to the proposed amendments were presented after August 2, 2018, and were considered at the September 2018 planning commission meeting and again at the October 2, 2018 board of county commissioners hearing.

Citing ORS 197.620(2)(c), petitioner argues that "[t]he adopted version differs from the proposed changes provided to DLCD to such an extent that the notice does not reasonably describe the proposed and ultimate decision. *See* ORS 197.620(2)(c) (granting right of appeal in such circumstances)."[2] Petition for Review 24. We understand petitioner to argue that the county failed to provide the notice required under ORS 197.610(1), and that failure requires remand. Petition for Review 24 (citing *Oregon City Leasing, Inc. v. Columbia County*,

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[2] ORS 197.620(2)(c) provides:

> "(2) Notwithstanding the requirements of ORS 197.830(2) that a person have appeared before the local government orally or in writing to seek review of a land use decision, the Director of the Department of Land Conservation and Development or any other person may appeal the decision to the Land Use Board of Appeals if:
>
> "* * * * *
>
> "(c) The decision differs from the proposed changes submitted under ORS 197.610 to such an extent that the materials submitted under ORS 197.610 do not reasonably describe the decision."

121 Or App 173, 854 P2d 495 (1993) (complete failure to provide the notice required under ORS 197.610(1) is a substantive error that requires remand)).

The county's response first points out that ORS 197.620(2)(c) has no bearing on the present appeal, in which no challenge to petitioner's standing to appeal the decision has been raised.[3] We agree with that response.

The county next responds that LUBA has held that *inadequate* provision of the notice required under ORS 197.610(1), as opposed to a complete failure to provide the required notice, requires remand only if that failure (1) prejudiced petitioner's substantial rights, or (2) was likely to prejudice the substantial rights of other persons who may be relying on DLCD's notice to participate in the post-acknowledgment plan amendment (PAPA). We agree with the county that an

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[3] The county's response also cites and discusses ORS 197.610(6), a provision that petitioner does not cite or discuss. ORS 197.610(6) provides:

> "If, after submitting the materials described in subsection (3) of this section, the proposed change is altered to such an extent that the materials submitted no longer reasonably describe the proposed change, the local government must notify the Department of Land Conservation and Development of the alterations to the proposed change and provide a summary of the alterations along with any alterations to the proposed text or map to the director at least 10 days before the final evidentiary hearing on the proposal. The director shall cause notice of the alterations to be given in the manner described in subsection (4) of this section. Circumstances requiring resubmission of a proposed change may include, but are not limited to, a change in the principal uses allowed under the proposed change or a significant change in the location at which the principal uses would be allowed, limited or prohibited."

argument that the notice provided under ORS 197.610(1) was incomplete or inaccurate is a challenge that requires a demonstration of prejudice. *Bryant v. Umatilla County*, 45 Or LUBA 653, 656-57 (2003); *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647, 653-56 (2003); *OCAPA v. City of Mosier*, 44 Or LUBA 452, 468-72 (2003); *Stallkamp v. City of King City*, 43 Or LUBA 333, 351-52 (2002), *aff'd*, 186 Or App 742, 66 P3d 1029 (2003). Petitioner has not attempted to establish that any inadequacy in the notice provided by the county to DLCD pursuant to ORS 197.610(1) on August 2, 2018 prejudiced her substantial rights, or the substantial rights of others.

We also conclude that petitioner has not established that the notice provided to DLCD as required by ORS 197.610(1) was inadequate. Petitioner argues that the amendments to LDO 5.2.600 that were submitted to DLCD on August 2, 2018 did not include what was eventually adopted as LDO 5.2.600.1.b(1), which provides that "[a]ll conditional uses for residential development including overlays shall not expire once they have received approval." Petitioner also argues that language included in the adopted version of LDO 5.2.600 identified as "footnote 3" was not included in the version provided to DLCD. Petition for Review 23-24. However, petitioner does not explain why the changes that occurred during the legislative proceeding on the proposed amendments mean that the original notice provided pursuant to ORS

197.610(1) was inadequate.[4] Accordingly, this subassignment of error provides no basis for reversal or remand of the decision.

This subassignment of error is denied.

C. Citizen Advisory Committee Review

In the third subassignment of error, petitioner argues that the county's decision to amend the LDO fails to comply with Coos County Comprehensive Plan (CCCP) Section 5.1. ORS 197.835(6). That is so, petitioner argues, because the Citizen Advisory Committee provided for in CCCP 5.1 did not review changes that were proposed to the LDO after the CAC initially met and reviewed the changes in February 2018 and May 2018.[5]

CCCP 5.1 provides that the CAC:

> "[s]hall aid the Planning staff in the direction of revising the Comprehensive Plan and Implementing Ordinance, as well as to voice concerns and/or support revisions and updates of the plan and implementing ordinance prior to public hearings and determinations

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[4] We have observed that ORS 197.610(1) and ORS 197.615(1) "expressly recognize the reality that proposed legislative post-acknowledgement amendments may be revised during the course of local proceedings." *OCAPA*, 44 Or LUBA at 468. We observe here that ORS 197.610(6) appears to us to be the legislature's attempt to identify non-exclusive circumstances under which post-notice revisions to a land use regulation go so far that new notice is required. *See* n 3. Petitioner has not argued or demonstrated that the revisions in this case are of the same nature as those circumstances described in ORS 197.610(6).

[5] Petitioner also argues, in a single sentence, that the process in CCCP 5.1 violates Statewide Planning Goal 1 (Citizen Involvement). Petition for Review 25. We do not address that undeveloped argument.

at the Planning Commission and Board of Commissioners level.

"* * * * *

"[CAC] meetings shall be scheduled and publicized as deemed necessary by the Planning Director or the designee."

The county responds initially that petitioner failed to object to the alleged procedural error during the proceedings below, and having failed to object, may not raise the procedural error before LUBA. Petitioner's reply brief does not respond to the county's argument in any way that we can understand. Accordingly, we agree with the county that petitioner has not demonstrated that she objected to the alleged procedural error. *Dobson*, 47 Or LUBA at 277.

However, we also agree with the county's response on the merits that nothing in CCCP 5.1 requires the CAC to review every proposed change to the CCCP or the LDO prior to public hearings by the planning commission or the board of commissioners. The role of the CAC is to assist the planning staff, and nothing in the language of CCCP 5.1 suggests that the CAC must review every proposed change to the LDO that arises after the public hearings have commenced.

The third subassignment of error is denied.

The third assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 197.722 to 197.728 allow a local government to designate "regionally significant industrial areas" (RSIAs) and to provide for protections from

development standards that may have the effect of limiting industrial development on such a RSIA site. ORS 197.724 provides:

> "(1) An applicant for a new industrial use or the expansion of an existing industrial use located within a regionally significant industrial area may request that an application for a land use permit be reviewed as an application for an expedited industrial land use permit under this section if the proposed use does not require:
>
> > "(a) An exception taken under ORS 197.732 to a statewide land use planning goal;
> >
> > "(b) A change to the acknowledged comprehensive plan or land use regulations of the local government within whose land use jurisdiction the new or expanded industrial use would occur; or
> >
> > "(c) A federal environmental impact statement under the National Environmental Policy Act.
>
> "(2) If the applicant makes a request that complies with subsection (1) of this section, the local government shall review the applications for land use permits for the proposed industrial use by applying the standards and criteria that otherwise apply to the review and by using the procedures set forth for review of an expedited land division in ORS 197.365 and 197.370."

The board of county commissioners adopted amendments to the LDO at LDO 4.3.220(6)(e), LDO 5.0.250, and LDO 5.0.900. Those amendments implement provisions of ORS 197.724. In her second assignment of error, petitioner argues that LDO 4.3.220(6)(e), LDO 5.0.250, and LDO 5.0.900 are inconsistent with ORS 197.724(1) because according to petitioner, those provisions require the county to process *all* applications for a new industrial use or expansion of an

existing industrial use in a RSIA according to the procedures for an expedited land division, whether or not the applicant requests such a process. In addition, petitioner argues that ORS 197.723 required the county to consider whether the amendments to the LDO comply with ORS 197.723.

The county responds, initially, that ORS 197.726(1) places the issues raised in the second assignment of error outside of LUBA's scope of review.[6] ORS 197.726(1) provides in relevant part that LUBA "does not have jurisdiction to consider decisions, aspects of decisions or actions taken under ORS 197.722 to ORS 197.728." As the county explains it, the county's implementation of ORS 197.724 in the Ordinance is an "action taken under" ORS 197.724.[7] Response Brief 2.

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[6] The county argues that ORS 197.726(1) "deprives LUBA of jurisdiction to review the county's implementation of [ORS 197.724.]" Response Brief 18. The county does not dispute that the Ordinance is a PAPA subject to review by LUBA pursuant to ORS 197.825(1). Accordingly, we understand the county's argument to be that ORS 197.726(1) places the issues presented in petitioner's second assignment of error outside LUBA's scope of review

[7] Absent ORS 197.724, an application for development of an industrial use in a RSIA would almost certainly be an application for "the discretionary approval of a proposed development of land," or in other words, an application for a "permit" as that term is defined in ORS 215.402. As such, the procedures at ORS 215.416 and the provisions of the LDO that implement ORS 215.416 would apply. However, ORS 197.724, and the LDO provisions that implement the statute at ORS 197.724, provide for a different and more expeditious way to process an application for an industrial use in a RSIA. That procedure – which is the same as the procedure for processing an expedited land division – expressly removes such a county decision on a development application from LUBA's

"Under" is generally interpreted as meaning "as authorized by." *Jones v. Douglas County*, 247 Or App 81, 93-94, 270 P3d 278 (2011). ORS 197.722 to 728 provide the substantive authority for the county to treat and process an application that would otherwise be a permit as something other than a permit. However, it is ORS 197.646(1) that requires the county to adopt the challenged amendments to the LDO. ORS 197.646(1) provides that "a local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 *to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals*." (Emphasis added.) In other words, the Ordinance is not an "action taken under" ORS 197.724. It is an action taken under ORS 197.646(1).

The county next responds that the LDO provisions the county adopted to implement ORS 197.724 are consistent with the statute. The county responds that notwithstanding any difference in language between the LDO and the statute, the language of the statute continues to apply directly to an application for an expedited land use permit described in ORS 197.724(1). Absent any developed

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jurisdiction. ORS 197.375(7) ("The Land Use Board of Appeals does not have jurisdiction to consider any decisions, aspects of decisions or actions made under ORS 197.360 to 197.380.") Rather, review of a final county decision on an expedited land division application is subject to judicial review by the Oregon Court of Appeals.

argument from petitioner regarding why the LDO provisions are inconsistent with ORS 197.724 or ORS 197.723(4) and (5), we agree with the county.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error presents myriad challenges to LDO 5.2.600.

1. First Subassignment of Error

a. LDO 5.2.600.1.a(3)

OAR 660-033-0140 is an administrative rule, adopted by the Oregon Land Conservation and Development Commission (LCDC), that governs expiration and extension of permits on farm and forest land. The county's amendments to LDO 5.2.600 are intended to implement the rule. OAR 660-033-0140(3) provides that "[a]pproval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision." The phrase "administrative decision" is not defined by LCDC. In her first subassignment under the first assignment of error, petitioner first argues that the amendments to LDO 5.2.600 are "inconsistent with" OAR 660-033-0140(3). Petition for Review 13.

LDO 5.2.600.1.a(3) provides that "[a]pproval 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." Petitioner first argues that "administrative decision[s]" as that term is used in OAR 660-033-

0140(3) are "subject to a post-decision de novo hearing," while "'ministerial decisions' are not." Petition for Review 13. If petitioner is arguing that the phrase "administrative decisions" as used in the rule refers to decisions that are subject to the procedures for a permit under ORS 215.416, we reject that argument. It is clear that in adopting the rule, LCDC intended to make extension decisions under the rule *not* permit decisions (and not land use decisions at all).

As the county explains it, the LDO includes types of decisions that are referred to as "administrative conditional uses," and the LDO does not define the term "ministerial." According to the county, the county chose to use the word "ministerial" where the rule uses the phrase "administrative decision" in order to avoid confusion with the phrase used in the LDO "administrative conditional uses."

If petitioner is arguing that the LDO treats "administrative decisions" and "ministerial" decisions differently, petitioner has not demonstrated that is true. We conclude that the county's use of the word "ministerial" to describe the type of extension decisions subject to LDO 5.2.600 is not inconsistent with the rule's description of the same decisions as "administrative decision[s]."

b. LDO 5.2.600.1.a(2)

In LDO 5.2.600.1.a(2), the county adopted a provision that

> "Coos County has and will continue to accept reasons for which the applicant was not responsible as, but [not] limited to, financial hardship, death or owner, transfer of property, unable to complete conditions of approval and projects that require additional permits."

Petitioner challenges that provision as inconsistent with OAR 660-033-0140(2)(d), which provides that the county may grant an extension to a permit on farm or forest land if "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*." (Emphasis added.) Petitioner argues that "the county may not legislate away its requirement to exercise discretion in making that decision by adopting a list of potential reasons that might satisfy the criteria." Petition for Review 14. The county responds, and we agree, that adopting an explanatory list of examples of "reasons for which the applicant was not responsible" is not inconsistent with the rule, especially in the absence of any definition for the phrase used in the rule or guidance given in the rule. The county will still be required to determine for each extension application whether "reasons for which the applicant was not responsible" prevented the applicant from initiating development.

This subassignment of error is denied.

2. OAR 660-033-0140(3)

We briefly discussed OAR 660-033-0140(3) above in our discussion of petitioner's challenges that LDO 5.2.600.1.a(3) is inconsistent with the rule. In her second subassignment of error, petitioner argues that OAR 660-033-0140(3) is inconsistent with ORS 197.015(10)(a) and (b), and that LCDC exceeded its authority in adopting the rule. Petitioner argues that LCDC's rule enacts an additional exception to LUBA's jurisdiction that the legislature has not enacted.

OAR 660-033-0140(3) provides that "[a]pproval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision." In previous challenges to LUBA's jurisdiction over a decision to approve an extension to a permit on farm or forest land, we have concluded that OAR 660-033-0140(3) limits our jurisdiction over those decisions. *McLaughlin v. Douglas County*, 76 Or LUBA 77 (2017).

LUBA's standard of review of the county's legislative decision is set out above. We have the authority to reverse or remand the decision if "the local government * * * exceeded its jurisdiction." ORS 197.835(9)(a)(A). However, petitioner's argument is that *LCDC* exceeded its authority in enacting OAR 660-033-0140(3). An argument that LCDC exceeded its authority in enacting an administrative rule does not provide LUBA with a basis under ORS 197.835(9)(a)(A) for reversal or remand of a county decision that merely implements, in nearly identical terms, the LCDC rule.

This subassignment of error is denied.

3. Third Subassignment of Error

We are unable to discern a cognizable argument providing a basis for reversal or remand in this subassignment of error, and we therefore will not consider the arguments included in it. *See Sommer v. Josephine County*, 54 Or LUBA 507, 511-12, *aff'd* 215 Or App 501, 170 P3d 8, 9 (2007) (LUBA will not

consider arguments that are so poorly stated that they cannot reasonably be responded to).

This subassignment of error is denied.

4. Fourth Subassignment of Error

In her fourth subassignment of error, we understand petitioner to argue that LDO 5.2.600.1.b(1) fails to comply with Statewide Planning Goal 2 (Land Use Planning).[8] Petitioner's argument is difficult to follow, but we understand her to argue that such a provision fails to comply with Goal 2 because Goal 2 anticipates that changes to adopted and acknowledged comprehensive plans and land use regulations will be adopted as the needs of the community evolve. Petitioner also argues that the county's decision is not supported by an adequate factual base, because the county's findings do not address Goal 2.

Our standard of review of the Ordinance allows us to reverse or remand this amendment to the LDO if "(a) the regulation is not in compliance with the comprehensive plan; or (b) the comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals." ORS 197.835(7). Petitioner's argument does not establish that the county was required to consider or establish compliance with Goal 2, or explain why our standard of

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[8] LDO 5.2.600.1.b(1) provides that "all conditional uses for residential development including overlays shall not expire once they have received approval."

review requires review of the Ordinance for compliance with Goal 2. Thus, petitioner's argument does not provide a basis for reversal or remand.

This subassignment of error is denied.

The first assignment of error is denied.

The county's decision is affirmed.

FILED: September 11, 2019

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JODY MCCAFFREE,
Petitioner,

v.

COOS COUNTY,
Respondent.

Land Use Board of Appeals
2018132

A171439

Argued and submitted on August 23, 2019.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.

Attorney for Petitioner: Tonia Moro.

Attorney for Respondent: Nathaniel Greenhalgh-Johnson.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[X] Costs allowed, payable by Petitioner.

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Jill Rolfe, Planning Director

STAFF REPORT

Friday, June 21, 2019

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

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

FILE NUMBER: EXT-19-004

DECISION: APPROVED

APPEAL DEADLINE Monday, July 01, 2019 at 12:00 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.
  - 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 referred to as the "Original Alignment" (County Order No. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01)

III. BACKGROUND:

On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, approving Applicant's request for a conditional use permit authorizing development of the Pipeline and associated facilities, subject to certain conditions. The decision was subsequently appealed to, and remanded by the Oregon Land Use Board of Appeals (LUBA). On March 13, 2012, the Board addressed and resolved two grounds for remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL.

The applicant has been working toward obtaining all state and federal approvals necessary to initiate construction, however, the process is ongoing and it was found to be impossible complete within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original land use approvals for two additional years (ACU-14-08). The Planning Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

On local appeal, the Board of Commissioners invoked its authority under CCZLDO § 5.0.600 to appoint a hearings officer to conduct the initial public hearing for the appeal and make a recommendation to the Board. After a public hearing, an extended open record period for written evidence and testimony, and final written argument from the applicant, the Hearings Officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. In light of limitations contained in OAR 660-033-0140 applicable to extensions in farm- and forest-zoned lands, the Hearings Officer recommended approving the extension request for only one year, extending the conditional use permit approval from April 2, 2014 to April 2, 2015.

On March 16, 2015, Pacific Connector filed a request for a second extension of the land use approvals for the original Pipeline alignment. File No. ACU-15-07. Staff reviewed the matter, deemed the application complete on April 8, 2015, and the Planning Director rendered a decision approving the extension request on April 14, 2015. The approval was appealed on April 30, 2015. File No. AP-15-01. After a hearing before a County Hearings Officer, the Hearings Officer issued a written opinion and recommendation to the Board of Commissioners that they affirm the Planning Director's decision granting the one year extension to April 2, 2016. On October 6, 2015, the Board adopted the Hearings Officer's recommended decision and approved the requested extension. Final Decision No. 15-08-039PL. The Board of Commissioners' approval of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final. On March 16, 2016 the applicant's attorney filed for an extension and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017. The applicant's attorney submitted a subsequent extension as the applicant (EXT-17-05) that was approved granting an extension to the effective time to April 2, 2018. The prior extension was submitted on March 30, 2018 prior to the expiration date (EXT-18-003) and was appealed. Copies of the extensions are on file with the Planning Department. The last extension was approved on November 20, 2018 (County File Nos. AP-18-002/EXT-18-003). This extended the approval date to April 2, 2019. Opponents appealed this decision to the Land Use Board of Appeals. The County staff received the LUBA decision on April 25, 2019. The decision made by LUBA was to affirm the county's prior decision. Issues that have been raised in prior appeals should be raised in this current appeal. Therefore, if this decision is appealed there will be no arguments accepted regarding the criteria that applicant shall comply with.

The current application for extension was received on March 28, 2019 via email followed by a hardcopy on March 29, 2019. The applicant has requested decisions on extensions be processed as a land use decisions. The County has decided in this situation that there may be discretion applied and; therefore, chooses to be conservative in their approach and provide a notice of decision and opportunity to appeal.

The application was found to be completed and met the submittal criteria on April 26, 2019 (within 30 days).

An extension of the County approval for the original is the sole subject of this application and arguments regarding changes to the original route or argument beyond the criteria found in Section 5.2.600 Expiration and Extension of Conditional Uses will not be accepted.

An extension shall be received prior the expiration date of the conditional use or the prior extension.

Coos County 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. The County was appealed on this text amendment. However, the County was affirmed on the text amendment on June 6, 2019. Staff has been reviewing the history and intent of the OAR 660-033-0140 due to the prior appeals just for clarification and has included the relevant background information for guidance to this decision and to help understand how OAR 660-033-0140 applies.

OAR 660-033-0140 was adopted to implement portions of requirements of ORS (in part) 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. Statutory actions, and laws created to implement statutes, can only be based upon the particular statues or rules creating them. In other words it cannot enforce or regulate other statutes or rules unless expressly stated.

> ***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 in the event that discretion has been applied even though it is not required. There is nothing in the OAR that prevents the county for taking a conservative approach and sending notice with the opportunity to appeal on the limited criteria for extensions. Staff is not legally changing the authority that LCDC had to adopt language that states under OAR 660-033-0140 is not a land use decision (effective 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 but it does incorporate certain dwellings addressed under OAR 660 Division 6[1]. OAR 660 Division 6 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 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. The Comprehensive Plan is silent on the issue which requires staff and the applicant to rely on the ordinance. 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 past have continued to raise an issue with changes to the location of the pipeline but this is not relevant to an extension. The appropriate criteria that would regulate any development beyond what is permitted is 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". Again, 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. 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

[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.

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 them through Statute or Rule. Opponents continue to ask to incorporate in federal regulations such as environmental impact studies as an example. The local jurisdiction does not have authority to make determination using federal laws unless that federal law has been incorporated into a Statewide Planning Goal. Planning Goals, Statutes and Rules that regulate land use are the basis for creating comprehensive plans. However, some language in Planning Goals, Statutes and Rules are not mandatory language 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 DLCD 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.

The background provided is not addressing the criteria or meant to be any type of findings to the criteria. The findings to the criteria are found in the next section. The background provides context and reasoning to why the application was submitted and how the relevant criteria were determined.

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.
        (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[2] for reasons for which the applicant was not responsible.

[2] 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.

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.

FINDINGS: A portion of the alignment authorized by in the prior approval crosses resource zoned property (Exclusive Farm Use, Forest and Forest Mixed Use). Coos County may grant an extension of up to 12 months if the applicant makes a written request for an extension of the development approval period. The approval period was clearly stated n the last approved extension as April 2, 2019 (County File Nos. AP-18-002/EXT-18-003). The applicant provided an electronic application followed by a hardcopy prior to the April 2, 2019 date (email March 28, 2019 and hardcopy received March 29, 2019). The application was reviewed for relevant completeness pursuant to Section 5.0.200 and found to meet the submittal requirements on April 26, 2019. Therefore, based on the dates of submittal found in the record the permit was valid and the applicant submitted the request prior to the expiration.

The applicant has provided the reasons that prevented the applicant from beginning or continuing development within the approval period. The applicant states that they were 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 required pre-authorization by 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 in the County or elsewhere along the pipeline route. As of the date the application was submitted FERC had not made a final decision.

The County has previously accepted this reasoning as a basis to grant a tem extension for the pipeline. The applicant has correctly identified several citations to prior extension cases in which the County accepted this as a reasonable cause for granting an extension. Therefore, staff concurs with the applicants statements.

(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.

(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.

FINDINGS: The applicant has requested a notice of decision be made as a land use decision in this matter. Nothing in the county's ordinance prohibits the county from processing this as a land use decision. Therefore, given the controversy over this applicant and the fact that discretion may be applied the county is treating this as a land use application in the same manner as a conditional use.

The county has the ability to authorize one-year extension where the applicable criteria have not changed. There have been no change in the Exclusive Farm Use, Forest or Forest Mixed Use criteria that have changed. Therefore, staff is able to grant additional one-year extensions. Given the CCZLDO allows for an unlimited number of extensions it is consistent to grant another extension.

Therefore, the applicant has complied with the criteria. The permit has been extended to April 2, 2020.

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.

FINDINGS: All portions of the pipeline, given this is a nonresidential use, that are located outside of the Exclusive Farm, Forest and Forest Mixed Use areas are subject to extensions under this section. There have been no areas reconfigured and rezoned in the pipeline route. The application applied for the extension on the official form and provided the fee. The prior extension determined the date to be April 2, 2020 as explained in prior section and the applicant has complied. Therefore, all portions of the pipeline outside of the Exclusive Farm Use, Forest Mixed Use or Forest Use zones are extended for four years, April 2, 2023. The applicant may choose to reapply within one year to be on the same time table as the portions located in the resource zones, April 2, 2020.

2. Changes or amendments to areas subject to natural hazards[3] 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.

FINDINGS: The applicant has acknowledged that they will comply with this section if it is found to be applicable.

V. CONCLUSION:

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

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.

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 **April 2, 2020**.

All conditions remain in effect unless otherwise amended.

Jill Rolfe Planning Director

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

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CAROL WILLIAMS AND JODY MCCAFFREE,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

PACIFIC CONNECTOR GAS PIPELINE, LP,
Intervenor-Respondent.

LUBA Nos. 2018-141/142

FINAL OPINION
AND ORDER

Appeal from Coos County.

Tonia L. Moro, Medford, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Seth J. King and Steven L. Pfeifer, Portland, filed the response brief and Seth J. King argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 04/25/2019

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a board of commissioners' decision granting one-year extensions of two conditional use permits to develop segments of a natural gas pipeline.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to waiver arguments raised in the response brief. There is no opposition to the motion and the reply brief is allowed.

BACKGROUND

This appeal involves extensions granted by the county of two previously-issued conditional use permits for a pipeline to serve the proposed Jordan Cove liquefied natural gas (LNG) export facility in the county. We set out the history of the two conditional use permit approvals and subsequent extensions below.

A. 2010 CUP

In 2010, intervenor-respondent (intervenor) applied for a conditional use permit to develop and operate a LNG pipeline in connection with the proposed Jordan Cove LNG terminal in Coos Bay (2010 CUP). The pipeline is proposed to be developed on both resource and non-resource land in the county. We discuss the significance of the difference in classification of land on which the pipeline is proposed to be developed as resource or non-resource later in this opinion.

The county approved the application, and the decision was appealed to LUBA. We remanded the county's decision in *Citizens Against LNG, Inc. v. Coos County*, 63 Or LUBA 162 (2011). Thereafter, the county again approved the application, and that decision became final. In 2013, intervenor applied to the county to modify the 2010 CUP to delete a condition that prohibited use of the pipeline "for the export of LNG." Record 49. The county granted that approval, the county's decision was appealed to LUBA, and we affirmed. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014), *aff'd*, 267 Or App 424, 341 P3d 252 (2014).

In March 2014, intervenor applied for an extension of the 2010 CUP for two additional years. The county approved that request, but limited its approval to a one-year extension. In March 2015, April 2016, and March 2017, intervenor sought and the county approved additional one-year extensions.

In March 2018, intervenor sought and received a fifth one-year extension to April 2, 2019. That decision is the subject of LUBA No. 2018-142.

B. 2013 CUP

In 2013, intervenor applied for and the county approved a conditional use permit for two alternative alignments of the proposed pipeline route, the Brunschmid and Stock Slough alignments (2013 CUP). The original approval was valid for two years.

In April 2016 and May 2017 the county approved additional one-year extensions of the 2013 CUP. In February 2018, intervenor applied for a third one-

year extension of the 2013 CUP, and the county approved the extension request. That decision is the subject of LUBA No. 2018-141.

C. Amendments to the Coos County Zoning and Land Development Ordinance

Since the county's original approvals of the 2010 CUP and the 2013 CUP, the county has amended various provisions of the Coos County Zoning and Land Development Ordinance (LDO). In 2015, the county amended LDO 5.0.175, adding a provision expressly authorizing transportation agencies, public utilities, and certain private entities with a private right of condemnation to apply for a permit without landowner consent. Also in 2015, the county amended LDO 5.2.600, which governs the expiration and extension of conditional use permits, to add two new subsections, subsections 2 and 3.

In 2017, the county adopted LDO Article 5.11, which includes special regulations for development and uses in hazard areas identified on the county's Natural Hazards Map, and LDO 4.11.125, which includes special development considerations for areas of concern, including hazard areas.

We discuss those LDO provisions later in this opinion.

FIRST ASSIGNMENT OF ERROR

LDO 5.2.600 governs extensions of previously issued conditional use permits. As relevant here, for resource-zoned lands, LDO 5.2.600.1(b)(iii) and (iv) allow the county to grant "one extension period of up to 12 months if;"

"(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."

LDO 5.2.600(1)(c) provides that "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." LDO implements OAR 660-033-0140, an administrative rule adopted by the Land Conservation and Development Commission (LCDC).

In several subassignments of error under the first assignment of error, petitioners argue that the board of commissioners "[i]mproperly construed the applicable law," and that the county's findings are inadequate to explain why the county determined that the extension requests satisfied LDO 5.2.600.1(b)(iii) and (iv). ORS 197.835(9)(a)(C) and (D).

A. LDO 5.2.600.1(b)(iii) – "States the Reasons"

The application stated that the "reason[]" that prevented intervenor from beginning development of the pipeline is "because the Pipeline has not yet obtained federal authorization to proceed." Record 1501. The board of commissioners found that the reason for the delay in beginning development is that a certificate issued by the Federal Energy Regulatory Commission (FERC) is required in order to begin development, and intervenor has applied for a certificate but it has not been issued. Record 28, 70.

In a portion of their first subassignment of error and in their second subassignment of error, petitioners argue that the county's decision that the application met the requirement to "state[] reasons" that prevented intervenor from beginning development is not supported by substantial evidence in the record, and improperly construes the provision. ORS 197.835(9)(a)(C) and (D). Petition for Review 17, 19-20. That is so, according to petitioners, because the pending FERC application proposes alignments for the pipeline that differ from the alignments approved in the 2010 CUP and the 2013 CUP. Petitioners also argue that there is not substantial evidence in the record that the reason for the extension is able to be "cured within the extension period." Petition for Review 20. We also understand petitioners to argue that the evidence in the record is that intervenor is not seeking a FERC certificate to build the pipeline in the exact location where it was approved by the county in the 2010 CUP and the 2013 CUP, and therefore the lack of FERC approval is not a valid "reason[]" that prevented intervenor from beginning development. Petitioners also argue that the board of commissioners improperly construed LDO 5.2.600.1(b)(iii) when it failed to interpret that provision to require an applicant for an extension to "demonstrate[e] a sufficient causal relationship between the * * * statement of reason and the delay." Petition for Review 17.

We reject petitioners' arguments. First, the board of commissioners found that the uncertainty of the final alignment does not undercut the reason stated for the delay under LDO 5.2.600.1(b)(iii). Record 33-34. In essence, we understand

the board of commissioners to have interpreted LDO 5.2.600.1(b)(iii) as not being a particularly demanding standard, and that it may be satisfied where the reason for the delay is that additional state or federal approvals have been applied for, but not yet secured. That interpretation of the requirement to "state the reasons" is not inconsistent with the express language of the provision, and we affirm it. ORS 197.829(1)(a).

In addition, we reject petitioners' argument that the board of county commissioners' decision that LDO 5.2.600.1(b)(iii) is met is not supported by substantial evidence in the whole record. The board of commissioners' decision is supported by evidence in the record that one of the alignments proposed in the pending application to FERC is nearly identical to the route approved by the county in the 2010 CUP.[1] Record 33, 75, 342.

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[1] The county's findings explain:

> "[Petitioners'] argument does not reflect a correct understanding [of] the permitting process. It is true that Coos County can only approve or deny whatever pipeline route that is requested by the applicant in a formal land use application. FERC is different, however. FERC has the regulatory authority under NEPA to approve routes that are different from the applicant's 'preferred' route. In this regard, it is important to understand a pipeline applicant does not select the actual approved route of the pipeline. Rather, the route is selected by FERC via the NEPA process. The fact that [intervenor] has sought – at great expense – approval for alternative alignments that deviate from the original alignment approved in 2010 is testament to the fact that [intervenor] is not in control of the route selection process. It also demonstrates that

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

B. LDO 5.2.600.1(b)(iv) – "Reasons for which the applicant was not responsible"

In the third subassignment of error, we understand petitioners to argue that there is not substantial evidence in the record to support the county's conclusion under LDO 5.2.600.1(b)(iv) that intervenor "was unable to begin or continue development during the approval period for reasons for which [intervenor] was not responsible." Petitioners repeat the argument made in their first subassignment of error that intervenor is responsible for its inability to begin development because intervenor has failed to apply for a FERC approval to build the pipeline in the exact alignments that the county approved in the 2010 CUP and the 2013 CUP. The evidence in the record is that in 2017 intervenor applied for a FERC certificate, and that application is pending. Record 317-320. While the new FERC application proposes largely the same alignment that was

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> FERC does not place much, if any, weight on the fact that County approved the original route in 2010. [Intervenor] cannot be faulted [for] wanting to keep the county permits alive while FERC determines the route that has the least environmental impact. In fact, it is quite possible that FERC could approve the original alignment, perhaps as modified by the County-approved alternatives, or something close thereto." Record 33, 75.

approved in the 2010 CUP and the 2013 CUP, approximately 6 or 7 miles of the pipeline differ from what was originally proposed and approved in 2010 and 2013. After rejecting petitioners' proposed interpretation of LDO 5.2.600.1(b)(iv), the board of commissioners adopted findings that:

> "In this case, the Board continues to find that 'it is sufficient to conclude that because [intervenor] has thus far been unsuccessful in obtaining permits from FERC despite its reasonable efforts, [intervenor] is therefore *not at fault* for failing to begin construction on the pipeline.'" Record 30 (emphasis in original.)

We understand the board of commissioners to have interpreted LDO 5.2.600.1(b)(iv) to mean that as long as intervenor has in fact applied for the FERC certificate, a difference in the alignment proposed in the application to FERC from what was approved in the 2010 CUP and the 2013 CUP does not alter that fact and intervenor is not "responsible" for the lack of an approved FERC certificate. That interpretation is not inconsistent with the express language of the provision, and we affirm it. ORS 197.829(1)(a). Under that interpretation, we also agree with intervenor that the FERC application in the record is substantial evidence that the criterion is satisfied.

C. Collateral Attack

The board of commissioners adopted alternative findings that the doctrine of "collateral attack" applies to decisions on an application for an extension of a permit, to preclude a party challenging an extension application from raising issues "actually decided in [the county's] previously issued extension decisions."

Record 27. According to the board of commissioners, the extension application is part of the "same case." Record 25-26. Petitioners challenge those findings and argue that the doctrine of collateral attack does not apply to a decision to extend a previously issued permit, and does not provide a basis for rejecting petitioners' challenges to the extensions.

Intervenor responds that the even if the county's alternative findings that petitioners were precluded under the collateral attack doctrine from raising issues "actually decided" in the previous extension decisions are legally incorrect, the county also adopted findings that LDO 5.2.600.1(b)(iii) and (iv) were met, and therefore, petitioners' arguments provide no basis for reversal or remand of the decision. We agree.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

LDO 5.2.600.1(c) provides that, for an extension on resource lands "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." In their second assignment of error, petitioners argue that provisions of the LDO adopted between 2015 and 2017 apply to the 2010 CUP and the 2013 CUP, and that therefore the applicable criteria for the decision have changed.

A. Hazard Review

As explained above, in 2017 the county adopted the special development considerations for hazard areas identified on the Natural Hazards Map.

Petitioners take the position that some areas where the pipeline was approved are located in areas identified on the Natural Hazards Map.

LDO 4.11.125.7 provides that "[h]azard review shall not be considered applicable to any application that has received approval and is [sic] requesting an extension to that approval[.]" The parties refer to this provision using the colloquial phrase "grandfather clause." The board of commissioners relied on the grandfather clause to conclude that "applicable criteria for the extension have not changed," LDO 5.2.600.1(c), because both the 2010 CUP and the 2013 CUP "ha[ve] received approval." Record 33.

Petitioners argue that the board of commissioners improperly construed LDO 5.2.600.1(c) and the grandfather clause when it concluded that the provision does not apply to the 2010 CUP and the 2013 CUP. In particular, petitioners argue that the 2010 CUP and 2013 CUP proposed, and the county approved, above ground block valve stations that qualify as structures, to which firebreak standards in LDO 4.11.125.7.f apply. Petition for Review 26.

Petitioners also argue that the grandfather clause is inconsistent with LCDC's administrative rule at OAR 660-033-0140(1)(c), which LDO 5.2.600.1(c) implements word for word. According to petitioners, OAR 660-033-0140(1)(c) "directly prevents 'grandfathering' of un-executed permitted uses beyond that first-year extension. Said another way, the rule imposes a three-year statute of repose on a resource permitted use." Petition for Review 30.

Intervenor responds that the time for petitioners' challenge to the grandfather clause as being inconsistent with OAR 660-033-140(1)(c), the administrative rule that implements Statewide Planning Goal 3 (Agricultural Lands), was when the provision was adopted in 2017. We agree. LDO 4.11.125.7 is acknowledged to comply with the statewide planning goals, including administrative rules that implement the goals. ORS 197.625(1); *Gould v. Deschutes County*, 67 Or LUBA 1, 5 (2013) (the time to challenge an ordinance as inconsistent with OAR 660-033-0140 was prior to acknowledgement).

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

B. LDO 5.11.100-.300

As noted above, in 2017, the county adopted amendments to the LDO to add LDO Article 5.11, Geologic Assessment Reports. LDO 5.11.300.1 provides in relevant part that "the review and approval of a conditional use in a Geologic Hazard Special Development Consideration area shall be based on the

conformance of the proposed development plans with the following standards. * * *." The remainder of LDO 5.11.300 contains the requirements for the contents of a geologic assessment, and additional standards for oceanfront development not relevant here. We understand petitioners to argue that LDO 5.11.300 is a new criterion that applies to the 2010 CUP and the 2013 CUP and accordingly, the extensions are prohibited pursuant to LDO 5.2.600.1(c).

Relying on context provided in LDO 4.11.125.7, the board of commissioners interpreted LDO 5.11.100 to .300 to apply only when a landowner proposes to build a "structure" in a Geologic Hazard Special Development Consideration area, and concluded that the 2010 CUP and 2013 CUP do not authorize a structure.[2] Petitioners argue that the board of county commissioners improperly construed LDO 5.11.300 to only apply when a landowner proposes to build a structure.

Intervenor responds that, based on context provided in LDO 4.11.125.7.b., d., and e., the board of commissioners properly construed LDO 5.11.300 as

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[2] The board of commissioners found:

> "[Petitioners' counsel] cites to new requirements for geologic assessments, including new reporting requirements. See LDO 4.11.125(7), LDO 5.11.100, 5.11.200. and LDO 5.11.300(1). The requirement to perform these geologic reviews applies when a landowner proposes to build a 'structure,' and the Board has previously determined that the Applicant is not proposing to build a structure in these areas. * * *" Record 36, 78.

applying only when a landowner proposes to build a "structure" in a Geologic Hazard Special Development Consideration area. Those provisions state generally that the county may allow construction of "new structures" in known areas potentially subject to landslides, earthquakes, and erosion, "subject to a geologic assessment review as set out in Article 5.11." LDO 4.11.125.7.b., d., and e. Absent any developed argument by petitioners as to why we are not required to affirm the board of county commissioners' interpretation under ORS 197.829(1)(a), we agree with intervenor that the board of county commissioners' interpretation is not inconsistent with the express language of LDO 5.11.300 or LDO 4.11.125.7.

C. LDO 5.0.175

LDO 5.0.175 took effect in 2015. LDO 5.0.175(1) provides that for an application for a permit "[a] transportation agency, utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 may submit an application to the Planning Department for a permit or zoning authorization required for a project without landowner consent otherwise required by this ordinance." Differently, LDO 5.0.150(1) provides that an application for a permit "shall include the signature of all owners of the property." Petitioners argue that LDO 5.0.175 is a new "approval criteri[on]" within the meaning of LDO 5.2.600.1(c), and that it applies to the 2010 CUP and the 2013 CUP.

The board of commissioners adopted findings that LDO 5.0.175 is not an "approval criteri[on]" but rather is an application submittal requirement. The

board of commissioners also adopted alternative findings that even if LDO 5.0.175 is an "approval criterion," it is not "applicable" to the 2010 CUP and the 2013 CUP, because it is an optional provision that allows certain entities to choose to apply for a permit without landowner consent. Petitioners argue that in its decision approving the 2010 CUP, the county concluded that LDO 5.0.150 is an "approval criterion," and accordingly, the county must also conclude that LDO 5.0.175 is an approval criterion, and not merely a submittal requirement.

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

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, the pipeline routes authorized in the 2010 CUP and the 2013 CUP are located on both resource and non-resource land. LDO 5.2.600.2 (subsection 2) governs extensions on non-resource lands and provides:

> "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."

As noted above, subsection 3 was added to LDO 5.2.600 in 2015. Relying on LDO 5.2.600.3.e, the board of county commissioners approved the extensions of the 2010 CUP and the 2013 CUP for the portions of the pipeline located on non-

resource land. The board of commissioners interpreted subsection 3 as modifying subsection 2 to allow for additional extensions:

> "If [LDO] 5.2.600(3)(e) does not modify [LDO] 5.2.600(2)(b) then subsection (3)(b) is rendered 'superfluous' and is not given effect. ORS 174.010 provides that 'where there are several provisions or particulars such construction is, of possible, to be adopted as will give effect to all.' * * *
>
> "Subsection (3)(e)'s provision that 'additional extensions may be applied' is rendered meaningless if it does not modify subsection (2) and allow for additional extensions of conditional uses on non-resource zoned property. The word 'additional' is defined by the Oxford English Dictionary as 'added, extra or supplementary to what is already present or available.' In order to give the work additional effect in subsection (3)(e) it must be read to provide for the 'added' or 'supplementary' extensions to those extensions already provided for in LDO 5.2.600 as a whole. The only subsection that could logically be modified by subsection (3)(e) is thus subsection (2), which standing along only provides for one extension.
>
> "If the intent of subsection (3)(e) was merely to serve as a reminder that the extensions under subsections (1) and (2) may serve to modify the initial conditional use time periods specified in subsection (2), this intent could have been accomplished by providing that 'extensions may be applied' with the word 'additional' omitted altogether. Once again, the word 'additional' makes clear that subsection (3)(e) is intended to add to the limited extensions in subsection (2). While this is not an example of the most artful drafting, any other interpretation renders subsection (3)(e) meaningless." Record 41-42.

Under the deferential standard of review set out at ORS 197.829(1), LUBA is required to affirm the board of county commissioners' interpretation of the LDO unless the interpretation is "(a) Is inconsistent with the express language of

the comprehensive plan or land use regulation;" or "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements." *Siporen v. City of Medford*, 349 Or 247, 252, 243 P3d 776 (2010) (LUBA must affirm a city council's code interpretation under ORS 197.829(1) unless the interpretation is "implausible"). Petitioners argue that LUBA is not required to affirm the board of county commissioners' interpretation of subsection 3 because the interpretation is inconsistent with the express language of subsection 2, and that there is no way to give effect to both provisions.

Intervenor responds, and we agree, that the board of commissioners' interpretation of subsection 2 and subsection 3 is not inconsistent with the express language of either provision. The board of commissioners' interpretation that subsection 3 modifies subsection 2 to allow for "additional" extensions beyond the single extension allowed by subsection 2 is supported by the plain meaning of the word "additional" as providing for supplemental extensions beyond the one allowed in subsection 2. Petitioners do not offer any other interpretation that harmonizes subsection 2 and subsection 3; rather, petitioners focus solely on subsection 2.

Petitioners also argue that LUBA is not required to affirm the board of county commissioners' interpretation because it is contrary to ORS 197.010(2), Statewide Planning Goal 1 (Citizen Involvement) and Statewide Planning Goal

1 2 (Land Use Planning).[3] Petition for Review 33; ORS 197.829(1)(d). We also
2 conclude that the board of commissioners' interpretation is not contrary to ORS

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[3] ORS 197.010(2) provides:

"(a) The overarching principles guiding the land use program in the State of Oregon are to:

"(A) Provide a healthy environment;

"(B) Sustain a prosperous economy;

"(C) Ensure a desirable quality of life; and

"(D) Equitably allocate the benefits and burdens of land use planning.

"(b) Additionally, the land use program should, but is not required to, help communities achieve sustainable development patterns and manage the effects of climate change.

"(c) The overarching principles in paragraph (a) of this subsection and the purposes in paragraph (b) of this subsection provide guidance to:

"(A) The Legislative Assembly when enacting a law regulating land use.

"(B) A public body, as defined in ORS 174.109, when the public body:

"(i) Adopts or interprets goals, comprehensive plans and land use regulations implementing the plans, or administrative rules implementing a provision of ORS chapter 195, 196, 197, 215 or 227; or

"(ii) Interprets a law governing land use.

197.010(2)(a), Goal 1, or Goal 2. First, ORS 197.010(2)(d) provides that the overarching principles set out in ORS 197.010(2)(a)(A)-(D) are not a legal requirement for a public body and are "not judicially enforceable." Second, petitioners do not develop any argument explaining why the board of commissioners' interpretation is contrary to the overarching principles guiding the land use program set out in ORS 197.010(2)(a), or otherwise explain how those overarching principles should be applied in interpreting LDO 5.2.600.2 and .3. For example, it is reasonably clear that application of the overarching principles would call for some type of balancing, and petitioners do not explain how the board of commissioners' interpretation is contrary to any balancing that the overarching principles require. Finally, petitioners do not develop any argument explaining why the board of commissioners' interpretation is contrary to Goal 1 and Goal 2. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The third assignment of error is denied.

The county's decision is affirmed.

"(d) Use of the overarching principles in paragraph (a) of this subsection and the purposes in paragraph (b) of this subsection is not a legal requirement for the Legislative Assembly or other public body and is not judicially enforceable.

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

IN THE MATTER OF APPROVING AN EXTENSION REQUEST APPLIED FOR BY PACIFIC CONNECTOR GAS PIPELINE, LP AND APPEALED BY CITIZENS AGAINST LNG	FINAL DECISION AND ORDER NO. 18-11-073PL

NOW BEFORE THE Board of Commissioners sitting for the transaction of County business on the 20th day of November, 2018, is the matter of the appeal of the Planning Director's May 21, 2018, decision granting Pacific Connector Gas Pipeline, LP's (hereinafter the "Applicant") application for approval of an extension to a conditional use approval for the construction and operation of a natural gas pipeline to provide gas to Jordan Cover Energy Project's liquefied natural gas (LNG) terminal and upland facilities.

The Board of Commissioners invoked its authority under the Coos County Zoning and Land Development Ordinance (CZLDO) §5.0.600.4 to pre-empt the appeal process and appoint a Hearings Officer to conduct the initial public hearing for the application and then make a recommendation to the Board of Commissioners. The Board of Commissioners appointed Andrew H. Stamp to serve as the Hearings Officer.

Hearings Officer Stamp conducted a public hearing on this matter on July 13, 2018. 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 on August 3, 2018.

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners on September 21, 2018. Staff presented some revisions to the Findings of Fact; Conclusions of Law and Final Decision for the Board of Commissioners to consider.

The Board of Commissioners held a public meeting to deliberate on the matter on October 24, 2018. All members present and participating unanimously voted to tentatively accept the decision of the Hearings Officer, and continued the final decision on the matter to allow staff to draft the appropriate order and findings. The meeting was continued to November 20, 2018, for final approval.

On October 24, 2018, the meeting on deliberation was reopened to provide an additional opportunity to the Board of Commissioners to declare any potential ex-parte contacts or conflicts of interest. Commissioner John Sweet revealed potential ex-parte communications and those present were allowed to challenge and rebut the substance of Commissioner Sweet's disclosure.

NOW, THEREFORE, the Board of Commissioners, having reviewed the Hearings Officer's Analysis, Conclusions and Recommendation, the arguments of the parties, and the records and files herein,

IT IS HEREBY ORDERED that the Planning Director's May 21, 2018, decision granting Pacific Connector Gas Pipeline, LP's (hereinafter the "Applicant") application for approval of an extension to the conditional use approval for the construction and operation of a natural gas pipeline is affirmed, and the Board further adopts the Findings of Fact; Conclusions of Law, and Final Decision attached hereto as "Attachment A" and incorporated by reference herein.

ADOPTED this 20th day of November 2018.

BOARD OF COMMISSIONERS:

Robert "Bob" Main
COMMISSIONER

Bobbi Brooks
RECORDING SECRETARY

COMMISSIONER

APPROVED AS TO FORM:

absent
COMMISSIONER

Nathaniel Johnson
Office of Legal Counsel

FINAL DECISION AND ORDER NO. 18-11-073PL
ATTACHMENT A

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

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(APPEAL OF ADDITIONAL EXTENSION REQUEST
FOR COUNTY FILE NO. HBCU 10-01 / REM 11-01)
COOS COUNTY, OREGON

FILE NO. AP-18-002
(APPEALS OF COUNTY FILE NOS. EXT-18-03)

NOVEMBER 20, 2018

I. INTRODUCTION

A. NATURE OF THE LOCAL APPEAL

The appellant challenges the Planning Director's decisions to allow the applicant Pacific Connector Gas Pipeline, LP (hereinafter the "Applicant" or "Pacific Connector") an additional one-year extension on its development approval for HBCU 10-01, Final Order 10-08-045PL, as amended on remand from LUBA, County File No. REM 11-01, Final Order 12-03-18 PL. The staff decision for the file, which was assigned file No. EXT-18-003 is dated May 21, 2018. Staff assigned County File No. AP 18-002 to the appeal.

Previous one-year extensions are documented as follows:

- File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).
- File No. ACU 15-07/ AP-15-01, Final Ord. No. 15-08-039PL (Oct. 6, 2015).
- File No. ACU-16-013 (no appeal filed after staff decision)
- File No. EXT-17-005/ AP-17-004, Final Ord. No. 17-11-046PL (Dec. 19, 2017).

B. CASE HISTORY

In 2010, Pacific Connector submitted a land use application seeking development approval to construct and operate a natural gas pipeline to provide gas to Jordan Cove Energy Project's liquefied natural gas ("LNG") terminal and upland facilities. As established in Pacific Connector's original land use application and subsequent proceedings, the pipeline is within the exclusive siting and authorizing jurisdiction of the Federal Energy Regulatory Commission ("FERC"), requiring a FERC-issued Certificate of Public Convenience and Necessity ("Certificate") prior to construction. Under the federal Coastal Zone Management Act, however, a land use consistency determination is also required within the state's Coastal Zone Management Area ("CZMA"), precipitating Pacific Connector's application for local land use approvals, including the 2010 application to Coos County.

On September 8, 2010, the County Board of Commissioners ("Board") adopted and signed Final Order No. 10-08-045PL, approving Applicant's request for a CUP authorizing development of the Pipeline and associated facilities, subject to certain conditions. The decision was subsequently appealed to, and remanded by the Oregon Land Use Board of Appeals ("LUBA"). On March 13, 2012, the Board addressed and resolved two grounds from remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL. The March 13, 2012 decision became final when the 21-day appeal window expired and no appeals were filed on April 2, 2012. The 2010 and 2012 approvals are referred to collectively as the CUP. The CUP authorizes construction and operation of a natural gas pipeline and associated facilities on approximately 49.72 linear miles within Coos County, extending from Jordan Cove Energy Project's LNG Terminal to the alignment section in adjacent Douglas County.

Over the past several years, Pacific Connector has been pursuing the necessary approvals for the Pipeline. Pacific Connector received a FERC Certificate on December 17, 2009. *Pacific*

Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP, 129 FERC ¶ 61, 234 (2009). However, due to changes in the natural gas market and Jordan Cove's reconfiguration of its facility from an LNG import facility to an LNG export facility, FERC issued an order on April 16, 2012 vacating Pacific Connector's Certificate despite objections of Pacific Connector. *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 139 FERC ¶ 61,040 (2012).

Due to FERC's decision to revoke Pacific Connector's FERC Certificate, it was necessary for Pacific Connector to seek new FERC approval for the Pipeline as reconfigured to serve Jordan Cove's proposed LNG export facility. In June 2012, Pacific Connector initiated the mandatory FERC "pre-filing" process to seek a new FERC Certificate. FERC Docket No. PF12-17-000. Following a public scoping process initiated by FERC that lasted until October 29, 2012, Pacific Connector filed a new application with FERC on June 6, 2013. FERC Docket No. CP-13-492-00.

Pacific Connector's CUP originally contained a condition which prohibited the use of the CUP "for the export of liquefied natural gas" (Condition 25). After the initial FERC authorization for the Pipeline was vacated due to the reconfiguration of the Jordan Cove facility, Pacific Connector applied to Coos County on May 30, 2013 for an amendment to the CUP requesting deletion or modification of Condition 25 as necessary for the use of the Pipeline to serve the Jordan Cove LNG export facility. After a revised application narrative was submitted, the application was deemed complete on August 23, 2013, and the County provided a public hearing before the Hearings Officer. On February 4, 2014, the County Board of Commissioners adopted the Hearings Officer's decision and approved Pacific Connector's requested modification of Condition 25. Final Order No. 14-01-006PL, HBCU-13-02 (Feb. 4, 2014).

Project opponents appealed the County's Condition 25 Decision to LUBA, which upheld the County decision on July 15, 2014. *McCaffree et al. v. Coos County et al.*, 70 Or LUBA 15 (2014). After further appeal of the LUBA decision, the Oregon Court of Appeals affirmed LUBA's decision without opinion in December 2014.

On August 13, 2013, Pacific Connector submitted an application requesting approval of two alternative segments of pipeline route, known as the "Brunschmid" and "Stock Slough" Alternative Alignments. The Hearings Officer recommended approval of these two route amendments and the Board accepted those recommendations on February 4, 2014. Final Decision and Order HBCU-13-04; Order No. 14-01-007PL.

On November 7, 2014, FERC issued a Draft Environmental Impact Statement (DEIS) for the pipeline, with public comment held open until mid-February 2015. FERC's revised schedule for the project indicated that completion of the Final EIS was scheduled for June 12, 2015, with a FERC decision on Pacific Connector's application expected by September 10, 2015. *Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483- 000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015).

Meanwhile, in light of the withdrawal of its FERC Certificate and the consequent

impossibility of obtaining all federal approvals necessary to initiate construction within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original CUP approval (i.e. HBCU-10-01- County Ordinance No. 10-08-045PL (Pacific Connector Pipeline Approval, County File No. HBCU-10-01, on remand Final Decision and Order No. 12-03-018PL) for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to extension provisions (then codified at CCZLDO § 5.0.700). The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

On local appeal, the Board of Commissioners appointed the Hearings Officer to conduct the initial public hearing for the appeal and make a recommendation to the Board. After a public hearing, an extended open record period for written evidence and testimony, and final written argument from the applicant, The Hearings Officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. In light of limitations contained in OAR 660-033-0140 applicable to extensions in farm- and forest-zoned lands, the Hearings Officer recommended approving the extension request for only one year, extending the CUP approval from April 2, 2014 to April 2, 2015. The Board of Commissioners held a public meeting on September 30, 2014 and voted to accept the Hearings Officer's recommended approval as it was presented. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for the original alignment for one year, until April 2, 2015.

On November 12, 2014, Jody McCaffree and John Clarke (Petitioners) filed a Notice of Intent to Appeal the Board's decision to LUBA. On January 28, 2014, the deadline for Petitioners to file their Petition for Review, Petitioners instead voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed Petitioners' appeal. *McCaffree v. Coos County*, (LUBA No. 2014-102 (Feb. 3, 2015). Accordingly, the Board's decision to extend Pacific Connector's conditional use approval until April 2, 2015 was final and not subject to further appeal.

On January 20, 2015, the Coos County Board of Commissions enacted Final Decision and Ordinance 14-09-012PL. This Ordinance amended Section 5.2.600 of the Zoning Code in a number of substantive ways. Most significantly, it allowed an applicant for a CUP located out of Resource zones to apply for - and obtain - additional extensions to a CUP. It also changed the substantive criteria for extensions.

On March 16, 2015, Pacific Connector filed a request for a second extension of the land use approvals for the original Pipeline alignment. File No. ACU-15-07. Staff reviewed the matter, deemed the application complete on April 8, 2015, and the Planning Director rendered a decision approving the extension request on April 14, 2015. The approval was appealed on April 30, 2015. File No. AP-15-01. After a hearing, the Hearings Officer issued a written opinion and recommendation to the Board of Commissioners that they affirm the Planning Director's decision granting the one-year extension to April 2, 2016. On October 6, 2015, the Board adopted the Hearings Officer's recommended decision and approved the requested extension. Final Decision No. 15-08-039PL. The Board of Commissioners' approval of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final.

On March 11, 2016, FERC issued an Order denying Pacific Connector's application for a certificate of public convenience and necessity. Nonetheless, on March 16, 2016, the applicant's attorney filed for a third extension and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017. The FERC Order issued on March 11, 2016 was made "without prejudice," meaning Pacific Connector could file again if it wishes to do so. *See* FERC Order dated March 11, 2016 at 21. On April 8, 2016, Pacific Connector filed a request for a rehearing to FERC. FERC issued a denial of that request on December 9, 2016.

On April 11, 2016, Staff approved a one-year extension request for the Brunschmid and Stock Slough alignments, (HBCU-13-04 /ACU-16-003). No local appeal was filed.

Pacific Connector filed a Request for Pre-Filing Approval with FERC on January 23, 2017. FERC approved that request on February 10, 2017. *Id.*

On February 13, 2017, the applicant submitted a second extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on May 21, 2017. (HBCU-13-04 / ACU-16-003). The opponents did not file an appeal of the Planning Director's decision. The second extension kept the CUP active until February 25, 2018.

On March 30, 2017, the Applicant submitted the fourth extension request for the original pipeline alignment (County File No. EXT-17-005). A notice of decision approving the extension was mailed on May 18, 2017. Opponents filed a timely appeal on June 2, 2017. The Hearings Officer recommended approval of the extension, which was approved by the Board on December 19, 2017 (Final Decision and Order No. 17-11046PL). This fourth extension kept the CUP active until April 2, 2018. No one appealed this fourth extension.

On September 21, 2017, Pacific Connector submitted an application to FERC requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act (NGA) to construct, operate, and maintain certain natural gas pipeline facilities. *See* Letter from FERC to Pacific Connector, dated October 5, 2017. Exhibit 7 to Application.

On February 21, 2018, the Applicant submitted a third extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on May 18, 2018. (HBCU-13-04 / EXT-18-001). The opponents filed a timely appeal of the Planning Director's decision, which the Board referred to the Hearings Officer for consideration. The Hearings Officer held a duly noticed public hearing on July 13, 2018, wherein the Applicant and the opponents presented arguments and evidence to the Hearings Officer. The Hearings Officer allowed an open record period for both sides to present additional arguments in writing.

On or about March 20, 2018, the Applicant filed the current (fifth) extension request of the original pipeline alignment ("Application"). Staff assigned the number EXT 18-003 to this application, which was timely filed and was submitted with all of the required documents to allow the application to be deemed complete. The Planning Director approved this latest extension request on May 21, 2018, and followed that up with a corrected notice on May 24, 2018. Opponents filed a timely appeal. The Hearings Officer held a duly noticed public hearing

on July 13, 2018, wherein the Applicant and the opponents presented arguments and evidence to the Hearings Officer. The Hearings Officer allowed an open record period for both sides to present additional arguments in writing.

These two cases have not been consolidated. County staff has kept the records separate. The Hearings Officer did allow the audio tapes from AP-18-001 to be added to the record of AP-18-002 and to consider arguments raised in the first proceeding to have also been raised in the second proceeding. Likewise, any person who testified orally in AP-18-001 will be considered to have standing via appearance in AP-18-002.

This decision is the result of that local appeal and the evidence and arguments presented by the parties at the public hearing and during the subsequent open record period.

II. LEGAL ANALYSIS.

A. Procedural Issues.

1. Open Record; Standing.

At the hearing held on July 13, 2018, the Hearings Officer set a schedule for post-hearing submittals. Staff issued a memorandum on July 17, 2018 that further memorialized the schedule in writing. The Hearings Officer left the record open until July 20, 2018 for rebuttal evidence and argument responding to issues raised at the July 13, 2018 hearing. Surrebuttal evidence was due on July 27, 2018, in addition to any final argument submitted by opponents. Consistent with state law, the Applicant was given an additional seven days, until August 3, 2018 to submit final arguments.

Some concern was raised pertaining the standing of the opponents to appeal this extension decision. The Board finds that all parties that have appeared have standing.

2. Allegations of Bias.

At the Board deliberations in this matter on October 24, 2018, Natalie Ranker, JC Williams, and Jody McCaffree contended that Commissioner Sweet was biased and should not participate in the deliberations or decision for the Application. The Board finds that most of these allegations were previously raised and rejected by the Board in a land use proceeding involving a related land use development proposed by Jordan Cove Energy Project L.P. ("JCEP") (County File Nos. HBCU-15-05 / CD-15-152 / FP-15-09, August 30, 2016). Opponents then raised these issues on appeal to the Land Use Board of Appeals ("LUBA"):

> "McCaffree alleges that Chair Sweet was biased in favor of the proposed LNG terminal. According to McCaffree, on April 22, 2016, Chair Sweet sent a letter, on county letterhead, to FERC expressing support for the Jordan Cove LNG terminal and Pacific Connector Pipeline Project applications then pending before FERC. Supplemental Record 527. In addition, McCaffree quotes Chair Sweet as making public statements in support of the Jordan Cove project. *Id.* at 529-30.

> McCaffree contends that the letter and statements demonstrate that Chair Sweet was incapable of deciding the land use application pending before the county with the requisite impartiality."

Oregon Shores Conservation Coalition v. Coos County, __ Or LUBA __ (LUBA No. 2016-095, November 27, 2017) (slip op. at 35). After discussing the high bar for disqualifying bias in local land use proceedings, LUBA denied McCaffree's assignment of error and concluded that then-Chair Sweet was not actually biased:

> "We disagree with McCaffree that Chair Sweet's April 11, 2016 letter, or his public statements, demonstrate that Chair Sweet was incapable of determining the merits of the land use application based on the evidence and arguments presented.
>
> * * * *
>
> "As far as McCaffree has established, Chair Sweet's statements of support of the LNG terminal represent no more than the general appreciation of the benefits of local economic development that is common among local government officials. Those statements fall far short of demonstrating that Chair Sweet was not able to make a decision on the land use application based on the evidence and arguments of the parties."

Oregon Shores Conservation Coalition, __ Or LUBA at __ (LUBA No. 2016-095, November 27, 2017) (slip op. at 36-37). The Court of Appeals affirmed LUBA's decision on this issue. *Oregon Shores Conservation Coalition v. Coos County*, 291 Or App 251, 416 P3d 1110 (2018). The Supreme Court denied review on this issue. *Oregon Shores Conservation Coalition v. Coos County*, 363 Or 481, 291 Or App 251 (2018). The Board finds that none of the challengers explain why a different outcome is warranted in the present case.

The Board denies the current contentions as follows:

Agreement between Applicant and County: The Board denies the contention that the Board members were biased due to a 2007 agreement between the Applicant and the County pursuant to which the Applicant pays the County $25,000 a month. The challengers did not adequately explain the terms of the agreement, how they were related to the specific matter pending before the Board, or how the existence of the agreement would cause any of the Board members to prejudge the Application. As a result, the Board finds that the facts alleged by Ms. McCaffree are not sufficient to establish disqualifying actual bias by any Board members.

Reports of JCEP Funding for County Sheriff's Office: For three reasons, the Board denies the contention that the Board members were biased due to funding by JCEP for the County Sheriff's Office. First, JCEP is not the applicant in this case, so even if there were bias in favor of JCEP, it would not necessarily be bias in favor of Applicant. Second, challengers have not adequately explained how the existence of this funding would cause any Board members to prejudge the Application (which is not related to funding of the Sheriff's Office), and they have not identified

any "statements, pledges or commitments" from any Board members that the existence of the funding has caused them to prejudge the Application. Third, the Sheriff's Office funding is not contingent upon approval of the Application. Therefore, the challengers have not demonstrated that any Board member demonstrated "actual bias" due to this funding.

Letter from Commissioner Sweet to FERC: The Board denies Ms. McCaffree's contention that Commissioner Sweet was biased due to a letter he wrote to FERC in support of the project in April 2016. Ms. McCaffree did not adequately explain the content of the letter, or how it related to the specific matter pending before the Board. Additionally, the Board finds that, even if the facts alleged by Ms. McCaffree are correct and Commissioner Sweet did express general support for the project in the letter to FERC, the requests pending before FERC are not of the same nature as the applications at issue in this proceeding. In other words, the letter does not demonstrate that Commissioner Sweet has prejudged the specific applications pending before the County or that he is unable to objectively apply the County's approval criteria to the Application. Finally, the Board notes that LUBA, the Court of Appeals, and the Supreme Court all previously concluded that the statements in question simply reflected a generalized support for economic development in the community. As a result, the Board finds that the facts alleged by Ms. McCaffree are not sufficient to establish disqualifying actual bias by Commissioner Sweet.

Statements Made by Commissioners in 2014 and 2015: The Board denies the contention that Commissioners Sweet and Cribbins were biased due to statements they made to the media about the project in 2014 and 2015. The facts alleged by the challengers are not supported by substantial evidence because they did not provide enough details about the statements such as their substance, their timing, or their context, or how they demonstrate prejudgment by the Board members. Further, the Board finds that all of these statements appear to predate the filing of the Application and thus they could not relate to the specific matter pending before the Board. Finally, the Board notes that LUBA, the Court of Appeals, and the Supreme Court all previously concluded that the statements in question simply reflected a generalized support for economic development in the community. The Board finds that the facts alleged by the challengers are not sufficient to establish disqualifying actual bias by any Board members.

Private Meetings Between Applicant and Board Members: The Board denies Ms. McCaffree's contention that Board members were biased due to their attendance at private meetings with the Applicant. The facts alleged by Ms. McCaffree are not supported by substantial evidence because she did not provide any details about the meetings such as when and where they occurred, what was discussed, how they related to the matter pending before the Board, or how they would cause the Board members to prejudge the Application. As a result, the Board finds that Ms. McCaffree has not alleged facts sufficient to establish disqualifying actual bias arising from the alleged meetings.

Trip to Colorado: The Board denies the contention that Commissioner Sweet's trip to Colorado in September 2018 caused him to be actually biased in the matter. The record reflects that, on the trip, Commissioner Sweet learned more about the natural gas market and met with elected officials. Challengers did not present any evidence that tied the trip to the Applicant or the specific matter pending before the Board. Challengers also did not identify with specificity why the existence of the trip caused Commissioner Sweet to be biased.

Campaign Contribution by JCEP to Commissioner Sweet: The Board denies the contention that a cash contribution by JCEP to Commissioner Sweet's campaign caused him to be biased. Commissioner Sweet acknowledged the campaign contribution on the record. The challengers did not explain why this disclosure was inadequate or what bearing the existence of the contribution has on the ability of Commissioner Sweet to render an unbiased decision. Under similar circumstances, LUBA rejected a bias claim. *Crook v. Curry County*, 38 Or LUBA 677, 690 n 17 (2000) (mere existence of campaign contribution by a party to a decision-maker does not cause the decision-maker to be biased).

Finally, before taking final action to approve these findings, Chair Sweet stated that he had not prejudged the Application and that he could evaluate the testimony and evidence in the record and make a decision based upon whether the testimony and evidence demonstrates compliance with applicable criteria. Commissioner Cribbins also stated that her comments to the media expressing general support for job creation would not cause her to be biased.

For these reasons, the Board denies the bias challenges alleged in this case.

B. General Statement Summarizing Overall Policy Concern of the Opponents.

Before delving deep into the substance of the approval criteria, the Board would like to document the overarching policy point asserted by the opponents to the Application. First, the opponents state that the delays the applicant has experienced in obtaining the FERC permits is causing severe hardship for property owners who own land in the potential paths of the pipeline. In particular, they argue that the potential for the pipeline to be built inhibits the ability of landowners whose property is in the proposed route to sell their property.

In the case of the original route, the opponents note that it has been eight years since the County granted the original land use approval for the PCGP pipeline. The opponents have therefore asked the County to balance the rights of the landowners against the rights of the pipeline company.

The Board is sympathetic to these concerns. The Board is also sympathetic to the fact that the Applicant faces a very byzantine and inefficient regulatory process for approval of gas pipelines that is going to take time. For purposes of this decision, the Board finds these issues are not relevant to the approval criteria, and has therefore not allowed these policy or political considerations to detract from the mission of applying the facts to criteria as written in the code.

Moreover, the reality is, as the Board correctly noted back in 2010, that the "cloud" affecting these properties will exist so long as the FERC process is active, regardless of the County land use permitting process, which the Board noted was a "sideshow" to the FERC process. *See* Findings of Fact, Conclusions of Law, and Final Decision of the Board of Commissioners dated Sept. 8, 2010, at p. 22. FERC specifically allowed Pacific Connector to reapply for a new certificate, and Pacific Connector has done so. That process will likely take a

few years to work through the federal bureaucracy. In the meantime, nothing the County does in these land use proceedings will cause that "cloud" to disappear.

C. Criteria Governing Extensions of Permits.

Once a development approval has been granted, as happened in this case, an extension may or may not be allowed, based on the criteria found in CCZLDO §5.2.600. Under the terms of CCZLDO §5.2.600, the Planning Director may approve extension requests as an Administrative Action under the local code. Extension decisions are subject to notice as described in CCZLDO §5.0.900(2) and appeal requirements of CCZLDO §5.8 for a Planning Director's decision. The criteria set forth in CCZLDO §5.2.600 are reproduced below.

> ***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.*[1]

CCZLDO §5.2.600; *see also* OAR 660-033-0140(2). These criteria are addressed individually below.

Note: Applicant's permit authorizes the pipeline to be developed on both resource-zoned and non-resource-zoned land, which would mean that a portion of the pipeline is subject to a two-year extension period while a portion of the pipeline is subject to a one-year extension period. For the sake of administrative convenience, the Applicant takes the conservative approach and requests a one-year extension of the entire permit.

D. Pacific Connector's Compliance with the Applicable Standards for a CUP Extension

[1] The section was modified to add subsection (3)(e) by Coos County Ordinance 14-09-012PL on January 20, 2015.

Request on Farm and Forest Lands

1. The Application Meets the Applicable Criteria Set Forth at § 5.2.600(1)(a).

CCZLDO §5.2.600(1)(a) provides as follows:

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.

The Board finds that Pacific Connector's application and attachments demonstrate compliance with the code requirements at CCZLDO §5.2.600(1)(a) for granting extension requests for land use approvals on farm and forest lands.

This criterion is met because a timely extension request was filed and the approval criteria have not changed. (See discussion below).

2. The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600(1)(b).

a. Pacific Connector has made a written request for an extension of the development approval period.

CCZLDO §5.2.600(1)(b)(i) provides as follows:

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;

The Applicant submitted written narratives and applications, which specifically request an extension, on March 20, 2018 (EXT-18-003), which is within the development approval period. CCZLDO § 5.2.600(1)(b)(i).

This criterion is met.

b. Pacific Connector's request was submitted to the County prior to the expiration of the approval period.

CCZLDO § 5.2.600(1)(b)(ii) provides as follows:

> *b. Coos County may grant one extension period of up to 12 months if:*
>
> *ii. The request is submitted to the county prior to the expiration of the approval period;*

As noted above, the CUP for the main alignment was operating on the fourth one-year extension request and was set to expire on April 3, 2018 (EXT-18-003). The extension application was filed on March 20, 2018 and thus was timely submitted prior to the expiration of the previously extended CUP. CCZLDO §5.2.600(1)(b)(ii).

This criterion is met.

c. **Pacific Connector was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.**

CCZLDO §5.2.600(1)(b)(iii) and (iv) provides as follows:

> *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.*

To approve this extension application, the Board must find that Pacific Connector has stated reasons that prevented Pacific Connector from beginning or continuing development within the current approval period (*i.e.* since the last extension was applied for and granted), and Pacific Connector is not responsible for the failure to commence development. CCZLDO §5.2.600 (1)(b)(iii) & (iv).

This is the fifth extension request, and this is the fourth time the extension criteria have been addressed by the County. For this reason, the Hearings Officer asked the parties present at the July 13, 2018 hearing to brief the issue of whether the opponents' arguments are barred by the doctrine of issue preclusion, law of the case, collateral attack, or some other similar jurisprudential doctrine. The concern was that some of the arguments seemed to the same as arguments which were resolved in the decision in AP-17-004 as well as other prior extension decisions.

As a preliminary matter, it is important to think about what authority LUBA has for using jurisprudential rule that seek to promote judicial efficiency, such as collateral attack, law of the case, and issue preclusion. Unlike a court, LUBA is a creature of statute, and its authority begins and ends with the statutes that created it. For example, LUBA has stated on many occasions that

it cannot apply equitable doctrines such as laches, because it does not possess the same powers as a court. *See, e.g., Jones v. Douglas County*, 63 Or LUBA 261, 269-70 (2011); *Macfarlane v. Clackamas County*, 70 Or LUBA 126, 131 (2014). As discussed below, at least one statute that governs LUBA has been determined to prohibit a jurisprudential rule that sought to promote judicial efficiency.

In *Macfarlane,* LUBA held for the first time that it "would no longer entertain arguments based on equitable doctrines, unless the proponent first establishes that LUBA has the authority under its governing statutes to reverse, remand or affirm a land use decision based on the exercise of equitable doctrines." The timing of LUBA's pronouncement in *Macfarlane* was notable, as it came directly on the heels of *Dexter Lost Valley Cmty. Ass'n v. Lane* County, 255 Or. App. 701, 300 P3d 1243 (2013).

Dexter Lost Valley Cmty. Ass'n is an interesting case because it indicates how closely the Court of Appeals is willing to scrutinize LUBA's procedural practices for consistency with LUBA's enabling statute. For many years, LUBA had created various procedural practices intended to create efficiency in the review process. One example of this was LUBA's creation of the practice for accepting "Motions for Voluntary Remand." While provisions for voluntary remand are not set forth in the statutes or rules, LUBA had established a framework for voluntary remand through case law. *Hastings Bulb Growers, Inc. v. Curry Co.*, 25 Or LUBA 558, 562 (1993), *aff'd without opinion*, 123 Or App 642, 859 P2d 1208 (1993); *See also Angel v. City of Portland*, 20 Or LUBA 541 (1991), *Smith v. Douglas Co.*, 34 Or LUBA 682, LUBA (1997); *Mazeski v. Wasco Co.*, 27 Or LUBA 45, 47 (1994). LUBA would routinely grant motions for voluntary remand if it concluded that granting the motion was "consistent with sound principles governing judicial review." LUBA believes that such procedure was allowed by ORS 197.805, which states that "[i]t is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review."

However well-settled the practice had been, voluntary remands came to a sudden and unexpected halt when the Court of Appeals issued its opinion in *Dexter Lost Valley Cmty. Ass'n.* The Court of Appeals noted that "[a]n administrative agency cannot act outside of its legislative grant of authority in order to "amend, alter, enlarge or limit the terms of a legislative enactment." The court then looked at what called the "unusually persuasive legislative history" of the statute now codified at ORS 197.830(13)(b) and concluded that the voluntary remand practice is inconsistent with the intent of that statute.

It is unclear how far *Dexter* should be extended in different but related contexts. It is unlikely that other LUBA statutes have legislative history that give such clear guidance as was the case in *Dexter.* Nonetheless, *Dexter* certainly raises the question of how far LUBA can create procedural practices based on common-law doctrines which are based on "judicial economy." As discussed in more detail below, the use of both the "collateral attack" doctrine (aka "waiver") and the application of *Nelson* test for "issue preclusion" have been approved by the Court of Appeals for use in a land use context. As far as the Board can tell, however, no focused challenges were raised in those cases, as happened in *Dexter.* Nonetheless, for now, the answers remain elusive, and given the Court of Appeals case law on the topic, the Board assumes that the

"collateral attack", "law of the case," and "issue preclusion" doctrines are still viable for use by LUBA, and by extension, by the County.

We start with issue preclusion, which in the civil context is a common law doctrine[2] that bars relitigation of an issue in subsequent proceedings in some situations, when the issue has been determined by a valid and final determination in a prior proceeding. *Nelson*, 318 Or at 103. Like the related doctrines of waiver and collateral attack, issue preclusion is a jurisprudential rule that seeks to promote judicial efficiency.

As early as 1969, Oregon courts recognized that a governing body is not necessarily bound to decide a land use matter in the same manner as a previous governing body. In *Archdiocese of Portland v. Washington County*, 254 Or 77, 87-8, 458 P2d 682 (1969), the Oregon Supreme Court stated:
"Implicit in the plaintiff's contention is the assumption that the Board of County Commissioners of Washington County is bound by the action of previous Boards of County Commissioners in that county. This assumption is not sound. Each Board is entitled to make its own evaluation of the suitability of the use sought by an applicant. The existing Board is not required to perpetuate errors of its predecessors. Even if it were shown that the previous applications were granted by the present Board, there is nothing in the record to show that the conditions now existing also existed at the time the previous applications were granted."

See also Okeson v. Union County, 10 Or LUBA 1, 5 (1983) ("There is no requirement local government actions must be consistent with past decisions, but only that a decision must be correct when made. Indeed, to require consistency for that sake alone would run the risk of perpetuating error."); *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990) (same).

Similarly, in *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990), LUBA recognized that Oregon's system of land use adjudication "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding."[3]

In a more recent case, *Green v. Douglas County*, 63 Or LUBA 200, 207 (2011), LUBA stated the following:

> It is not clear that issue preclusion applies generally in land use appeals. In at least two decisions, based on the fifth *Nelson* factor, LUBA has concluded that it does

[2] According to the Oregon Supreme Court, "[i]ssue preclusion can be based on the constitution, common law, or a statute." *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993) (citing *State v. Ratliff*, 304 Or 254, 257, 744 P2d 247 (1987). The five-part *Nelson* test is based on common law. *Hickey v. Settlemier*, 318 Or. 196, 201, 864 P.2d 372 (1993). In *Nelson*, the Court stated, as an example, that there is a constitutional basis for issue preclusion in a criminal case via the principle of double jeopardy. The Court further noted that the civil common-law doctrine of issue preclusion is based on judicial economy. Finally, the Court cited to ORS 43.130 as an example of a statute setting forth a principle of issue preclusion. *See also Fisher Broadcasting v. Department of Revenue*, 321 Or. 341, 898 P.2d 1333 (1995); *DLCD v. Benton County*, 27 Or LUBA 49, 61 (1994).

[3] *See also Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873, *rev den*, 319 Or 150, 877 P2d 87 (1994); *Douglas v. Multnomah County*, 18 Or LUBA 607, 612-3 (1990); *Ben/Fran Development v. Metro Service Dist.*, 17 Or LUBA 30, 46-47 (1988); *S & J Builders v. City of Tigard*, 14 Or LUBA 708, 711-712 (1986).

> not. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002); *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990). However, as we noted in *Kingsley v. City of Portland*, 55 Or LUBA 256, 262-63 (2007), the Court of Appeals in *Lawrence* affirmed our decision in that appeal on narrower grounds, and reserved its opinion on whether under the fifth *Nelson* factor the issue preclusion doctrine categorically could never apply to land use proceedings. *Lawrence v. Clackamas County*, 180 Or App 495, 504, 43 P3d 1192 (2002). For purposes of this opinion we will assume without deciding that the fifth *Nelson* factor is present. However, as explained below, two other *Nelson* factors are missing and the issues petitioners raise in this appeal are not barred by issue preclusion.

See also Broderson v. City of Ashland, 62 Or LUBA 329, 338 (2010). That uncertainty remains, but as the case law now stands, LUBA's *Lawrence* decision remains good law according to LUBA. Thus, while some exceptions to this general rule exist,[4] the Board understands that local land use decisions do not create legal precedent that is binding on subsequent land use decision-makers concerning: (1) unrelated property, or (2) new, unrelated land use applications proposing development on the same property as an earlier land use decision, particularly when the prior land use decision has expired or is inconsistent with the newer land use decision.

Unfortunately, neither LUBA nor the courts have ever clearly explained the distinction between issue preclusion and the collateral attack doctrine, nor have they given a clear rule what situations call for the application of one doctrine to the exclusion of the other. Even more surprising, the Board's research reveals that LUBA rarely uses the two phrases in the same case. As far as the Board can tell, in cases where the *issues* raised between earlier and later cases addressing the same property really are the same, the only principled way to distinguish when collateral attack applies and when issue preclusion applies is to limit issue preclusion to situations where the decisions are not sequential (*i.e.* one is not needed to implement the other) and either:

- the first decision expired, or was not otherwise acted upon, and therefore a second application had to be filed. *See Widgi Creek Homeowner's Ass'n v. Deschutes County*, ___ Or LUBA ____(2015), *aff'd without opin.* 273 Or App 821, 362 P2d 1215 (2015); *Broderson v. City of Ashland*, 62 Or LUBA 329, 338 (2010); *Davenport v. City of Tigard*,

[4] LUBA has stated, in dicta, that "[a]rbitrary and inconsistent interpretation of approval criteria in deciding applications for land use permits may provide a basis for remand. *See Friends of Bryant Woods Park v. City of Lake Oswego*, 26 Or LUBA 185, 191 (1993), *aff'd*, 126 Or App 205, 868 P2d 24 (1994) (although local legislation may be susceptible of more than one interpretation, local government may not "arbitrarily * * * vary its interpretation"); *Smith v. Clackamas County*, 25 Or LUBA 568, 570 n1 (1993). For example, when a local government determines that comprehensive plan objectives are mandatory approval standards in one case, it may not later determine that those plan objectives are mere guidelines in a different unrelated case, absent some reasonable explanation for the disparity. *Welch v. City of Portland*, 28 Or LUBA 439, 448 (1994). Nonetheless, LUBA has also stated that the exception is not triggered unless "there is an indication that different interpretations are the product of a design to act arbitrarily or inconsistently from case to case." *Greer v. Josephine County*, 37 Or LUBA 261 (1999). Thus, the exception does not prevent a local jurisdiction from changing previously-stated interpretations; it merely prohibits the arbitrary flip-flopping of interpretations on a case-by-case basis.

27 Or LUBA 243 (1994), or

- the first decision resulted in a denial. *Kingsley v. City of Portland*, 55 Or LUBA 256, 262-63 (2007); *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd*, 180 Or App 495, 43 P3d 1192 (2002), *rev den*, 334 Or 327, 52 P3d 435 (2002); *Nelson v. Clackamas County*, 19 Or LUBA 131,140 (1990).

In these limited situations, under current law articulated in *Lawrence,* issues that were decided in an earlier proceeding can be re-litigated.[5]

In her surrebuttal argument dated July 27, 2018, attorney Tonia Moro argues that the Board should not apply the five-part *Nelson* test for "issue preclusion" because the doctrine does not apply to this proceeding. Ms. Moro states that legal issues decided in County land use decisions should categorically not be given preclusive effect in later land use proceedings. In support of this argument, she cites *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd*, 180 Or App 495, 43 P3d 1192 (2002) *rev den*, 334 Or 327, 52 P3d 435 (2002). *Lawrence* addresses a situation where an applicant seeks to apply for a second land use determination after having been *denied* in a first land use application. *Lawrence* has no applicability here.

Ms. Moro then applies the five-part *Nelson* test to the facts of this case and concludes that the test is not met because, among other reasons, "the issue is more developed," and "it is about the effect [of FERC denying the prior application] and its cause on the ability of the applicant to obtain a FERC permit within a one year extension." With regard to this point, the Board partially agrees with Ms. Moro. The issue is whether the applicant is responsible for the failure to commence development within the current approval period (*i.e.* since the last extension was applied for and granted). Those dates are from April 3, 2017 to April 3, 2018. With regard to events that happened within those time periods, no party can be prohibited from raising issues premised on those time periods. The Board disagrees that the approval criteria require the applicant to prove that it will be able to obtain a FERC permit within a one-year extension and commence development.

Ms. Moro also argued that because the parties are different, the *Nelson* test is not met. If one is correct in applying *Nelson* to this case, that is indeed a relevant factor. But it is not relevant under the collateral attack doctrine, as discussed in more detail below. That is why it so important to know which test to apply.

The Applicant essentially ignores the opponent's *Nelson* analysis, and instead focuses on the doctrine of collateral attack:

> Notwithstanding the Board's careful consideration and resolution of the FERC denial issue in the 2017 Extension Decision, opponents nevertheless attempt to

[5] Another situation where the five *Nelson* factors would apply is when determining whether a Circuit Court proceeding should have preclusive effect in a subsequent LUBA appeal. *See, e.g., DLCD v. Benton County*, 27 Or LUBA 49 (1994).

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

See Applicant's Final Written Argument, Seth King letter dated August 3, 2018, page 9. Unfortunately, the *Noble Built Homes* case is unremarkable and does not get to the core of the issue presented here.[6]

The Board is not aware of cases that applied the collateral attack doctrine to extensions. It is true that these serial extension requests seem, in a very real sense, to be a continuation of the same case. In a similar context, the Court of Appeals has stated that the "same parties" issue does not matter in a second land use proceeding on remand from LUBA because it is part of the same case. *See Mill Creek Glen Protection Ass'n v. Umatilla County*, 88 Or App 522, 746 P2d 728 (1987):

> Petitioners maintain that, whether or not a law of the case or waiver principle might bar new arguments by parties who participated in an earlier appeal, neither should apply when, as here, different parties bring the second appeal and the appellant in the first was not represented by counsel. We do not think that petitioners' distinction aids them. Although it is true that new parties in a second appeal could not have raised particular issues in the earlier appeal in which they did not participate, it is also true that they did have and did forego the opportunity to participate in the first appeal. A party who did not raise an issue in an earlier proceeding because he chose not to participate in it should be as precluded from later raising the issue as a party who did participate but neglected to raise the issue.

See also Beck v. City of Tillamook, 313 Or 148, 154 n 2, 831 P.2d 678 (1992). This, of course, makes sense, since a party should not be afforded more rights by *not* showing up to a fight than if it had showed up. Logically, that same policy expressed above *should* apply to extension cases as well.

That quote from *Mill Creek* hints at the problem in this case. It is clear that if the Applicant had let these permits expire and was filing an entirely new land use application, then all issues and interpretations would be back on the table. However, unlike other cases in which

[6] The Board notes that the Applicant also contended, in the alternative, that if opponents' contentions were not barred by the various doctrines, the Board should nevertheless deny opponents' contentions on the merits. As explained in this decision below, the Board adopts the Applicant's contentions on the merits, which provides an alternative grounds for denying opponents' challenge and for affirming the Planning Director's decision.

the *Nelson* test has been applied, the opponents fail to acknowledge that both LUBA and the courts have applied two different sets of rules in situations where the previous interpretation is made in the same case / proceeding or, in an earlier phase of a multi-phase development.

This set of facts is closer to *Mill Creek* than to *Lawrence.* In this case, these permit extensions all relate to the same permit (HBCU-10-01), and are in some ways similar to a proceeding on remand. They essentially act to perpetuate the life of the existing permit that would otherwise expire, and denial of an extension must be based on certain facts taking place relevant to the original permit. The question here is when a county decides certain issues in a decision granting a third or fourth extension for a permit, can an opponent get another bite at the apple at the hearing for the fifth extension by raising the same issues that were decided – or could have been raised and decided, in the earlier extension proceeding?

Under the doctrine of "waiver" (aka "law of the case") once a land use decision is remanded by LUBA and a local government adopts a decision on remand, issues that can be raised on remand or in a subsequent LUBA appeal of the second decision are limited to those that could not have been raised in the first LUBA appeal. *Portland Audubon v. Clackamas County*, 14 Or LUBA 433, *aff'd*, 80 Or App 593, 722 P2d 748 (1986).[7] Although nothing in the land use statutes directly calls for use of this doctrine, LUBA noted in *Portland Audubon* that various statutory provisions support its use. *See* ORS 197.805; 198.830(14); 197.835(10); 197.855.

In *Mill Creek Glen Protection Ass'n*, 88 Or App at 526, the Court of Appeals approved of LUBA's use of the "law of the case" doctrine, but stated that the preferred term should be "waiver." The *Mill Creek* Court also clarified that this waiver principle applied even to persons who did not appear in the first proceeding. *Id.* at 527.

In *Davenport v. City of Tigard*, 27 Or LUBA 243, 246-7 (1994), LUBA stated an important limit on the "law of the case" doctrine: as the name implies, it only applies in subsequent stages of the *same case.* In *Davenport*, the applicant was granted approval for a site plan review, but then submitted a new application seeking to modify the approval in minor ways pertaining to landscaping and parking. LUBA stated that the fact that the application is a "new" one prohibits application of the "waiver" doctrine, even though the proposed development differs from the earlier approved decision in only minor details.[8] The Board believes that the key distinction in *Davenport* is that the modification of the plan essentially meant that older aspects of the plan were being abandoned, which is very similar to what would happen if the permit had expired: the modification triggered the ability to revisit old issues that might overwise be off the

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[7] *See also Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998), *rev den.*, 328 Or 115 (1998); *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005); *Halverson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193, 205 (2000); *Dickas v. City of Beaverton*, 17 Or LUBA 578, 582-3 (1989); *Hearne v. Baker County*, 16 Or LUBA 193, 195 (1987), *aff'd*, 89 Or App 282, 748 P2d 1016, *rev den*, 305 Or 576 (1988).

[8] *See also Sequoia Park Condominium Unit Owner's Ass'n v. City of Beaverton*, 36 Or LUBA 317, 326-7 (1999); *Green v. Douglas County*, 63 Or LUBA 200, 205-6 (2011); *Neighbors Against Apple Valley Expansion v. Washington County*, 59 Or. LUBA 153 (2009); *Durig v. Washington County*, 40 Or LUBA 1, 8 (2001), *aff'd*, 177 Or App 453, 34 P3d 169 (2001).

table.

Many LUBA cases refer to the term "collateral attack" but do not make it clear if that is the same thing as the "waiver" doctrine or something doctrinally different. As discussed below, it must be something slightly different. Under the collateral attack doctrine, a local government cannot deny a land use application based on (1) issues that were conclusively resolved in a prior related discretionary land use decision, or (2) issues that could have, but were not, raised and resolved in an earlier related land use proceeding. *Safeway, Inc. City of North Bend*, 47 Or LUBA 489, 500 (2004) (When a city previously approved a "site plan review" decision that decided certain issues but deferred other non-discretionary issues to a later ministerial process, the City cannot revise issues previously decided to "correct" any "mistakes" it might have made which benefited the applicant at the expense of the City); *Carlsen v. City of Portland*, 169 Or App 1, 8 P3d 234 (2000).[9] Unlike the pure "law of the case" doctrine, the "collateral attack" doctrine does not have to apply to the same case.

The "collateral attack" concept has been used in many different contexts, including:

- ❖ goal challenges directed at land use ordinances that were not timely appealed,[10]
- ❖ belated challenges to building permits that inadvertently made land use decisions without undertaking land use procedures,[11]
- ❖ Implementing permits: arguments directed at ministerial permits that should have instead been directed at the preceding land use decisions,[12] and
- ❖ Multi-Phase projects: arguments directed at land use actions that should have been directed at earlier phases of a multi-phase approval process.[13]

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[9] *See also Northwest Aggregate v. City of Scappoose*, 34 Or LUBA 498, 510-11 (1998) *Rocklin v. Multnomah County*, 37 Or LUBA 237, 247-8 (1999); *Dalton v. Polk County*, 61 Or LUBA 27, 38 (2009); *Shoemaker v. Tillamook County*, 46 Or LUBA 433 (2004); *Sahagain v. Columbia County*, 27 Or LUBA 341 (1994); *Louks v. Jackson Co.*, 65 Or LUBA 58 (2012); *Just v. Linn County*, 59 Or LUBA 233 (2009); *ONRC v. City of Seaside*, 27 Or LUBA 679, 681 (1994); *Drake v. Polk County*, 30 Or LUBA 199 (1995).

[10] *Byrd v. Stringer*, 295 Or 311, 316-17; 666 P2d 1332 (1983); *Friends of Neabeck Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350 (1996); *Urquhart v. Lane Council of Governments*, 80 Or App 176, 181, 721 P2d 870 (1986); *Femling v. Coos County*, 34 Or LUBA 328, 333 (1998); *Lowery v. City of Kaiser*, 48 Or LUBA 568 (2005); *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001); *Greenwood v. Polk County*, 11 Or LUBA 230 (1984); *Holloway v. Clatsop Co.*, 52 Or LUBA 644 (2006); *Toler v. City of Cave Junction*, 53 Or LUBA 635 158 (2008).

[11] *Ortman v. City of Forest Grove*, 55 Or LUBA 426 (2007); *Ceniga v. Clackamas County*, 32 Or LUBA 273 (1997); *Corbett / Terwilliger Lair Hill Neigh. Ass'n v. City of Portland*, 16 Or LUBA 49, 52 (1987).

[12] *Bullock v. City of Ashland*, 57 Or LUBA 635 (2008); *Sandler v. City of Ashland*, 21 Or LUBA 483 (1991); *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 296, *aff'd*, 195 Or App 763, 100 P3d 218 (2004); *Piltz v. City of Portland*, 41 Or LUBA 461 (2002); *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000).

[13] *DLCD v. Crook County*, 25 Or. LUBA 625 (1993), *aff'd*, 124 Or App 8, 10, 860 P2d 907 (1993) (discussing County's three-stage PUD approval process); *Safeway, Inc. City of North Bend*, 47 Or LUBA 489, 500 (2004); *Westlake Homeowners Ass'n v. City of Lake Oswego.*, 25 Or LUBA 145, 148 (1993); *Headley v. Jackson County*, 19 Or LUBA

Putting aside attacks on legislation, which have no applicability here, in the quasi-judicial context a collateral attack argument only applies to the same property, and it does not apply to previous permit decisions that have expired or abandoned.

The phrase "collateral attack" can be viewed as a type of statutory issue preclusion. It is really nothing more than an informal term describing a series of separate but related statutory requirements embodied in Oregon's land use laws. *See, e.g.,* ORS 197.835(1) (limiting LUBA's scope of review to land use decisions under appeal); ORS 197.625(1)(setting forth rules for when ordinances are deemed to be "acknowledged" and therefore immune from goal challenges); and ORS 197.825(2)(a) (setting forth an "exhaustion of remedies" rule that can trigger application of the collateral attack doctrine).[14]

Various LUBA cases discuss the nature and origins of the "collateral attack" doctrine. For example, in *Butte Conservancy v. City of Gresham,* 47 Or LUBA 282, *aff'd* 195 Or App 763, 100 P3d 218 (2004), LUBA described the doctrine as merely representing the "unexceptional principle that assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand." *See also Robson v. City of La Grande,* 40 Or LUBA 250, 254 (2001) (same). Similarly, in *Safeway, Inc.,* 47 Or LUBA at 500, LUBA described one aspect of the collateral attack doctrine as it relates to sequential permits needed for a single phase development, as follows: "As a general principle, issues that were conclusively resolved in a final discretionary land use decision, or that could have been raised and resolved in that land use proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out that earlier final decision."

In *VanSpeybroeck v. Tillamook County,* 56 Or LUBA 184 (2008), *aff'd,* 221 Or App 677, 191 P3d 712 (2008), LUBA set forth in the limits of the doctrine, by stated that "[i]n our view, to give preclusive effect to an earlier unappealed land use decision and thus bar raising issues in a subsequent decision on a related, but separate permit proceeding, the issue must concern particular development that was proposed, considered and approved in the earlier unappealed decision." *Id.* at 204. Thus, once it has been determined that the issues raised in the subsequent proceeding concern the same particular development that was "proposed, considered and approved" in the earlier unappealed decision, any issues that were decided, or could have been raised and decided, in the earlier unappealed decisions are "beyond LUBA's scope of review." In a very real sense, this makes the earlier decision "precedential" in nature, regardless of the correctness of those earlier decisions, at least in regards to the land for which the earlier decision was issued. That is the very essence of what it means to say that the earlier decision cannot be "collaterally attacked."

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109 (1990); *Edwards Ind. Inc., v. Board of Comm'rs of Washington Co.,* 2 Or LUBA 91 (1980); *J.P. Finley & Son v. Washington County,* 19 Or LUBA 263 (1990).

[14] *See, e.g., Petterson v. Klamath Co.,* 31 Or LUBA 402 (1996) (When a planning director rescinds a decision he issued two days earlier, the applicant cannot fail to appeal that rescission and then attempt to challenge that decision as part of a later appeal of a denial of the same permit); *Lloyd Dist. Community Ass'n v. City of Portland,* 141 Or App 29, 916 P2d 884 (1996); *Ortman v. City of Forest Grove,* 55 Or LUBA 426 (2007).

Unlike the waiver doctrine, which is limited to giving preclusive effect to issues raised in the same case / proceeding, collateral attack arises most frequently when challenges are made against discretionary and ministerial permits needed to carry out an earlier land use approval. *See* cases collected at fn 11, *supra*. Collateral attack also plays a role when developments that are approved via multi-phase sequential land use decisions, and issues decided in earlier phases are challenged in the decisions approving later phases. *See* cases collected at fn 12, *supra*. In this regard, the Court of Appeals has stated that "local decisions rendered at the early stages of multi-stage review processes can be final and, if they are, issues that could have been raised in an appeal or review proceeding at an earlier stage are not cognizable in an appeal to LUBA from a later decision." *Carlsen*, 169 Or App at 8.

For example, in *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64, 70-1 (1990), LUBA addressed how the collateral attack doctrine works in the context of a multi-phase development. At the time *Hoffman* was decided, the City of Lake Oswego Code allowed "major developments" to occur in phases. The City's approval process called for the submission of an "Overall Development Plan and Schedule ("ODPS"), which was intended to address the overall plan so as to give the development "reliable assurance of the City's expectations for the overall project as a basis for detailed planning and investment." *Id.* at 68. Once the ODPS was approved, development permits for each successive phase of the development could be issued without revisiting issues determined by the ODPS. The applicant had obtained ODPS approval in 1981, and by 1989 was working on Phase 6 of the plan. Petitioner appealed Phase 6 to LUBA, arguing that even though various Comprehensive Plan policies related to schools had been addressed by the ODPS, circumstances had changed to the point where the schools were no longer adequate to provide the required levels of service needed by Phase 6. LUBA determined that the Code did not necessarily require that all comprehensive plan policies be reapplied each time a new phase of a PUD is approved. *Id.* at 70. LUBA stated that where comprehensive plan compliance issues have been fully resolved for a PUD during the ODPS process, those comprehensive plan issues need not be reconsidered in approving individual phases of the PUD. *Id.* at 72.

In *Edwards Ind., Inc. v. Board of Comm'rs of Washington County*, 2 Or LUBA 91 (1980), LUBA reached the same conclusion interpreting a similar Washington County PUD approval procedure. In *Edwards*, the County granted initial approval of an "outline master plan," subject to a condition that development be phased to allow adjoining roadways to be improved to provide adequate capacity. No party appealed the decision approving the outline master plan. Two years later, a request for subdivision plat approval for one of the approved phases was turned down solely on the basis of concerns over impacts on the road system adjoining the PUD. LUBA concluded that under the county's PUD approval procedures, the submission of the preliminary plat in accordance with the outline master plan could not be used as a vehicle to reopen the issue of impacts on external roadways which was decided in the approval of the outline master plan. *Id.* at 96, n8. *See also J.P. Finley & Son v. Washington County*, 19 Or LUBA 263, 269-70 (1990) (Petitioner participated in first decision but did not appeal it, and was foreclosed from appealing the second decision even though that second process used the wrong (Type I) procedure, because the first decision specified use of the Type I procedure).

Finally, in cases where the collateral attack doctrine applies, the issue preclusion doctrine does not operate to defeat it. For example, in *Doney v. Clatsop County*, 142 Or App 497, 921 P2d 1346 (1996), the Court rejected the county's argument that it could deny an access permit for reasons that would essentially have required the applicant to modify the decision and reapply for a new decision from the City. Citing to "law of the case" case law, including *Beck* and *Mill Creek, supra,* the Court noted that the county could have - but did not - participate in the city's proceedings approving the development or in an appeal to LUBA from the city's decision, and it *could have* raised questions regarding access in that forum. It did not do so. The Court emphasized that: "[t]he county's argument that its denial of the access permit was also a land use decision amounts to nothing more than a collateral attack on the city's decision." *Doney,* 142 Or. App. at 503. While using the "collateral attack" moniker, the fact that the *Doney* Court cited to two cases that address "law of the case" doctrine does tend to blur the distinction between the two doctrines to an extent, and suggests that same policy basis underlies both doctrines.

Whereas the *Doney* court found that the county was bound by a city land use decision even though it did not participate in that decision, *Doney*, 146 Or App at 499, application of the third *Nelson* factor would suggest that the County should not have been precluded from denying the access permit. Thus, *Doney* provides authority for the fact that issue preclusion does not apply where collateral attack / waiver do apply.

As discussed above, these "extension" cases such as this present a situation which is similar, but not exactly the same as, a "multi-phase" development case. Nonetheless, the analysis in permit extension cases should generally be governed by collateral attack, not the *Nelson* factors. Opponents should not get a second bite at the apple to re-litigate issues actually decided in the Board's previous extension decisions. That includes issues that could have been raised and decided, but which were not raised for whatever reason. However, as discussed above, there will be certain issues that could not have been raised in any earlier proceedings because they pertain to facts that had not yet occurred as of the time of the decision.

As previously noted, the code is drafted in a manner that it requires 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." The Board of Commissioners previously interpreted the word "responsible" to be the same as "beyond the applicant's control." Stated another way, the Board determined that the question is whether the applicant is "at fault" for not exercising its permit rights in a timely manner. The Board further found that "[t]he 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." No party appealed that decision to LUBA, and the Board will continue to apply that same standard. *See* Findings of Fact, Conclusions of Law and Final Decision of the Coos County Board of Commissioners, dated December 19, 2017, at p. 8.

In AP 17-004, the Board of Commissioners adopted examples of factual situations that

might help guide staff's analysis. Reasons that might typically found to be "beyond the control" of an applicant would include:

- Delays caused by construction contractors or inability to hire sufficient workers;
- Unusual delays caused by abnormal weather years, such as in the case of El Nino or La Nina weather patterns;
- Delays in obtaining financing from banks;
- Delays in getting approval from HOA architectural review committees;
- Encountering unexpected legal problems related to the land, such as a previously unknown adverse possession claim;
- Encountering sub-surface conditions differing from the approved plans,
- Exhuming Native American artifacts; and
- Inability to meet requirements imposed by other governmental agencies.

Failures to act which might be considered to be within the control of an applicant include:

- Failing to apply for required permits;
- Failing to exercise due diligence in pursuing the matter;
- Procrastination.

As shown above, this is a highly subjective determination, and judicial review of well-documented reason for granting or denying an extension is likely limited, at best. *See* Findings of Fact, Conclusions of Law and Final Decision of the Coos County Board of Commissioners, dated December 19, 2017, at p. 8.

In proposing this interpretation and providing these examples, the Board intended to set a low bar for extensions. The primary concern for the Board was not wanting to force staff into delving deeply into the underlying causes of various delays affecting development permits, particularly when those delays involved third parties. This is largely due to the fact that such analysis would be very time consuming and not particularly fruitful, which is to say that it would be difficult to correctly ascertain the truth in many cases. Given the chosen formulation, the intent of the Board was to create a relatively clear line for staff to follow, essentially only denying extensions when it was relatively obvious that the permit was not implemented due to some rather blatant and obvious failures that were the responsibility of the applicant.

In this case, the Board finds that the Applicant has not been responsible for the delays that prevent it from building the pipeline. As the Applicant explains, the pipeline is an interstate natural gas pipeline that requires pre-authorization by the Federal Energy Regulatory Commission ("FERC"). Until Pacific Connector obtains a FERC certificate authorizing the Pipeline, Pacific Connector cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. FERC has not yet authorized the Pipeline. Therefore, Pacific Connector cannot begin or continue development of the Pipeline along the alignment authorized by the County's land approval.

It is true that FERC was not persuaded by the applicant's previous presentation, and the applicant has been forced to reapply for a new FERC Certificate. However, the facts surrounding

that process were addressed by the last extension and are not relevant here. Moreover, the legal process for obtaining the plethora of federal, state, and local permits for this facility is lengthy, byzantine, and cumbersome. To get a flavor of the complexity of the project, it must be understood that the following laws apply and have permitting requirements that apply to this pipeline:

- Natural Gas Act
- Section 401 and 404 of the Clean Water Act
- Coastal Zone Management Act (requires consistency determination from the State)
- Clean Air Act
- Rivers and Harbors Act
- National Historic Preservation Act
- National Environmental Policy Act
- Migratory Bird Treaty Act
- Marine Mammals Protection Act
- Northwest Forest Plan, Federal Land Policy Management Act
- Oregon and California Lands Act
- Endangered Species Act
- Magnuson-Stevens Fishery Conservation Act

See Exhibit 4, at p. 4-5. This type of permitting process does not happen overnight, and there is no possible way that any applicant could acquire its permits sequentially, as Ms. McCaffree argues should happen. Rather, it must request the various permit applications concurrently. And during this process, market conditions have changed due to refinement of fracking technology, which has caused the applicant's partner to redesign the LNG gas terminal from an import facility to an export facility. In the meantime, the applicant has been forced into a juggling effort: it has to file concurrent applications and thereby keep as many balls in the air as possible.

In this regard, the Applicant corrected points out that the County previously accepted the "no federal permits in hand" reasoning as a basis to grant a time extension for the pipeline, without getting into a detailed analysis regarding who is "at fault" for not obtaining the needed permits. In a previous extension case for the main alignment, the County found that the lack of FERC approval meant Pacific Connector 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 Director's Decision for County File No. ACU 14-08/AP 14-02, a copy of which is found at Application Narrative Exhibit 4, at p. 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-16-003 in Application Narrative Exhibit 2 at p.8.

The opponents read the Board's formulation in the exact opposite manner as was intended. Latching on to the subjective nature of the inquiry, the opponents provide evidence intended to convince the Board that Pacific Connector was in fact "responsible" for the delay because they did not actively pursue the permits they needed from FERC. In their estimation, getting denied by FERC is a *per se* example of failure to exercise due diligence.

The opponents argue that Pacific Connector's failure to secure the necessary FERC authorizations was Pacific Connector's own fault. For example, Ms. McCaffree points out that Pacific Connector's application was denied because they failed to provide evidence of sufficient market demand, and because they failed to secure voluntary right-of-way from a majority of landowners on the pipeline route. *See, e.g.,* Letter from Jody McCaffree dated July 13, 2018, at p. 2. Ms. Moro similarly argues that the "FERC specifically found that the applicant had not been diligent." *See* Letter from Tonia Moro dated July 27, 2018, ap. 2. The Board has read the relevant FERC Orders and does not have the same takeaway.

It is certainly true that FERC stated that "Pacific Connector had every opportunity to demonstrate market demand," and it "failed to do so over a three-and-a-half year long period, despite the issuance of four data requests by Commission staff seeking such information." *See* FERC Order Denying Rehearing, dated December 9, 2016, at p. 8. However, the opponents seem to conflate a lack of success with a lack of effort and diligence. It is simply not fair to conclude, based upon the record, that Pacific Connector did not prove market demand because it was not trying very hard or was not exercising diligence. To the contrary, the Board finds that the significant amount of time and money spent by Pacific Connector pursuing permits in various forums for the pipeline reflects diligence.

Beyond that, however, the opponents would have the County delve deeply into FERC's administrative proceedings and assess Pacific Connector's actions and inactions and draw conclusions about same within the context of a complex, multi-party administrative proceeding being conducted by a non-County agency. The Board believes that the opponents are asking the County to get into way too much detail about the reason for the FERC denial.

In this case, the Board continues to find that "it is sufficient to conclude that because the applicant has thus far been unsuccessful in obtaining permits from FERC despite its reasonable efforts, the applicant is therefore *not at fault* for failing to begin construction on the pipeline."

Regardless, what happened in December of 2016 (or before) is information that is not relevant to the *current* extension request, which addresses the events the applicant took during the prior one-year time-period. In its final argument, the applicant discusses the steps it has taken

over the past year to move towards permit approval. The Board finds the Applicant's following arguments to be compelling, and are quoted as length:

> Opponents have not cited any new facts in support of their position that PCGP caused the FERC denial. They also have not identified any legal errors in the Board's earlier decision. There is simply no basis to sustain opponents' contention on this issue.
>
> Opponents' related contentions also fail. For example, although opponents contend that PCGP must now submit evidence that it has cured the deficiencies from the FERC denial (including supplying contracts from end users), the Hearings Officer should deny this contention for four reasons.
>
> First, this contention manufactures a requirement that does not exist in the CCZLDO.
>
> Second, it is inconsistent with the Board's application of CCZLDO 5.2.600.1.b.iv in the 2017 Extension Decision, which concluded that signed contracts were not required because they were necessarily outside of PCGP's control:
>
> > "But, both of these categories of evidence (precedent agreements with end users and agreements with landowners) are bilateral contracts, which require a meeting of the minds between PCGP and a third party. PCGP cannot unilaterally enter a bilateral contract or coerce another party into such a contract."
>
> 2017 Extension Decision at 10.
>
> Third, petitioners' contention ignores the unrebutted new evidence PCGP has submitted in the current proceeding, which includes evidence that PCGP has progressed to holding an "open season" for commitments for firm natural gas pipeline transportation on the Pipeline. *See* Exhibit C to Letter from Perkins Coie LLP dated July 20, 2018 at 5. PCGP never progressed to this stage during the last FERC proceedings. *See* FERC Order dated March 11, 2016. Thus, the only evidence in the record supports the conclusion that PCGP is actively working to cure prior deficiencies identified by FERC.
>
> Fourth, opponents misstate the applicable standard. The correct question, as identified by the Board, is whether PCGP has made "reasonable efforts" to obtain its FERC certificate within the 12- month period since the previous extension and whether PCGP has "exercised steps within its control to implement" the permit. The Hearings Officer should find that PCGP easily meets these standards. The record reflects that in September 2017, PCGP filed an application with FERC requesting authorization for a liquefied natural gas pipeline and export terminal in Coos County. *See* Exhibit 7 to Application narrative. The record also reflects that PCGP has diligently supplemented its application on multiple occasions in

response to FERC data requests over the course of the year. *See* FERC docket for the certificate application in Exhibit A to the Perkins Coie LLP letter dated July 20, 2018. The record also includes an excerpt of one of the data requests to illustrate the level of detail of both FERC's questions and PCGP's responses. *See* Exhibit B to the Perkins Coie letter dated July 20, 2018. Opponents do not challenge any of this evidence or present any conflicting evidence. Therefore, the Hearings Officer should rely upon this evidence to support the conclusion that PCGP has made "reasonable efforts" to obtain its FERC certificate and has "exercised steps within its control to implement" the County land use approval.

Finally, although opponents contend that PCGP's inability to obtain approval of the now-pending FERC certificate request is not the actual cause of PCGP's delay in building the Pipeline because the now-pending request before FERC does not mirror the alignment approved by the County, opponents' contention lacks merit. In fact, with the exception of about 6-7 miles near the Jordan Cove terminal, the preferred alignment PCGP identified in the new FERC submittal closely tracks the route approved by the County in the Pipeline permit. *See* Exhibit D to the respective Perkins Coie letters dated July 20, 2018. Further, the FERC submittal identifies the Brunschmid/Stock Slough alignment as an alternative. *Id.* Accordingly, FERC approval of the pending certificate would affect the vast majority of the Pipeline alignment. The Hearings Officer should deny opponents' contention on this issue.

See Applicant's Final Written Argument, dated August 3, 2018, page 11. (Appeal Rec. at Exhibit 11).

Mr. King's arguments are persuasive. He is correct that the 2017 extension decision (File No. EXT-17-005/ AP-17-004, Final Ord. No. 17-11-046PL, Dec. 19, 2017) is not subject to collateral attack, at least to the extent that certain issues could have been raised and decided in that forum, as discussed in more detail above. He also accurately characterizes the "reasonable efforts" standard. There is no need to take a deep look into the interactions between Pacific Connector and FERC that have occurred over the past year, as it is reasonably clear that there is a current pending application before the agency and the Applicant is submitting regular submittals of information to FERC and has provided notice that it is providing a binding open season for its proposed pipeline. *See* Appeal Rec. Exhibit 7 (Applicant's July 20, 2018 submittal, Exhibit C, p. 5 of 10).

In her submittal dated July 13, 2017, Ms. Moro argues that the fact that the Applicant applied for a FERC Certificate on September 21, 2017 is not dispositive, because the applicant's preferred alignment proposed in that current FERC application is different than the alignment approved by Coos County. *See* Appellant's Hearing Memorandum dated July 13, 2018, at p. 6-7. This is a new argument that could not have been raised in the local proceedings that resulted in previous extensions, because the Applicant had not submitted the applications at that time. This new argument is therefore not subject to "collateral attack" analysis.

Nonetheless, to the extent the opponents have raised a viable argument, they have simply

not developed it sufficiently to allow the Board to understand how it relates to an approval standard for an extension, or why it should succeed on the merits. As best the hearing officer can tell, the argument is intended to relate to CCZLDO §5.2.600(1)(b)(iii) and (iv), which together require the applicant to state reasons for the delay and requires the county to 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 fact that the applicant may be submitting various other proposed alignments to FERC is not a valid reason to deny the extension request for alignments previously approved by the County. FERC will pick the ultimate route via the NEPA process. Until that happens, no route is off the table, particularly one that fared well during the last NEPA process.

Although Ms. Moro argues that the applicant is responsible for failing to be able to build the pipeline approved in the HBCU 10-01 because if has not applied for a permit to build that particular route, that argument does not reflect a correct understanding the permitting process. It is true that Coos County can only approve or deny whatever pipeline route that is requested by the applicant in a formal land use application. FERC is different, however. FERC has the regulatory authority under NEPA to approve routes that are different from the applicant's "preferred" route. In this regard, it is important to understand a pipeline applicant does not select that actual approved route of the pipeline. Rather, the route is selected by FERC via the NEPA process. The fact that Pacific Connector has sought – at great expense – approval for alternative alignments that deviate from the original alignment approved in 2010 is testament to the fact that Pacific Connector is not in control of the route selection process. It also demonstrates that FERC does not place much, if any, weight on the fact that County approved the original route in 2010. Pacific Connector cannot be faulted to wanting to keep the county permits alive while FERC determines the route that has the least environmental impact. In fact, it is quite possible that FERC could approve the original alignment, perhaps as modified by the County-approved alternatives, or something close thereto.

Ms. Moro further argues that the County may not simply "rely on unsworn statements from the applicant about what actions it has taken to obtain third party approval," and "must obtain evidence from the applicant that demonstrates that it has cured the deficiencies that led to the last denial." *Id.* at p.3. The argument is made without citation to authority, and therefore the Board finds that Ms. Moro has not identified a legal basis for the claim. If this argument is intended to be a substantial evidence challenge, it fails.

The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). The evidence cited by the applicant at Exhibit 7 is unrebutted, and there is nothing that seems facially or inherently unreliable about this evidence that would cause a reasonable decisionmaker to conclude that the applicant has not been diligent in pursuing its FERC permits.

3. **The Criteria Governing the PCGP CUP Have Not Changed.**

CCZLDO §5.2.600.1.c provides as follows:

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

Opponents contend that the "applicable criteria" for the CUP permit have changed. *See* Letter from Jody McCaffree dated July 13, 2018. *See* Hearing Memorandum from opponents' counsel, Tonia Moro, dated July 31, 2018.

For example, in her memo submitted on July 13, 2018, Ms. Moro argues that since 2013, the following comprehensive map and code changes, among others, were adopted:

- CCZLDO §5.0.175, amended by County File AM 14-11 (Ord. 14-09-012PL dated January 20, 2015, effective April 20, 2015).
- Comprehensive Plan Vol 1, Part 1, §5.11 & Part 2, §3.9 Natural Hazard Maps, amended by County File AM-15-03 and County File AM-15-04 (Ord. 15-05-005PL, dated July 30, 2015, which had a delayed effective date of July 30, 2016 and was again delayed until July 30, 2017).[15]
- CCZLDO §4.11.125 (Special Development Considerations); CCZLDO §5.11.300(1)(Geologic Assessments), County File AM 16-01 (Ord. 17-04-004PL) dated May 2, 2017, effective July 31, 2017.

Each of these three issues is addressed below.

Opponents contend that CCZLDO §5.0.175 constitutes an "applicable criteri[on]" that has changed; however, this contention lacks merit because this provision is a submittal requirement, not an approval criterion. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004); *Frewing v. City of Tigard*, 59 Or LUBA 23 (2008); *Stewart v. City of Salem*, 58 Or LUBA 605 (2008). The term "criteria" is intended to be a term of art: it is a regulatory standard that can form the basis of a denial of a permit. Ms. Moro is correct that the Board has previously ruled that the signature requirement set forth at CCZLDO §5.0.150 is an approval standard because the failure to have signatures could form the basis of denial of an application. That does not make CCZLDO §5.0.175 an approval standard, particularly when it exists as an alternative to CCZLDO §5.0.150.

CCZLDO §5.0.175 is entitled "Application Made by Transportation Agencies, Utilities or Entities." It allows transportation agencies, utilities, or entities with the private right of property acquisition pursuant to ORS Chapter 35 to apply for a permit without landowner consent, subject to following certain procedural steps. Under CCZLDO §5.0.175, the approvals do not become effective until the entity either obtains landowner consent or property rights necessary to develop the property. As discussed above, CCZLDO §5.0.175 is an alternative to

[15] County Ordinance No. 15-05-005PL—which adopted amendments to the Coos County Comprehensive Plan (CCCP) pertaining to natural hazards— had an original effective date of July 30, 2016. However, on July 19, 2016, prior to the effective date of Ordinance No. 15-05-005PL, the board "deferred" the effective date of Ordinance No. 15-05-005PL to August 16, 2017.

the traditional requirement that an application must include the landowner's signature. CCZLDO §5.0.150. As such, even if CCZLDO §5.0.175 could be an application requirement, it is not necessarily "applicable" because an applicant could always opt to file its application pursuant to CCZLDO §5.0.150 rather than CCZLDO §5.0.175. For the same reason, CCZLDO §5.0.175 is not mandatory in nature. As such, it is not properly construed to be a "criteri[on]."

In 2015, the County amended its comprehensive plan and land use regulations to adopt provisions pertaining to natural hazards, but the County has previously determined that these provisions are not "applicable criteria for the decision." *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004 ("2017 Extension Decision") at pp.17-23. With regard to the comprehensive plan provisions, the Board previously determined that they were not "approval criteria" for a pipeline permit. *Id.* Raising this issue in this fifth extension is a collateral attack on the 2017 Extension Decision.

Even if the Board was to reach the merits, the opponents do not identify any errors in the Board's previous determination. Therefore, there is no basis for the Board to reach a different conclusion about the comprehensive plan natural hazard provisions in the present case.

In the 2017 Extension Decision, the Board also concluded that the CCCP and CCZLDO §4.11.125(7) natural hazard provisions are not approval criteria that would apply to the Pipeline "decision" because the CCZLDO includes a "grandfather" clause that exempts the Pipeline from compliance with these provisions: "Hazard review shall not be considered applicable to any application that has received approval and [is] requesting an extension to that approval * * *." CCZLDO §4.11.125(7). *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004, at p. 21. This determination is not subject to collateral attack in this proceeding. More importantly, pursuant to CCZLDO §4.11.125(7), the natural hazard provisions are not "applicable approval criteria" that have changed.

In her submittal dated July 13, 2018, Ms. Moro attempts to re-litigate issues related CCZLDO §4.11.125(7) natural hazard provisions were raised and decided in 2017 Extension Decision. *Compare* Hearings Memorandum, at p. 9, with the 2017 Extension Decision at pp. 17-23. These decisions are not subject to collateral attack in this proceeding. The argument also fails on the merits for the same reasons that are set forth in the 2017 Extension decision. That portion of the 2017 Extension decision is incorporated herein by reference.

On page 8 of her submittal dated July 13, 2018, Ms. Moro then makes a new argument that was previously not raised: she argues that the county did not have the authority to "grandfather in" existing permits simply by declaring that the new text amendments passed in Ord. 17-04-004PL did not apply to approved permits and permit extensions. Ms. Moro argues that that "[s]uch an act by the County is void because it is merely an attempt to * * * legislate around state law [i.e. OAR 660-033-0140] that requires the county to deny an extension application when applicable criteria have changed."

The argument does not succeed on the merits. Mr. King responds on behalf of the applicant by citing to *Gould v. Deschutes County,* 67 Or LUBA 1 (2013), which appears to be directly on point. In *Gould*, the petitioner argued that the county should have applied OAR 660-

033-0140 rather than the similar, but different, permit expiration standards set out in the County Code. A key difference between the rule and the county permit expiration standards was that the county permit expiration standards expressly tolled the running of the two-year period while there are pending land use appeals; OAR 660-033-0140 does not expressly do so. In *Gould*, LUBA summarized the Deschutes County hearings officer's findings as follows:

> The hearings officer found that because the county's comprehensive plan and land use regulations have been acknowledged, DCC 22.36.010 applies in this case and OAR 660- 033-0140, which is part of the Land Conservation and Development Commission's (LCDC's) administrative rule implementing Goal 3 (Agricultural Lands), does not apply. *Byrd v. Stringer*, 295 Or 311, 318-19, 666 P2d 1332 (1983) ("[O]nce acknowledgment has been achieved, land use decisions must be measured not against the goals but against the acknowledged plan and implementing ordinances."); *Friends of Neabeck Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350 (1996) (same). Petitioner contends *Byrd* is not controlling here because OAR 660- 033-0140 applies specifically to permits on agricultural and forest land and DCC 22.36.010 is a generally applicable permit expiration provision that is not specific to agricultural land.

LUBA affirmed the hearings officer, and therefore, the *Gould* case conclusively resolves the issue against the opponents.

On page 9 of her submittal dated July 13, 2018, Ms. Moro cites to new requirements for geologic assessments, including new reporting requirements *See* CCZLDO §4.11.125(7) CCZLDO §5.11.100, §5.11.200, and CCZLDO §5.11.300(1). The requirement to perform these geologic reviews applies when a landowner proposes to build a "structure," and the Board has previously determined that the applicant is not proposing to build a structure in these areas. *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004, at pp. 20. Ms. Moro does not explain why this determination is incorrect, and the Board will not attempt to develop her argument for her. As presented, the argument provides no basis for determining that these new requirements are changes in the law that would constitute approval standards for the applicant.

On page 10 of her Hearings Memorandum, Ms. Moro argues that the County should apply CCZLDO §5.0.500 to deny the extension. She argues that this provision prohibits Coos County from allowing an applicant to submit two different ("alternative") pipeline routes for the same pipeline project. She states, for example, that the South Slough route is a "substitution" of a portion of the original route, and therefore "automatically revokes" the previous.

However, the Planning Director, Ms. Jill Rolfe, testified at the public hearing that this provision has not been amended since 2014, which was when the pipeline's Brunschmid and Stock Slough alternative route were first approved. It is therefore not a "change" in the applicable criteria. This argument could have easily been brought up in the 2014 CUP proceeding that approved these alignments. It constitutes a collateral attack on the original approval and is therefore waived.

Even if this provision was new, this provision does not constitute an approval criterion for an extension of a CUP, nor is it an approval criterion for the original CUP. Instead, it is a provision that explains the consequence of submitting an application that is inconsistent with any previously submitted pending application. It only applies to "previous pending applications" in any event, as opposed to applications which have been approved but not yet implemented. Therefore, it provides no basis for denial of an extension.

Ms. McCaffree also identified a number of issues in her appeal. In many cases, she did not elaborate or further develop the arguments at the hearing or in her written open-record submittals. None of the provisions listed by Ms. McCaffree constitute changed approval criteria that would apply to the Pipeline:

- CCZLDO §5.0.150: In 2014, the County amended this section to require that land use applicants submit either two paper copies or one paper copy and one electronic copy of any land use application. (AM-14-11). This file includes amendments to CCZLDO Chapter 5, including the amendments to CCZLDO §5.0.150 and §5.0.175 addressed above. In general, these amendments involved renumbering, changes to application submittal requirements, and changes to make the CCZLDO consistent with state law. This minor change in submittal requirements does not constitute a change in "applicable criteria."

- CCZLDO §5.2.500: The County amended this provision in 2014 to revise a cross-reference to Chapter 4, which was modified as a result of reformatting. These amendments did not constitute changes in approval criteria because both before and after the amendments, CCZLDO §5.2.500 required compliance with "any other applicable requirements of this Ordinance." The full text of the amendment reads as follows:

  > "An application for a conditional use or an administrative conditional use shall be approved only if it is found to comply with this Article and the applicable review standards and special development conditions set forth in ~~Tables 4.2.a through 4.2 f, and Table 4.3 a~~ ***the zoning regulations*** and any other applicable requirements of this Ordinance."

- CCZLDO §5.2.600(1)(a)(b)(iv) and (c): This citation does not exist in the CCZLDO; however, to the extent it is an attempt to reference one or more subsections of CCZLDO 5.2.600, it does not identify any changed criteria that would apply to a Pipeline conditional use permit. Rather, CCZLDO §5.2.600 concerns criteria for evaluation of extension applications. As mentioned above, the County amended these criteria in January 2015; however, as noted in the Board's decision approving the 2017 extension (AP-17-004), "these amendments did not affect the criteria on which the 'decision' —the initial land use approval—was based." 2017 Extension Decision at p.12, n 1.

- AM-16-01: This file includes the CCZLDO amendments pertaining to natural hazards, which are not "applicable criteria" for the pipeline for the reasons explained above.

- AM-15-04: This file includes the CCCP amendments pertaining to natural hazards, which

are not "applicable criteria" for the pipeline, for the reasons explained above.

- AM-14-01: This file includes amendments to adopt the updated Flood Insurance Maps and Flood Insurance Study completed by the Federal Emergency Management Agency. Even to the extent these amendments affect areas along the pipeline alignment, they do not constitute "changes" in "applicable criteria." The Pipeline decision is subject to a condition requiring floodplain certification for any development in a flood hazard area. *See* Condition of Approval A.15. That condition is not limited the flood hazard areas in effect at the time of the decision; rather, it will include the adopted flood hazard areas in effect when development proceeds. Thus, the condition ensures that the updated maps apply to the Pipeline approval. In this way, the amendments are not "changes" that the Pipeline approval would evade compliance with if it is extended.

- AM-14-10: Ms. McCaffree mentions "Final Ordinance AM-14-10" in her appeal, and states that the proposed pipeline is in the applicant does not meet CCZLDO §4.11.430,[16] §4.11.440[17] and §4.11.445(3) & (6).[18] Her arguments are not developed well enough to

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[16] **SECTION 4.11.430 NOTICE OF LAND USE, PERMIT APPLICATIONS AND OVERLAY ZONE BOUNDARY OR SURFACE CHANGES WITHIN OVERLAY ZONE AREA:**

Except as otherwise provided herein, written notice of applications for land use decisions, including comprehensive plan or zoning amendments, in an area within this overlay zone, shall be provided to the airport sponsor and the Department of Aviation in the same manner as notice is provided to property owners entitled by law to written notice of land use applications found in Article 5.0.

[17] **SECTION 4.11.440 PROCEDURES:**

An applicant seeking a land use approval in an area within this overlay zone shall provide the following information in addition to any other information required in the permit application:

1. A map or drawing showing the location of the property in relation to the airport imaginary surfaces. The airport authority shall provide the applicant with appropriate base maps upon which to locate the property.

2. Elevation profiles and a plot plan, both drawn to scale, including the location and height of all existing and proposed structures, measured in feet above mean sea level (reference datum NAVD 88).

[18][17] **SECTION 4.11.445 LAND USE COMPATIBILITY REQUIREMENTS:**

Applications for land use or building permits for properties within the boundaries of this overlay zone shall comply with the requirements of this section as provided herein:

* * * * *.

3. Glare. No glare producing material, including but not limited to unpainted metal or reflective glass, shall be used on the exterior of structures located within an approach surface or on nearby lands where glare could impede a pilot's vision.

* * * * *.

permit adequate review of the issues she seeks to raise. In any event, none of the three cited code sections create approval criteria applicable to a pipeline conditional use permit. CCZLDO §4.11.430 and CCZLDO §4.11.440 represent both procedural requirements and application submittal requirements, not approval standards. CCZLDO §4.11.445(3) might be an applicable approval standard to any structure associated with the pipeline that is located in the airport overlay zone. However, Ms. McCaffree does not identify any evidence in the record that suggests that the applicant has proposed to build any above-ground structures in the airport overlay zone. Therefore, her argument fails.

- AM-14-11: This file included amendments to CCZLDO Chapter 5, including the amendments to CCZLDO 5.0.150 and 5.0.175 addressed above. In general, these amendments involved renumbering, changes to application submittal requirements, and changes to make the CCZLDO consistent with state law.

- AM-12-04: With these legislative amendments, the County attempted to clarify use of the various terms "site plan," "plot plan," and "sketch plan." These amendments also removed site plan review for industrial development. These amendments did not modify the approval criteria that would apply to a conditional use permit for a pipeline.

- CCZLDO 4.11.125:[19] Ms. McCaffree argues that this section applies to the application and constitutes changed criteria. Her arguments are not developed well enough to permit adequate review of the issues she seeks to raise.

E. The Application Complies with the Two-Year Extension Limitation – Non-Resource Land Criteria.

CCZLDO § 5.2.600.2 provides as follows:

> ***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***

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6. Communications Facilities and Electrical Interference. Proposals for the location of new or expanded radio, radiotelephone, television transmission facilities and electrical transmission lines within this overlay zone shall be coordinated with the Department of Aviation and the FAA prior to approval.

[19] SECTION 4.11.125 SPECIAL DEVELOPMENT CONSIDERATIONS:
The considerations are map overlays that show areas of concern such as hazards or protected sites. Each development consideration may further restrict a use. Development considerations play a very important role in determining where development should be allowed in the Balance of County zoning. The adopted plan maps and overlay maps have to be examined in order to determine how the inventory applies to the specific site.

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.*

The Applicant proposes only a one-year extension due to the fact that the pipeline is located partially on EFU and Forest zoned land. The pipeline is still listed as a conditional or permitted use in all of the CBEMP zones which it traverses. The pipeline is still listed as a conditional or permitted use in rural residential zones.

In her letter dated July 20, 2018, Ms. Jody McCaffree cites to argues that CCZLDO § 5.2.600.2(c) only allows one extension. *See* Letter from Jody McCaffree dated July 20, 2018 at pp. 2-3. She notes that Pacific Connector's original CUP was final on March 13, 2012 and had a two-year expiration date (i.e. March 13, 2014). She argues that the one allowed extension would have expired March 13, 2016, which is two years from the original approval's expiration date.

The problem with Ms. McCaffree's analysis is that it failed to account for the fact that the County amended the code on January 20, 2015 to allow additional extensions. *See* Ordinance 14-09-012PL, dated 20 January 2015. Exhibit 10. This issue is discussed in more detail below.

This criterion is met.

F. **Additional Extensions Are Authorized.**

CCZLDO § 5.2.600.3 provides as follows:

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.*

The Pipeline is permitted on EFU lands as a "utility facility necessary for public service" under CCZLDO 4.9.450(C) and ORS 215.283(1)(c). The applicable County criteria at CCZLDO § 4.9.450(C) have not changed since the County's original 2010 decision to approve the CUP.

The pipeline is permitted as a "new distribution line" under CCZLDO § 4.8.300(F) and OAR 660-006-0025(4)(q). The applicable County criteria at CCZLDO § 4.8.300(F) have not changed since 2010. Accordingly, an additional one-year extension may be authorized for the Pipeline pursuant to CCZLDO § 5.2.600(1)(c).

While the County may therefore grant the extension for the prior approvals on Farm and Forest resource lands based *solely* on the absence of any changes to relevant County approval criteria, this is the first extension that Pacific Connector has requested under the amended extension criteria at CCZLDO § 5.2.600.

Opponents argued at the hearing that there is a "cap" on the number of extensions that an applicant may receive. That is, they argued that the applicant has already been granted four extensions on the main alignment, and a fifth extension is not allowed. Opponents' contention fails because it only focuses on CCZLDO 5.2.600.2.a and does not acknowledge, let alone address, CCZLDO 5.2.600.3.e, which expressly authorizes the Planning Director to grant "[a]dditional extensions" for the permit. Further, the case law cited by opponents (*Scovel v. City of Astoria*, 60 Or LUBA 371 (2009)) in support of their interpretation is distinguishable. Unlike the County, the city in *Scovel* did not have a provision expressly permitting "additional extensions" for all permit types. As a result, the holding in *Scovel* is not controlling on or particularly helpful to resolving the issue in this case.

Finally, although opponents correctly note that CCZLDO 5.2.600.1.c expressly authorizes additional extensions of permits on resource land while the parallel subsection applicable to permits on non-resource land (CCZLDO 5.2.600.2) is silent, this fact is not dispositive of the matter for two reasons because as noted, CCZLDO 5.2.600.3.e includes a universally applicable provision allowing the County to grant "[a]dditional extensions" for all permits.

The Board also adopts as findings in this matter the testimony of County Counsel as follows:

> "If CCZLDO § 5.2.600(3)(e) does not modify CCZLDO § 5.2.600(2)(b), then subsection (3)(b) is rendered 'superfluous' and is not given effect. ORS 174.010 provides that 'where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.' Furthermore, there is ample case law to support the basic principle that interpretations that render portions of a statute or other law 'superfluous' or 'meaningless' are to be avoided. *See, e.g., Friends of Hood River Waterfront v. City of Hood River*, 263 Or. App. 80, 90 (2014); *State v. Urie*, 268 Or. App. 362, 365 (2014).
>
> "Subsection (3)(e)'s provision that 'additional extensions may be applied' is rendered meaningless if it does not modify subsection (2) and allow for additional extensions of conditional uses on non-resource zoned property. The word 'additional' is defined by the Oxford English Dictionary as '[a]dded, extra, or supplementary to what is already present or available.' In order to give the word additional effect in subsection (3)(e), it must be read to provide for 'added' or

'supplementary' extensions to those extensions already provided for in CCZLDO § 5.2.600 as a whole. The only subsection that could logically be modified by subsection (3)(e) is thus subsection (2), which standing alone only provides for one extension.

"If the intent of subsection (3)(e) was merely to serve a reminder that the extensions under subsections (1) and (2) may serve to modify the initial conditional use time periods specified in subsection (3), this intent could have been accomplished by providing that 'extensions may be applied,' with the word 'additional' omitted altogether. Once again, the word additional makes it clear that subsection (3)(e) is intended to add to the limited extensions in subsection (2). While this is not an example of the most artful drafting, any other interpretation renders subsection (3)(e) meaningless."

See Letter from Nathaniel Johnson, Coos County Counsel at 2. The Board also finds that its past practice has been to interpret this provision to permit serial renewals for conditional use permits on non-resource-zoned properties.

For the foregoing reasons, the Board finds that the Application is not barred due to a cap on extensions because no such cap exists under the CCZLDO.

This criterion is met.

G. Other Issues Raised by Opponents.

1. Discussion Related to the Contention that "Extension Decision Are Not 'Land Use Decisions."

In her letter dated July 20, 2018, Jody McCaffree makes a contention related to the relationship between OAR 660-033-0140(3) and CCZLDO §5.2.600 and whether the Board's decision in this matter is a land use decision. The contention is difficult to follow, and the Board finds that, in any event, it lacks the authority to define for an appellate body what is or is not a land use decision under Oregon law. Further, the Board finds that it has followed the correct procedures in this matter, including providing adequate public notice and providing a full and fair hearing to all parties. Ms. McCaffree's contention does not demonstrate error by the County or provide a basis to deny or further condition the Application.

2. NEPA Compliance.

Ms. McCaffree continually raises the issue of NEPA compliance and the related Environmental Impact Statement (EIS). In this case, she argues that the NEPA process must be completed before land use approvals can be issued. *See* McCaffree Letter dated July 13, 2018, at p. 3. However, Board has rejected that argument on numerous previous occasions. NEPA is not an approval standard for a land use case. These arguments offer nothing new of substance, and do not seem to acknowledge previous holdings from the County on these topics. For example, in her letter dated July 13, 2018, Ms. McCaffree rhetorically the following question:

> How can FERC "have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." [15 USC § 717b(e)(1)] if the Jordan Cove and Pacific Connector project are allowed to continue processing land use permit applications for the previously FERC "denied" Jordan Cove / Pacific Connecter LNG terminal design and pipeline?

Ms. McCaffree posed this exact same question to the Board in a letter dated September 8, 2017, and the Board addressed the issue in its final decision. *See* Case File AP-17-004. The answer remains the same: First, FERC left the door open for Pacific Connector to apply again, and Pacific Connector has done so.

Second, 15 USC § 717b(d) states the following:

> *(d) Construction with other laws. Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—*
> *(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);*
> *(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or*
> *(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).*

County permitting authority is a mandate of the Coastal Zone Management Act of 1972. If not for the CZMA, the County would have no land use permitting jurisdiction or authority over the pipeline project.

For the reasons stated above, he Board finds that Ms. McCaffree's arguments constitute nothing more than a collateral attack on previously-issued land use decisions and also fail on the merits.

3. **Pacific Connector's Right of Condemnation.**

As the Board understands the facts, the opponents argue that Pacific Connector's right of condemnation stems from federal law and is premised on the acquisition of a Certificate of Public Convenience and Necessity. They argue that since Pacific Connector lost its certificate, it may no longer file land use applications. *See* Letter from Tonia Moro dated July 27, 2018, at p. 6.

The Applicant argues, with virtually no elaboration, that this argument "is not relevant to determining compliance with any approval criteria for this Application." *See* Final Argument dated Aug. 3, 2018, at p. 13.

Further, the County has previously determined that the owner signature requirement for filing a land use application is not jurisdictional. *See* Findings of Fact, Conclusions of Law, and Final Decision of the Board of Commissioners dated Sept. 8, 2010, at p. 15-17. Pacific Connector is in the process of applying for a Certificate of Public Convenience and Necessity from FERC. The fact that such a Certificate was previously issued to Pacific Connector is at least indicative that it is plausible for another Certificate to be issued to Pacific Connector in the

future. In other words, the Applicant is not precluded as a matter of law from obtaining FERC permits. Although FERC denied a separate application, it did so for reasons that can be remedied by obtaining foreign or domestic contracts for the purchase of natural gas.

The initial land use decision on the pipeline matter was conditioned, by Condition 20, to require the Applicant to obtain landowner signatures in order for the pipeline permit to be effective. The Applicant will need to obtain a FERC Certificate in order to effectuate that condition. Applicant has not yet satisfied Condition 20, and granting the extension does not alter the condition or the requirement that Applicant obtain landowner signatures in order for the pipeline permit to be effective. In short, the question of whether landowner signatures are required in the present case is a moot point because the Board has already determined they are required before the Applicant can develop the pipeline.

Moreover, whatever the merits of this argument, this issue could have been raised in either of the two other land use applications that resulted in permit extensions. The issue is not jurisdictional, and therefore the issue can be, and has been, waived.

4. **DOGAMI Comments.**

The opponents presented at Exhibit 3 a letter from Oregon's Department of Geology and Mineral Industries ("DOGAMI") that sets forth a punch list for changes that need to be made to certain Resource Reports submitted by Pacific Connector to address geologic hazards along the route. It is not apparent whether the report has any obvious relevance to the approval criteria, but to the extent that it does, that issue has not been raised with sufficient specificity to allow for a response.

III. CONCLUSION.

To summarize, this extension request concerns both resource and non-resource lands. Under the terms of the relevant criteria, CCZLDO § 5.2.600, there are two different standards for granting an extension. For granting an extension on ***resource lands***, the applicant must show it was unable to begin construction for reasons out of its control. The Board finds that, despite the applicant's diligent pursuit of the federal approvals required, those approvals have not yet been secured, and thus the applicant was unable to commence its development proposal before the expiration date for reasons beyond the applicant's control.

For granting an extension on ***non-resource lands***, CCZLDO § 5.2.600 only requires that an applicant show that none of the relevant approval criteria have changed since the development approval was given. The applicant's use is still listed as a conditional use in the relevant non-resource zones under the current zoning regulations, and thus the Board finds the applicant meets this second criterion as well.

For these reasons, the Board finds and concludes that the Applicant, Pacific Connector, has met the relevant CCZLDO § 5.2.600 approval criteria for a CUP extension of one year, to April 2, 2019. Accordingly, the Board affirms the Planning Director's May 21, 2018 decisions granting the one (1) year CUP in County File No. HBCU-10-01 / REM-11-01, to April 2, 2019

(EXT-18-003), subject to the conditions of approval set forth in Exhibit A to the Planning Director's decision.

Adopted this 20th day of November, 2018.

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

IN THE MATTER OF AN APPEAL (AP-15-01) OF A CONDITIONAL USE APPLICATION (ACU-15-07) SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE, L.P.	)	FINAL DECISION AND ORDER NO. 15-08-039PL

WHEREAS, Pacific Connector Gas Pipeline, L.P. applied for approval of a one (1) year extension of the development approval period for County File No. HBCU-10-01 (REM-11-01). The 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; 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 of Commissioners. The Board of Commissioners appointed Andrew H. Stamp to serve as the Hearings Officer.

Hearings Officer Stamp conducted a public hearing on this matter on June 26, 2015, 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 17, 2015.

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners to approve the application on August 18, 2015.

The Board of Commissioners held a public meeting to deliberate on the matter on September 22, 2015. The Board of Commissioners, all members present and participation,

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 6th day of October 2015.

BOARD OF COMMISSIONERS

Robert "Bob" Main

COMMISSIONER

COMMISSIONER

COMMISSIONER

ATTEST:

Bobbi L. Brooks

Recording Secretary

APPROVED AS TO FORM:

Office of Legal Counsel

Exhibit A

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

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(APPEAL OF AN EXTENSION REQUEST FOR
COUNTY FILE NO. HBCU 10-01 / REM 11-01)
COOS COUNTY, OREGON

FILE NO. AP 15-01 (APPEAL OF COUNTY FILE NO. ACU 15-07).

AUGUST 18, 2015

ANDREW H. STAMP, P.C.
KRUSE-MERCANTILE PROFESSIONAL OFFICES, SUITE 16
4248 GALEWOOD STREET
LAKE OSWEGO, OR 97035

I. INTRODUCTION

The applicant requested approval for a one (1) year extension of the development approval period for County File No. HBCU-01-10 (REM-11-01). That conditional use was approved for a natural gas pipeline and associated facilities on approximately 49.72 miles extending from the Jordan Cove Energy project's LNG Terminal upland from the Port's Marine Terminal to the alignment segment located in adjacent Douglas County. On September 8, 2010, the Board of Commissioners (Board) adopted and signed Order No. 10-08-045PL (File No. HBCU-10-01) approving a conditional use permit for the development of a natural gas pipeline and associated facilities, subject to conditions. That decision was subsequently appealed to the Land Use Board (LUBA) of Appeals, which remanded the case back to Coos County for further consideration of two issues: (1) a procedural issue related to property owner consents under Coos County Zoning and Land Development Ordinance (CCZLDO) §5.0.150; and (2) potential impacts to Olympia oysters in Haynes Inlet under the two applicable CBEMP Management Objectives. On March 13, 2012, the Board addressed and resolved the grounds identified in the remand, and approved findings supporting approval of a valid conditional use permit by adopting Order No. 12-03-018PL (File No. REM-11-01). That second decision was not appealed to the Land Use Board of Appeals.

On March 7, 2014, Pacific Connector filed a request to extend the original ACU approval for two additional years from April 2, 2014 to April 2, 2016. Due to reasons out of the applicant's control, Pacific Connector had been unable to obtain all federal approvals necessary to begin construction on the project. The Planning Department approved this extension request, and that decision was appealed (AP-14-02). The final decision approving the extension was adopted by the Board of Commissioners on October 21, 2014, Final Decision and Order No. 14-09-063PL for a one-year extension expiring April 2, 2015. One November 12, 2014, petitioners Jody McCaffree and John Clarke filed a Notice of Intent to Appeal the decision to the LUBA. On January 28, 2014, Petitioners voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed the appeal on those grounds (*McCaffree v. Coos County*, LUBA No. 2014-102). As a result, the Board's approval of the one-year extension requested by Pacific Connector became final and could not be further appealed.

On March 16, 2015, Pacific Connector filed for another one-year extension. Staff reviewed the request and issued a decision approving the request on April 14, 2015. That staff decision was timely appealed on April 30, 2015, by attorney Kathleen Eymann representing Citizens Against LNG, Inc. A duly noticed public hearing was scheduled and held before Hearings Officer Andrew H. Stamp on July 26, 2015, in the Owen Building, 201 North Adams, Coquille, Oregon. The applicant appeared and testified through counsel, as did the appellants and their counsel. At the conclusion of the hearing the Record was left open to allow the parties to make additional written submissions, if they chose to do so.

A. NATURE OF THE APPEAL

The appellant challenges the Planning Director's decision to allow the applicant Pacific Connector an additional one-year extension on its development approval, to April 2, 2016.

Challenges to a Planning Director decision are reviewed by a substantial evidence in the whole record standard.

B. HISTORY OF THIS CASE

Pacific Connector Gas Pipeline, LP, (hereinafter the "Applicant" or "Pacific Connector"), submitted an application to Coos County (County) requesting approval of a one-year extension of the development approval period for Pacific Connector's conditional use permit and utility facility necessary for public service authorization in County File No. HBCU-10-01, Final Order No. 10-08-045PLas amended on remand, County File No. REM 11-01, Final Order 12-03-18PL. The 2010 and 2012 approvals are referred to collectively as the CUP. The CUP authorizes construction and operation of a natural gas pipeline and associated facilities on approximately 49.72 linear miles within Coos County, extending from Jordan Cove Energy Project's LNG Terminal to the alignment section in adjacent Douglas County.

On March 7, 2014, Pacific Connector filed a request to extend its original CUP approval for two additional years from April 2, 2014 to April 2, 2016. As described further below, the Board of Commissioners ultimately approved a one-year extension expiring April 2, 2015. File No. ACU 14-08/AP 14-02, Final Order No. 14-09-063PL (Oct. 21, 2014). The applicant asserts that, due to reasons for which it is not responsible, the applicant has thus far been unable to obtain all federal approvals necessary to begin construction.

Pacific Connector's CUP is for the purpose of constructing and operating a natural gas pipeline to provide gas to Jordan Cove Energy Project's liquefied natural gas (LNG) terminal and upland facilities. As established in Pacific Connector's original land use application and subsequent proceedings, the Pipeline is within the exclusive siting and authorizing jurisdiction of the Federal Energy Regulatory Commission (FERC), requiring a FERC-issued Certificate of Public Convenience and Necessity (Certificate) prior to construction. Under the federal Coastal Zone Management Act, however, a land use consistency determination is also required within the state's Coastal Zone Management Area (CZMA), precipitating Pacific Connector's application for local land use approvals, including the 2010 application to Coos County.

On September 8, 2010, the Coos County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, approving the Applicant's request for a CUP authorizing development of the Pipeline and associated facilities, subject to certain conditions. The decision was subsequently appealed to, and remanded by, the Oregon Land Use Board of Appeals (LUBA). On March 13, 2012, the Board addressed and resolved two grounds from remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL. The March 13, 2012 decision became final when the 21 day appeal window expired and no appeals were filed on April 2, 2012.

Over the past several years, Pacific Connector has been pursuing the necessary approvals for the Pipeline. Pacific Connector received a FERC Certificate on December 17, 2009. *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 129 FERC ¶ 61, 234 (2009). However, due to changes in the natural gas market and Jordan Cove's reconfiguration of its

facility from an LNG import facility to an LNG export facility, FERC issued an order on April 16, 2012 vacating Pacific Connector's Certificate despite objections of Pacific Connector. *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 139 FERC ¶ 61,040 (2012) (attached as Exhibit D).

Due to FERC's decision to revoke Pacific Connector's FERC Certificate, it was necessary for Pacific Connector to seek new FERC approval for the Pipeline as reconfigured to serve Jordan Cove's proposed LNG export facility. In June 2012, Pacific Connector initiated the mandatory FERC "pre-filing" process to seek a new FERC Certificate. FERC Docket No. PF12-17-000. Following a public scoping process initiated by FERC that lasted until October 29, 2012, Pacific Connector filed a new application with FERC on June 6, 2013. FERC Docket No. CP-13-492-00.

FERC, however, has yet to complete the environmental review of the project needed for a full evaluation of Pacific Connector's application. On November 7, 2014, FERC issued a Draft Environmental Impact Statement (DEIS) for the Pipeline, with public comment held open until mid-February 2015. FERC's revised schedule for the project now indicates that completion of the Final EIS is scheduled for June 12, 2015, with a FERC decision on Pacific Connector's application expected by September 10, 2015. *Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015).

Pacific Connector's CUP originally contained a condition which prohibited the use of the CUP "for the export of liquefied natural gas" (Condition 25). After the initial FERC authorization for the Pipeline was vacated due to the reconfiguration of the Jordan Cove facility, Pacific Connector applied to Coos County on May 30, 2013 for an amendment to the CUP requesting deletion or modification of Condition 25 as necessary for the use of the Pipeline to serve the Jordan Cove LNG export facility. After a revised application narrative was submitted, the application was deemed complete on August 23, 2013, and the County provided a public hearing before a Hearings Officer. On February 4, 2014, the County Board of Commissioners adopted the hearings officer's decision and approved Pacific Connector's requested modification of Condition 25. Final Order No. 14-01-006PL, HBCU-13-02 (Feb. 4, 2014).

Project opponents appealed the County's Condition 25 Decision to LUBA, which upheld the County decision on July 15, 2014. *McCaffree et al. v. Coos County et al.*, __ Or LUBA __ (LUBA No. 2014-022 July 25, 2014). After further appeal of the LUBA decision, the Oregon Court of Appeals affirmed LUBA's decision without opinion in December 2014.

Meanwhile, in light of the withdrawal of its FERC Certificate and the consequent impossibility of obtaining all federal approvals necessary to initiate construction within the original two-year County approval period, Pacific Connector filed a request with the County Planning Department on March 7, 2014 to extend its original CUP approval for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

On local appeal, the Board invoked its authority under CCZLDO § 5.0.600 to appoint a Hearings Officer to conduct the initial public hearing for the appeal and make a recommendation to the Board. After a public hearing, an extended open record period for written evidence and testimony, and final written argument from the applicant, Hearings Officer Andrew Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. In light of limitations contained in OAR 660-033-0140 applicable to extensions in farm- and forest-zoned lands, the Hearings Officer recommended approving the extension request for only one year, extending the CUP approval from April 2, 2014 to April 2, 2015.

The Board held a public meeting to deliberate on the matter on September 30, 2014. At the hearing, the Board voted to accept the Hearings Officer's recommended approval as it was presented. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for one year, until April 2, 2015.

On November 12, 2014, Jody McCaffree and John Clarke (Petitioners) filed a Notice of Intent to Appeal the Board's decision to LUBA. On January 28, 2014, the deadline for Petitioners to file their Petition for Review, Petitioners instead voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed Petitioners' appeal. *McCaffree v. Coos County*, __ Or LUBA __, LUBA No. 2014-102 (Feb. 3, 2015). Accordingly, the Board's decision to extend Pacific Connector's conditional use approval until April 2, 2015 is final and not subject to further appeal.

II. LEGAL ANALYSIS.

A. CRITERIA GOVERNING EXTENSIONS OF PERMITS.

Once a development approval has been granted, as happened in this case, an extension may or may not be allowed, based on the criteria found in CCZLDO § 5.2.600. Under the terms of CCZLDO § 5.2.600, the Planning Director may approve extension requests as an Administrative Action under the local code. *See* Final Decision and Order 14-09-012PL, AM-14-11. Extension decisions are subject to notice as described in CCZLDO § 5.0.900(2) and appeal requirements of CCZLDO § 5.8 for a Planning Director's decision.

The Planning Director may grant an extension up to 12 months where:

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 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.

CCZLDO § 5.2.600(1)(b); *see also* OAR 660-033-0140(2).

Further, additional one-year extensions "may be authorized where applicable criteria for the decision have not changed." CCZLDO § 5.2.600(1)(c); OAR 660-033-0140(4).

On non-resource zoned property, "The Director shall grant an extension of up to two (2) years so long as the use still listed as a conditional use under current zoning regulations." CCZLDO § 5.2.600(2)(a).[1]

The CUP authorizes the Pipeline to be developed on both resource-zoned and non-resource zoned land. Therefore, the Applicant takes the conservative approach and requests a one-year extension for the entire CUP.

B. PROCEDURAL ISSUE: EXPANDING THE GROUNDS FOR APPEAL BEYOND WHAT IS STATED IN THE NOTICE OF APPEAL.

CCZLDO 5.8.170 provides, in relevant part, as follows:

> ***SECTION 5.8.170 Appeal procedures:***
>
> *An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section. If an appellant fails to correctly fill out the form, and there has already been a public hearing on the matter, the Board of Commissioners may deny the appeal based on failure to comply with this section. In the event the appeal is denied based on a failure to comply with this section, a refund of unexpended fees shall be returned to the appellant.*
>
> *The appeal form shall contain the following:*
>
> *5. The nature of the decision and the specific grounds for appeal citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule.*
>
> *6. The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria should or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application.*

The Appellant listed certain issues in Attachment B & C to its appeal narrative dated April 30, 2015. However, at the hearing, the appellant largely abandoned these issues in favor of other

[1] Pacific Connector notes that the then-current CCZLDO § 5.0.700 at issue in the prior extension proceedings has been deleted from the Coos County code and replaced with the above-referenced provisions at CCZLDO § 5.2.600. Accordingly, whether there have 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" is not an approval criterion applicable to this extension request. *Compare* CCZLDO § 5.2.600 *with prior section* § 5.0.700.

legal arguments that were brought up for the first time at the hearing. The applicant objected to the hearings officer addressing these issues on the merits, arguing that Oregon law does not allow the appellant to raise issues not set forth in the Notice of Appeal.

In support of its argument, the applicant cites *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997).[2] In *Johns*, the Court of Appeals construed code language which limited the issues that a party could raise in an appeal of a permit decision that was rendered initially by the planning director without a hearing. LUBA had reached the opposite conclusion, distinguishing the relevant Lincoln City code language from the Douglas County code language that was at issue in *Smith v. Douglas County*, 93 Or App 503, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989), which expressly limited the scope of review in a local appeal to the legal issues that are presented in a local notice of appeal. The Court of Appeals rejected LUBA's reasoning and concluded that the city's code requirement that the issues in a local appeal be listed in the notice of local appeal carried with it an implicit limitation on the issues that a party may later raise in such an appeal:

> "The ordinance requires that a notice of appeal from the planning director's decision 'shall indicate the interpretation that is being appealed and the basis for the appeal.' As noted, LUBA found 'nothing in [section] 9.040 that prohibits the planning commission from considering' or 'anyone from raising' issues 'beyond those indicated as the basis for appeal' in the notice. LUBA distinguished section 9.040 from the ordinance we considered in *Smith*, which expressly 'limited [the appellate body's review] to the grounds relied upon in the notice of review * * * if the review is initiated by such notice.' It is of course true that the provision in *Smith* was express in limiting the review to the issues specified in the notice, while the provision here simply requires that the issues be specified. However, it is not readily apparent why such a specification would be required if it carried no limitation with it. In addition to the fact that requiring issues to be defined in advance would serve no clear purpose if the issues that may later be considered were not correspondingly limited, such a requirement without such a limitation would *dis*serve the objective of providing the other parties to the proceeding with notice of the issues that they must *actually* be prepared to meet. *See Smith*, 93 Or App at 506-07, 763 P2d 169. " 146 Or App at 601-02 (emphases in original; footnote omitted).

ORS 215.416(11)(a)(E) and 227.175(10)(a)(E) were adopted by the legislature in 1999 to overrule the Court of Appeals decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997). *See Haug v. City of Newberg*, 42 Or LUBA 411, 418 n 7 (2002). ORS 215.416(11)(a)(E) now provides as follows:

[2] The applicant mixes up its citation by citing to a later installment of the *Johns* case (161 Or App 224), but it is reasonably clear from the context of the discussion that the applicant meant to cite to 146 Or App 594.

(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;

(ii) *The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal*; and

(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing. (Emphasis added).

The Applicant does not account for ORS 215.416(11)(a)(E)(ii) in its argument to the Hearings Officer. This statute applies to *de novo* appeal hearings that are required where a county renders a permit decision without a hearing pursuant to ORS 215.416(10)(a). That raises the question of whether the decision under appeal is a "permit" as defined by ORS 215.402. LUBA case law makes clear that a decision to grant an extension of a permit is itself a "permit" subject to LUBA's jurisdiction pursuant to ORS 197.015(10), especially when the decision is governed by discretionary criteria. *See Wilhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000); *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010). ORS 215.416(11)(a)(E)(ii) appears, therefore, to be directly on point and disposes of the applicant's argument.

Although the Applicant does not mention *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), the hearings officer has contemplated whether *Miles* could potentially raise another specific type of preservation issue, which has been call the "exhaustion of remedies waiver." This type of preservation error is a somewhat recent phenomenon, given that it stems from the Court of Appeal's decision in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003).

In *Miles,* the Court of Appeals construed ORS 197.763(1) and 197.835(3) with the statutory requirement in ORS 197.825(2) that petitioners must first exhaust local administrative remedies before appealing to LUBA. In *Miles*, an issue was raised during the local proceedings concerning the proper interpretation and application of a lot width requirement. LUBA concluded the issue was adequately raised before the planning commission to preserve the issue for review at LUBA. *Miles*, 44 Or LUBA at 417-18. However, the Court of Appeals construed ORS 197.763(1) and 197.835(3) with the exhaustion requirement of ORS 197.825(2) to conclude that the critical step in *Miles* was when *the petitioners filed their local appeal of the planning commission's decision.*

The City of Florence Code at issue in *Miles* required that the local appeal document include a statement of "[t]he specific errors, if any, made in the decision of the [planning commission] and the grounds therefore." 190 Or App at 503. There was no dispute in *Miles* that the document that the petitioners filed to perfect their appeal of the planning commission

decision specified four errors and that the petitioners' argument concerning the disputed lot width requirement was *not* one of those four alleged errors. The Court of Appeals rejected the petitioners' contention that a letter they later sent to the city council during its deliberations sufficed to raise the issue, because it was sent after the local appeal was filed. 190 Or App 508 n 6 ("that letter did not satisfy the city's requirement that the issues presented for the appeal be specified in their written petition for appeal"). *See also McKeown v. City of Eugene*, 46 Or LUBA 494 (2004), *aff'd without opinion*, 193 Or App 845, 93 P3d 845 (2004) (petitioners waived the issue because they did not include that issue as one of their bases for appeal in the appeal form and attached documents).

If this case were a limited land use decision, then *Miles* would likely apply. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004), *aff'd without opinion*, 193 Or App 845, 93 P3d 845 (2004) However, since ORS 215.416(11)(a)(E)(ii) does apply, *Miles* is not operative.

C. PACIFIC CONNECTOR'S COMPLIANCE WITH THE APPLICABLE STANDARDS FOR A CUP EXTENSION REQUEST ON FARM AND FOREST LANDS

The Hearings Officer finds that Pacific Connector's application and attachments demonstrate compliance with the code requirements at CCZLDO 5.2.600(1) and OAR 660-033-0140(2) for granting extension requests for land use approvals on farm and forest lands.

A. APPLICABLE CRITERIA FOR THE COUNTY'S DECISION TO APPROVE THE CONDITIONAL USE PERMIT HAVE NOT CHANGED.

The County previously granted a one-year extension of the CUP from April 3, 2014 until April 2, 2015. The LUBA appeal challenging the County's extension decision was dismissed after Petitioners withdrew their appeal. The County's prior extension decision is not subject to further appeal. Accordingly, this current request is for an additional one-year extension until April 2, 2016.

Under the local code and by state regulation, "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." CCZLDO § 5.2.600(1)(c); *see also* OAR 660-033-0140(4). While the County standards for approving extensions have recently been modified, none of the applicable substantive approval criteria for the Pipeline have changed since the original County decision to approve the Pipeline in 2010.[3]

The Pipeline is permitted on EFU lands as a "utility facility necessary for public service" under CCZLDO 4.9.450(C) and ORS 215.283(1)(c). The applicable County criteria at CCZLDO § 4.9.450(C) have not changed since the County's original 2010 decision to approve the CUP.

The Pipeline is permitted as a "new distribution line" under CCZLDO § 4.8.300(F) and OAR 660-006-0025(4)(q). *See* Exhibit A at 80–86. The applicable County criteria at CCZLDO §

[3] While the County amended its criteria for evaluating extension applications in January 2015, these amendments did not affect the criteria on which the "decision" – the initial land use approval – was based.

4.8.300(F) have not changed since 2010. Accordingly, an additional one year extension may be authorized for the Pipeline pursuant to CCZLDO § 5.2.600(1)(c).

While the County may therefore grant the extension for the prior approvals on Farm and Forest resource lands based *solely* on the absence of any changes to relevant County approval criteria, this is the first extension that Pacific Connector has requested under the amended extension criteria at CCZLDO § 5.2.600. Accordingly, we will next address the applicable criteria for evaluating initial extension requests under CCZLDO § 5.2.600(1)(b).

B. PACIFIC CONNECTOR HAS MADE A WRITTEN REQUEST FOR AN EXTENSION OF THE DEVELOPMENT APPROVAL PERIOD.

This written narrative and application specifically request an extension of the development approval period. CCZLDO § 5.2.600(1)(b)(i).

C. PACIFIC CONNECTOR'S REQUEST WAS SUBMITTED TO THE COUNTY PRIOR TO THE EXPIRATION OF THE APPROVAL PERIOD.

As noted above, the CUP originally was scheduled to expire on April 2, 2014. *See* Exhibit C at 1–2. On March 7, 2014, Pacific Connector applied for an extension of the approval period. As detailed above, a one-year extension (to April 2, 2015) was approved, and that approval is now final and not subject to further appeal. The March 7th extension application was thus timely submitted prior to the April 2, 2015 expiration of the extended CUP. CCZLDO § 5.2.600(1)(b)(ii).

D. THE APPLICANT HAS STATED REASONS THAT PREVENT THE APPLICANT FROM BEGINNING DEVELOPMENT WITHIN THE APPROVAL PERIOD.

In its approval of Pacific Connector's first extension request, the County found it "clear that the 'applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.'" Specifically, the County found that "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." *Id.*

The County's prior analysis continues to apply. While the Applicant has filed a new application with FERC to authorize the Pipeline, FERC has not yet reached a decision on Pacific Connector's application, and does not expect to reach a decision before the CUP's first extension period has expired. As noted above, in November 2014, FERC issued its DEIS for the Pipeline, with the public comment period open until February 13, 2015. According to FERC's most recent schedule, the Final EIS for the project is scheduled for issuance on June 12, 2015. *Id.* FERC's final decision on Pacific Connector's request for a Certificate of Public Convenience and Necessity is now anticipated to be made by September 10, 2015.

As the County previously recognized in its decision to grant Pacific Connector's initial extension request, Pacific Connector needs federal approvals for the Pipeline and cannot commence project construction or operation until such federal approval is received. While Pacific Connector has made significant efforts and progress towards obtaining federal approval for the Pipeline, the Hearings Officer finds that the federal process cannot be completed before the permit expiration date of April 2, 2015. Accordingly, the Hearings Officer finds that Pacific Connector has stated valid reasons why it has been prevented from initiating development during the period of the initial extension. CCZLDO § 5.2.600(1)(b)(iii).

FINDING: PACIFIC CONNECTOR WAS UNABLE TO BEGIN OR CONTINUE DEVELOPMENT DURING THE APPROVAL PERIOD FOR REASONS FOR WHICH PACIFIC CONNECTOR WAS NOT RESPONSIBLE.

As noted above, the Pipeline is an interstate natural gas pipeline that requires FERC authorization. Accordingly, until Pacific Connector obtains a FERC Certificate for the Pipeline, it cannot begin construction or operation in Coos County or elsewhere along the Pipeline route. On April 16, 2012, however, FERC issued an order vacating Pacific Connector's Certificate despite objections of Pacific Connector. *See* Applicant's Exhibit D. FERC's order was not based on actions by Pacific Connector; rather FERC's order was based upon the decision by Jordan Cove Energy Project, LP to modify its plans "to make use of the Jordan Cove LNG terminal as an export facility for domestically produced natural gas." *Id.* at 7–9. Although Pacific Connector is a different company and did not make the decision to shift to export, FERC vacated its authorization of the Pipeline because FERC viewed the Pipeline as integral to the LNG terminal project. *Id.* at 10–11. Due to this FERC action, many of the other state and federal agencies terminated work on permit applications. FERC's action was not within the control of Pacific Connector and it created delays for the entire permitting process.

The County previously determined that FERC's revocation of the original FERC Certificate was a valid reason, outside of Pacific Connector's control, which prevented Pacific Connector from beginning development during the initial approval period (prior to April 2, 2014). Applicant's Exhibit C at 9. This prior determination is not at issue in this case. Instead, for the purposes of the extension request now before the County, the County must determine whether there are reasons for which Pacific Connector was not responsible which prevented the company from beginning Pipeline development during the first extension period (*i.e.* from April 3, 2014 to April 2, 2015).

After its initial federal authorization was revoked by FERC, Pacific Connector applied for a new FERC Certificate in June 2013. However, FERC's review is still ongoing, and until the environmental review is complete and a Final Environmental Impact Statement is issued, FERC cannot make a final decision on the merits of Pacific Connector's application or issue a Certificate for the Pipeline. As noted above, FERC has indicated that it expects to issue its Final EIS for the project in June 2015, with its final decision on Pacific Connector's application to follow by September 10, 2015. Applicant's Exhibit E. Pacific Connector has provided all information requested by FERC, and the federal agency's lengthy review period is outside Pacific Connector's control.

As the Applicant's Exhibit F indicates, there are dozens of major federal, state, and local permits, approvals, and consultations needed before the Jordan Cove and Pacific Connector projects can begin construction. While Pacific Connector has worked to move the Pipeline through the federal, state, and local processes, this rigorous regulatory environment does not lend itself to fast-track approval. In addition to the ongoing federal FERC process, the Applicant has applied for local Coos County approvals for alternative alignments requested by FERC, as well as Douglas County land use approval within the CZMA. While these alternative alignments and other jurisdictions are not at issue in this proceeding, they further demonstrate Pacific Connector's diligence in pursuing all necessary federal, state, and local approvals necessary to initiate construction as expeditiously as possible.

Accordingly, the Hearings Officer finds that, for reasons for which it is not responsible, Pacific Connector has been unable to initiate construction and vest its conditional use during the initial CUP extension period from April 3, 2014 to April 2, 2015. The applicant has been diligently pursuing all necessary local, state, and federal approvals, but has not yet received its needed FERC Certificate. For the foregoing reasons, the Hearings Officer finds that Pacific Connector was unable to begin construction during the first extension period for reasons outside its control. CCZLDO § 5.2.600(1)(b)(iv).

FINDING: PACIFIC CONNECTOR HAS DEMONSTRATED COMPLIANCE WITH THE APPLICABLE STANDARDS FOR A CUP EXTENSION REQUEST ON NON-RESOURCE LANDS

The recent amendments to the CCZLDO also provide the County standard for extensions of land use approvals on non-resource lands: "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." CCZLDO 5.2.600(2)(a). On all non-resource lands, the Pipeline use is still listed as a conditional use under current zoning regulations, and the Planning Director was justified in granting Pacific Connector's request for an extension of the CUP for one year.

The County's land use approval criteria applicable to the Pipeline have not changed since the County's original decision to approve the Pipeline in 2010. In the F zone, the Pipeline was approved as a "new distribution line," permitted as a conditional use. In the EFU zone, the Pipeline was approved as a "utility facility necessary for public service," permitted outright under both the local code and state law. *Id.* at 115–23; CCZLDO 4.9.450(C); ORS 215.283(1)(c). The CCZLDO provisions providing the applicable approval criteria have not changed.

The approval standards for the Pipeline in non-resource zoned lands have also not changed. In the RR-2 and RR-5 zoning districts, the Pipeline was approved as a "utility facility not including power for public sale," a conditional use under the CCZLDO. CCZLDO § 4.2.400; Table 4.2c. In the IND zoning district, the Pipeline was permitted outright as a "utility facility not including power for public sale." CCZLDO § 4.2.600; Table 4.2e. None of the relevant approval standards for the Pipeline have changed.

C. APPELLANT'S ARGUMENTS.

Appellant raises several arguments in this appeal. First, citing CCZLDO § 5.2.600, the appellant states the Coos County ordinance "only allows extensions where applicable criteria for the decision have not changed.'" The appellant then states the code provisions concerning the Southwest Oregon Regional Airport overlay were changed in February, 2015, and then cites several sections of CCZLDO § 4.1.400 *et sequent* dealing with the Southwest Oregon Regional Airport overlay zone.

That might all be true, but these CCZLDO provisions (specifically, the appellant cites to §§ 4.1.430, 4.1.440 and 4.1.445) are not relevant approval criteria for a pipeline. The Southwest Oregon Regional Airport overlay does not extend into the *resource zone* where the applicant's development is proposed to occur. Therefore, these are not applicable approval criteria. The criteria that is cited are specific to resource zoning, listed in CCZLDO Chapter 4 as Forest, Forest Mixed use or Exclusive Farm Use.

Second, the appellant argues:

> "the Applicant has made significant changes to the proposed pipeline route and configuration in applications to other governments agencies. These changes have not been approved by Coos County. Appellants are concerned that this Administrative Decision will be interpreted to permit Applicant's proposed changes to the pipeline route and configuration in the area west of Hayes Inlet..."

This argument is reiterated in pp 1-4 of Ms. Eymann's July 10, 2015 submission. Essentially, Appellant is arguing a fear that a decision on the extension might somehow be misused in future by the applicant (or perhaps even the County) to allow the applicant to make pipeline alterations or extensions without seeking the necessary legal permission. Fear of future imaginary misdeeds has no bearing on whether the applicant has satisfied the CCZLDO § 5.2.600 criteria for obtaining an extension. The extension is just that: an authorization to complete an approved project over a longer time period. It does not allow the application to build anything for which a land use application has not been submitted and approved. Appellant's argument, while perhaps only precautionary in nature, has no merit. The appellant raises additional issues which also form collateral attacks on the CUP itself (*e.g.* gas pipeline route, pipeline configuration, and other matters), not the extension request under appeal. The applicant addresses these arguments in its written final argument dated July 17, 2015; the Hearings Officer hereby adopts these arguments into this decision by this reference, finding they are meritorious, persuasive, and based on substantial evidence based on the whole record.

Third, the appellant makes the following assertion: "CCZLDO § 4.1.435 – The pipeline constitutes a physical hazard to air navigation." That sentence stands alone, with no elaboration or explanation or any kind. Without more, it is impossible to see how the proposed pipeline could be a "physical hazard to air navigation." In any event, air navigation hazards are not listed as an approval criteria for extensions of development permission under CCZLDO § 5.2.600.

Fourth , the appellants assert that the applicant "have not demonstrated that the project complies with the CBEMP" and states "Applicant must demonstrate that consultation with the State Department of Geology and Mineral Industries has occurred before final approval of any plan to build a hazardous facility." Again, it seems the Appellant does not seem to understand that the very limited scope of this appeal concerns one question only – whether Pacific Connector meets the CCZLDO § 5.2.600 approval criteria for a CUP extension. This appeal is not an opportunity to collaterally attack the initial CUP approval.

Fifth, during the July 26, 3015 public hearing, appellant's counsel seemed to be arguing that the Hearings Officer has the authority to re-open the Board's 2010 approval of the CUP to determine if the County appropriately categorized Pacific Connector's proposed use as a conditional in the relevant non-resource zones under the current zoning regulations, or if that proposed use is some sort of other, non-listed (and thus impermissible) "low intensity" utility use. The Hearings Officer lacks the legal authority to engage in such an undertaking, as he is limited to reviewing the Planning Director's extension decision according the CCZLDO § 5.2.600 approval criteria. However, even if such authority existed, the Hearings Officer stands by the original analysis set forth in the 2010 decision.

Opponent John Clarke submitted a July 10, 2015 letter regarding the size of the pipe for the boil-off gas, and the processing of the liquid natural gas in the approved CUP. Again, this issue had nothing to do with the CCZLDO § 5.2.600 criteria or approving or denying an extension, and instead appears to concern the related JCEP project. That is not relevant at this time.

In its submittal dated July 10, 2015, Appellant argues that Coos County is currently in the process of amending its Comprehensive Plan to adopt Hazard Maps generated by the Oregon Department of Geology and Mineral Industries." *See* Eymann Letter, Exhibit 4, dated July 10, 2015, at p. 5. While that may be true, it has no bearing on the current extension request under appeal. A land use application (and any extension of land use permission) must be evaluated under the approval criteria in effect at the time, not under some hypothetical criteria that could be adopted in the future. Appellant faults the County for not adopting the 2012 DOGAMI hazard maps, but fully concedes that the applicant's current request does not violate the relevant CCZLDO approval criteria: "As a result of this failure by the County, the applicable criteria for Resource zoned property and the current zoning regulations for non-Resource areas have not changed in a way that would make the proposed extension violate the CCZLDO." Eymann submission, July 10, 2015, p. 2).[4] That, right there, is the appellant conceding that the decision the appellant is appealing does not violate the law.

If the appellant's DOGAMI hazard map arguments have legal merit, they might be introduced when and if they are adopted and the applicant applies for yet another extension after April 2, 2016. But that has not happened, so appellant's arguments are premature and

[4] Appellant's counsel Kathleen P. Eymann submitted two letters both dated July 10, 2015. This quotation is taken from the six-page letter with "LEGAL ISSUES RAISED BY EXTENSION" on the first page. The other July 10, 2015 Eymann submission, by way of identification, is seven pages and has "CHANGES TO PCGP ROUTE" written on the first page.

hypothetical and do not concern the relevant approval criteria currently in effect in CCZLDO § 5.2.600.

To further explain this point, Oregon is a "planning mandate" or "planning consistency" state, ORS 197.175; 197.250, which means that the comprehensive plan is binding law. Local governments are required to exercise all land use planning, zoning, and construction-related functions consistent with its existing acknowledged comprehensive plans. *See generally Fasano v. Board of County Commissioners of Washington County*, 264 Or 574, 507 P2d 23 (1973) *overruled on other grounds, Neuberger v. City of Portland.*;[5] *Baker v. City of Milwaukee*, 271Or 500, 533 P2d 772 (1775).[6] A comprehensive plan has been compared to a constitution in the sense that it is law, and it is intended to bind a city's current and future governing bodies. *Baker v. City of Milwaukie*, 271 Or 500, 507, 533 P2d 772 (1975). In fact, the *Baker* Court firmly established the supremacy of the comprehensive plan over other city or county land use planning documents:

> The fact is that the City of Milwaukie has adopted a comprehensive plan. * * *. If that plan is to have any efficacy as the basic planning tool for the City of Milwaukie, it must be given preference over conflicting prior zoning ordinances. To hold otherwise would allow a city to go through the motions and expense of formulating a comprehensive plan and then relegating that document to oblivion through continued reliance on the older zoning ordinances.

Id. at 507. As relevant here, the salient point from *Baker* is that the comprehensive plan is not a collection of pretty maps and aspirational, feel-good policies that can be relegated to some planner's dusty bookshelf. Nor is it a "vest pocket tool" of the planning commission. *Id.* at 514. Rather, *it is controlling law* that is binding on both landowners and the local government, subject, of course, to the governing body's authority to amend it pursuant to state law. It governs all subsequent planning decisions and actions of the governing body and staff. *See* ORS 197.015(5), Goal 2. That means, for example, that if a comprehensive plan contains a population projection covering a twenty-year planning horizon, no implementation measure, post

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[5] In *Fasano*, the Oregon Supreme Court explained how the comprehensive plan works, as follows:

> ORS 215.050 states county planning commissions 'shall adopt and may from time to time revise a comprehensive plan.' In a hearing of the Senate Committee on Local Government, the proponents of ORS 215.050 described its purpose as follows:
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> '* * * The intent here is to require a basic document, geared into population, land use, and economic forecasts, which should be the basis of any zoning or other regulations to be adopted by the county. * * *'

(citing hearing on Senate Bill 129 before the Senate Committee on Local Government, 52nd Legislative Assembly, February 14, 1963).

[6] *See generally*, Edward J. Sullivan and Laurence Kressel, *Twenty Five Years After: Renewed Significance of the Comprehensive Plan Requirement*, 9 URBAN LAW ANNUAL 33 (1975); James H. Wickersham, *The Quiet Revolution Continues: The Emerging Model for State Growth Management Statutes*, 18 HARVARD ENVTL L REV, 489, 531-2 (1994).

acknowledgement plan amendment ("PAPA") or permit can rely on a different, inconsistent population projection - unless the comprehensive plan is first updated to replace the old projections with the new ones. *City of La Grande v. Union County*, 25 Or LUBA 52 (1993); *See generally 1000 Friends of Oregon v. Metro*, 174 Or App 406, 26 P3d 151 (2001) (discussed, *infra*).

This "plan as law" concept is perhaps best reflected in ORS 197.175, which states, in relevant part, that "[c]ities and counties shall exercise their planning and zoning responsibilities * * * in accordance with ORS chapters 195, 196 and 197 and the goals * * *. The definition of "comprehensive plan" set forth at ORS 197.015(5) reinforces this mandate:

> "(5) 'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. "Comprehensive" means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. "General nature" means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is "coordinated" when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. "Land" includes water, both surface and subsurface, and the air." (Emphasis Added).

In *South of Sunnyside Neighborhood League v. Board of Comm'rs of Clackamas County*, 280 Or 3, 569 P2d 1063 (1977), the Oregon Supreme Court interpreted the definition's phrase "coordinated and integrated" as requiring internal consistency within a comprehensive plan:

> "In order for a comprehensive plan to be coordinated and interrelated as required by the statute, its land use maps must be consistent with the applicable textual provisions, which normally take the form of goals and policy statements. When it is proposed to change the plan by changing the permitted use of a single parcel of land, the legislative requirement that a comprehensive plan be coordinated and interrelated includes, we believe, a requirement that the amendment to the map be consistent with the unamended portions of the plan. Conformance with the applicable textual goals and policies, which will normally be designed to guide future change and development, is particularly important."

Id. at 13. Subsequent courts echoed this requirement, holding that when a local government amends its acknowledged comprehensive plan, it is obligated to assure both that its amended plan remains in compliance with the statewide planning goals and that the amendment does not

create a conflict with the un-amended portions of the acknowledged comprehensive plan and land use regulations. *1000 Friends of Oregon v. Jackson County,* 79 Or App 93, 98, 718 P2d 753 (1987); *Ludwick v. Yamhill County,* 72 Or App 224, 231, 696 P2d 536, *rev den* 299 Or 443 (1985). *See also Von Lubken v. Hood River County,* 22 Or LUBA 307, 313 (1992); ORS 197.175(2)(d).

As discussed in more detail below, ORS 197.175 and Goal 2 require that the current comprehensive plan form the basis for all government decision-making that affects land use. The existing comprehensive plan controls other documents or studies, and the plan must be amended if it is no longer reflective of the facts and assumptions which the local government wishes to rely. *See* Statewide Planning Goal 2; *D.S. Parklane Development, Inc. v. Metro,* 165 Or App 1, 22, 994 P2d 1205 (2000); *Residents of Rosemont v. Metro,* 173 Or App 321, 333-34, 21 P3d 1108 (2001); *1000 Friends of Oregon v. Metro,* 174 Or App 406, 26 P3d 151 (2001).

The issue this case raises is whether information contained in DOGAMI hazard maps can be applied as approval standards to a land use application before they are formally adopted. The short answer is "No." This is sometimes referred to as the "Goal 2 consistency" requirement /doctrine. Most commonly, the issue arises when a local government attempts to rely on facts set forth in either "adopted" or "unadopted" plans or maps that conflict with facts or maps set forth in the Comprehensive Plan.

The first case that confronted this "internal consistency" aspect of the doctrine head on is LUBA's opinion in *City of La Grande v. Union County,* 25 Or LUBA 52 (1993). In this 1993 case, the City of Island City sought to amend its UGB. This legislative planning action required the county's approval, due to the manner in which the city and county had structured their respective comprehensive planning responsibilities over the land in question. The city's then-current comprehensive plan was of 1984 vintage, and thus was approximately eight years out of date when the county approved the UGB amendment in 1992 *Id.* at 56. The city's 1984 comprehensive plan included population projections and assumptions that were used to justify the amount of land contained inside the city's initial UGB, and concluded that the despite anticipating very high rates of growth (from a 1984 population of approximately 600[7] persons in 1984 to 3,127 persons by the year 2000), the then-existing UGB was sufficient to meet residential development needs clear out to the year 2000. *Id.*

In adopting the 1992 UGB amendment, the city and county relied on (and adopted into their respective comprehensive plans) newer, more up-to-date planning assumptions justifying the need to expand the boundary. *Id.* at 57. However, the city and county did not delete the old assumptions and analysis supporting the 1984 boundary. *Id.* In addition, the city and county did not amend the city's 1984 population projections, which, with the benefit of eight years of hindsight, were proving too high. Nonetheless, the city and county insisted that new pro-growth

[7] We say "approximately" because the case does not reveal the precise 1984 population. The case does note that the 1975 population was 475 and the 1992 population was 750. *See City of La Grande,* 25 Or LUBA at 56, n5. Notwithstanding our rough numerical extrapolation, it is not important to know the *precise* 1984 population for purposes of understanding the legal precedence of the case. Rather, it is only important to understand a rough baseline so as to put the 3,127 figure into perspective.

policies and commercial projects would stimulate housing demand beyond that which could be accommodated in the existing boundary. LUBA did not find that rationale very compelling, describing it as being "speculative" and without substantial evidence. Beyond that, however, LUBA continued on with the following key passage:

> "However, even if there were such evidence in the record, the challenged decision does not amend the plan to revise the prior population projections, as must be done if the county is relying on changes in the projected urban population to justify the UGB amendment."

Id. at 57. Although LUBA did not cite any authority for the proposition, in a later case it clarified that it had relied on Goal 2 and Goal 14 for that holding.[8]

The next case to address the Goal 2 consistency requirement was *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999), *aff'd as modified*, 165 Or App 1, 22, 994 P2d 1205 (2000), the first in a triad of high-profile Metro cases addressing urban reserves and urban growth boundaries. In *D.S. Parklane*, Metro relied on a 20-year data set known as the "Urban Growth Report" ("UGR") to estimate the amount of housing that could be accommodated within the existing UGB, a determination which drives the amount of land needed in the urban reserve area. Based on the Urban Growth Report's analysis, Metro concluded that the existing UGB could accommodate 207,600 dwelling units through 2017, whereby leaving an unmet shortfall of 41,400 dwelling units.

The petitioners in *D.S. Parklane* argued that use of the un-adopted Urban Growth Report was improper since its conclusions were inconsistent with the adopted target capacity estimates contained in an earlier acknowledged planning and regulatory document known as the "1996 Urban Growth Management Functional Plan."[9] This UGM Functional Plan had set target

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[8] *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 545 (1999), *aff'd as modified*, 165 Or App 1, 22, 994 P2d 1205 (2000). In *D.S. Parklane*, LUBA discussed its decision in *La Grande* and recognized the underlying rationale for its holding in that case as having roots in Goal 2 and Goal 14:

> In *La Grande*, we observed that, where a city justifies a UGB amendment on the basis of higher population projection than reflected in the initial projections that were used in the comprehensive plan to establish the UGB, the city must amend its comprehensive plan to incorporate the new higher projections. Underlying our conclusion is the recognition that, because both establishment and amendment of a UGB require a demonstration of need under Goal 14, factors 1 and 2, a UGB amendment justified on different population projections than reflected in initial projections or assumptions used to justify establishment of that UGB is necessarily a conclusion that those initial projections, and hence the very basis for the established UGB, are no longer valid. In such circumstances, both Goal 2 and Goal 14 require that the comprehensive plan be amended to correct those projections or assumptions. (Emphasis added).

Id. at 545.

[9] A "Functional Plan" is a document adopted by a regional government that achieves regulatory implementation of regional land use goal and objectives adopted pursuant to ORS 268.380(1)(a). *See* ORS 268.390(2) ("A district

densities for the region and required that local governments take specific measures to increase residential densities so that the target capacities would be met. The UGM Functional Plan estimated that if target capacities were achieved, the existing UGB could accommodate 243,600 households, or 37,000 more households (roughly 4000 acres) than what was estimated in the Urban Growth Report.

Respondents argued that the Urban Growth Report was nothing more than an updated version of the data used to develop prior Metro planning documents. As it was mere data, respondents argued, it could not conflict with Policies in the UGM Functional Plan. Furthermore, Respondents argued, the UGM Functional Plan only set "target" densities, and the UGR estimated what Metro thought was more realistically achievable, given all the variables that could prevent the full realization of the target numbers in the UGM Functional Plan.

In resolving the issues, LUBA ultimately agreed with respondents that the UGM Functional Plan capacity "targets" serve a different purpose than the capacity estimates in the Urban Growth Report, and therefore petitioners had not shown that the UGR was inconsistent with the UGMFP. 35 Or LUBA at 545. However, the court of appeals disagreed with LUBA's analysis and conclusion on this point. The court noted that LUBA had focused on the wrong inquiry, finding that the "correct question is whether the land use action itself, *i.e.*, the determination of the amount of needed land, is consistent with and based upon the applicable plan and 'related implementation measures.'" 165 Or App at 22. The court held:

> "The objective of [Goal 2] is to make the planning process and planning documents the '*basis* for all decisions and actions related to use of land.' The draft [UGR] is not a plan or a planning document of the kind that Goal 2 contemplates. It is an informal study that, by its own terms, is not related to the designation of urban reserves and, by its own terms, is not even a 'final' document for the purposes at which it is directed. Under Goal 2, the computation of need must be based upon the functional plan and/or Metro's other applicable planning documents. Metro may, of course, amend those documents in the manner prescribed by law, if it chooses, but it cannot simply subordinate them to an informal study that is concerned with a remotely related matter." (Emphasis in original).

Id. Thus, the court found that the draft report was not a "planning document" in the Goal 2 sense, meaning that it had not been adopted pursuant to a Goal 2 mandated land use planning process, and had not been coordinated as being in compliance with the Statewide Planning Goals, neighboring jurisdictions' plans, and unamended portions of Metro's own regional plans.

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may prepare and adopt functional plans for those areas designated under subsection (1) of this section to control metropolitan area impact on air and water quality, transportation and other aspects of metropolitan area development the district may identify.") A Functional Plan is binding on local governments with the regional government's jurisdiction.

The issue presented in *D.S. Parklane* resurfaced in *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000), *aff'd in part, rev'd in part*, 173 Or App 321, 333-34, 21 P3d 1108 (2001) in the context of Metro's December 1998 decision to amend the Metro Portland UGB. In *Residents of Rosemont*, Metro continued to rely on its 1997 UGR as the basis for finding the need to enact a much larger UGB expansion than would have been needed if the population forecasts and the target capacities in the 1996 UGM Functional Plan had been relied on. In addition, Metro bolstered their case with additional data provided by a draft 1998 update to the UGR, as well as a draft "Assessment of Need" document. None of the relied-upon documents were formally adopted into the acknowledged regional plans, nor were they acknowledged. However, the 1997 UGR had in the interim been formally adopted by Resolution of Metro's governing body.

Nonetheless, despite taking the extra step of formally "adopting" the 1997 UGR, both LUBA and the court of appeals found Metro's failure to amend its acknowledged planning documents to reflect the newer updated projections and growth assumptions constituted reversible error. LUBA viewed the central lesson from *D.S. Parklane* as establishing that it is "Metro's planning documents developed pursuant to the Goal 2 mandated process" that must form the "basis for Metro's land use decisions." 38 Or LUBA at 208.

The issue of whether Metro's 1997 UGR could be relied on to support a PAPA was the subject of the third of the Metro "triad" cases, *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565, *aff'd in part, rev'd in part*, 174 Or App 406, 26 P3d 151 (2001) *("Ryland Homes")*. However, this third case presented a factual twist insomuch as Metro had attempted to improve the pedigree of the capacity numbers in the 1997 UGR by formally incorporating them into the Regional Framework Plan ("RFP"). Since the RFP was a coordinated, authoritative planning document of the type contemplated by Goal 2, Metro reasoned that incorporating these numbers into the RFP would satisfy the concerns raised by the opponents in the two earlier cases. Indeed, LUBA took the bait and affirmed Metro's reliance on those numbers.

However, the Court of Appeals applied a much more critical eye, and held that LUBA missed the point: Goal 2 required planning documents and actions to be consistent. Although Metro had "checked the box" by incorporating the capacity numbers from the 1997 UGR into the RFP, Metro had not altered the capacity numbers contained in the 1996 UGM Functional Plan, nor had it harmonized or otherwise explained the relationship between the two sets of inconsistent numbers. The court explained:

> "By relying on the lower capacity estimates of the UGR (or its methodology in the RFP) to add land to the UGB without amending the UGM Functional Plan to reflect those numbers, *Metro imposes an inconsistent planning requirement on local governments.* It tells local governments to prepare for one method of accommodating growth (*i.e.*, accommodate more employment and housing inside the existing UGB), while Metro relies on another method to manage the UGB (*i.e.*, add land to accommodate that same projected employment and housing). The two methods are in conflict. Providing additional land for the same projected population will decrease the likelihood that infill

> and redevelopment will occur inside the UGB, or that higher density housing inside the UGB will be sought after. This is the type of inconsistent, uncoordinated planning that Goal 2 is intended to prevent." (Emphasis in Original).

Id. at 422-23. Because the UGM Functional plan's target capacities were mandated requirements binding local governments, and because Metro had not made the documents consistent with one another, or otherwise explained how the numbers in the 1997 UGR related to the target capacities in the Functional Plan, the Court of Appeals found an inconsistency and remanded. The Court stated:

> "Without some provision explaining how the update numbers affect the target capacities in the functional plan, or without an amendment to the target capacities, we are unable to conclude that it was appropriate for Metro to rely on the UGB capacity estimates from the 1997 UGR. LUBA erred in so concluding."

Id. at 424. Thus, the Court in *Ryland Homes* went a step further than *D.S. Parklane*, by explaining that the Goal 2 consistency requirement demands more than simply incorporating the desired facts and assumptions in to the controlling land use plan. Rather, it requires that the new data and assumptions be fully integrated into the existing plan, so that the plan will continue to function as a fully integrated whole.

Finally, consider the case of *1000 Friends of Oregon v. City of Dundee,* 203 Or App 207, 124 P3d 1249 (2005). In that case, I wrote an *amicus* brief for the Home Builders Association that successfully reversed a LUBA decision that did not apply the Goal 2 consistency principle in a correct manner. In that case, the City of Dundee had an acknowledged comprehensive plan, but portions of it, such as its buildable lands inventory, were functionally obsolete due to the passage of time. In approving the comprehensive plan amendments necessary to allow the Newberg-Dundee Bypass project to move forward, the city ignored the outdated 17-year-old BLI contained in its comprehensive plan. Instead, it relied on an un-adopted and unacknowledged study conducted by its planning staff two years prior. This 2003-vintage document was prepared at the staff level and was not subject to any formal land use review process. Although the 2003 BLI contained a more current factual base that its older counterpart contained in the obsolete comprehensive plan, the court held that it did not give the city any legal basis to avoid the Goal 2 consistency requirement by ignoring the facts, assumptions, and data as set forth in the comprehensive plan, and instead rely on inconsistent, unadopted data. The court stated:

> In sum, a planning decision based on a study contemplated by a comprehensive plan but not incorporated into the comprehensive plan after the study is carried out is not a planning decision that is made on the basis of the comprehensive plan and acknowledged planning documents, as is required by Goal 2. *D.S. Parklane Development, Inc.*, 165 Or. App. at 22. That is not a matter of mere abstract concern. Rather, it goes to the heart of the practical application of the land use laws: The comprehensive plan is the

> fundamental document that governs land use planning. Citizens must be able to rely on the fact that the acknowledged comprehensive plan and information integrated in that plan will serve as the basis for land use decisions, rather than running the risk of being "sandbagged" by government's reliance on new data that is inconsistent with the information on which the comprehensive plan was based. LUBA erred in concluding otherwise.

In conclusion, these Goal 2 consistency doctrine cases make it clear that unadopted facts or DOGAMI hazard maps that may be formally incorporated into a Comprehensive Plan sometime in the future can form no basis for evaluating a CUP extension request currently under appeal. If and when the County adopts the DOGAMI maps, that may form grounds to evaluate future extension requests, but that issue need not be addressed as part of this extension request. The scope of this appeal is limited to the legal grounds to challenge the Planning Director's decision to grant applicant Pacific Connector a one-year extension, and those criteria are found in CCZLDO § 5.2.600.

III. CONCLUSION.

To summarize, this extension request concerns both resource and non-resource lands. Under the terms of the relevant criteria, CCZLDO § 5.2.600, there are two different standards for granting an extension. For granting an extension on ***resource lands***, the applicant must show it was unable to begin construction for reasons out of its control. The Hearings Officer finds that, despite the applicant's diligent pursuit of the federal approvals required, those approvals have not yet been secured, and thus the applicant was unable to commence its development proposal before the April 2, 2015 date for reasons beyond the applicant's control.

For granting an extension on ***non-resource lands***, CCZLDO § 5.2.600 only requires that an applicant show that none of the relevant approval criteria have changed since the development approval was given. The applicant's use is still listed as a conditional use in the relevant non-resource zones under the current zoning regulations, and thus the Hearings Officer finds the applicant meets this second criterion as well.

For these reasons, the Hearings Officer finds and concludes that the applicant, Pacific Connector, has met the relevant the CCZLDO § 5.2.600 approval criteria for a CUP extension of one year, to April 2, 2016. The Hearings Officer recommends to the Board that they so find, affirming the Planning Director's April 14, 2015 decision granting the one (1) year CUP in County File No. HBCU-10-01 / REM-11-01, to April 2, 2016.

Respectfully submitted this 18th day of August, 2015.

Andrew H. Stamp
Hearings Officer

Attachments

- Exhibit A: Final Order No. 10-08-045PL, HBCU-10-01 (Sept. 8, 2010)
- Exhibit B: Final Order No. 12-03-018PL, REM 11-01 (Mar. 13, 2012)
- Exhibit C: Final Order No. 14-09-063PL , ACU 14-08/AP 14-02 (Oct. 21, 2014)
- Exhibit D: *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 139 FERC ¶ 61,040 (2012)
- Exhibit E: *Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015)
- Exhibit F: Major Permits, Approvals, and Consultations for the JCE & PCGP Project, Table 1.5.1-1, *Jordan Cove Energy and Pacific Connector Gas Pipeline Project Draft EIS* (Nov. 7, 2014)
- Exhibit G: *McCaffree v. Coos County*, __ Or LUBA __, LUBA NO. 2014-102 (Feb. 3, 2015)
- Exhibit H: Final Order No. 14-09-12PL, AM-14-11 (Jan. 20, 2015)

Exhibit A

Final Order No. 10-08-045PL, HBCU-10-01 (Sept. 8, 2010)

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

IN THE MATTER OF CONSOLIDATED CONDITIONAL USE APPLICATIONS HBCU-10-01 SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE	FINAL DECISION AND ORDER NO. 10-08-045PL

WHEREAS, on Pacific Connector Gas Pipeline filed consolidated permit applications to develop 49.72 miles of gas pipeline and associated facilities on property described in Exhibit "B" of this Order; and

WHEREAS, on March 2, 2010, pursuant to its authority under CCZLDO §5.0.600, the Board of Commissioners (Board) voted 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. On April 5, 2010, the Board appointed Andrew H. Stamp to serve as the Hearings Officer.

WHEREAS, on May 20, 2010, Hearings Officer Stamp conducted a public hearing on this matter and at the conclusion of the hearing the record was held open for 21 days to accept additional written evidence to rebut evidence presented at the hearing, followed by a 7-day period for accepting surrebuttal testimony, followed by a 7-day period for the applicant to submit final written argument.

WHEREAS, on July 16, 2010, Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board to approve the applications subject to the imposition of conditions.

EXHIBIT A

WHEREAS, on August 3, 2010, at 1:30 p.m., the Board met to deliberate on the matter and made a tentative decision to accept the Hearings Officer's recommended approval subject to amended findings and conditions.

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 8th day of September 2010.

BOARD OF COMMISSIONERS

COMMISSIONER

COMMISSIONER

COMMISSIONER

ATTEST:

Recording Secretary

APPROVED AS TO FORM:

Office of Legal Counsel

EXHIBIT A

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

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
COOS COUNTY, OREGON

FILE NO. HBCU-10-01
SEPTEMBER 8, 2010

Exhibit "A"
Order. 10-08-045PL

EXHIBIT A

TABLE OF CONTENTS

EXHIBIT A

EXHIBIT A

I. SUMMARY OF PROPOSAL AND PROCESS

A. Summary of Proposal.

This consolidated application is made by Pacific Connector Gas Pipeline Company, LP ("Pacific Connector" or "applicant") with respect to the Coos County segment of its proposed interstate natural gas pipeline known as the Pacific Connector Gas Pipeline ("PCGP" or "pipeline"). This is the fifth in a series of interrelated land use applications for the development of the Oregon International Port of Coos Bay's multi-berth Oregon Gateway Marine Terminal, a deep-draft moorage facility on the North Spit of Coos Bay, and Jordan Cove Energy Project's ("JCEP") associated Upland LNG Terminal. Both were previously approved by Coos County and have now received Federal Energy Regulatory Commission ("FERC") approval.[1]

The applicant seeks land use approval from Coos County ("County") for the 49.72-mile segment of the PCGP located within Coos County. The County alignment runs from JCEP's LNG Terminal upland from the Port's Marine Terminal to the alignment segment in adjacent Douglas County (mileposts [MPs] 0.00 to 45.70).

Pacific Connector has received authorization from FERC under Section 7c of the Natural Gas Act ("NGA") to construct, install, own, operate, and maintain an interstate natural gas pipeline, the PCGP, that will transport gasified natural gas from the Jordan Cove LNG terminal in Coos Bay to existing interstate natural gas transmission pipelines near Malin, Oregon and points in between. The 36-inch diameter pipeline will be a total of 234 miles and will provide natural gas to markets throughout the region.[2]

Within the applicable 49.72-mile segment of the PCGP that will be located within the County, the PCGP will cross through five Coos County zoning designations: Forest (F), Exclusive Farm Use (EFU), Rural Residential 2 (RR-2), Rural Residential 5 (RR-5), and Industrial (IND). Additionally, the PCGP will cross 14 Coos Bay Estuary Management Plan (CBEMP) zoning districts: Water Dependent Development Shorelands (6-WD), Development Shorelands (7-D, 19-D), Water Dependent Development Shorelands (8-WD), Conservation Aquatic (8CA, 20CA, 21CA), Natural Aquatic (13A-NA, 11-NA), Rural Shorelands (11-RS, 18-RS, 20-RS, 21-RS), and Development Aquatic (19B-DA) (see Tables 1 and 2).

Within the forest (F) zone, the pipeline use is characterized as a new gas distribution line with no greater than a 50 foot right of way. Within the agricultural (EFU) zone, the pipeline use

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[1] The County previously approved JCEP's LNG Terminal (Case File No. HBCU-07-03), the Port's Marine Terminal and Access Waterway (Case File No. HBCU-07-04) and the related Port applications for Sand Storage and Sorting Yard (Case File Nos. ACU-08-10 and CL-08-01) and Kentuck Mitigation Site (Case File Nos. AM-09-03/RZ-09-02/HBCU-09-01).

[2] The route mileposts no longer reflect the actual length of the PCGP because based on FERC's National Environmental Policy Act (NEPA) process, which resulted in a Final Environmental Impact Statement, Pacific Connector incorporated an alternative within Coos County into the original route. The environmental analysis was tied to the original mileposts, and the mileposts remain unchanged from the route filed with FERC in September 2007. Therefore, MP 11.36 R (revised) merges with the 2007-filed route at MP 7.67.

is characterized as a utility facility necessary for public service. Within the RR and IND zones, the pipeline use is characterized as a utility facility not including power for public sale. Finally, within the CBEMP, the pipeline use is characterized in the respective management units as a low-intensity utility.

The project consists of two distinct sets of components, the first permanent and the second temporary: (1) the pipeline itself, including its permanent 50-foot right-of-way, block valve assemblies, and two access roads; and (2) the temporary construction areas necessary to construct the pipeline. The pipeline consists of the 36 inch subsurface gas pipeline, four mainline block valves and associated facilities. The temporary construction areas (construction areas) include: the 95-foot temporary construction easement, temporary extra work areas, uncleared storage areas, two temporary access roads, and temporary construction storage yards. Environmental alignment sheets, which have been provided with the application as Exhibit 1, depict the pipeline alignment overlaid on a 2006 aerial photograph. The environmental alignment sheets provide land ownership and parcel information along the pipeline route. While the alignment sheets generally depict the FERC-authorized route, the applicant has stated that "there may be minor changes in the alignment within a given property boundary to accommodate a landowner request or to avoid specific construction obstacles." *See* Application Narrative, at p. 3.

As discussed above, Pacific Connector proposes the construction and operation of a 49.72-mile segment of the PCGP within the County. The pipeline would originate at milepost (MP) 0.0 at the Jordan Cove Receipt Meter Station located within the Jordan Cove LNG terminal site, on the North Spit of Coos Bay. The pipeline would extend east from the LNG terminal, passing through the Weyerhaeuser Linerboard site, and entering Haynes Inlet at about MP 1.7. The pipeline would be installed for about 2.4 miles in Coos Bay, exiting to the north of the Glasgow peninsula at about MP 4.1. It would then turn southeast to cross Kentuck Slough at about MP 6.3, and proceeding to Graveyard Point. The pipeline would cross under the Coos River at about MP 8.1 and then will cross Catching Slough at MP 11.11. Between about MPs 12.8 and 26.1, the pipeline would generally follow the existing Bonneville Power Administration (BPA) powerline. The pipeline would then proceed in a southeasterly direction and follow existing logging roads, where feasible. The pipeline would exit the County at MP 45.7. As noted, where feasible, the PCGP alignment is co-located with existing rights-of-ways and corridors to limit the areas of new disturbance.

As a result of the subsurface nature of the pipeline, the majority of the impacts from the pipeline will occur during the construction process. Generally throughout the project, Pacific Connector proposes to utilize a 95-foot wide temporary construction easement and associated temporary extra work areas and uncleared storage areas, with a 50-foot permanent right-of-way. The temporary construction easement configuration is required to accommodate the necessary clearing and grading activities to prepare for construction, temporarily store spoil materials for construction, and to provide a passing lane during construction for movement up and down the construction area. The temporary extra work areas and uncleared storage areas are needed because of site-specific characteristics of the construction easement. Pacific Connector has limited the width of the temporary construction easement and the size of the temporary extra work areas and uncleared storage areas to the greatest extent practicable.

There are two locations within the County where it will be necessary to create temporary access roads in order to construct a portion of the pipeline. These two temporary access roads will be located south of the Coos River in the 20RS zoning district, and will be restored to preconstruction conditions following completion of construction.

Pacific Connector will also need to create two permanent access roads providing access to the above-ground block valve facilities. These will be graveled private roads that are necessary for the operation and maintenance of the pipeline. Pacific Connector has located the final placement of the block valves adjacent to existing roads to minimize the need for creating new access roads and the length of the two new permanent access roads.

The pipeline is allowed as a hearings body conditional use within the EFU, RR-2, and RR-5 zones, an administrative conditional use within the F zone, and a use permitted outright in the IND zone. The pipeline is also allowed in the 15 zones that it crosses within the CBEMP as a permitted use, subject only to consistency with various general conditions.

B. Process

1. Summary

The review timeline for this application is as follows:

Feb. 12, 2010	Application submitted and accepted.
March 12, 2010	Application deemed incomplete.
April 19, 2010	Application deemed complete.
April 30, 2010	County mailed public notice.
May 13, 2010	County Planning Department issued Staff Report.
May 20, 2010	Public Hearing before Hearings Officer
June 10, 2010	First Open Record Period Closed (rebuttal testimony only).
June 17, 2010	Second Open Record Period Closed (for surrebuttal testimony only
June 24, 2010	Applicant's Final Argument
July 8, 2010	County Planning Staff issued Supplemental Staff Report.
July 16, 2010	Hearings Officer's Recommendation.
Aug. 3, 2010	Deliberations and Decision by Board of Commissioners
September 8, 2010	Adoption of Final Decision by Board of Commissioners
September 25, 2010	150 Day Deadline.

2. Board Call-Up and Delegation to Hearings Officer

On March 2, 2010, pursuant to its authority under CCZLDO 5.0.600, the Board voted 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. On April 5, 2010, the Board appointed Andrew Stamp to serve as the Hearings Officer.

3. Public Hearing and Open Record Periods

On May 20, 2010, Andrew H. Stamp, Hearings Officer, held a public hearing on this matter. At the commencement of the hearing, he stated he did not have any bias, conflicts of interest, or *ex parte* contacts to disclose: He asked whether anyone wanted to challenge his impartiality. One member of the public inquired who was paying for his services. Mr. Stamp responded, he was being paid directly by the County pursuant to a contract. Further questions ensued regarding whether the applicant was paying Mr. Stamp. Planning Director Patty Evernden clarified the Hearings Officer was under contract with the County and the applicant was reimbursing the County for the administrative cost of reviewing the application, including the expense of retaining the Hearings Officer. Mr. Stamp advised this was a typical arrangement for local jurisdictions. Ultimately, no one formally challenged the Hearings Officer's impartiality to conduct the hearing and issue a recommendation on the application.

Mr. Stamp read the required notices of ORS 197.763 into the record and gave detailed instructions regarding presentation of testimony. He then called for the staff report. The Planning Director summarized the proposed development and staff report. After this presentation, the applicant and its representatives presented testimony, and members of the public (some in favor, some in opposition, and some who were neutral) presented testimony. At the conclusion of public testimony, the applicant presented rebuttal testimony to respond to various questions and issues raised by the public. At the conclusion of all oral testimony, the Hearings Officer left the record open for 21 days for the submission of additional written evidence to address testimony presented at the hearing, followed by a 7-day period for surrebuttal testimony, and a final 7-day period for the applicant to submit its final written argument.

Several parties submitted additional arguments and evidence into the record during the open record period. On July 16, 2010, the Hearings Officer delivered his opinions and recommendations to the County Board of Commissioners in a document entitled *Coos County Hearings Officer Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners*. Therein, the Hearings Officer recommended the Board approve the application, subject to proposed conditions.

4. Board of Commissioners' Deliberations

On August 3, 2010, at 1:30 p.m., the Board convened a public meeting to discuss the Hearings Officer's recommendation and deliberate on the application. Commissioners Kevin Stufflebean, Bob Main, and Nikki Whitty were present. The Board opted to act, pursuant to its authority under CCZLDO 5.0.600.C, to review only the evidence, data, and testimony submitted prior to the close of the record by the Hearings Officer. The Board did not accept new evidence or allow additional public comment. At the commencement of the meeting, Assistant County Counsel Oubonh White inquired whether any members of the Board had any conflicts of interest or *ex parte* communications to disclose since the time the applications were filed. Commissioner Whitty disclosed she had a short conversation with Will Wright at the fair. When she realized he wanted to discuss the applications, she responded the issues were part of this proceeding and ended the conversation. All three Commissioners disclosed they attended the May 20, 2010

public hearing on this matter to observe. No other disclosures were made. No member of the public challenged the *ex parte* disclosures or the participation of any member of the Board in this matter.

Commissioner Stufflebean then called for the staff presentation. The Planning Director summarized the proposal and process to date. At the conclusion of this presentation, the Board discussed the application and the Hearings Officer's recommendation. These discussions included various questions to and responses from Planning staff. At the conclusion of these discussions, Commissioner Whitty made a motion, seconded by Commissioner Main, to tentatively approve the applications based upon the evidence in the record and to direct staff to work with the applicant to prepare findings of fact, conclusions of law, and conditions of approval consistent with the Board's discussion, for the Board's consideration at a later date. The Board approved the motion, 3-0.

C. Record and Scope of Review

1. Record Before the Board

The record before the Board consisted of the *Coos County Hearings Officer Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners* for HBCU-10-01 dated July 16, 2010; the written and oral testimony presented by the applicant, including the application materials; the written and oral testimony presented by other parties to the Hearings Officer, except where such testimony was specifically rejected by the Hearings Officer at the hearing as irrelevant; the various staff reports prepared by County Planning Department dated May 13, 2010, July 8, 2010, and July 28, 2010; and the entire Planning Department file, which was physically before and not rejected by the Board.

2. Scope of Review

When addressing the criteria and considering evidence in the record, the Board used the standard of review required for land use decisions. The applicant must provide substantial evidence in the whole record to demonstrate that all approval standards are met. When evidence conflicted, the Board reviewed the entire record to see if the undermining evidence outweighed the applicant's evidence. In addition, where the ordinance provisions were ambiguous, the Board applied the *PGE v. BOLI* methodology, discussed *infra* and as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), to arrive at what it finds to be the correct construction. In so doing, the Board attempted to rely, as much as possible, on past interpretations adopted by the Board, while still making sure that the interpretation is affirmable.

The Board believes that the conclusions made herein would be affirmed if appealed. The Board has fairly wide latitude under state law to draw its own conclusion about the evidence. In addition, with regard to issues of local code interpretation, state law establishes a very deferential standard of review, ORS 197.829(1). *Compare Clark v. Jackson County*, 313 Or 508 (1992); *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003); *Siporen v. Medford*, 231 Or App 585, 220 P3d 427 (2009), *rev allowed* 348 Or 19 (2010).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. The Opponents' "Alternative Route" Arguments Must Fail Because Only FERC has Jurisdiction to Regulate the Route of a Gas Pipeline or to Control Safety Standards Related to Gas Pipelines.

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

Nonetheless, the Board finds that any local land use process that would seek to determine the route of the pipeline or otherwise purport to take action inconsistent with FERC's determination in the "Certificate of Public Convenience and Necessity" would likely be preempted[3] by federal law. A discussion of this issue is included in Appendix A. For purposes of this application, however, the Board may only approve or deny the application that the applicant has submitted. The Board does not have the ability to propose major changes to the route, although minor detours (< 400 feet off centerline) are possible. In any event, the Board finds that there is no substantial evidence in the record to support any significant changes to the alignment that has been carefully analyzed and approved through the FERC process.

2. Landowner Consent.

There was considerable discussion concerning the applicant's ability to submit a land use application for a pipeline that will cross private property, when the landowner does not give consent to the application. The only applicable code section requiring landowner consent is

[3] The preemption doctrine is rooted in the Supremacy Clause of the Constitution, Article VI, clause 2, which states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Preemption doctrine consists of four different types: (1) "express preemption," resulting from an express Congressional directive ousting state law (*Morales v. Trans World Airlines, Inc.*, 504 U.S.374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)); (2) "implied preemption," resulting from an inference that Congress intended to oust state law in order to achieve its objective (*Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)); (3) "conflict preemption," resulting from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it (*Florida Line & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963)); and (4) "field preemption," resulting from a determination that Congress intended to remove an entire area from state regulatory authority (*Fidelity Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)). *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04, 103 S.Ct. 1713, 1721-22, 75 L.Ed.2d 752 (1983). The present case involves express and field preemption.

EXHIBIT A

CCZLDO §5.0.150.[4] The requirement that a property owner or contract purchaser sign the application is a mandatory prerequisite to a properly filed application. However, as discussed below, it is procedural requirement that can be deferred to a later stage in the approval process.

At the onset, the Board notes that other local governments' codes have adopted specific exceptions to the general requirement that an owner must sign the land use application. For example, in *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004), LUBA addressed a code provision that contained a specific exception to the signature requirement aimed at "[a]pplications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the Application."[5] *See also Kurihashi Partners v. City of Beaverton*, 46 Or LUBA 791 (2004) (noting similar provision contained in the City of Beaverton Code). However, the CCZLDO contains no similar type of exception.

In a sense, the owner signature requirement may be viewed as a "completeness" issue, insomuch as an application may not be "complete" until the required signatures are present. In this case, staff had already deemed the application complete. Staff defends its decision to accept

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[4] SECTION 5.0.150 is entitled "APPLICATION REQUIREMENTS" and provides, in relevant part:

> "(Article 5.6 of this ordinance Site Plan Review Requirements and Chapter 6 Land Divisions have additional submittal requirements)
>
> Applications for development or land use action shall be filed on forms prescribed by the County and shall include sufficient information and evidence necessary to demonstrate compliance with the applicable criteria and standards of this Ordinance and be accompanied by the appropriate fee. An application shall not be considered to have been filed until all application fees have been paid. All applications shall include the following:
>
> Applications shall be submitted by the property owner or a purchaser under a recorded land sale contract. "Property owner" means the owner of record, including a contract purchaser. The application shall include the signature of all owners of the property. A legal representative may sign on behalf of an owner upon providing evidence of formal legal authority to sign. * * * *. (Emphasis Added).

[5] Deschutes County Code ("DCC") 22.08.010 provides, in relevant part:

> "A. For the purposes of DCC 22.08.010, the term 'property owners' shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.
> "B. Applications for development or land use actions shall:
> "1. Be submitted by the property owner or a person who has written authorization from the property owner as defined herein to make the application;
> "C. The following applications are not subject to the ownership requirement set forth in DCC 22.08.010(B)(1):
> "1. Applications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the Application[.]"

EXHIBIT A

the applications, despite the lack of an owner's signature, based on precedent set in earlier cases. As stated in the Supplemental Staff Report dated June 10, 2010:

> The County treated the PCGP consolidated applications in the same manner as the County's prior pipeline applications (2002 and 2003) which were also submitted without owner signatures. The County determined the LDO's application signature provision was not intended to address applications for linear utility facilities involving numerous ownerships where the utility company has the right of condemnation and where obtaining all of the property owner signatures would be virtually impossible.
>
> At that time, the Board of Commissioners decided not to require the utility provider to initiate condemnation litigation against its citizens within the proposed pipeline alignment in order to submit a land use application.
>
> The prior approvals reflect the County's interpretation of its code to accept land use applications for pipelines in Coos County without the signatures of all landowners, as long as the applicant has condemnation authority and a condition is imposed that the land use approval would not take effect until the applicant acquires the necessary property. The precedent created in the prior County decisions was followed in this application.
>
> The County's interpretation is supported by the language in the code. LDO Section 5.0.150 addresses requirements for an application submittal. The first paragraph requires an application to be submitted on forms provided by the county and that the submitted application must be accompanied by the appropriate fee. This paragraph specifically states that "An application shall not be considered to have been filed until all application fees have been paid."
>
> It is the County's position that the signature requirement in the second paragraph is merely procedural rather than jurisdictional. The language in the first paragraph expressly creates a jurisdictional requirement: "An application shall not be considered to have been filed until all application fees have been paid." This same requirement is not applicable to the signature provisions of this Section. Therefore, the signature requirement is procedural, while the fee payment requirement is jurisdictional.
>
> Processing the consolidated applications without the property owners' signatures will not be prejudicial to the rights of any of the property owners if the applications are approved subject to a

condition that the approvals shall not become effective until PCGP acquires the interest in the subject properties necessary to precede with the project. This is essentially the same condition that the county used to approve its own pipeline application in 2002.

Supplemental Staff Report dated June 10, 2010, at p. 1-2.

For its part, the applicant does not argue that it is a "property owner" within the meaning of the Code. Rather, the applicant appears to be arguing, in part, that it does not need to obtain the consent of the property owner because it has a statutory power of condemnation.

The applicant cites ORS 772.510(3) and 15 USC § 717 in support of this argument. ORS 772.510 provides:

> 772.510. Pipeline companies, right of entry and condemnation
>
> (1) Any pipeline company[6] that is a common carrier[7] and that is regulated as to its rates or practices[8] by the United States or any agency thereof, may enter in the manner provided by ORS 35.220 upon lands within this state outside the boundaries of incorporated cities.[9]
>
> (2) This right may be exercised for the purpose of examining, surveying and locating a route for any pipeline, but it shall not be done so as to create unnecessary damage.

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[6] Under ORS 772.505(2), the term "pipeline company" includes "any corporation, partnership or limited partnership, transporting, selling or distributing fluids, including petroleum products, or natural gases and those organized for constructing, laying, maintaining or operating pipelines, which are engaged, or which propose to engage in, the transportation of such fluids or natural gases."

[7] Determining whether an interstate natural pipeline company has proven to be a more difficult question than anticipated. The Hearings Officer requested briefing on the issue, but no party directly responded. Since interstate gas companies derive eminent domain authority from the federal Natural Gas Act (specifically 15 U.S.C. 717f(h), it may not matter whether similar authority is granted under state law. In any event, it does appear that interstate natural gas pipelines are common carriers due to the passage of FERC Order No. 636. A concise history of the subject is set forth in *General Motors Corp. v. Tracy*, 519 U.S. 278, 283-4, 117 S. Ct. 811 (1997). *See also United Distribution Companies v. F.E.R.C.*, 170 P.U.R.4th 425, 88 F.3d 1105, 1123 (D.C. Cir. 1996) ("In Order No. 436, the Commission began the transition toward removing pipelines from the gas-sales business and confining them to a more limited role as gas transporters. *.*.* In effect, the Commission for the first time imposed the duties of common carriers upon interstate pipelines.").

[8] The term "practices" is very broad, and therefore there can be little doubt that the "practices" of Pacific Connector Gas Pipeline LP are regulated by a federal agency.

[9] In looking at the maps provided by the applicant, it appears that no part of the proposed gas pipeline traverses a city located in Coos County. Presumably, if the pipeline did traverse a City boundary, that City would be the land use approval authority for that portion of the pipeline.

(3) These pipeline companies may appropriate and condemn such lands, or easements thereon or thereover, in such width as is reasonably necessary to accomplish their pipeline company purposes, by proceedings for condemnation as prescribed by ORS chapter 35. (Second Emphasis added).

It seems that federal law may provide additional statutory authority for the use of eminent domain in this case. 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).

Based on ORS 772.510(3) and 15 U.S.C. 717f, it appears that Pacific Connector does have the right of condemnation. The initial question is whether that right of condemnation itself provides an implicit exception to the Code's definition of "property owner." It does not.

The Board has reviewed the hearings officer's decision in the Pipeline Solutions Case (County File No. HBCU-02-04). In that case, the applicants argued that "[i]n cases such as this, where the application is for a public utility[,] an applicant, as a County with eminent domain powers, the applicant need not obtain signatures or consents from the property owners before obtaining land use permits."[10] The opponents cited CCZLDO §5.2.200 as an approval criterion requiring consent of property owners. The hearings officer found that CCZLDO §5.2.200 was a "procedural requirement" and not an approval criterion.

[10] The hearings officer in that case did not say whether the applicant provided authority to support that assertion.

EXHIBIT A

The hearings officer in HBCU-02-04 went on to find the following:

> It would be reasonable for Coos County to have accepted the Application as complete without the consent of all affected property owners following the rationale of *Schrock Farms vs. Linn County*. The Application is for a public utility and the Applicant is Coos County, which has eminent domain powers. Therefore written consent would not be necessary from the affected property owners before filing this Application.

See Hearings Officer Decision, HBCU-02-04, at p. 4. The hearings officer in that prior case seemed to rely on *Schrock Farms Inc. v Linn County*, 31 Or LUBA 57 (1996) for his ruling.

In *Schrock Farms*, ODOT was the applicant for a PAPA. The Code allowed only property owners to file an application for a PAPA. The petitioner argued that ODOT was not a "property owner" within the meaning of the code. ODOT argued that it was a property owner *because it had initiated condemnation proceedings on the subject property* prior to the application being deemed complete on April 6, 1994. Petitioners countered that the condemnation proceedings had been dismissed by the Court on October 31, 1994, and therefore ODOT was no longer a property owner. LUBA disagreed with the petitioner regarding the legal import of the dismissal, noting that the "dismissal became effective after the application was deemed complete." Thus, LUBA apparently viewed the completeness date as having legal relevance to the issue.

Schrock Farms does not stand for the broader proposition that any entity with condemnation authority automatically has "property owner" status simply by virtue of a statutory grant of condemnation authority such as ORS 772.510(3). For this reason, *Schrock Farms* is not direct authority for this case, since no condemnation proceedings had been filed by the time the application was deemed complete back in April of 2010. However, as discussed in more detail below, *Schrock Farms* does suggest that one possible method for a common carrier pipeline company to gain "property owner" status is to do exactly what ODOT did in that case: initiate condemnation proceedings on the subject properties.

Staff and the applicant both state that most of the requirements set forth in CCZLDO §5.0.150 are not "jurisdictional" despite being worded in a mandatory fashion. Their argument is that some requirements may be merely "procedural" in nature, as opposed to being "jurisdictional." In this manner, a jurisdictional requirement is one that must be completed or met at the time the application is submitted. In that event, the County cannot process the application unless the requirement is completed. On the other hand, under their analysis, a procedural act – even one worded in mandatory terms – is one that may be met at some future point in time. For its part, Western Environmental Law Center ("WELC") states that the procedural versus jurisdiction issue is a "difference without distinction." *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1.

The applicant cites *Simonson v. Marion County*, 21 Or LUBA 313 (1991). In *Simonson*, LUBA addressed whether the county hearings officer correctly rejected an application because it had not been signed by the "legal owner" at the time it was filed. LUBA reversed the hearings officer, holding that:

> "A zoning ordinance requirement may be jurisdictional, in the sense that failure to comply with the requirement may not be waived by the local government or cured by later performance of the requirement. *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 690, 692-93 (1988); *Beaverton v. Washington County*, 7 Or LUBA 121, 127 (1983). However, the code language must clearly express that the requirement is jurisdictional. *See Rustrum v. Clackamas County*, 16 Or LUBA 369, 372 (1988); *Beaverton v. Washington County, supra*."

In *Simonson*, the "agent" of the landowner filed the land use application in Marion County on May 2, 1990. The application was defective when submitted because it did not meet the requirement that the property owner submit in writing a document that confirms that the agent is "duly authorized" to submit the application on the owner's behalf. The applicant cured that defect on August 14, 1990 by submitting the required documentation. The County held its first hearing on the application on September 12, 1990, but ultimately denied the application on the basis that, on the day the application was submitted, the application did not contain the required documentation from the owner. LUBA held that this was in error, because the applicant had eventually submitted the required letter, and the requirement was not jurisdictional. Thus, *Simonson* makes clear that the application *could* be accepted and processed before compliance with the signature requirement is established. Had the issue been "jurisdictional," the application could not have accepted and processed.

The case of *Base Enterprises, Inc. v. Clackamas County*, 38 Or LUBA 614 (2000) also discusses the distinction between jurisdictional requirements and non-jurisdictional requirements, as follows:

> According to petitioner the requirement at ZDO 1301.03(A) that the application be submitted by "the owner, contract purchaser, option holder, or agent of the owner, of the property in question" is a jurisdictional requirement.
>
> * * * * *
>
> Petitioner assumes, but does not establish, that the ZDO 1301.03(A) limitation on persons who may submit an application for an administrative action is a "jurisdictional" requirement. It may be that if ZDO 1301.03(A) expressly stated that its limitations are "jurisdictional" we would be required to treat it as a jurisdictional requirement. *See Breivogel v. Washington County*, 114 Or App 55, 58-59, 834 P2d 473 (1992) (county code made signature on local appeal

> document a jurisdictional requirement). However, unlike the code language at issue in *Breivogel*, ZDO 1301.03(A) does not state that its limitations on who may submit an application are "jurisdictional." ZDO 1301.03(A) does not state that the county lacks authority to consider an application for an administrative action that is submitted by someone who does not prove he or she is among the persons listed in ZDO 1301.03(A).
>
> The first hearings officer presumably could have terminated his review, and determined that the first application should be dismissed, once he determined that Zamani was not among those authorized to submit the application under ZDO 1301.03(A). However, that does not mean the hearings officer was legally compelled to do so. We do not agree with petitioner that the county lacked jurisdiction to deny the first application or that it erred by denying the second application because it is substantially similar to the first application.

Similarly, in *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994), LUBA held that where a local code provision does not explicitly state that the elements of a complete development application are "jurisdictional" (specifically, a signature requirement), the local government's interpretation of the code provision as imposing a "procedural" requirements must be affirmed under ORS 197.829.

Thus, *Simonson, Base Enterprises, BCT Partnership* and similar cases[11] make clear that application signature requirements are not "jurisdictional" unless the code specifically makes them so. Simply because the signature requirement is worded in mandatory terms does not make the requirement "jurisdictional." Rather, to be jurisdictional, the Code must state something along the lines that "the county lacks authority to consider an application for an administrative action that is submitted by someone meeting the definition of owner." Under *BCT Partnership, Womble,* and *Bridges,* an application submittal requirement that is not jurisdictional is "procedural" in nature. Once it has been determined that an application submittal requirement is procedural, then an opponent challenging compliance with the requirement must demonstrate prejudice to his or her substantial rights. *See generally Burdhardt v. City of Molalla*, 25 Or LUBA 43, 51 (1993).

In the present case, the signature requirement under CCZLDO 5.0.150 is not presented as a jurisdictional element of an application. Although it does state a requirement that the application shall be signed by all property owners, it does not expressly make such signatures a jurisdictional requirement, and therefore it must be treated as procedural under the case law discussed above.

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[11] *See also Womble v. Wasco County*, 54 Or LUBA 68 (2007) (petitioner failed to provide basis for reversal or remand when, although land use application was not authorized by the property owners under local code, petitioner did not establish that the code requirements in question were "jurisdictional" in nature); *Bridges v. City of Salem*, 19 Or LUBA 373 (1990) (same).

EXHIBIT A

This conclusion is directly support by the text and context of the CCZLDO itself. As staff notes, CCZLDO 5.0.150 also includes the following statement, which clearly creates the type of "jurisdictional" requirement contemplated in the LUBA cases cited above: "An application shall not be considered to have been filed until all application fees have been paid." Thus, the County has expressly created a jurisdictional requirement that an application cannot be considered without payment of the fee. However, there is no similar jurisdictional language associated with the property owner signature requirement.

However, just because something is not jurisdictional does not mean that it is not a mandatory requirement that can simply be ignored. WELC correctly asserts that the County cannot "waive" the requirement even if it is procedural. *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. In this regard, the case of *Baker v. Washington County*, 46 Or LUBA 591 (2004) is instructive. In *Baker*, the intervenors were applicants seeking to partition their property into two parcels. Intervenor took access to the parcels via a driveway easement that crosses the petitioner's land. Petitioners objected to the use of the easement for access for the two parcels, arguing that, as the underlying fee owners of the easement, Washington County Community Development Code (CDC) 203-1.1 required that the petitioners sign the application. In this regard, the code provision at issue stated:

> CDC 203.1.1. "Type I, II and III development actions may be initiated only by: Application by *all the owners* of the subject property, or any person authorized in writing to act as agent of the owners or contract purchasers. (Emphasis added).

The code did not make the signature a "jurisdictional" defect. Nonetheless, LUBA held that the County erred in concluding that the disputed application could be processed without petitioners' joining in the application, because the petitioners are "owners" of the property within the meaning of the code.

As if this were not complicated enough, *Caster v. City of Silverton*, 54 Or LUBA 441 (2007) throws another wrinkle into the mix. Pacific Connector argues, the County cannot deny the application for failure to obtain signatures of all owners, on account of the fact that staff issued a completeness letter. The applicant states:

> The signature requirement goes to completeness, not approvability or jurisdiction, and the county may not deem an application complete and then subsequently deny the application based upon noncompliance with a procedural factor that goes to the completeness of the applications. In *Caster v. City of Silverton*, 54 Or LUBA 441 (2007), the applicant failed to provide information requested by the city for completeness under ORS 227.178(2). LUBA held that the city could not deem an application complete but then subsequently deny the application based on noncompliance with a factor that goes to completeness of the applications:

> "Finally, even if petitioner in this case failed to provide the notice required by ORS 227.178(2)(b), the city elected to proceed with review of the permit application rather than treat the permit application as void under ORS 227.178(4). In that circumstance, the city may not thereafter simply cite an alleged failure on petitioner's part to provide requested information as a basis for denying a permit application. Having elected to proceed with the application notwithstanding petitioner's failure or refusal to provide the requested information, the city owes petitioner at least some explanation for why it believes petitioner's evidentiary submittal falls short of demonstrating the proposal complies with the relevant approval criteria." *Caster*, 54 Or LUBA at 451-52.

See Applicant's Final Argument dated June 24, 2010, at p. 2. However, the last sentence of the above-cited quote demonstrates that LUBA's point is rather nuanced. What LUBA is saying is that once a completeness letter is issued, the application cannot be denied due to a failure to provide the requested information. Rather, to the extent the local government wishes to deny the applicant, it may then only do so on the basis that the lack of the requested information causes there to be insufficient evidence to meet the requirements set forth in applicable approval standards. The Board finds that CCZLDO §5.0.150 is a mandatory approval standard because it could form the basis of denial of the application. *See Baker, supra.*

Notwithstanding the various cases in the field, the Board agrees with the applicant that "[i]t does not make practical sense for Pacific Connector to condemn the property required for construction of the pipeline until the necessary final approvals from the county and FERC have been obtained and any appeals are exhausted." *See* Applicant's Final Argument dated June 24, 2010, at p. 2.

Because the defect is not jurisdictional, it does not appear that the County is required to reject or deny the application, and the Board does not read *Baker* to establish an absolute rule to the contrary. *Compare Bridges .City of Salem*, 19 Or LUBA 373 (1990) (failure to provide proof of agency until after the application is filed does not warrant denial of application, where petitioners were not able to show prejudice). Rather, the County has some flexibility to allow the applicant to submit the required documentation at a later date. In this regard, *Simonson* is instructive:

> Where a local government imposes standards that must be met to obtain approval of permits, the local government must find that those standards are met before granting approval. If the permit applicant fails to demonstrate that applicable approval standards are met, the local government must deny the application. Of course, a local government also may, in an appropriate circumstance, impose conditions and rely on those conditions in determining that the application, as conditioned, meets the applicable approval

standards. *Lousignont v. Union County, supra; Sigurdson v. Marion County*, 9 Or LUBA 163, 170 (1983); *Margulis v. City of Portland, supra.*

Continuing in a footnote, LUBA stated:

> In *Holland v. Lane County*, 16 Or LUBA 583, 596 (1988), we explained that a local government may be able to defer a determination of compliance with a discretionary approval standard to a later stage of the development process, where the code does not prohibit such deferral and the requisite notice and public hearing or notice and opportunity for an appeal is provided. *Compare Storey v. City of Stayton*, 15 Or LUBA 165, 184 (1986); *Spalding v. Josephine County*, 14 Or LUBA 143, 147 (1985).

Id. at 325, n 11. Before a condition can be imposed, the County has to make a determination of feasibility. The concept of "feasibility" findings is well established in Oregon. In *Meyer v. City of Portland*, 67 Or App 274, 280 n.3, 678 P2d 741 (1984), the Court of Appeals explained that the required finding of "feasibility" for the first stage approval requires "more than feasibility from a technical engineering perspective." *Id.* at 280, n3. The Court explained that "[i]t means that substantial evidence supports findings that solutions to certain problems * * * posed by a project are possible, likely and reasonably certain to succeed." *Id.* A feasibility finding that is equivocal or wavering is not sufficient. *Griffith v. City of Corvallis*, 16 Or LUBA 64 (1987); *Doughterty v. Tillamook County*, 12 Or LUBA 20, 31 (1984).[12]

The core goal of a typical two-stage approval process is to give the applicant certainty over the more discretionary, big picture issues, while allowing the resolution of more technical, *non-discretionary* issues to be deferred to a later stage in an approval process. Often, these non-discretionary issues are expensive and time consuming to resolve, and therefore it makes practical sense to get the "big-picture" discretionary issues out of the way first. The risk, of course, is that the decision-maker will improperly allow the applicant to defer discretionary decision-making to a later stage in the approval process where the public has no opportunity to participate. The local government can avoid this problem by agreeing to hold further public hearings on the deferred issue in the future. *Turner v. Washington County*, 8 Or LUBA 234 (1983); *Rhyne v. Multnomah County*, 23 Or LUBA 442 (2000); *Stockwell v. Benton County*, 38 Or LUBA 621, 629 (2000).

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[12] Provided this required "feasibility" determination is made when first stage approval is granted, precise solutions for problems posed by a land use decision and other detail technical matters may "be worked out between the applicant and city's experts during the second stage approval process for the final plan." *Id.* at 282 n.6. Resolution of precise solutions and technical matters and final approval of the subdivision need not include public hearings. *Id. See also Golf Holding Co. v. McEachron*, 39 Or App 675, 593 P2d 1202, *rev den*, 287 Or 477 (1979); *Meyer v. City of Portland*, 7 Or LUBA 184, 196 (1983), *aff'd*, 67 Or App 274, 687 P2d 741 (1984); *Rhyne v. Multnomah County*, 23 Or LUBA 42, 46-47 (1992).

EXHIBIT A

LUBA recognized in *Schrock Farms* that initiation of a condemnation proceeding was sufficient to qualify an entity as an "owner" for purposes of a local code provision requiring a land use application be submitted by an owner of the property. In this case, the Board concludes the applicant has condemnation powers pursuant to ORS 772.510(3) and 15 USC § 717, at least to the extent that the FERC Certificate is not rescinded on appeal or via a reconsideration process. Therefore, the Board finds it is *feasible* for Pacific Connector to become a property owner for purposes of the signature requirement through the initiation of condemnation proceedings, and Pacific Connector may become an 'owner' for application purposes before actually obtaining the final judgment in the condemnation proceedings in the individual properties at issue. The Board also finds that it is feasible for Pacific Connector to obtain signatures of affected property owners indicating their consent to the application, either through negotiations with individual property owners or through the condemnation process.

WELC takes issue with this conclusion, and states that "there is no currently valid [FERC] authorization of condemnation power available to the applicant to exercise, let alone upon which to rely to evade the landowner consent requirements." *See* Letter from WELC Staff attorney Jan Wilson, dated June 8, 2010, at p. 2. The applicant responds to this argument as follows:

> Western Environmental Law Center (WELC) and other opponents argue that the FERC Order dated December 17, 2009 approving the project is not currently effective due to a subsequent Order Granting Rehearing for Further Reconsideration dated February 16, 2010. Therefore, opponents claim, Pacific Connector has no current authorization of condemnation authority and the FEIS is not currently valid. WELC goes to some length to quote from the Natural Gas Act, but chooses to ignore the provisions of the Act that require "stays" of FERC Orders, and require that "the filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section [appeal to U.S. Court of Appeals] shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." 15 USC § 717r(c).
>
> The FERC Order is still effective upon request for rehearing, and is still effective upon appeal to the Ninth Circuit Court of Appeals, unless a stay of that Order is obtained by opponents. In other words, a FERC Order is similar to a local land use decision in Oregon, which remains effective upon appeal unless and until a stay is obtained from LUBA.
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> The issuance by FERC of the "Order Granting Rehearing for Further Consideration" dated February 16, 2010 does not stay the effectiveness of the Order. In fact, as explained in the attached excerpt from the American Bar Association's "FERC Basic

Practice Series" * * *, such orders are commonly issued by FERC as a "tolling" mechanism, which allows the Commission to avoid the otherwise strict deadline for ruling on rehearing requests. As explained by the ABA materials:

> "Because the Commission rarely has time to issue an order on rehearing within 30 days after receiving requests for rehearing, it usually issues 'tolling' orders, granting the request for rehearing solely for purposes of further consideration. The effect of these tolling orders is to avoid the automatic denial that results from Commission inaction. FERC then proceeds to issue the real order on rehearing at its own pace."

In the absence of a stay, the FERC Order dated December 17, 2009 is still valid and effective. Attached as Exhibit 2 to this letter is the relevant portion of an Order on Rehearing issued by FERC in January 2003, denying requests for rehearing of its original September 2002 order issuing a Certificate of Public Convenience and Necessity to Islander East (authorizing construction of the Islander East pipeline).

The discussion of the request for the stay begins at paragraph 20. The Connecticut Attorney General's request for stay was based partly on Islander East's announced intention to utilize eminent domain authority granted by the original order to access certain properties on its authorized right of way (¶ 21, see also ¶ 24). Islander East responded by asserting that "it needs the September 19 order to obtain access to the few remaining properties where access has been denied so that it can complete the surveys and reports." (¶ 27-28).

Paragraphs 31 et seq. set forth the standards the Commission applies when determining whether to grant a stay. In this case it found that the Connecticut AG had not shown irreparable injury, while granting a stay might harm Islander East:

> "easement agreements negotiations and condemnation proceedings are lengthy procedures. One of the reasons the Commission issued the September 19 order was to give Islander East sufficient time to conduct preconstruction activities, including acquiring the necessary easements. Staying Islander East's right to eminent domain while it resolves preconstruction environmental conditions would needlessly delay the project." (¶ 34).

> The attached FERC Order makes clear that (a) the original order conveys the right of eminent domain (b) which, absent a stay explicitly granted by the Commission, is not affected by the rehearing (or appeal) process.

See letter from Mark Whitlow, dated June 17, 2010. WELC disagrees with the applicant's legal conclusions, but does little to press its case. *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. The Board concludes the original FERC order conveys the right of eminent domain when no stay of such order was obtained or explicitly granted by FERC.

WELC raises another issue in its letter dated June 8, 2010. It notes that CCZLDO §5.0.150 requires "*all* owners of the property" to sign the application. *See* Letter from WELC Staff attorney Jan Wilson, dated June 8, 2010, at p. 2, n2. In this regard, the code is worded in a manner similar to the provision at issue in *Baker v. Washington County,* 46 Or LUBA 591 (2004). WELC argues that even if Pacific Connector condemns an easement, that it will still have to obtain the signature of the owner of the fee interest due to the use of the phrase "all of the owners of property." The Board finds that it is feasible for Pacific Connector to obtain signatures of affected property owners indicating their consent to the application, either through negotiations with individual property owners or through the condemnation process and resulting court order condemning the necessary property.[13] As discussed elsewhere in these findings, the Board also finds that the property owner signature requirement is an element of local procedure that was not intended to apply to this type of application, and could be preempted by federal law, which does not contemplate that a property owner whose property interests are subject to condemnation pursuant to FERC order would still need to sign a consent form.

The County can ensure there will be no prejudice to the rights of any affected property owner through the imposition of a condition of approval requiring the applicant to acquire an ownership interest in the property and/or to obtain signed consents from property owners prior to the actual construction of the pipeline. The Board further finds the act of verifying the signatures will be ministerial in nature, because ownership can be verified without exercising discretionary decision-making.[14] County staff can simply verify the signatures received for a certain property against the County's ownership records for that property. The records will either match or not; there will not be a need or opportunity to exercise judgment in this process. As a result, the County will not need to conduct an additional quasi-judicial land use hearing to verify ownership.

In summary, the Board adopts the interpretation and legislative history of CCZLDO §5.0.150 contained in the Supplemental Staff Report dated June 10, 2010. Because the property

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[13] These alternative findings are effectuated by the Board through the adoption of two alternative versions of Condition 20 regarding landowner consent. The first condition 20(a) allows that a court order condemning property for the pipeline could also convey the corresponding consent of the property owners or otherwise obviate the need for their signatures. In the alternative, if that condition is deemed invalid or insufficient on appeal, the Board finds that alternative condition 20(b) ensures compliance with CCZLDO 4.0.150.

[14] A determination is discretionary if it "requires the application of judgment or some form of evaluation." *Buckman Community Ass'n v. City of Portland,* 168 Or App 243, 245 n1 (2000). A standard that is subjective, discretionary, or requires factual, legal, or policy judgment is also not clear and objective. *Hiebenthal v. Polk County,* 41 Or LUBA 316 (2002).

EXHIBIT A

owner signature requirement is procedural rather than jurisdictional and it is feasible for the applicant to initiate condemnation proceedings in the future; the County may approve this application subject to a condition requiring that the land use approval will not take effect until the applicant acquires an ownership interest in the necessary property and/or acquires the signed consent of the property owners.

One final note is worth mentioning. WELC states that "even if the condition of approval requiring landowner consent somewhere down the road" is added to the decision, the landowners will still be prejudiced because "it puts an immediate cloud over the property, such that selling it becomes difficult and burdensome." *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. Regardless of whether a condition of approval is added or the land use application is denied, this land use process will not cause *further* damage beyond what is going to occur as a result of the FERC process. In other words, the real battle is at FERC and this application is a mere sideshow. If the opponents somehow convince FERC to rescind the Certificate, or if they successfully overturn the FERC Certificate at the Ninth Circuit, then this land use approval is worthless to the applicant. On the other hand, if the FERC Certificate is ultimately affirmed, then whatever ill-effects stem from the "cloud" created by a condition of approval mandated here will be indistinguishable from the "cloud" created by the FERC Certificate itself.[15]

3. Potential for Mega Disasters (Tsunamis, Earthquakes, etc).

One common theme throughout much of the testimony stems from the concern that a gas pipeline would create secondary problems such as explosions and fire if the County is hit by a tsunami or earthquake. 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.

As an initial matter, the Board finds that tsunamis are not much of an issue considering the pipe will be a thicker grade of steel and it will buried in 5-8 feet of sediment and encased in four inches of concrete. Although it is not clear whether a natural gas pipeline is one of the types of facilities regulated in a tsunami zone under ORS 445.447,[16] the FEIS makes clear that the risk

[15] WELC further states that the condition of approval would "in effect, * * * authorize a taking of the landowner's rights to freely transfer their property." *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. As an initial matter, the irony of having an environmental group raising a pro-property rights "takings" argument is duly noted. But regardless of that hypocrisy, there is no "taking" caused by a pipeline because there will still be economically viable uses of the landowner's property. As Measure 37 claimants know all too well, a taking only occurs is there is a virtual wipeout of all economically viable uses of the land. Moreover, planning a future condemnation alone is not enough to constitute a taking for condemnation blight. *Clarke v. Port of Portland*, 23 Or App 730, 543 P2d 1099 (1975). Regardless, protection of property value is not an approval standard for this case. Therefore, the opponent's comments on this issue provide no basis for denial. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994); *Sunburst II Homeowners Assn v. City of West Linn*, 17 Or LUBA 401 (1989).

[16] ORS 455.447 Regulation of certain structures vulnerable to earthquakes and tsunamis; rules. (1) As used in this section, unless the context requires otherwise:
(a) "Essential facility" means:
(A) Hospitals and other medical facilities having surgery and emergency treatment areas;

of a tsunami has been studied and planned for. *See* FEIS 5.1.1, at p. 5-2. The applicant's geo-technical engineers studied the potential effect of a "design tsunami event," which is apparently a 565 year return period. *See* Geologic Hazard's Report dated October 30, 2009, by Geo-Engineers at p. 26-27. The modeled event predicted three feet of temporary scouring. Since the pipe will be buried at a depth of five feet, no harm is anticipated to occur to the pipe as a result of a design tsunami event. The opponents have not presented credible evidence that suggests that

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(B) Fire and police stations;

(C) Tanks or other structures containing, housing or supporting water or fire-suppression materials or equipment required for the protection of essential or hazardous facilities or special occupancy structures;

(D) Emergency vehicle shelters and garages;

(E) Structures and equipment in emergency-preparedness centers;

(F) Standby power generating equipment for essential facilities; and

(G) Structures and equipment in government communication centers and other facilities required for emergency response.

(b) "Hazardous facility" means structures housing, supporting or containing sufficient quantities of toxic or explosive substances to be of danger to the safety of the public if released.

(c) "Major structure" means a building over six stories in height with an aggregate floor area of 60,000 square feet or more, every building over 10 stories in height and parking structures as determined by Department of Consumer and Business Services rule.

(d) "Seismic hazard" means a geologic condition that is a potential danger to life and property that includes but is not limited to earthquake, landslide, liquefaction, tsunami inundation, fault displacement, and subsidence.

(e) "Special occupancy structure" means:

(A) Covered structures whose primary occupancy is public assembly with a capacity greater than 300 persons;

(B) Buildings with a capacity greater than 250 individuals for every public, private or parochial school through secondary level or child care centers;

(C) Buildings for colleges or adult education schools with a capacity greater than 500 persons;

(D) Medical facilities with 50 or more resident, incapacitated patients not included in subparagraphs (A) to (C) of this paragraph;

(E) Jails and detention facilities; and

(F) All structures and occupancies with a capacity greater than 5,000 persons.

(2) The Department of Consumer and Business Services shall consult with the Seismic Safety Policy Advisory Commission and the State Department of Geology and Mineral Industries prior to adopting rules. Thereafter, the Department of Consumer and Business Services may adopt rules as set forth in ORS 183.325 to 183.410 to amend the state building code to:

(a) Require new building sites for essential facilities, hazardous facilities, major structures and special occupancy structures to be evaluated on a site specific basis for vulnerability to seismic geologic hazards.

(b) Require a program for the installation of strong motions accelerographs in or near selected major buildings.

(c) Provide for the review of geologic and engineering reports for seismic design of new buildings of large size, high occupancy or critical use.

(d) Provide for filing of noninterpretive seismic data from site evaluation in a manner accessible to the public.

(3) For the purpose of defraying the cost of applying the regulations in subsection (2) of this section, there is hereby imposed a surcharge in the amount of one percent of the total fees collected under the structural and mechanical specialty codes for essential facilities, hazardous facilities, major structures and special occupancy structures, which fees shall be retained by the jurisdiction enforcing the particular specialty code as provided in ORS 455.150 or enforcing a building inspection program under ORS 455.148.

(4) Developers of new essential facilities, hazardous facilities and major structures described in subsection (1)(a)(E), (b) and (c) of this section and new special occupancy structures described in subsection (1)(e)(A), (D) and (F) of this section that are located in an identified tsunami inundation zone shall consult with the State Department of Geology and Mineral Industries for assistance in determining the impact of possible tsunamis on the proposed development and for assistance in preparing methods to mitigate risk at the site of a potential tsunami. Consultation shall take place prior to submittal of design plans to the building official for final approval. [1991 c.956 §12; 1995 c.79 §229; 1995 c.617 §1; 2001 c.573 §12] (Emphasis added).

the measures proposed in the FEIS would be insufficient to prevent the pipe from getting scoured out by a tsunami. In any event, the Board has already granted land use approval for the LNG terminal, which presumably would be at much greater risk in a tsunami event.

Moreover, if a tsunami that has the power to uproot a steel pipe buried in five to eight feet of sediment[17] and encased in four inches of concrete hits Coos Bay, then Keith Comstock is correct when he states that the "LNG facility will be the least of your worries."

FLOW claims that Pacific Connector "*failed to provide adequate information regarding the geologic hazards for the pipeline*" and cites the State of Oregon's comments to the FERC FEIS. Attached to the State of Oregon's comment letter are the DOGAMI comments and recommendations made to the project's Draft EIS (Attachment 1, page 3) recommending additional work to be completed and included in the Final EIS. Pacific Connector responded to questions and comments raised by DOGAMI in the updates noted in the FEIS.

Also, FLOW incorrectly attributes comments made by DOGAMI in Section 4.1.2.3 to Pacific Connector. In fact, Section 4.1.2 of both the FERC DEIS and FERC FEIS are specific to the geo-hazard analysis of the Jordan Cove LNG Terminal. Geo-hazard evaluations and recommendations for the Pacific Connector Gas Pipeline are found in Section 4.1.3 in both documents.

Pacific Connector evaluates, analyzes and mitigates the effects of earth movement potential in all phases of the project: pipeline routing, detailed engineering design, facility construction, and ongoing operations and monitoring of the in-service pipeline facilities. As part of the Coos County public record, Pacific Connector submitted the *Coos County Geologic Hazards Report* prepared by GeoEngineers for Pacific Connector. This report is an excerpt from the 2007 FERC Certificate application and provides the geotechnical and geohazard information along the pipeline route within Coos County. The report constitutes substantial evidence, and there is no scientifically-based evidence to the contrary.

The issue of earthquakes has also been considered. Earthquakes have the ability to impact the pipeline by causing earth movement and thus displacing the pipeline from its original location. This displacement can be caused from crossing an earthquake fault or secondary impacts from an earthquake such as liquefaction, lateral spreading, or landslides. In addition to earth movement, river and stream scour potential was analyzed at each river crossing within the report.

Regarding earthquakes, Section 3.3 Seismic Settings (of the GeoEngineers report), 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).*

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[17] The top of the pipe will be covered by 5 feet of sediment. *See* FEIS at p. 2-98.

Regarding the other forms of earth movement that may cause displacement to the pipeline, Pacific Connector chose avoidance as the mitigation priority when routing the pipeline. Appendix A and Appendix B in the *Coos County Geologic Hazards Report* identify the locations along the pipeline alignment where a geohazard exists, what risk level the hazard presents to the pipeline, and if mitigation measures will be required at those locations (where avoidance was not possible). 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. In addition, FERC Environmental Condition #14 requires Jordan Cove and Pacific Connector to hire a board of third-party consultants to review and approve both projects' final design as it relates specifically to their geotechnical evaluation and mitigation measures.

Next, the issue of landslide risks in riparian reserves is considered. FLOW asserts that the pipeline will increase the risk of landslides due to the removal of vegetation on steep slopes. Pacific Connector has included in its FERC application, and federal and state water quality permit applications, an Erosion Control and Revegetation Plan (ECRP) 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. The ECRP is attached under the tab labeled "Erosion Plan" as an exhibit to the Applicant's May 12, 2010 Pre-Hearing Evidentiary Submittal. The ECRP has been reviewed by various federal and state agencies (including the Forest Service and BLM) during the FERC pre-filing process, the FERC Certificate application process, and the Plan of Development process, and their review comments have been incorporated into the plan. The noted temporary and permanent BMPs have been approved by these agencies for use on private and federal lands. Mitigation measures specific to steep slope construction are discussed in Section 11.0 and the related appendices in the Pacific Connector ECRP. In summary these measures include:

- 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 to Welling letter dated June 17, 2010);
- 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.

The Board finds that these BMPs are adequate to address the risk of landslides.

4. Riparian vegetation removal and the "public utility" exemption.

Generally, the CCZLDO requires that riparian vegetation must be maintained within 50 feet of certain waterbodies. However, applicable code provisions in the EFU, Forest, Rural Residential and CBEMP zoning districts include the following exemption: "Riparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-way."

WELC and other opponents assert that the PCGP is not a "public utility" to which this exemption can be applied. However, the pipeline falls within the CCZLDO definition of a "low-intensity utility facility," which is described as including gas lines for "public service." CCZLDO §2.1.200. The pipeline also falls within the ORS 757.005(1)(a)(A) definition of a "public utility," which includes "[a]ny corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power...."

Contrary to the unsupported assertions of several opponents, the term "public utility" referenced in the analogous provision of ORS 215.213(1)(d) is not concerned with whether the utility is owned by a public or private entity but whether the facility is so impressed with a public interest that it comes within the field of public regulation. 42 Or Att'y Gen 77 (1981) (cited in *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 773 P2d 779 (1989)).

Notwithstanding the applicability of this exemption, in circumstances where riparian vegetation must be removed for construction of the pipeline, Pacific Connector is proposing to restore riparian vegetation within 25 feet of the impacted waterbody. Pacific Connector has stated that it will comply with all FERC requirements regarding waterbody crossings, and has provided a detailed Erosion Control and Revegetation Plan (ECRP) that was developed using FERC's Upland Erosion Control, Revegetation, and Maintenance Plan and FERC's Wetland and Waterbody Construction and Mitigation Procedures. The applicant's ECRP and the two referenced FERC documents were submitted into the record as part of the applicant's submittal dated May 12, 2010.

Section 10.12 of the ECRP includes detailed information regarding planting of native shrubs and trees in wetland and riparian areas to mitigate impacts from construction, and provides that "in riparian areas, shrubs and trees will be planted across the right-of-way for a width of 25 feet from the waterbody banks." ECRP pages 38-39.

WELC also contends the applicant has not established that any necessary removal of riparian vegetation will be "the minimum necessary," as required within riparian areas in the Rural Residential and CBEMP zones. In response to these concerns, during the second open record period the applicant provided correspondence from Randy Miller of Pacific Connector dated June 17, 2010, which identifies measures that have been taken by the applicant in designing the project in order to minimize impacts to riparian vegetation, including the following:

- Construction impacts to riparian areas have been minimized to the extent possible through routing efforts to ensure a safe, stable alignment for long-term pipeline integrity. Through these efforts, the alignment follows ridgelines and watershed boundaries in many areas, significantly minimizing waterbody and riparian crossings.
- Construction work area limits have been minimized and work area setbacks from waterbodies and wetlands provided where feasible based on topographic and engineering constraints.
- Construction schedules across waterbodies have been planned to coincide with ODFW recommended in-stream work windows and the low-flow periods, unless an unknown occurrence of northern spotted owls or marbled murrelets arise which create a conflict in seasonal restrictions between species. Should such a conflict arise, Pacific Connector would work with federal and state wildlife agencies to determine the appropriate construction schedule.
- Streambeds will be restored to their preconstruction contours, elevations and grade and streambanks will be restored to their approximate original contour or to a stable configuration to ensure stability and to restore floodplains. These measures will ensure that streamflow characteristics and floodplain functions are restored.
- Streambeds will be reclaimed with replacement of existing spawning substrate.
- After construction is complete, large woody debris will be placed in streams or banks depending upon the size of the stream, its pre-construction condition relative to the presence or absence of trees and other site specific factors.

- All riparian areas will be restored and revegetated including trees and shrubs where appropriate and in accordance with the federal and state permit conditions.
- Coniferous and shrub vegetation will be re-established within affected riparian areas for a distance of 25 feet on each side of intermittent and perennial waterbodies, or to the limit of the existing riparian vegetation.
- The pipeline maintenance corridor has been narrowed to the minimum necessary and to comply with DOT maintenance requirements.
- Erosion control will be implemented as described in the project's Erosion Control and Revegetation Plan (ECRP) through implementation of extensive BMPs as required by federal, state, and local permits. The ECRP includes BMPs for construction and post-construction; it provides environmental controls for waterbody and wetland crossings, spill management, hydrostatic testing, and trench dewatering. Restoration procedures include recontouring, soil compaction and scarification, seedbed preparation, seed mixes, fertilization, noxious weed control, and maintenance.

As explained in the June 17, 2010 correspondence from Randy Miller, and in the above-cited provisions of the ECRP, the applicant has exceeded any applicable County standards regarding protection of riparian vegetation. The applicant has demonstrated that the amount of riparian vegetation that will be removed will be the minimum necessary, and that vegetation will be replanted in any event. WELC does not explain what additional measures could be taken, or otherwise provide evidence that refutes Mr. Miller's testimony. For this reason, the Board rejects WELC's arguments regarding this issue. Nevertheless, to ensure compliance with the applicant's representations, the Board imposes Condition of Approval A.18 to read as follows:

> "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."

The Board finds that the applicant's proposed condition (Condition of Approval B.3) is redundant with Condition of Approval A.18 and should be deleted and identified as "Intentionally deleted."

5. Coordination with Native American Tribes (CCZLDO §3.2.700)

The applicable county requirements governing archaeological resources are CBEMP Policy #18 and CCZLDO §3.2.700, which directly implements Policy #18. Representatives from the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians testified that the following Code provision was applicable to this case:

SECTION 3.2.700. Process for Tribe(s) Review and Response of Proposed Development within Acknowledged Archaeological Sites. Properties which have been determined to have an "archaeological site" location must comply with the following steps prior to issuance of a "Zoning Compliance Letter" for building and/or septic permits.

1. The County Planning Department shall make initial contact with the Tribe(s) for determination of an archaeological site(s). The following information shall be provided by the property owner/agent:
   a. plot plan showing exact location of excavation, clearing, and development, and where the access to the property is located; and
   b. township, range, section and tax lot(s) numbers; and
   c. specific directions to the property.
2. The Planning Department will forward the above information including a request for response to the appropriate tribe(s).
3. The Tribe(s) will review the proposal and respond in writing within 30 days to the Planning Department with a copy to the property owner/agent.
4. It is the responsibility of the property owner/agent to contact the Planning Department in order to proceed in obtaining a "Zoning Compliance Letter" (ZCL) or to obtain further instruction on other issues pertaining to their request.[OR-00-05-014PL]

By its express terms, CCZLDO §3.2.700 only applies if the proposed land use will occur on lands determined to be an "archaeological site" location. The County has generally mapped "cultural areas" consistent with Statewide Planning Goal 5, but the specific location of Native American cultural sites is not provided in the Goal 5 maps for security reasons. Nonetheless, the reference in Section 3.2.700 to acknowledged "archaeological site" locations is a reference to these Goal 5 maps. The generalized Goal 5 Element map makes clear that portions of the proposed pipeline will travel through lands that are identified as "Areas of Archaeological Concern" in the Coos County Comprehensive Plan. Therefore, the route chosen by the applicant triggers CCZLDO §3.2.700 review, although, as discussed below, the timing of that review is an issue.

The correct application of CCZLDO §3.2.700 and CEBMP Policy #18[18] was one of the issues addressed by LUBA in the appeal of the Jordan Cove LNG terminal, *Southern Oregon*

[18] Policy #18: Protection of Historical, Cultural and Archaeological Sites

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 Site Plan Application, 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

Pipeline Information Project v. Coos County, 57 Or LUBA 44, 2008. In that case, LUBA held that Policy #18 is only triggered upon the applicant's submittal of a "site plan application" that identifies "all areas proposed for excavation, clearing or construction." The County's requirements for coordination and consultation with the tribes do not begin under Policy #18 until such an application has been submitted. At that point, the tribes have 30 days to submit a written statement regarding any objections to the specific development proposal, and if the tribes and the applicant cannot agree on appropriate protective measures, the county must hold a public hearing to resolve the dispute.

In its review of the LNG terminal on remand from LUBA, the Board of Commissioners adopted the following interpretation of Policy #18 and CCZLDO §3.2.700:

Umpqua Tribe(s) in writing, together with a copy of the Site Plan Application. 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.
"Appropriate measures" may include, but shall not be limited to the following:
a. Retaining the prehistoric and/or historic structure in situ or moving it intact to another site; or
b. Paving over the site without disturbance of any human remains or cultural objects upon the written consent of the Tribe(s); or
c. Clustering development so as to avoid disturbing the site; or
d. Setting the site aside for non-impacting activities, such as storage; or
e. If permitted pursuant to the substantive and procedural requirements of ORS 97.750, contracting with a qualified archaeologist to excavate the site and remove any cultural objects and human remains, reinterring the human remains at the developer's expense; or
f. Using civil means to ensure adequate protection of the resources, such as acquisition of easements, public dedications, or transfer of title. If a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply. Land development activities, which violate the intent of this strategy, shall be subject to penalties prescribed in ORS 97.990.
III. Upon receipt of the statement by the Tribe(s), or upon expiration of the Tribe(s) thirty day response period, the local government shall conduct an administrative review of the Site Plan Application and shall:
a. Approve the development proposal if no adverse impacts have been identified, as long as consistent with other portions of this plan, or
b. Approve the development proposal subject to appropriate measures agreed upon by the landowner and the Tribe(s), as well as any additional measures deemed necessary by the local government to protect the cultural, historical and archaeological values of the site. If the property owner and the Tribe(s) cannot agree on the appropriate measures, then the governing body 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 archaeological values of the site.
IV. Through the "overlay concept" of this policy and the Special Considerations Map, unless an exception has been taken, no uses other than propagation and selective harvesting of forest products consistent with the Oregon Forest Practices Act, grazing, harvesting wild crops, and low intensity water-dependent recreation shall be allowed unless such uses are consistent with the protection of the cultural, historical and archaeological values, or unless appropriate measures have been taken to protect the historic and archaeological values of the site. This strategy recognizes that protection of cultural, historical and archaeological sites is not only a community's social responsibility, it is also legally required by ORS 97.745. It also recognizes that cultural, historical and archaeological sites are non-renewable cultural resources.

"LUBA's remand regarding archaeological resources issues under Policy #18 is based upon a lack of clarity regarding whether LDO 3.2.700 implements Policy #18. As explained in more detail below, the Board finds that the 'Site Plan Application' requirement contemplated by Policy #18 is intended by the county to be implemented through the submittal of a 'plot plan' under LDO 3.2.700 at the time the applicant requests a zoning compliance (verification) letter under LDO 3.1.200 for the issuance of building permits by the State of Oregon Building Codes Division. In its final opinion LUBA stated:

> 'We leave open the possibility that the county might interpret LDO 3.2.700 to fully implement CBEMP Policy #18 because all development subject to CBEMP Policy #18 will require a zoning compliance letter and the decision making required by Paragraph III of CBEMP Policy #18, including any required 'administrative review' and 'quasi-judicial hearing' will occur under LDO 3.2.700(4). But any attempt to defer the quasi-judicial hearing and necessary decision making that may be required to resolve disputes between the tribes and the applicant to a point in time after the conditional use approval is granted, must ensure that the required decision making and quasi-judicial hearing will be provided later before the proposed development can commence.'

"Consistent with the above-quoted portion of LUBA's decision, the Board of Commissioners finds that LDO 3.2.700 provides the county's intended process for the tribe(s) review of proposed development in order to fully implement Policy #18. Although the plan policy and code provision do not expressly cross-reference each other, the stated purpose of LDO 3.2.700 is to provide a 'Process for Tribe(s) Review and Response of Proposed Development within Acknowledged Archaeological Sites,' and Policy #18 is also designed to protect such sites. Like Policy #18, LDO 3.2.700 provides the Tribes a 30-day review period within which to review a development proposal and respond in writing.

"Significantly, LDO 3.2.700 makes clear that the time for compliance with applicable requirements regarding protection of archaeological resources is at any time before a 'zoning compliance letter' is requested for purposes of obtaining building permits, not at the time of conditional use permit approval. Under LDO 3.2.700, this is accomplished through the applicant's submittal of a 'plot plan showing exact location of excavation, clearing, and development.' The time for application of the Policy #18 and LDO 3.2.700 requirements is prior to obtaining a zoning compliance

letter and building permit under LDO 3.1.200 (LDO 3.2.700 refers to a 'zoning compliance letter,' which the Board finds is the equivalent of a 'zoning verification letter' as described under LDO 3.1.200).

"Therefore, the Board finds that the 'Site Plan Application' contemplated by Policy #18 is the 'plot plan' contemplated under LDO 3.2.700, which expressly implements the policy. JCEP must comply with the specific coordination and administrative hearing requirements of Policy #18 prior to obtaining a zoning compliance (verification) letter as required for issuance of building permits under LDO 3.1.200, rather than as part of its conditional use permit approval. The administrative review and hearing required under Policy #18 will occur at the time a 'plot plan' and related information are submitted for obtaining the necessary zoning compliance letter.

In this case, the Supplemental Staff Report provides:

The consultations, surveys, and reports undertaken by the applicant regarding compliance with state and federal law governing cultural and archaeological resources are explained in Section 4.10 of the FEIS. As described in Sections 4.10.1.3 and 4.10.2.3 of that document, Pacific Connector has surveyed the pipeline route, and has prepared a Cultural Resources Survey Report identifying locations of archaeological sites along the route, and filed that report with both FERC and the State Historic Preservation Officer (SHPO), as required under state and federal law. However, according to staff, the report is not included in the record because under state and federal law, the contents of the report cannot be made available for public review in order to protect specific cultural sites that may be of interest to artifact hunters. This confidentiality requirement is also recognized in CBEMP Policy #18, which provides that the county "shall refrain from widespread dissemination of site-specific information about identified archaeological sites."

See Supplemental Staff Report dated July 8, 2010, at p. 1.

CCZLDO §3.2.700 sets forth a process that is, by its express terms, applicable only "prior to issuance of a 'Zoning Compliance Letter' for building and/or septic permits." In this case, a zoning compliance letter will be required prior to obtaining a building permit from State Building Codes in order to construct and connect the pipeline to the meter station at the LNG terminal. At that point, the notice required under Policy #18 must be provided to the tribes, who will be entitled to submit comments and concerns regarding resource sites along the entire pipeline route. Other state agencies may also require county sign-off on a land use compatibility

statement. The planning department will ask for comment from the appropriate tribe (Coquille or Confederated) consistent with CCZLDO §3.2.700 prior to issuance of a zoning compliance letter or sign-off on a land use compatibility statement.

Given this backdrop, the concerns of the Tribes can be addressed. The Cultural Resources Protection Coordinator for the Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, Ms. Arrow Coyote, wrote a letter dated June 10, 2010 in which she states the following:

> Section 3.2.700 would fail to protect the County's cultural resources if it were limited only to cases where a permit was being issued under the Oregon Building Codes Agency regulations. Too many ground disturbing activities would not be covered including roads, underground cables and pipelines. The placement of Section 3.2.700 in provisions involving use and the context of the section itself strongly suggest that the intent of the County was to protect its cultural resources, and those of the tribes, when any ground disturbing activity occurs that requires County approval.

The CCZLDO language is unambiguous and only applies to "building and/or septic permits." While it may be true that certain other ground-disturbing activities do not trigger CCZLDO §3.2.700, it is not within the Board's authority to rewrite the CCZLDO as part of this application process. However, the concern may be overstated, because, as quoted above, staff advises that building permits will be required for the pipeline's connection to the meter station itself. The Board agrees that this is the case. In any event, the Tribes are afforded what are perhaps even stronger protections under the FERC condition of approval No. 17, discussed below.

With regard to CBEMP Policy #18, the Board's Remand Order sets forth a workable solution for implementation of that policy. In a June 6, 2010 letter, the Hearings Officer stated that "[a]t this point, I am inclined to agree with the applicant that compliance [with CBEMP Policy #18 and CCZLDO §3.2.700] can be met with a condition of approval." The Hearings Officer further stated that "I would be interested in hearing from the Tribes whether they have any reason to believe that a condition of approval would not be sufficient to address their concerns." The Tribes responded to the Hearings Officer's request in a letter dated June 10, 2010. In that letter, Ms. Coyote expresses a generalized concern that CEBMP Policy 18 may not have any force once a CUP is issued. However, given the condition of approval proposed by the applicant, see *infra*, the Board finds that CBEMP Policy 18 and CCZLDO §3.2.700 will continue to have full force.

In her June 10, 2010 letter, Ms. Coyote explains that in the FEIS, FERC staff recommended certain conditions of approval related to cultural resources. *See* FEIS 4.10-21 and 5-32. These conditions were adopted, in somewhat modified form, in the Dec. 17, 2009 FERC Order. *See* FERC Order at p. 72-73. FERC's Condition 17 provides as follows:

Jordan Cove and Pacific Connector shall not begin construction and/or use any of their respective proposed facilities, including related ancillary areas for staging, storage, temporary work areas, and new or to-be-improved access roads until:

a. Jordan Cove and Pacific Connector each file with the Secretary remaining cultural resource survey reports and requested revisions, necessary site evaluation reports, and required avoidance/treatment plans;
b. Jordan Cove and Pacific Connector each file with the Secretary comments on the reports and plans from [SHPO], appropriate land management agencies, and interested Indian tribes;
c. The [ACHP] has been afforded an opportunity to comment, and a Memorandum of Agreement has been executed; and
d. The Commission staff reviews and the Director of Office of Energy Projects (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".

Thus, this condition requires certain action to be taken prior to construction of the proposed pipeline. Ms. Coyote faults Pacific Connector for not completing the tasks set forth in the condition, as follows:

These deficiencies are specifically as follows:

1. Re-routing of the pipeline in the Fairview Area to avoid two known sites 35CS225 and 35CS226 that will be impacted by the pipeline (FEIS 4.10-9).

2. Failure of draft unanticipated discovery plan to correctly identify state law process, address monitoring of ground disturbing activities adequately, or identify the role of the Confederated Tribes, and no requirement that the Project make use of the State-Tribal Inadvertent Discovery Plan.

3. Although the cultural resource surveys in the Haynes Inlet have been conducted, Pacific Connector has not provided with [sic] the Confederated Tribes with a rerouting plan to avoid the newly discovered archaeological sites.

4. Lack of cultural resources surveys and testing at the crossings at Kentuck and Willanch Sloughs.

5. Further archaeological investigation including trenching below the dredge fill at Graveyard Point.

6. Lack of a report of the archaeological investigation of the new upland route above Coos Bay.

7. The lack of an MOA outlining future consultation responsibilities or any other aspect of cultural resource protection.

While it is understandable that the tribes may be concerned that their issues could get lost in the shuffle, so to speak, it seems premature to criticize the applicant at this point in time for any failures to comply with FERC Condition 17. The applicant is a long way away from starting construction, and it seems that most, if not all, of the issues germane to CBEMP Policy #18 will get worked out as a part of the process of satisfying FERC Condition 17. By making FERC's condition a requirement for this approval, the County can assume a supervisory role as well.

In her letter dated June 10, 2010, Jody McCaffree states the following:

> Since dredging by Pacific Connector Gas Pipeline could impact unknown burial sites among other Archeological impacts that may yet be discovered in the area of the proposed pipeline route, it is the duty of the Hearings Officer and Commissioners to deny this permit application until the issues and concerns of the Tribe have all been resolved.

Id. at p. 29. However, given the Board's prior interpretation, Ms. McCaffree's suggested resolution makes no sense. As interpreted by the Board, CBEMP Policy #18 and CCZLDO §3.2.700 set forth processes that are to be undertaken *after* CUP approval is obtained. The Board finds that it is feasible for the applicant to fulfill the FERC conditions and to undertake the analysis required by CBEMP Policy #18 and CCZLDO §3.2.700. While it may be that this analysis will lead to further revisions and modifications to the route and/or other aspects of the proposal, that is a factual matter that will develop with time.

In any event, the applicant proposed a condition of approval on this issue which is essentially the same as the condition on this issue added to the LNG terminal approval. Staff proposed a condition of approval on this issue as well. The Hearings Officer recommended approving the applications, subject to both the applicant-proposed and staff-proposed conditions. The Board reviewed the Hearings Officer's recommendation and discovered minor variations between the language of the applicant-proposed and staff-proposed conditions. Prior to the deliberations in this matter, County staff submitted a staff report recommending that the Board accept the applicant's condition and delete the staff condition. At the deliberations in this matter, the Planning Director further advised the Board that the staff-proposed condition should be tweaked to reflect that the applicant would not be required to obtain approval of septic permits or a plot plan for the pipeline. Accordingly, the Board strikes the staff-proposed condition on this subject and instead adopts the applicant's proposed condition of approval as Condition of Approval B.24 to read as follows:

Historical, Cultural and Archaeological.

At least 90 days prior to issuance of a zoning compliance letter under CCZLDO Section 3.1.200, the County Planning Department shall make initial contact with the affected Tribe(s) regarding the determination of whether any archaeological sites exist within the CBEMP areas proposed for development, consistent with the provisions of CCZLDO Section 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of CCZLDO Section 3.2.700, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources have been identified, the County may approve and issue the requested zoning compliance letter and 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 CBEMP Policy #18 resources on the site and the applicant and the 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 archaeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of Section 5.8.200 of the CCZLDO with the Board of Commissioners serving as the Hearings Body.

The Board finds that imposing this condition of approval addresses the opponents' concerns.

B. Multiple Approval Standards Related to Specific Zones

1. Rural Residential RR-2 and RR-5 Zones.

The staff report notes that the proposed pipeline crosses a total of approximately 0.37 of a mile of private property zoned Rural Residential - 5 (RR-5), and approximately 0.10 of a mile of private property zoned Residential Rural - 2 (RR-2). According to the applicant, the pipeline crosses five RR-5 zoned areas from MPs 10.15 to 10.25, 11.94 to12.04, 12.47 to 12.49, 14.22 to14.28, and 22.59 to 22.71. From MPs 4.17 to 4.22 and 10.12 to 10.15, the pipeline crosses property zoned RR-2. All of the RR-5 and RR-2 zoned lands crossed are private.

The applicable code provision is CCZLDO §4.2.900 (7), which provides as follows:

SECTION 4.2.900.7 – The use must be found compatible with surrounding uses or may be made compatible through the imposition of conditions.

The County has interpreted this standard to mean that the proposed use "is capable of existing together with surrounding uses without discord or disharmony." That formulation was upheld as falling within the permissible range of interpretations under ORS 197.829(1). *Clark v. Coos County*, 53 Or LUBA 325 (2007). In *Clark*, LUBA also upheld the County's conclusion that the "compatibility" requirement of CCZLDO 4.2.900(7) only applies to *existing* uses, and not to future or potential uses or additions to residential property. *Id.* at 330.

Compatibility standards of this sort are extremely subjective in nature. *Corbett/ Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601, 617 (1993); *Knight v. City of Eugene*, 41 Or LUBA 279 (2002). As LUBA has noted, "[i]ndividual perceptions may widely diverge about whether a proposed development will be compatible with the existing setting or the type and scale of development envisioned in planning documents. The term is flexible and, therefore, an imperfect standard for judging the acceptability of proposed development" *See Marineau v. City of Bandon*, 15 Or LUBA 375 (1987).

Given the deferential scope of review LUBA and the Courts apply to a governing body's code interpretations under ORS 197.829(1); *Church v. Grant County*, 187 Or App 518, 525, 69 P3d 759 (2003) and *Siporen v. Medford*, 231 Or App 585, 220 P3d 427 (2009), *rev allowed* 348 Or 19 (2010), the Board has a fairly wide degree of latitude on this issue. However, LUBA has cautioned, in a pre-*Clark* case, that it is not proper to, in effect, balance the need for the land use against the potential harm to surrounding uses. *See Vincent v. Benton County*, 5 Or LUBA 266 (1982). Whether that holding survives *Clark* and ORS 197.829(1) is unclear, but in all likelihood, it does not.

Nonetheless, by defining the proposed use as a "conditional use" in the zone, there has already been a legislative determination that gas pipelines are not *per se* incompatible with rural residential uses. Were that not the case, then gas pipeline uses would be considered to be a prohibited use in the zone. Thus, the issue becomes whether the proposed pipeline creates specific incompatibility issues with the uses that currently exist in the surrounding areas.

The term "surrounding uses" is not defined in the CCZLDO. No party attempts to assert that analysis of any particular geographical area is required. The applicant seems to have attempted to define the "surrounding area" via its maps and aerial photographs. The applicant's analysis focuses on all structures within 100 feet of edge of the corridor, the temporary work areas and uncleared storage areas. The Board finds that the applicant's maps and aerial photos included with the June 17, 2010 letter from Mr. Gregory are adequate to define the "surrounding area," and accepts the 100 foot limit as acceptably defining the limit of possible impacts.

WELC and other opponents argue that the pipeline should not be allowed in the Rural Residential zones because the applicant has failed to identify nearby uses with sufficient specificity, and therefore the county cannot make the "compatibility" determination required

under CCZLDO 4.2.900(7). *See* Letter from WELC staff attorney Jan Wilson, dated June 8, 2010 at p. 7.[19] Also, WELC contends that the applicant has not provided sufficient detail regarding mitigation measures that would be employed to ensure compatibility with rural residential uses. *See* Letter from WELC staff attorney Jan Wilson, dated June 8, 2010, at p. 7.

As the applicant notes, WELC does not present any evidence of its own suggesting that a particular segment of pipe is not compatible with an existing use in the rural residential zones. Rather, WELC's focus seems to be on the argument that the applicant's evidence is *per se* insufficient to meet its threshold burden of proof, even in the absence of any evidence to the contrary. In this regard, WELC is correct that the applicant has the burden of proof to

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[19] The June 10, 2010 letter from WELC states:

> "The application narrative says that the surrounding uses include "residential uses, pasture land, and forest operations." This list is too vague as to which uses are where and how close to the pipeline and what, exactly, is being done on the property. For example, a "residential use" could include a backyard children's play area or garden beds or a residential septic field – all things that may be impacted in a variety of ways. Without knowing what uses – specifically – are on each of the specific properties, it is impossible for the hearings body to make the required finding of "compatibility."
>
> Further, the applicant makes general assertions of minimization and mitigation, without detailing what would be done where, so that those things can be incorporated into the conditions of approval, as required by CCZLDO 4.2.900(7). What does the applicant mean when it says that it would engage in "appropriate" measures to protect homes and structures during pipeline construction and that it would restore disturbed areas "as closely as possible" to preconstruction condition? For example, where the pipeline crosses pasture land, would gates be installed in existing pasture fence, or would fences be moved, or would livestock (or pets) be merely excluded from the pipeline right-of-way (presumably with appropriate monetary compensation for the loss of pasture land)? By quoting Condition 43 of the FERC order, does the applicant mean to request that the same condition of approval be incorporated into the county's decision and also to assert that the condition is adequate to make the pipeline compatible with surrounding uses? By including the Groundwater Supply Monitoring and Mitigation Plan, which itself is vague about exactly what wells, springs, and seeps are near the proposed pipeline route, does the applicant mean to have those determinations made part of the conditions of approval?
>
> Under recent and current Oregon law, as interpreted by LUBA and the Court of Appeals, where an approval criteria specifically requires a finding – such as the requirement of a finding of compatibility with surrounding uses, in this case – the decision can not merely defer and delay determination of the relevant finding until the applicant gets around to providing the factual data necessary to make the finding. Instead, in order to defer a finding such as the "compatibility" finding required here, the county must find (a) that it is feasible for the applicant to satisfy the criteria and (b) that the later process, where the finding is actually made, offers the same level of public review and participation as the original proceeding. In this case, the applicant has not provided the data necessary to make a "compatibility" finding, has not even provided enough data to make it possible to determine that satisfying the compatibility requirement is even feasible, and has made no suggestion about any future process that would allow that determination to be made with the same level of public participation as this current process.
>
> Thus, lacking adequate information to make the required finding, the county should deny the application."

demonstrate compliance with an approval criterion, but as discussed, below, the applicant has met its burden.

WELC states that a "residential use could include a backyard children's play area or garden beds or a residential septic field – all things that may be impacted in a variety of ways," but then does not describe any of those alleged ways. It is not intuitive to the Board how an underground pipe in normal operation 50 to a 100 feet away from a "backyard children's play area" or a "septic drainfield" could impact those uses. The only obvious potential impact would be those resulting from a leak or an explosion, which is discussed below. Nonetheless, with regard to septic drain fields, the FERC conditions require the applicant to file a plan with the Secretary "outlining measures that should be implemented to mitigate pipeline construction impacts on domestic water supply systems and septic systems." *See* FERC Condition No. 43. The Hearings Officer found that it is feasible for the applicant to demonstrate compliance and recommended that the FERC condition be applied here. The Board agrees and adopts Condition of Approval A.8 to read as follows:

> "To protect residences and structures, evidence of compliance with FERC's Certificate Order, Condition #43 must be provided prior to issuance of zoning clearance."

The April 14, 2010 application narrative, at pages 22-23, provides a description of why the pipeline is compatible with surrounding rural residential uses. Notably, as a sub-surface facility, the pipeline creates no real "compatibility" issues other than (1) temporary disturbances during construction, and (2) restricting the landowner from building new structures on top of the pipeline right-of-way.

The applicant has provided detailed information regarding compatibility and mitigation measures with existing residential uses in correspondence from Rodney Gregory and Derrick Welling on Williams Pipeline letterhead, dated May 11, 2010. The May 11, 2010 correspondence also provided two pages of detailed information regarding location of the pipeline in relation to existing residential structures, and also identified measures that will be taken to minimize and mitigate impacts on residential uses. *See* Williams Pipeline May 11, 2010 letter at p. 18-9.

Therein the applicant stated:

> Within RR-5 zoned lands near MP 14.25, there are two residences within 100 feet of the construction area. There are also several structures within RR-5 zoned lands within 100 feet of the construction area. Within RR-2 zoned lands, there are no residences within 100 feet of the construction area; however, there are several structures located within 100 feet of the construction area. The structures are shown on the Environmental Alignment Sheets provided in Exhibit 1 to the application narrative.
>
> Pacific Connector will undertake specific measures to ensure safety and mitigate impacts on residential uses and structures;

including the following: (1) installation of orange safety fence between the construction right-of-way and the residence; (2) avoiding removal of trees and landscaping wherever possible; (3) restoring all lawn areas and landscaping within the construction right-of-way consistent with the requirements of FERC's upland plan; (4) maintaining access to residences at all times during construction; (5) providing alternative sewer facilities if septic systems are disturbed during construction, including repairing and restoring such systems if necessary.

Consistent with the above, the principal method for mitigating impacts to existing residential areas will be to ensure that the construction proceeds quickly through such areas (thus minimizing exposure to nuisance effects, such as noise and dust) and limiting the hours of operations that high-decibel noise levels can be conducted. Landowners will be notified prior to construction and access and traffic flows will be maintained during construction activities, particularly for emergency vehicles. Pacific Connector has developed and will implement Landowner Complaint Resolution Procedures.

Dust minimization techniques such as watering will be used on-site and all litter and debris will be removed daily from the construction site. Pacific Connector will comply with all local noise ordinances. Pacific Connector does not currently plan to work on Sundays. However, certain activities, such as waterbody crossing construction and hydrotesting, may require a 24-hour work schedule. Pacific Connector will attempt to schedule activities during normal working hours.

After project construction, landowners affected by the project will have use of the right-of-way, provided it does not interfere with the easement rights granted to Pacific Connector for construction and operation of the pipeline system.

Mature trees, vegetation screens and landscaping will be preserved to the extent possible while ensuring the safe operation of construction equipment. Landowners will be compensated for removal of trees. Immediately after backfilling the trench and weather permitting, all lawn areas and landscaping within the construction work area will be restored. Permanent structures will not be permitted on the permanent right-of-way, including houses, tool sheds, garages, poles, guy wires, catch basins, swimming pools, trailers, leaching fields, septic tanks, or any other objects not easily removed; nor in general is grading or removal of cover allowed without Pacific Connector's involvement. Pacific

> Connector will compensate landowners for damage to homes if the damage is caused by pipeline construction. Depending on the specific circumstances, Pacific Connector may choose to relocate residents during construction activities. Arrangements will be determined through negotiations between the landowner and Pacific Connector's Land Representative prior to construction.
>
> Within 50 feet of a residence, the edge of the construction work area will be fenced for a distance of 100 feet on either side to ensure that construction equipment and materials, including the spoil pile, remain within the construction work area. Fencing will be maintained, at a minimum, throughout the open trench phases of pipeline installation. Where feasible, Pacific Connector has reduced the construction right-of-way near residences and placed temporary work areas as far as practicable from the residences. Pacific Connector will also limit the period of time the trench remains open prior to backfilling.

WELC does not specifically take issue with these findings.

Regarding WELC's argument concerning lack of sufficient information about nearby uses, it is not clear what additional information WELC believes is necessary to make the necessary determination about compatibility. The applicant has identified the specific locations of all residential structures on the alignment sheets attached to the April 14, 2010 application narrative as Exhibit 1. The applicant also provided correspondence dated June 17, 2010 from Rodney Gregory of Pacific Connector (attached as Exhibit 8 to the applicant's June 17, 2010 record submittal), providing further information regarding the compatibility issue and enclosing the following additional materials:

1. A table that identifies all structures located within 100 feet of the proposed pipeline corridor, or any TEWA or UCSA. Properties are identified by milepost, ownership, zoning, land use type, and the distance of each structure on the property from the corridor, TEWA or UCSA.

2. Close-up version of the aerial photo alignment sheets for the properties identified in the above-referenced table, showing all structures within 100 feet of any portion of the project and identifying their precise distance from the project.

The Board reviewed the information in the application, as set forth above, and concludes that this information constitutes substantial evidence that an underground natural gas pipeline is capable of existing together with surrounding rural residential zone uses without discord or disharmony. Once built, the pipeline itself will be underground and will not create noise, dust, vibration, or other impacts. The use will only generate traffic during inspections and periodic maintenance. The pipeline will not impair views or obstruct access to solar energy. The pipeline will not be a visual blight. The 30 foot corridor will remain clear of trees, shrubs, and similar vegetation, but that is not far removed from what happens when roads are built, and there is no suggestion that road are incompatible with rural residential uses. As discussed elsewhere, there is some potential

that the corridor will be used by off-road vehicles, but that possibility will be minimized with the appropriate condition of approval.

The only potential impacts are construction related, and *all* construction creates some temporary impacts – regardless of the proposed use under consideration. A review of LUBA case law reveals that compatibility analysis typically does not focus on temporary construction-related impacts of that sort. However, even to the extent that the criterion is focused on those types of temporary construction impacts, the code allows uses that might be incompatible to be "made compatible through the imposition of conditions." CCZDO 4.2.900(7) As the testimony of the applicant makes clear, it is feasible for a pipeline to be constructed in a manner that is compatible with neighboring residences, and the FERC conditions will ensure compatibility during construction.

The biggest potential compatibility concern stems from the property shown on Drawing No,. 3430.33-X-9007. (MP 13.8 to MP 14.4). On the drawing (aerial photograph), that property is listed as the "Ketchum residence," but the table accompanying Mr. Gregory's June 17, 2010 letter shows the property as being owned by "Robert G. Scoville." In any event, that property has two residential structures[20] that are 2.5 feet and 5.7 feet from the edge of the construction easement, and even that is somewhat misleading since it appears that the easement was reduced in width at that location to avoid those structures. The FERC condition of approval appears to provide a remedy for this particular landowner, as it requires "evidence of landowner concurrence if the construction work area and fencing would be located within 10 feet of a residence." Presumably, this consent requirement gives the landowner a high degree of negotiation leverage in the event the applicant does go this route. The applicant has testified that it has latitude under FERC's Order to make minor adjustments to the route of the pipeline. The Hearings Officer recommended a condition of approval requiring the pipeline to be rerouted to avoid the residence shown on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4).

The Board finds that the Hearings Officer's recommended condition may have misstated the name of the landowner as well as the direction the pipeline would need to be relocated in order to minimize impacts to the residence in question. Moreover, the Board finds the recommended condition may actually reduce the applicant's flexibility to respond to the landowner's concerns. Finally, the Board finds that the proposed condition is too narrow in scope and should apply to all landowners along the pipeline alignment. Accordingly, the Board modifies and adopts the condition as Condition of Approval A.4 to read as follows:

> "The pipeline will be rerouted, where feasible, in order to avoid impacts to the property identified on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4). If requested, the applicant shall work with affected property owners within the pipeline's alignment to make 'minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands' pursuant to FERC Order Condition #6 in order to avoid or minimize impacts to structures or the owner's use of the property."

[20] From the aerial photographs, the structures appear to a dwelling and a detached garage.

In looking at the remainder of the aerial photographs and maps, it appears that there is sufficient distance between the actual location of the pipeline and nearby residences to ensure co-existence without "discord or disharmony."

There is quite a bit of evidence in the record suggesting that gas pipelines occasionally explode, causing destruction to property and occasionally even injury and death to humans. *See* Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. For example, a natural gas pipe explosion in Carlsbad, New Mexico killed eleven people on August 19, 2000. *Id.* The argument advanced by the opponents seems to be that any utilityhas the potential to cause death and injury is *per se* incompatible with rural residential uses. However, the Board has already determined that the proposed use is a conditional use in the zone, and therefore this type of "*per se*" incompatibility argument is a collateral attack on the legislative enactment of the code.

Moreover, it is difficult to rely on anecdotal evidence as a basis to conclude incompatibility. For example, most of the incidents cited by opponents involve older pipes with deferred maintenance issues. *See* Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. The applicant has testified that the newer designed pipes have more built-in safety features and use better materials, and are less likely to have the same type of maintenance issues as experienced with older pipes. As a decision-maker in a land use hearing, one 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.").

Moreover, even if one assumes that a future accident will happen, it does not follow that occasional loss of life and property damage from accidents necessarily means that the gas pipeline utility use is not compatible with residential use. Obviously, if an explosion occurred, it would cause "discord or disharmony." However, the evidence in the record shows that the potential for an explosion at any one particular location is statistically very low, perhaps akin to the odds of a person getting hit by lightning. For example, the publication entitled "Out of Sight Out of Mind No More" was published in 2000, and documents less than 200 oil and gas pipeline deaths over the period from 1984-1999. *See* Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. The Board finds that the small potential for an accidental explosion does not form a basis to conclude that the pipeline is not "compatible" with any particular surrounding use.

Finally, the Board finds that the risk of an accident caused by the pipeline is no greater than the risk of any other life-threatening accident, such as an electrical house fire, electrocution,

EXHIBIT A

a tree fall, etc. We live in a modern society that demands certain conveniences, such as running water, electricity, natural gas, and automobiles. It is simply not possible to completely avoid the risk of death or injury to humans resulting from the provision of such systems. The allowance of automobile use, for example, is virtually guaranteed to kill tens of thousands of Americans every year, despite laws that demand reasonable and safe operation of these automobiles, and vigorous enforcement of such laws. And yet, despite the carnage caused by cars, is there any question that cars are "compatible" with residential areas, rural or otherwise? Is there any movement to bar cars on the grounds that human life will be saved? No, of course not. Similarly, all Americans take on a certain degree of risk of harm or death by having gas and electricity in their homes, and yet electrical and gas appliances and furnaces are still considered to be "compatible" with residential uses. Indeed, they are necessary for modern residential use. The bottom line is the risk of harm to life and property here is miniscule, and is far outweighed by the benefits to society. Therefore, public utility uses such as gas pipelines are compatible with residential uses despite the incidental risks associated therewith.

In closing on this issue, the application narrative also notes the following condition of approval being required by FERC that will ensure future compatibility with residential property:

> "43. Prior to pipeline construction, Pacific Connector shall file with the Secretary, for the review and written approval of the Director of OEP:
>
> a. The results of a civil survey of the entire pipeline route that identifies all residences and commercial structures within 50 feet of the construction right-of-way;
> b. A plan outlining measures that should be implemented to mitigate pipeline construction impacts on domestic water supply systems and septic systems; and
> c. For any residence closer than 25 feet to the construction work area, a site-specific plan that includes:
> (1) A description of construction techniques to be used (such as reduced pipeline separation, centerline adjustment, use of stove-pipe or drag-section techniques, working over existing pipelines, pipeline crossover, bore, etc.), and a dimensioned site plan that shows:
> (i) the location of the residence in relation to the pipeline;
> (ii) the edge of the construction work area;
> (iii) the edge of the new permanent right-of-way; and
> (iv) other nearby residences, structures, roads, or waterbodies.
> (2) A description of how Pacific Connector would ensure the trench is not excavated until the pipe is ready for installation and the trench is backfilled immediately after pipe installation; and
> (3) Evidence of landowner concurrence if the construction work area and fencing would be located within 10 feet of a residence."

The Hearings Officer recommended that the County impose a substantively identical condition. The Board agrees and adopts Condition of Approval A.8 for this purpose.

Testimony presented at the hearing, expressed concern about the possibility that the gas

pipeline will affect shallow rural wells and water supplies. It is not readily apparent or intuitive that a natural gas pipeline will have any effect on water supplies. Without more focused testimony and supporting evidence, the Hearings Officer did not give speculative testimony such as this any credence.[21] The Board sees no reason to do so either. As discussed above, FERC Condition 43 addresses this issue.

2. Industrial Zone (IND)

The proposed pipeline will cross approximately 0.07 mile of IND zoned property adjacent to Jordan Cove. According to staff, the site was previously impacted by industrial use (Weyerhaeuser yard).

The applicant has requested a consistency determination of the permitted nature of the use in the IND zone.

CCZLDO §4.1.100 sets forth the purposes of the Industrial (IND) zone:

> The purpose of the "IND" district is to provide an adequate land base necessary to meet industrial growth needs and to encourage diversification of the area's economy accordingly. The "IND" district may be located without respect to Urban Growth Boundaries, as consistent with the Comprehensive Plan. The "IND" designation is appropriate for industrial parcels that are needed for development prior to the year 2000, as consistent with the Comprehensive Plan.

CCZLDO §4.6.610 states that a "site plan review" is required for *all* uses in the IND zone. The term "use" is defined in a manner that includes "facilities." The term "utility" is defined in a manner that encompasses "facilities." Therefore, a utility is a "use." However, a "utility facility not including power for public sale" is a permitted use pursuant to Section 4.2.600 and Table 4.2-e. The Board finds that the proposed gas pipeline is a "utility facility- not including power for public sale" within the meaning of CCZLDO §2.1.200, and that it is an outright permitted use in the IND zone.

Staff states that "the pipeline will be located beneath the surface of the site and is a necessary component of the previously approved LNG facility." Therefore, staff asserts that further site plan review is not necessary.

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[21] The hearings officer is mindful of the fact that lay-person testimony can, under the right set of facts, undermine contradictory expert testimony. *See Johns v. City of Lincoln City*, 35 Or LUBA 421, 428 (1999); *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999). However, under this set of facts, no reasonable decision-maker would accept the vague and unsubstantiated opinions of lay persons that the pipeline will harm wells, particularly when the applicant's experts concluded that no such harm will result. To constitute substantial evidence sufficient to overcome such expert testimony, the opponents would need to support their conclusions and opinions with *some sort of* actual collaborating evidence or facts, and not just rely on an unsubstantiated, self-serving opinions.

EXHIBIT A

WELC and Jody McCaffree take issue with the staff report's conclusions. In a letter dated June 8, 2010, WELC's staff attorney states:

> CCZLDO §4.4.610 requires site plan review for "all" uses in the Industrial (IND) zoning district. Development proposed for the IND zones includes not only the pipeline itself but also temporary construction areas. The applicant has not applied for site plan review for these development activities, and thus the pipeline cannot be approved in the IND zones until the site plan review is completed. A condition of approval may be an appropriate way to ensure compliance with the code requirement for site plan review.

The applicant responds to these assertions in its letter dated June 24, 2010, as follows:

> [R]equiring a site plan review for a subsurface pipeline crossing of a portion of the Industrial zone would be inappropriate for several reasons. First, Section 5.6.400 indicates that the related development standards are intended to address a traditional "development of a site and building plans," which is obviously not implicated by the installation of a subsurface gas pipeline. Further, the standards of the section largely apply to structures and other types of above-surface improvements, which also cannot be applied to a subsurface pipeline. As discussed above in Section 5 of this letter, the pipeline is not a "structure" under the county code definition. Finally, the applicant submits that the only relevant standard in Article 5.6 is the Threshold Standard in Section 5.6.5003 [sic] which provides, in pertinent part, that "The Planning Director, at his discretion, may waive part or all of the site plan requirements including fees, if, in the Director's judgment, the proposed development is *de minimis* in extent to the existing development." This section allows the county discretion to find that the provisions of Article 5.6 are inapplicable because they were not intended to address a subsurface gas pipeline.

WELC is correct that the CCZLDO would typically require a site plan review for this site prior to development. Specifically, CCZLDO §5.6.300 states that "[w]ithin any zone designation requiring a site plan review, *no building permit or verification letter shall be issued for the* erection or *construction of a permitted* or conditional *use until* the plans, drawings, sketches and other documents required under Section 5.6.500 have been approved by the Planning Director in conformity with the criteria specified in Section 5.6.400."(emphasis added). Notwithstanding this general requirement, CCZLDO §5.6.500(3) authorizes the Planning Director to waive the site plan requirement. This provision states: "The Planning Director, at [her] discretion, may waive part or all of the site plan requirements including fees, if, in the Director's judgement [*sic*], the proposed development is diminimous [*sic*] in extent to the existing development."

The Hearings Officer found that nothing would be accomplished by requiring a "site plan

review" of an underground gas pipeline across an old Weyerhaeuser yard. Further, the Board finds that the development standards of CCZLDO §5.6.400 are intended to apply to structures and other types of above-surface improvements, and are not applicable to subsurface pipelines and their ancillary facilities, including temporary construction areas. Further, as conditioned, any adverse effects caused by the construction and operation of the pipeline on existing development will be fully mitigated. Accordingly, the pipeline will necessarily be *de minimis* in nature to existing development in this zoning district. The Board finds that the authority delegated by the Board to the Director under CCZLDO §5.6.500(3) also necessarily applies to the Board. The Board finds that the site plan requirements of this section are not applicable to the pipeline and its ancillary facilities, including temporary construction areas.

3. Coos Bay Estuary Management Plan (CBEMP)

The PCGP will cross through 15 CBEMP zoning districts. Compliance with the standards and policies applicable in those districts is addressed in the following documents submitted by the applicant in this proceeding:

- The application narrative dated April 14, 2010, at pages 26-50;
- Correspondence dated May 17, 2010 from Randy Miller of Pacific Connector, specifically addressing compliance with standards in CBEMP aquatic districts;
- Correspondence dated June 9, 2010 from Robert Ellis, Ph.D., of Ellis Ecological Services (the "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.

CCZLDO Section 4.5.100.

Some opponents raised CCZLDO 4.5.100 as a potentially applicable approval standard. It is a purpose statement stating general objectives, not an approval criterion. *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. Section 4.5.150 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 Section 4.5.150.

Section 4.5.150(5)(a) states that the Management Objective provides general policy guidance regarding the uses that are, or may be allowed in the district. Section 4.5.150(5)(b)

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

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

a. 6-Water-Dependent Development Shorelands (6-WD):

The 6-WD zoning district is a former industrial log yard, which will be the site of the Jordan Cove LNG terminal. The upland LNG terminal and all of its associated facilities and accessory uses, including the first segment of the pipeline, were approved in the 6-WD district as part of the Coos County Board of Commissioners decision dated December 5, 2007, and subsequent decision on remand from LUBA on August 21, 2009.[22]

> *Section 4.5.275 Management Objective: This district shall be managed so as to protect the shoreline for water-dependent uses in support of the water-related and non-dependent, nonrelated industrial use of the area further inland. To assure that the district shoreline is protected for water-dependent uses while still allowing non-water-dependent uses of the inland portion of the property (outside of the Coastal Shoreland Boundary), any new proposed use of the property must be found by the Board of County Commissioners (or their designee) to be located in such a manner that it does not inhibit or preclude water-dependent uses of the shoreline. Further, use of wetlands in the district must be consistent with state and federal wetland permit requirements.*

Section 4.5.276(A)(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 30, 49, 50, and 51.

Citizens Against LNG makes the following comments regarding this site:

> The proposed Pacific Connector pipeline route will cut through prime Industrial waterfront shoreline property making the property limited for future development. No structures can be built over the pipeline or in the easement areas. The Port has expressed concerns about this,[23] which was noted in the recent Pacific Connector

[22] On December 5, 2007, the Coos County Board of Commissioners adopted Order No. 07-11-289PL approving County File No. HBCU-07-04 regarding JCEP's proposed LNG import terminal as a water-dependent industrial and port facility, with the import terminal described in the decision to consist of upland facilities for LNG importation, processing, energy generation and transshipment into the interstate gas pipeline.

[23] Pacific Connector Clean Water Joint Permit - Appendix I - Wetland Mitigation PCGP - page 4:

> 401/404-permit application to Army Corps, DEQ and DSL. (See Exhibit P) The pipeline will also impact the shoreline area of Jordan Cove itself; impacting resource and development areas there as well. Impacts to protected Wetlands and Archeological sites noted on Coos Counties *Shoreland Values Requiring Mandatory Protection* Map will also occur in Jordan Cove, clearly violating the zoning requirements in this district. (See Exhibit B) Alternative Pipeline Routes that would have gone towards the North first instead of going directly East along the shoreline of the Coos Bay Estuary were never considered or analyzed by the Pacific Connector as indicated by their map of alternative routes. (See Exhibit A-1) This would have not only avoided impacts to future water dependant industrial development in this area, but also would not have been so impacting to the estuary. By using this more northerly route, most of the Pacific Connector right of way west of I-5 would cross property owned by Weyerhaeuser Corporation – which has supported the LNG development and would benefit from the sale of its North Spit property. The more northerly route would also avoid impacts to Rural Residential and EFU lands in Coos County. (See Exhibit A-1 & A-2)

See letter from Jody McCaffree, dated June 190, 2010, at p. 6. These type of "alternative route" are within the province of FERC, not the County. Nonetheless, the applicant responds as follows:

> [I]nstallation of the pipeline as a component of the approved LNG terminal will cause only temporary disturbance within the 6-WD zoning district. Pacific Connector has coordinated with Weyerhaeuser and Roseburg Forest Products to ensure that the pipeline location would not impede their existing or planned, future water-dependent uses or non-water-dependent uses or non-dependent, nonrelated industrial uses of the area further inland. Pacific Connector will obtain a 50-foot permanent right-of-way for the pipeline from landowners, and permanently engineered structures will not be allowed within the permanent right-of-way. However, once the pipeline is constructed and in operation, most water-dependent uses may proceed as they did prior to the pipeline

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"....The WC-1A-2A alignment modification on the north spit between approximately MPs 0.9 and 2.4 basically follows the original land route. Pacific Connector consulted with Clausen Oysters as well as the Port of Coos Bay about the modification to the WC-1A route variation. Although the WC-1A-2A is superior compared to WC-1A in avoiding direct effects to the oyster beds, Clausen Oysters have expressed concerns with the potential construction/ turbidity impacts of this route variation including WC-1A when compared to Pacific Connector's Proposed Route in the Bay that was filed in the FERC Certificate application. The Port of Coos Bay also indicated that WC-1A-2A would cross more areas that are within the Port's future development plans than the original WC-1A route.

installation. Furthermore, the beginning location of the pipeline is determined by the location of the LNG Terminal, which was approved by Coos County as an accessory component to the primary water-dependent port and industrial use. Pacific Connector has applied for state and federal wetland permits and will comply with all state and federal requirements.

Given both the coordination that has occurred between the applicant and Weyerhaeuser, and the distinct lack of objection from Weyerhaeuser in this proceeding, the Board finds that the proposed pipeline is not inconsistent with the management objective of the 6-WD zone.

The management objective is met.

b. 7-Development Shorelands (7-D)

The pipeline crosses the 7-D zoning district from MPs 0.97 R to 1.15 R and from MPs 1.22 R to 1.65 R. This section is privately owned by Weyerhaeuser Company. Section 4.5.286(A)(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 49, 50, and 5.

Pacific Connector would utilize the Roseburg Dock and the Weyerhaeuser Cove pipe storage and contractor yards during construction, which are partially zoned 7D. As described above, Roseburg Dock is a former industrial log yard, and the Weyerhaeuser Cove area is an old industrial site, half of which is paved.

Section 4.5.285 Management Objective: This shoreland district, which borders a natural aquatic area, shall be managed for industrial use. Continuation of and expansion of existing nonwater-dependent/non-water-related industrial uses shall be allowed provided that this use does not adversely impact Natural Aquatic District #7. In addition, development shall not conflict with state and federal requirements for the wetlands located in the northwest portion of this district.

Installation of the pipeline is consistent with the objective to manage the area for industrial use. The pipeline will be constructed using a stove pipe technique along the existing dirt service road on the Weyerhaeuser property that runs east-west just north of the Jordan Cove. This technique is being proposed to install the pipeline within the existing footprint of the road in order to avoid a known Point Reyes bird's-beak plant community, designated as a State Endangered Species, that borders the Jordan Cove shoreline as well as surveyed archeological sites located along the north and west shores of the Jordan Cove. The service road and all temporary extra work areas (TEWAs) would be reclaimed following installation of the pipeline within this district. Neither construction of the pipeline nor the permanent right-of-way will cross the 7-D district; therefore, there will be no direct impacts to 7-NA. To avoid indirect impacts, Pacific Connector will implement the ECRP throughout construction and restoration, which details the best management practices that will be installed to contain all project disturbance within the FERC-certificated boundaries (i.e., the construction right-of-way and TEWAs). Where the southern boundary of TEWA 1.19-N is adjacent to 7-NA, Pacific

Connector will install silt fencing to ensure that there is no off-site sedimentation or impact to 7-NA. Pacific Connector has applied for the necessary state and federal wetland permits and will comply with all state and federal requirements (see response to Policy #17 for consistency with significant wildlife habitat requirements).

In addition to the foregoing, the above-referenced Ellis Report provides the following testimony regarding compliance with the 7-D management objectives:

> "As outlined above, zone 7-D will be used as a temporary construction yard. Construction in the 7-D zone would be required to comply with a DEQ 1200-C Construction Stormwater Permit, which includes requirements for erosion control plans. The erosion control plans will be completed and submitted prior to initiation of construction and will include specifics on erosion control measures and BMPs to be implemented during construction. These protective measures could include the installation of silt fences, mulch blankets, slope breakers, straw wattles or other erosion controls. BMPs and other protective measures will preclude adverse impacts to the adjacent zone 7-NA aquatic unit, as required under the management objectives." Ellis Report, page 17.

The applicant asserts that, as a result of this information. "the first [*sic* third] condition of approval proposed by staff in the May 13, 2010 staff report is no longer necessary." That condition states "The applicant's plan to protect the 7-NA district from adverse impacts due to the temporary construction phase of the pipeline shall be provided to the Planning Department. The Board agrees.

Citizens Against LNG makes the following comments regarding a neighboring site which is zoned 7-NA:

> Applicant hasn't shown there will be no adverse effect on management unit 7-NA, where the Management Objective is, "*to protect natural resources.*" PCGP states they are submitting a plan to the Planning Dept in the future (SR Cond. 3), but this is not sufficient. In order to analyze this project properly we need to be able to see how they plan to protect this management unit. Stormwater and watershed runoff along with impacts from the pipeline easement and dredging being so near the shoreline in this area are highly likely to cause degradation to the waterway in management unit 7-NA. In addition, cumulative impacts from pipeline dredging of other estuarine water areas will filter down to this management unit. Habitat species and marine life degradation will occur and this clearly violates the management object of unit 7–D and 7-NA. This Zoning District has a noted Wetland on the West end of Jordan Cove that will also be impacted by the

pipeline-dredging proposal, making the project clearly not in zoning compliance. (See Exhibit B).

See letter from Jodi McCaffree, dated June 190, 2010, at p. 7. However, the applicant does not propose to build within the 7-NA zoned property, and therefore criteria in the 7-NA zone are not applicable here. Protection to neighboring area will be accomplished via the various federal CWA permits that the applicant will be required to obtain.

c. 8-Water-Dependent Development Shorelands (8-WD)

The pipeline crosses the 8-WD zoning district from MPs 1.65 R to 1.70 R. This section is privately owned by Weyerhaeuser Company. Section 4.5.371(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 49, 50 and 51. Pacific Connector proposes to utilize Weyerhaeuser Cove for pipe storage and as a contractor yard during construction (also designated as TEWAs 1.19-W/1.24-W), which is partially zoned 8-WD. The Weyerhaeuser Cove area is an old industrial site, half of which is paved.

Section 4.5.370 Management Objective: This shoreland district shall be managed to allow the continuation of and expansion of aquaculture, along with the development of a boat ramp and limited tie-up facilities, to permit public access to the Estuary.

Upon completion of construction, the Weyerhaeuser Cove yard will be reclaimed to pre-construction conditions, allowing pre-construction activities to continue unhindered. Pacific Connector will obtain a 50-foot permanent right-of-way for the pipeline. The development of the boat ramp and limited tie-up facilities would not be impeded as long as the boat ramp is not proposed within the 50-foot right-of-way. The pipeline will be buried and will not interfere with public access to the Estuary.

As the applicant notes, aquaculture is defined in the county code as "[r]aising, feeding, planting, and harvesting fish and shellfish, and associated facilities necessary for such use." The use of this upland district for the continuation and expansion of aquaculture should not be impacted during construction (*i.e.*, utilization of the Weyerhaeuser Cove yard) and will not be impacted once the pipeline is installed. Aquaculture can continue post-construction as it did pre-construction. Additional responses regarding potential construction-related impacts on aquaculture and other natural resources in the CBEMP aquatic districts are addressed elsewhere in this decision.

d. 8-Conservation Aquatic (8-CA)

The pipeline crosses a small portion of the 8-CA zoning district between mileposts 1.70 R and 1.78 R (see environmental alignment sheets attached as Exhibit 1 to April 14, 2010 application narrative). The 8-CA district includes upland and tideland areas east of the Southern Pacific Railroad right-of-way and the adjacent Weyerhaeuser industrial site. Section 4.5.376(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

Pacific Connector will utilize portions of the Weyerhaeuser Cove yard as a temporary construction and storage area, but not the submerged and submersible tideland areas located within the 8-CA zoning district. The only impact on tideland areas will be the installation of the pipeline itself.

> *Section 4.5.375 Management Objective: This district, because of its sheltered condition and location near productive aquatic resource areas, shall be managed for development of low intensity recreational facilities. The uses shall be limited by the small size of the area and the natural depths of the channel. The low-intensity recreational facilities must be located in such a manner that conflicts will not arise with the existing aquaculture use, which is also a permitted use.*

The management objective for the 8-CA zone is to manage the land "*for development of low intensity recreational facilities.*" However, low-intensity utility facilities are a permitted use in the zone, subject to the aforementioned CBEMP policies. Thus, there is clear legislative intent indicating that low-intensity utility facilities will not undermine the management objectives of the zone, at least to the extent that CBEMP policies are satisfied. The Board rejects the general tenor of arguments made by opponents suggesting that (1) only recreational use are allowed, and (2) a pipeline is *per se* incompatible with the management objective.

The applicant states that upon completion of construction, the Weyerhaeuser Cove yard will be reclaimed to pre-construction conditions, allowing pre-construction activities to continue unhindered. Following installation, the pipeline will be buried and will not affect any boating or other low intensity recreational facilities or aquaculture uses. Impacts during construction will be temporary. As defined by Section 2.1.200, aquaculture is, "[r]aising, feeding, planting, and harvesting fish and shellfish, and associated facilities necessary for such use."

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the discussion below regarding the 11-NA zoning district and the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010, submittal.

In their letter dated June 8, 2010, WELC asserts the following:

> The proposed project impacts the 8-CA site where the pipeline crosses the tideland area and where the Weyerhaeuser Cove yard will be used for construction staging and storage. The specific management objective there includes protection of the "existing aquaculture use." Neither the original application nor the supplemental materials are clear on the nature of the "existing aquaculture" or how it would be protected. The applicant says merely, "After the pipeline is installed, aquaculture can continue as it did pre-construction." Given the sensitivity of fish and shellfish to the turbidity and dredging likely to accompany the construction and installation of the pipeline, it seems more details are necessary

in order for the county to make the determination that the pipeline will, indeed, be consistent with the resource capabilities and management unit purposes and objectives.

In response, the applicant submitted the Ellis Report. This extensive analysis contained therein provides the following expert testimony regarding compliance with the 8-CA management objectives:

> "the impacts of the project to the zoning district will be short-term, primarily limited to the period of construction, with some lasting impacts to small patches of eelgrass. The eelgrass is expected to recover within three years or less and will be replanted at densities higher than are present currently. Following construction, the zone will be recontoured to preconstruction conditions, and there will be no lasting impacts to boating, clamming or other low-intensity recreational uses. Furthermore, effects to aquaculture (specifically oyster growing) should likewise be short-term, as discussed above." Ellis Report, pages 17-18.

The Board finds that a proposed pipeline is not considered to be a "recreational facility" for which conflicts with aquaculture must be limited under this management objective. Had the drafters envisioned a different reading of the Code, it seems unlikely that it would have made low-intensity utility facilities a permitted use in the zone. Nonetheless, the applicant notes that the long-term continuation and expansion of aquaculture should not be impacted during construction and the pipeline will have no impacts once it is installed. After the pipeline is installed, aquaculture can continue as it did pre-construction. Additional responses regarding potential construction-related impacts on aquaculture and other natural resources in the CBEMP aquatic districts are addressed elsewhere in this decision.

e. 11-Natural Aquatic (11-NA)

The pipeline crosses the 11-NA zoning district from mileposts 2.70 R to 4.12. This is a tideland area located at the north end of Haynes Inlet. Section 4.5.406(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

> *Section 4.5.405 Management Objective: This extensive intertidal/marsh district, which provides habitat for a wide variety of fish and wildlife species shall be managed to protect[24] its resource productivity. The opening in the Highway 101 Causeway is a designated mitigation site ("low" priority).*

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[24] LUBA provided extensive analysis of what the term "protect" means in the context of Goal 16 in *Columbia Riverkeeper v. Clatsop County*, __ Or LUBA __ (LUBA No. 2009-100, April 12, 2010):

> The definition of "protect" contains stringent language: "save or shield from loss, destruction, or injury." "Save" has many definitions, including "1:f: to preserve or guard from injury, destruction or loss." *Webster's Third New International Dictionary* 2019 (1981). "Shield" is defined as "to protect with or

Citizens Against LNG makes the following comments regarding this zone:

> However, to install the pipeline in either district, PCGP would need to engage in the ACTIVITY of wet open cut method, which would fall under the definition of dredging. In both zoning districts 11-NA and 13A-NA, any new dredging is a prohibited activity. So, although a "low-intensity utility" may be a permitted USE in zoning districts 11-NA and 13A-NA, any kind of new dredging is an impermissible ACTIVITY in zoning districts 11-NA and 13A-NA. PCGP must not only explain in what sense its pipeline is a low-intensity utility; it must also find some means other than the wet open cut dredging method for laying its pipeline in order to be permissible within zoning districts 11-NA and 13A-NA.

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as if with a shield." *Id.* at 2094.

Context for interpreting the goal definition of "protect" is provided by considering its use within the text of Goal 16. The goal itself provides that its purpose is:

> "To recognize *and protect* the unique environmental, economic, and social values of each estuary and associated wetlands; and
> "To *protect*, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries." (Emphases added.)

* * * * *

Although we agree with the county that the Goal definition of "protect" does not require that estuarine resources identified for protection be completely or absolutely protected from any "loss, destruction, or injury" whatsoever, the county has made a planning decision under the CCCP policies at issue that implement Goal 16 and the scheme set forth in the second paragraph of Goal 16, quoted above, to "protect" as opposed to a decision to "maintain," "develop," or "restore" traditional fishing areas and endangered or threatened species habitat. Having made that "protect" planning decision, the local program to protect those estuarine resources must not allow "loss, destruction, or injury" beyond a *de minimis* level. Thus, the development that is to be allowed by the disputed rezone is not consistent with the Goal definition of "protect" unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a degree that there is at most a *de minimis* or insignificant impact on the resources that those policies require to be protected. (Emphasis added).

In this case, the management objective of the 11-NA zone is to "*protect its resource productivity.*" Thus, the County has also made the "protect" determination in its Comprehensive Plan and Zoning Code for the 11-NA zone.

See letter from Jody McCaffree, dated June 10, 2010, at p. 8. As discussed elsewhere, the applicant does not have to "explain in what sense its pipeline is a low-intensity utility" because the Code makes it such as a matter of law. With regard to the contention that dredging is not an allowed activity in the 11NA and 13A-NA zones, the following definition from CCZLDO 2.1.200 applies:

> 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.

The applicant is not proposing "new dredging" because it is not proposing to deepen the channel. 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. <u>Pipelines, cables and utility crossings, including incidental dredging necessary for their installation.</u>

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."*[25] (Underlined emphasis added.

Before addressing that test, however, the Board addresses two contentions related to the above analysis. In her letter dated June 10, 2010, Jody McCaffree contends that portions of the PCGP project will constitute "temporary alterations" subject to CBEMP Policy #5a. This contention is not persuasive for the reasons set forth below.

First, 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. Ms. McCaffree is correct that the list of uses for the Natural management unit in Section B of Policy #2 includes "temporary alterations." However, that list also includes "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation," which more closely describes the PCGP project. The fact that the applicable use category already contemplates incidental dredging activities associated with the installation of "pipelines" indicates that any temporary impacts associated with the use are already contemplated as part of the allowed "pipeline" use designation. Under such circumstances, it would be redundant for the county to separately consider "temporary alterations" associated with the PCGP. Therefore, the Board finds that the PCGP does not include any "temporary alterations."

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

> TEMPORARY ALTERATION. Dredging, filling, or another estuarine alteration occurring over a specified short period of time

[25] 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.

which is needed to facilitate a use allowed by an acknowledged plan. Temporary alterations may not be for more than three years and the affected area must be restored to its previous condition. Temporary alterations include: (1) alterations necessary for federally authorized navigation projects (e.g., access to dredged material disposal sites by barge or pipeline and staging areas or dredging for jetting maintenance); (2) alterations to establish mitigation sites, alterations for bridge construction or repair and for drilling or other exploratory operations, and (3) minor structures (such as blinds) necessary for research and educational observation.

The PCGP project does not fall within any of the listed categories.

Third, the pipeline use, including incidental dredging necessary for its installation, is also allowed in both the Conservation and Development management units "without special assessment of the resource capabilities of the area." However, as explained above, because 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 finds that CBEMP Policy #5a is inapplicable.

However, in the alternative, the Board finds that Policy #5a is satisfied in this case based upon the analysis and reference to record submittals discussed below, in conjunction with the following review criteria set out in Section II of Policy #5a, as follows:

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

This criterion is satisfied by the Ellis Report submitted by the applicant, as mentioned elsewhere in this decision.

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.*

This criterion has been satisfied by the applicant's record submittals consisting of the letters from Randy Miller of Pacific Connector dated May 17, 2010 (describing how the application is consistent with all applicable aquatic management unit purpose statements) and of June 9, 2010 (identifying the state and federal environmental permits required for the aquatic portions of the project and the relationship with applicable CBEMP standards, and providing his professional opinion that it is feasible for Pacific Connector to obtain the necessary state and federal permits). Specifically, Randy Miller's June 9, 2010 letter describes the need for the PCGP project to obtain permits from the Oregon Department of State Lands (DSL) acting under the Oregon Removal-Fill Law (ORS 196. 800 et seq.) and the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (CWA). By cross reference, CBEMP Policy #5 (Estuarine Fill and Removal), at Section I.d contains the

relevant criterion that: "adverse impacts are minimized". Mr. Miller's letter, at pages 3-4, specifically states that: "The Corps will also evaluate the proposal under the 404(b)(1) Guidelines (Guidelines) which require, among other things, a stringent evaluation of alternative, impact avoidance and *mitigation*"(emphasis added). Further, the Corps cannot issue a permit under Section 404 without issuance of a water quality certificate by the Oregon Department of Environmental Quality (DEQ) under Section 401 of the CWA. Mr. Miller's letter also points out that the project will require a permit from the DEQ for a certification under Section 401 of the CWA and for a 1200-C (NPDES) permit under Section 402 of the CWA.

In summary, compliance with CBEMP Policy #5.I.d will be satisfied by the issuance of Pacific Connector's required permits from the Corps, DSL and DEQ, the review criteria of which are coincidental with the approval criteria of Policy #5 as outlined above, thereby being consistent with the review criterion of Policy #5a.II.b.

> *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 dredge areas, if this is shown to be effective).*

This criterion is satisfied through the evidence provided in the applicant's record submittals contained in the Ellis Report (see page 3 describing the incidental trenching and backfilling construction techniques proposed for pipeline installation which constitute the "removal of the fill" or the "filling of dredged areas") and the letter of June 4, 2010 from Randy Miller, Staff Environmental Scientist for Pacific Connector Gas Pipeline (see pages 3-4 describing the wet open cut crossing method to be used within Haynes Inlet). This criterion is satisfied.

> *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.*

This criterion is also satisfied by the evidence submitted in the letters from Robert Ellis and Randy Miller above described, which describe the related construction activities that will take less than 3 years. *See also* April 30, 2010 letter from Mark Whitlow to Patty Evernden (describing the tentative construction schedule and indicating that the pipe installation would occur in year two and the project restoration would occur in year three).

A second contention is raised by WELC in its letter dated June 8, 2010. WELC's argument is a bit difficult to follow, due to the nature of the subject matter, so it is set forth verbatim:

> In its application and again in its May 17, 2010 supplemental submittal letter, Pacific Connector references the Coos Bay Estuary Management Plan (CBEMP) Policy 2, which explains that there are, in fact, three estuarine management units within the CBEMP area: Natural, Conservation, and Development. Within

> Policy 2, certain uses for each management unit are allowed "without special assessment of the resource capabilities," subject to specific conditions for each particular zoning designation. (The zoning designation indicates the type of management unit – for example, the C in zone 8-CA (Conservation Aquatic) indicates that it's a Conservation management unit, whereas the N in 13-NA (Natural Aquatic) indicates that it's a Natural management unit.)
>
> The applicant asserts that Policy 2 says that pipelines "may be allowed in all three types of management units," and that does not, in fact, seem to be the case. Section B.9 under the Natural management unit listing in Policy 2 does list pipelines, and Section B.4 under the Development management unit listing includes "all activities allowed in Natural and Conservation units." But pipelines are not within the list for the Conservation management unit in Policy 2. Thus, in those zones within the Conservation management unit, the analysis of the resource capabilities and the purpose of the management unit – which ensures compliance with not merely the local plan (CBEMP) but also statewide Goal 16 and the federal Coastal Zone Management Act - cannot be so cursory.

WELC does appear to be correct that the "pipeline" category found at "Natural Management Unit" ("NMU") B9 and in Development Management Unit ("DMU") B4 is not specifically mentioned under the list of allowed uses under the Conservation Management Unit ("CMU"): However, WELC misreads the import of that omission.

CBEMP Policy #2 is intended to implement Statewide Planning Goal 16. Goal 16 makes clear that "[p]ermissible uses in conservation zones shall be all uses listed in (1) above except temporary alterations." *See* Statewide Planning Goal 16, at p. 3 (under "Management Units" Section (2): Conservation). According to DLCD staff, pipelines are an "allowed use or activity" in the CMU. See "A Citizen's Guide to the Oregon Coastal Management Program," DLCD, March 1997, at p. 19 (Table entitled "Permitted Uses in Estuary Management Uses"). Conversely, pipelines are subject to resource capability review in the NMU and DMU. Id.

There is no indication that Coos County intended to apply CBEMP Policy #2 in a more strict manner than Goal 16. Admittedly, CBEMP Policy #2 CMU (A(1) creates an ambiguity because of the use of the phrase "all uses permitted *outright.*" WELC reads that phrase "permitted outright" as being a reference to only the nine uses set forth at NMU A (1)-(9). That is perhaps understandable, since the NMU A(1)-(9) uses are those that do not require a "special assessment of the resource capabilities in the area." One might be tempted to say that the NAU A(1)-(9) uses are permitted "outright" and the NMU B(1)-(10) uses are permitted "conditionally" (*i.e.* requiring a special assessment). However, the same sentence in CMU A(1) goes on to say "(except for 'temporary alterations.')." There would be no need to list that specific exception if the intent had been to only include the nine NMU (A)(1)-(9) uses in the first place. One first level maxim to be considered under *PGE v. BOLI* is that that courts will give effect to all sections of a statute, in order to produce a harmonious whole. ORS 174.010; *Lane County v.*

LCDC, 325 Or 569, 578, 942 P2d 278 (1997). *See also Davis v. Wasco IED*, 286 Or 261, 267, 593 P2d 1152 (1979); *Tatum v. Clackamas County*, 19 Or App 770, 775, 529 P2d 393 (1974); *Plotkin v. Washington County*, 36 Or LUBA 378 (1996); *Walz v. Polk County*, 31 Or LUBA 363 (1996); *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996) (Ordinance). Courts will try to avoid a construction that makes a word or phrase a redundancy. *Phelps and Nelson*, 122 Or. App. 410, 415, 857 P.2d 900 (1993) (courts generally avoid giving statutes construction that render some portions redundant). *Cornier v. Paul Tulacz, DVM PC*, 176 Or. App. 245, 249, 30 P.3d 1210 (2001) ("[W]e 'presume that the legislature did not intend to enact a meaningless statute' " (*EQC v. City of Coos Bay*, 171 Or. App. 106, 110, 14 P.3d 649 (2000) ("We are required, if possible, to avoid construing statutes in a way that renders any provision meaningless.").

Moreover, there would be no apparent policy reason for allowing pipelines in NMU's but not allow them in the more permissive CMU. Therefore, given that Goal 16 allows pipelines in conservation areas, the Board interprets CBEMP Policy #2 CMU A(1) to be consistent with, and not more strict than, Goal 16, by interpreting the phrase "all uses permitted outright in Natural Management Unit (except for 'temporary alterations.')" to include the NMU B (1)-(10) uses such as "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation."

Turning back to the two-part test, the applicant submitted the Ellis Report, which provided a determination of consistency with resource capability and the purposes of the management units utilizing the three-part analysis articulated above in Policy #4. Page 17 of that Ellis Report includes the determination of consistency which finds, in pertinent part, that "[a]ll resources will be able to assimilate the pipeline and its effects, and will continue to function in a manner protective of significant wildlife habitats, natural biological productivity and values for scientific research and education."

In *Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc.*, LUBA affirmed a county's analysis under locally adopted "Resource Capacity test" criteria.[26] Analysis of those criteria led to the following conclusion: "Habitat disturbance will ultimately be temporary as the site will be restored following mining operations in a manner that must satisfy both ODFW and DOGAMI requirements. *Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc.*, __ Or LUBA __ (LUBA No. 2009-128, March

[26] Curry County's code, at CCZO 7.040(14)(a), contains test for evaluating a proposed uses consistency with the resource capabilities of the area which was similar to the test set forth at CBEMP 4:

> (a). Resource Capability Test. Certain uses in estuarine areas require findings of consistency with the resource capabilities of the area.
> "(1) A determination of consistency with resource capability shall be based on:
> "(a) Identification of all resources existing at the site and factors relating to the resource capabilities of the area.
> "(b) Evaluation of impacts on those resources by the proposed use.
> "(c) Determination of whether any or all of the identified resources can continue to achieve the purpose of the management unit if the use is approved.
> "(2) In determining the consistency of a proposed use or activity with the resource capabilities of the area, the county shall utilize information from federal or state resource agencies regarding any regulated activities in estuarine areas."

12, 2010). Once reclaimed, the property should provide the types of vegetative cover and promote the same animal species it supports now." *Id.* Stated in the words of the *Columbia Riverkeeper case,* the question presented in whether the incidental dredging associated with pipeline installation has "at most a *de minimis* or insignificant impact on the resources." *Columbia Riverkeeper v. Clatsop County,* __ Or LUBA __ (LUBA No. 2009-100, April 12, 2010). Those appear to be different formulations of essentially the same test.

In its final argument letter dated June 24, 2010, the applicant concludes that the installation of the pipeline will have no permanent impacts but admits that construction activities will result in some temporary impacts:

> The applicant states that following construction, the buried pipeline will not impact the intertidal/marsh district. Potential impacts during construction have been analyzed as part of the FERC NEPA process and are provided in the Section 4.5.2.3 of the Final Environmental Impact Statement (FEIS). Impacts to threatened and endangered species have also been analyzed and provided to FERC in a draft Biological Assessment (BA) that was provided to the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) for consultation. USFWS and NMFS transmitted comments to FERC that have led to a revised BA that is pending transmittal to those agencies.
>
> Following construction of the pipeline, Pacific Connector is proposing on-site wetland restoration for estuarine habitats impacted by construction of the pipeline through the Haynes Inlet of Coos Bay which also includes the intertidal/marsh district. Although the construction area across Haynes Inlet does not intercept high density eelgrass beds, all low and medium density eelgrass beds will be replanted at high density levels. The incremental gain to high density levels will provide sufficient compensation for the short-term loss of eelgrass caused by the PCGP construction.
>
> The pipeline route would temporarily impact mitigation site M-8(b) (Highway 101 Causeway) during construction. Construction of the natural gas pipeline within Haynes Inlet would involve burying approximately 2.5 miles of 36-inch diameter steel pipe. The steel pipe would be covered with a 4-inch layer of concrete and installed a minimum of five feet (measured from the top of the pipe) below the substrate surface. The burial depth was established based on the predicted maximum scour depth and to comply with 49 CFR 192.327. Construction would involve excavating an in-water trench, storing excavated material for backfill to the side of the trench, installing the pipe, backfilling the trench and re-grading. Trenching would be conducted with a barge-mounted bucket dredge where water depth allows. In shallow areas along the alignment, marsh excavators, which

are capable of trenching in shallow water, would be used. During the ebb tide, marsh excavators utilize tracks around pontoons to allow excavation in both "wet" and "dry" terrain. The pipeline would be laid using a "pipe push" method. During the portions of the alignment installed using the "pipe push" method, the lay barge would remain stationary and the pipe sections would be pushed and floated out from the barge into the pre-dredged ditch as they are completed, using pre-designed floats.

Following is a summary of preliminary work procedures, BMPs, and protective measures that will be implemented during construction to minimize short-term and long-term impacts to water resources, biological resources and the surrounding environment:

1. Work will be conducted in compliance with the comprehensive plan, zoning requirements and other local, state and federal regulations pertaining to the project.
2. The contractor shall develop a turbidity monitoring and management plan (TMMP) that describes measures to reduce turbidity impacts resulting from dredging and backfill operations to ensure compliance with federal and state water quality standards.
3. Where water depths allow, the dredge bucket will be kept below the water surface while placing excavated soil along the trench in order to minimize turbidity.
4. The pipeline trench will be backfilled as quickly as possible after the pipeline is installed to minimize the distribution of excavated spoil from tidal influence.
5. Turbidity will be monitored in accordance with the 401 Water Quality Certification (WQC) requirements during dredging and backfilling operations by the environmental inspector. If turbidity levels exceed established tolerances, then the procedures outlined in the 401 WQC will be followed.
6. Turbidity curtains may be deployed, as practicable, in certain areas to protect sensitive resources such as oyster and eelgrass beds. Implementation of turbidity curtains is limifed by local site conditions including flow velocities. Use and location of turbidity curtains will be determined during final design or as approved by the environmental inspector.
7. Construction will be scheduled to reduce impacts to sensitive resources and will be in accordance with the recommended in-water work window established by ODFW.
8. Work below mean higher high water (MHHW) will be conducted during the recommended in-water work window established by ODFW and approved by USFWS and NMFS.

The recommended in-water period for Coos Bay is October 1 through February 15.

9. Construction impacts will be confined to the minimum area necessary to complete the project.
10. When practicable, fueling and maintenance of equipment will occur more than 150 feet from the nearest wetland, ditch or flowing or standing water. (Fueling large compressors, cranes and generators 150 feet away may not be practicable.)
11. The contractor shall prepare a Spill Prevention Control and Countermeasure (SPCC) Plan prior to commencing work (available upon request).
12. All equipment used for construction activities will be cleaned and inspected prior to arriving at the project site to ensure no potentially hazardous materials are exposed, no leaks are present and the equipment is functioning properly.
13. The contractor shall perform daily inspection of construction equipment to ensure there are no leaks of hydraulic fluids, fuel, lubricants or other petroleum products.
14. Biological monitoring will be conducted as required by state and federal permit conditions.
15. A work plan will be prepared and submitted to the appropriate agencies prior to construction.
16. A site restoration plan will be prepared and submitted to the appropriate local, state and federal agencies prior to construction.

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010 submittal as Exhibit 1.

In addition to the foregoing, the June 9, 2010 letter report submitted by Robert Ellis, Ph.D., of Ellis Ecological Services provides the following testimony regarding compliance with the 11-NA management objectives:

"As discussed throughout this Impact Assessment, the installation of the pipeline will impact fish and wildlife habitat within this zoning district. However, as discussed, the impacts will be short-term and primarily limited to the period of construction. Following a brief recovery period (months in the case of benthic invertebrate recolonization to a few years for eelgrass restoration), the pipeline will not interfere with this zoning district's resource productivity." Ellis Report, page 18.

The applicant's expert witness, Robert Ellis, Ph.D., of Ellis Ecological Services conducted extensive analysis of the potential environmental impacts of the pipeline construction. The result of that effort is discussed in the Ellis Report, which sets forth the Resources Capacity Analysis envisioned by CBEMP Policy #4, including a description of all resources existing at the site, an impact assessment, and a determination of consistency relating to the resource capabilities of the area. The Board has read the Ellis Report in detail and has determined the report constitutes substantial evidence confirming that impacts will be temporary and insignificant. There is no expert evidence in the record to the contrary. The Board adopts the Ellis Report as additional findings in support of the application as if it was fully set forth herein.

f. 11-Rural Shorelands (11-RS)

The pipeline crosses the 11-RS zoning district from MPs 4.12 R to 4.17 R. In this segment, the pipeline exits Haynes Inlet and crosses a rural area that is dominated by trees. Section 4.5.401(15)(a) lists the use as permitted subject to CBEMP Policies 17, 18, 23, 38, 34, 14, 49, 50 and 51. Other than the pipeline and the construction easement itself, there are no other accessory project components within zoning district 11-RS.

SECTION 4.5.400 Management Objective: This district shall be managed so as to continue its rural low-intensity character and uses that have limited (if any) association with the aquatic district. This district includes three designated mitigation sites (M-12, M-13 and M-22). However, only Site M-22 shall be protected from pre-emptive uses. Other sites are "low" priority, and need not be protected. (See Policy #22).

Following installation, the buried pipeline will not affect the rural low-intensity character of the district nor the uses that have limited (if any) association with the aquatic district. All disturbed areas will be recontoured and revegetated in a manner consistent with the ECRP, and those areas that were forested prior to construction will be reforested except for the 30-foot maintained corridor centered over the pipe. The PCGP does not impact mitigation sites M-12, M-13, or M-22.

g. 13A-Natural Aquatic (13A-NA)

The pipeline crosses the 13A-NA zoning district from mileposts 1.78 R to 2.70 R. The pipeline crosses the Haynes Inlet in this zone. Section 4.5.426(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

Section 4.5.425 Management Objective: This district shall be managed to allow the continuance of shallow-draft navigation while protecting the productivity and natural character of the aquatic area. The openings in the two road dikes are designated mitigation sites [M-5(a) and (b), "low" priority]. Maintenance, and repair of bridge crossing support structures shall be allowed. However, future replacement of the railroad bridge will require Exception findings.

Construction of the 2.80-mile route across Haynes Inlet that includes district 13A-NA will occur within the ODFW-recommended in-water work timing window from October 1 of Year One construction through February 15 of Year Two. ODFW has recommended the in-water work timing window in Coos Bay be delayed to October 15 to minimize impacts to a fall Chinook fishery. The applicant proposed a condition of approval requiring fill and removal activities in Coos Bay be conducted between October 1 and February 15 unless otherwise modified by ODFW. The Board finds that this condition properly recognizes ODFW's jurisdiction in this field and modifies and adopts the condition as Condition of Approval B.6 to read as follows:

> "Fill and removal activities in Coos Bay shall be conducted between October 1 and February 15, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife."

Following construction of the pipeline, Pacific Connector is proposing on-site wetland restoration for estuarine habitats impacted by construction of the pipeline through the Haynes Inlet of Coos Bay which also includes district 13A-NA. Although the construction area across Haynes Inlet does not intercept high density eelgrass beds, all low and medium density eelgrass beds will be replanted at high density levels. The incremental gain to high density levels will provide sufficient compensation for the short-term loss of eelgrass caused by the PCGP construction. Additionally, the pipeline will be buried five feet below the bottom of the Inlet and will not affect shallow-draft navigation or the natural character of the aquatic area. The project does not impact mitigation sites M-5(a) or (b) and will not affect the bridges.

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the response above regarding the 11-NA zoning district and the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010 submittal as Exhibit 1.

In addition to the foregoing, the Ellis Report provides the following testimony regarding compliance with the 13A-NA management objectives:

> "Although there may be some temporary disruption of navigation during pipeline construction as discussed above, the pipeline will be buried five feet below current grade and will have no lasting effect on shallow-draft navigation. Affected low and medium density eelgrass beds in the zone will be replanted at high densities and are expected to recover quickly." Ellis Report, page 18.

The management objective is met, for the reasons stated both in the Ellis Report and the findings propose for the 11-NA zone, *supra.*

h. 18-Rural Shorelands (18-RS)

The pipeline crosses the 18-RS zoning district from MPs 10.74 R to 11.10 R. In this segment, the PCGP alignment is located within a vacant pasture area and crosses East Bay Drive. Other than the pipeline and the construction easement itself, there are no other accessory project components within zoning district 18-RS. Section 4.5.481(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 20, 22, 23, 27, 28, 34, 49, 50 and 51.

SECTION Management Objective 4.5.480: This district shall be managed to allow continued use as pasture-grazing but shall also be managed to allow dredged material disposal or mitigation. This district contains two designated mitigation sites, U-12 and U-16(a) ("high" priority). It also contains designated dredged material disposal site 30(b). 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).

Construction of the pipeline would temporarily impact this area. Following construction, the district could be used as pasture-grazing unimpeded by the pipeline. In agricultural areas, the pipeline will be installed with 5 feet of cover, to allow farming activities to continue safely over the pipeline. The area will be revegetated to preconstruction conditions; therefore, grazing could continue unhindered. Furthermore, the pipeline would not preclude use of the site for dredged material disposal; nor would the pipeline preclude mitigation development of the site (see discussion of CBEMP Policies #20 and #22 for more detail).

The management objective is met.

i. 19-Development Shorelands (19-D)

The pipeline crosses the 19-D zoning district from MP 11.10 R to MP 8.10. In this segment, the pipeline crosses a large, undeveloped privately owned parcel. In addition to the pipeline and construction easement itself, accessory uses within this segment of the alignment include a permanent access road at MP 7.70 and block valve #2 at MP 7.70. Section 4.5.536(15)(a) lists the use as permitted subject to CBEMP Policies14, 17, 18, 27, 49, 50 and 51.

SECTION 4.5.535 Management Objective: This district is a large parcel (152 acres) of filled, undeveloped property in a single ownership bordering on a maintained shallow-draft channel. While the site is presently suitable for pastureland, the Plan anticipates that these characteristics will make it an important water-dependent/water-related industrial site in the future. To protect the site for futures industrial development, the Plan designates it "D" (Development). According to staff, the parcel's large site and the limitation on water access from only the Coos River shoreland makes it unlikely that the entire site can be utilized for only water-dependent/water-related uses.

Therefore, to assure that non-water-dependent/non-water-related uses that which to locate on the site do not limit or preclude water-dependent uses of the shoreland, development must be consistent with a site plan that accomplishes this goal and is approved by the Coos County Board of Commissioners or their designee.

At page 20 of her June 10, 2010 letter, Ms. McCaffree states that the management objective for zoning district 19-D requires consistency with a site plan for the future development of the zoning district.[27]

The applicant notes that during construction, pipeline installation will temporarily impact this large parcel, which is owned by Weyerhaeuser. A site plan has not yet been developed by the landowner for future development of the site. However, following construction, the buried pipeline will be compatible with future industrial development. The only restriction will be the development of permanently engineered aboveground structures within the 50-foot permanent right-of-way. Pacific Connector states that they have consulted with Weyerhaeuser regarding the pipeline alignment, and there was no indication from Weyerhaeuser that the PCGP will impact future development plans. The accessory access road follows an existing pasture two-track road and would provide access to block valve assembly #2 for maintenance and operation purposes. The access road would be 25 feet wide and 154 feet long, and would be graveled. Block valve assembly #2 would be located within the 50-foot permanent right-of-way and would occupy a 50x50-foot area enclosed by a 7-foot high safety fence.

The Board finds that following construction, the buried pipeline will be compatible with future industrial development. The proposed access road follows an existing pasture two-track road. A review of Alignment Sheet 008 (Exhibit 1 to the application narrative of April 14, 2010), reveals that the alignment of the pipeline within the 19-D zoning district avoids the river frontage portions of the district except for the area of crossing, thus assuring that the pipeline will not interfere with future water-dependent or water-related uses or developments. The last sentence in paragraph 1 of the management objective set out in Section 4.535 indicates that the parcel's large size and the limitation of water access from only the Coos River shoreland makes it unlikely that the entire site can be utilized for only water-dependent/water-related uses. Otherwise stated, the management objective recognizes that the portions of the district most available for future water-dependent/water-related uses are the portions of the district along the water frontage, which will not be areas of the 19-D zoning district used for the proposed pipeline crossing. Accordingly, the Board finds that the pipeline crossing will not limit or preclude water-dependent uses of the 19-D shoreland.

The management objective is met.

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[27] Ms. McCaffree testifies as follows:

> Where is the required site plan? Proposal includes permanent road. Applicant must demonstrate road won't limit or preclude future water-dependent uses or impact important archeological sites that may be found in this zoning district. This zoning district, also known as Graveyard Point, is subject to policy's 14, 17, and 18, among others. Coos County's, *"Shoreline Values Requiring Mandatory Protection"* map shows the pipeline will be in violation of policy 18 due to it impacting an important and vital Archeological Site on Graveyard Point. (See Exhibit D) PCGP's application should be denied due to this issue and in any event would not be in line with Coos County's zoning management objectives and policies for this area that require both, *"Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands, and Protection of Historical, Cultural and Archaeological Sites."*

j. 19B-Development Aquatic (19B-DA)

A portion of the pipeline and related construction areas will be located in the 19B-DA zoning district. This area is on the north bank of the Coos River. Section 4.5.541(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

CCZLDO Section 4.5.540 Management Objective: This development aquatic district shall be managed primarily to maintain use of the channel for access to future upland development adjacent to Christianson Ranch.

The pipeline will be installed beneath the bottom of Coos River and will allow use of the channel for access to future upland development of any adjacent properties.

CCZLDO Section 4.5.541 Uses Activities and Special Conditions

The pipeline is permitted, subject to general conditions, as a low intensity utility in the 19B-DA district. The 19B-DA General Condition states that inventoried resources requiring mandatory protection in the district are subject to Policies #17 and #18. As addressed under the CBEMP Policy section below, the PCGP is consistent with each of those policies.

The management objective is met.

k. 20-Rural Shorelands (20-RS)

The pipeline crosses the 20-RS zoning district from MPs 8.22 to 8.39. This segment of the pipeline is located on the south bank of the Coos River. Section 4.5.546(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

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

The project will not impact mitigation sites, U-17(a) and (b). Once installed, the pipeline will not prohibit rural uses or recreational access. Additionally as discussed above, the temporary access road areas within the 20-RS district will be returned to their previous condition following construction. In this area on the south side of the Coos River, the area is pastureland and may continue be used as pastureland following construction. A 1,750-foot HDD is the crossing method for the Coos River. This crossing method 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 frac-out from the HDD bore. This issue is discussed in the section addressing the 20-CA zone. For the reasons set forth therein, the Board

finds that it is feasible to conduct HDD boring operations in an environmentally safe manner if the applicant follows the BMPs it has proposed to FERC, including those set forth in the HDD Contingency Plan.

The management objective is met.

L 20-Conservation Aquatic (20-CA)

The pipeline crosses the 20-CA zoning district from mileposts 8.12 to 8.22. The 20-CA district is aligned with the Coos River. Section 4.5.551(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

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

Pacific Connector states that it will use a horizontal directional drilling (HDD) method to install the pipeline below the Coos River. Using this crossing method, the PCGP will be installed approximately 57 feet beneath the bottom of the Coos River and will not impact log transport and will not impact fish habitat.

The HDD method involves boring under a feature and pulling the pipeline into place through the borehole that has been reamed to accommodate the diameter of the pipeline. This procedure involves three main phases: pilot hole drilling, subsequent reaming passes, and pipe pullback. These phases are explained in detail in correspondence from Randy Miller of Pacific Connector dated May 17, 2010. Upon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided. Additional details on the HDD process are included in Section 2.4.2 of the FEIS.

In addition to the foregoing, the Ellis Report provides the following additional testimony regarding compliance with the 20-CA management objectives:

> "As discussed above, this zoning district will be traversed using HDD methodology, which should have no affect on either fish habitat or log storage." Ellis Report, page 18.

WELC states the following in a letter dated June 8, 2010:

> The proposed project impacts the 20-CA site where the pipeline crosses the Coos River. The management objective for this site is to "allow log transport while protecting fish habitat." For this crossing, the applicant would use "horizontal directional drilling" (HDD), as described in the supplemental letter and the FERC environmental impact statement. The applicant gives the

assurance that, "[u]pon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided." However, as was abundantly documented in the FERC process, *un*successful HDD, including "frac-outs," can be devastating to aquatic species, sensitive resources and water quality. [*See* FEIS p 2-97; 4.3-50-51, 4.5-101-102]. We all know that the risks of environmental disasters – even when extremely low in probability – can result in unacceptable consequences. Given the very real risk of unsuccessful HDD occurring in at least one point among the many waterbody crossings proposed for the pipeline route, the applicant should be required to minimize the waterbody crossings where possible and document that the crossing point chosen is one that would have a relatively lower magnitude of harm to protected resources should the crossing go awry. The applicant should also be required to detail exactly how frac-outs and other drilling mishaps would be handled to minimize the potential environmental damage.

This last point is well taken, and, according to FERC, the HDD Contingency Plan addresses these issues. Both the Ellis Report and the discussion of the HDD Contingency Plan contained in the FEIS constitute substantial evidence.

In her June 10, 2010 letter, Jody McCaffree states:

> Application says "construction will use appropriate measures to minimize impacts; all impacts will be mitigated." Applicant must describe potential impacts on fish habitat; construction and mitigation measures. Pacific Connector is proposing to use the Horizontal Directional Drilling (HDD) method for the crossing of the Coos River (MP 8.18). The HDD method involves boring under the Coos River and pulling the pipeline into place through the borehole that has been reamed to accommodate the diameter of the pipeline. This procedure involves three main phases, pilot hole drilling, subsequent reaming passes, and pipe pullback. HDD typically is used for the crossing of major waterbodies (greater than 100 feet wide). Williams who will be responsible for constructing the PCGP has a HDD failure rate since 2000 of 2 of 6 involving 36' pipelines. Failure rates result in what is known as frac-outs where drilling muds are released into the waterbody. Frac-outs occurred with the 12-inch pipeline and the impacts to vital marine life and habitat were significant. Photos of the stream damage caused by the 12-inch line can be seen in Exhibit U. Potential releases of drilling fluid bentonite clay can wear down fish gills and impair fish vision making difficulty and predation easy (ODFW quote). As shown in the testimony above, the

impacts on fish habitat should this occur would be difficult or impossible to mitigate.

As discussed by FERC, FEIS p 2-97, 4.5-101-102, the risk of frac-outs from a properly-supervised HDD method bore are low, particularly if PCGP "locate[s] the HDD entry and exist points a good distance away from the backs of the waterbody." *Id.* at p. 4.5-102.

The management objective is met.

m. 21-Rural Shorelands (21-RS)

The pipeline crosses the 21-RS zoning district from MPs 10.97 to 11.11 and MPs 11.14 to 11.32. The segments of the PCGP Project within the 21-RS district are located on the east and west banks of Catching Slough. Section 4.5.596(15)(a) lists the use as permitted subject CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

SECTION 4.5.595 Management Objective: This shoreland district of generally diked farm land shall be managed to maintain the present low-intensity, rural character and uses in a manner compatible with protection of the aquatic resources. An existing heron rookery located in the district shall be preserved by protecting those trees in the rookery which are used by the birds. This district contains a number of designated mitigation sites. The following are "high" or "medium" priority, and must be protected as required by Policy #22: U-28, U-29(b), U-30(b), U-32(a)and (b), U-33, U-34(c) and (d). The following are "low" priority sites, and received no special protections: U-21(b), U-22, U-23, U-24, U-26, U-27, U-29(a), U-32(c) and U-34(a) and (b).

Upon completion of installation, the pipeline will not affect the present low-intensity, rural character and uses in the area because the pre-construction uses will be allowed to continue following construction both across and adjacent to the right-of-way. As detailed in the 21-CA narrative section below Catching Slough will be crossed using a conventional bore, protecting the diked waterbody. Pursuant to the County Shoreland Values map, the heron rookery is located where Catching Slough enters Coos Bay, which is several miles north of where the pipeline crosses Catching Slough. Nonetheless, between MPs 10.97 and 11.32, the pipeline will be installed in pasture lands, and there will be no tree removal required for that segment of pipeline construction. Therefore any trees used as bird habitat near that segment of the route will be protected. The pipeline will cross the northeastern edge of designated mitigation site U-22 and will cross the middle of designated mitigation site U-24. Both designated mitigation sites are "low" priority sites and, as stated above, receive no special protections. Furthermore, as discussed below this segment of the pipeline satisfies the requirements of Policy #22.

The management objective is met.

n. 21-Conservation Aquatic (21-CA)

The proposed pipeline crosses the 21-CA zoning district from MPs 11.11 to 11.14. This segment of the pipeline will cross Catching Slough. Section 4.5.601(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

> *Section 4.5.600. Management Objective: This aquatic district shall be managed to allow rural upland uses while protecting aquatic resources. Dredging for routine repair/maintenance of dikes shall only be permitted if no alternative upland source of suitable fill material is reasonably available and/or land access is not possible.*

According to the applicant, the upland areas will be returned to their previous condition in compliance with the ECRP. Therefore, the rural upland uses on the surrounding pasture lands will be able to continue once construction is complete.

Pacific Connector proposes to use a conventional bore method to install the pipeline below Catching Slough. The bore method is intended to provide additional protection to aquatic resources within the Slough. The specific type of bore that will be utilized for crossing Catching Slough will be determined during the design phase of the project and depends primarily on construction characteristics and the type of soils present.

According to the applicant, a conventional bore requires bore pits (launching and receiving) on either side of the feature being bored (*i.e.*, waterbody, road, railroad, etc.). The depth of the bore pits is dependent on the required pipeline depth and the construction equipment placed in the bore pits, and the bore pits are sized to allow for the necessary equipment and workers. The equipment, depending on the type of conventional bore, is lowered into the pit. Because conventional boring does not limit water migrating into the bore, an important factor in the design of launching and receiving pits is groundwater control. According to the applicant, dewatering systems using deep wells or well points are frequently used, and trench boxes or sheet piling are often used to support the pit walls and to temporarily cut off groundwater inflows.

In addition to the foregoing, the Ellis Report provides the following additional testimony regarding compliance with the 21-CA management objectives:

> "As stated above, adjacent rural uses will be temporarily impacted by pipeline construction. However these areas will be returned to pre-construction conditions following installation of the pipeline. Because Catching Slough will be bored under for pipeline installation, BMPs and other avoidance measures should protect all aquatic resources." Ellis Report, page 19.

WELC discusses this issue in their June 8, 2010 letter from attorney Jan Wilson:

> The proposed project impacts the 21-CA site where the pipeline is bored under Catching Slough. The management objective for that area is to allow rural upland uses while protecting aquatic resources. The applicant proposes to use "conventional" boring methods, including dewatering, to install the pipeline under the

slough. The supplemental letter indicates that many of the details for this crossing are yet to be worked out, and thus the county may not yet be able to make the feasibility determination required to satisfy this approval criterion. It is not clear, for example, how the dewatering might affect the aquatic resources, both in the short and long term.

WELC's testimony is again focused on the argument that the applicant has not put forth enough evidence to meet it prima facie burden of proof. This is simply not a very effective tactic, given that the applicant's experts have listed the BMPs that they will use to avoid harm to aquatic resources, and have opined that those resources will be adequately protected. *See* ECRP. WELC opines that 'it is not clear * * * how the dewatering might affect the aquatic resources, both in the short and long term." However, this criticism seems rather vague and uninformed, particularly given the fact that the ECRP addresses the BMPs that will be employed to prevent sediment laden water from being reintroduced directly into water-bodies during de-watering operations. *See* ECRP at p. 23. In any event, the "technical details" of how the crossing will occur are engineering and scientific matters that can worked out at a later date.

The management objective is met.

o. 36-Urban Water-Dependent (36-UW)

This site is known as the Georgia Pacific-Coos Bay site. The property contains an active sawmill and lumber yard and it is located within zoning district 36-UW. Section 4.5.691(15)(a) lists the use as permitted subject to CBEMP Policies 16, 17, 18, 23, 27, 49, 50 and 51. Pacific Connector would utilize the Georgia Pacific-Coos Bay site as an accessory pipe storage and contractor yard temporarily during construction.

SECTION 4.5.690 Management Objective: This shoreland district, which includes a mix of water-dependent and non-water-dependent industrial uses and an area bordering the 35-foot channel which is "suitable for water-dependent use", shall allow only water-dependent uses along the deep-draft channel, except as allowed by Policy #16. In the remainder of the district, existing uses shall be permitted to continue and expand.

The temporary storage of pipe and equipment and temporary addition of mobile office trailers during construction will be similar to the existing operations associated with the active sawmill and lumber yard, and as stated in the objective, "existing uses shall be permitted to continue and expand."

The management objective is met.

p. Other Estuary and Bay Related Concerns

i. Impact to Oyster Beds from Turbidity resulting from Wet Crossing Construction or "Open Cutting" Techniques.

Ms. Lilli Clausen entered a letter into the record dated May 13, 2010 and testified verbally, expressing concern that the pipeline construction activity in Haynes Inlet will silt up and kill her oyster beds. The Board's task in evaluating this letter is made more difficult because the letter does not state exactly where their oyster beds are in relation to the proposed pipe. Nonetheless, the map Ms. Clausen submitted seems to suggest that her oyster beds are very close to the proposed pipe location. Ms. Clausen does not submit any scientific expert testimony to support her contentions, which is highly problematic.

The Board has read the materials provided by the applicant which address this issue, including:

- letter from Mr. Randy Miller dated May 17, 2010
- the Ellis Report.[28]
- Excerpts from the FEIS entitled "Wildlife and Aquatic Resources"; at p. 4.5-93.
- Environmental Condition No. 24 in the FEIS.

The applicant states that the contractor will develop a turbidity monitoring and management plan ("TMMP") "to ensure compliance with federal and state water quality standards." *See* Miller letter dated May 17, 2010, at p. 5. In the June 6, 2010, letter, the Hearings Officer requested more information regarding the specific numeric water quality standards that are at issue and more information to demonstrate that the specific BMPs proposed in the TMMP will make it feasible to comply with the applicable regulations and protect the oyster beds. In addition, requested additional information verifying that the specific standards set forth in state and federal law are sufficient to ensure that oyster beds are protected under conditions similar to what the applicant will be facing in Haynes Inlet.

The applicant also stated that "turbidity will be monitored in accordance with the 401

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[28] In its June 16, 2010 letter, WELC purports to "object" to the applicant's submittal of the Ellis Report, complaining that that the opponents were not provided enough time to review and comment on the report. As the applicant notes, however, "the Ellis Report was prepared and submitted in direct response to concerns and questions raised at the public hearing; the Ellis Report contains precisely the type of surrebuttal evidence that is intended to be provided during the second open record period established by the hearings officer."

The applicant is also correct that "the opponents have had plenty of time to gather and provide their *own* evidence regarding alleged impacts on aquatic species and habitat, but have apparently chosen not to do so." As the applicant points out, there is no rule that says opponents may only comment on evidence submitted by an applicant; rather, they are obviously free to create their own evidentiary record and force the decision-maker to make a determination regarding whose evidence is more "substantial." Had WELC elected to submit its own evidence at the close of the open record period, the applicant would have been similarly limited to a seven-day response period.

Finally, the Board notes that any party had a right to file a written request to submit new evidence to respond to that surrebuttal evidence submitted during the second period (and raise "new issues" related to that evidence). ORS 197.763(6)(c) & (7). The type of evidence accepted under this provision is limited: it has to be evidence and argument that "respond[s] to new evidence submitted during the period the record was left open." *See* ORS 197.763(6)(c). Thus, the requested open-record period is an evidentially round, but limited to additional surrebuttal evidence: the parties can only raise "new issues" that relate to the rebuttal evidence, etc, raised during the first open-record period. No party availed themselves of that opportunity.

Water Quality Certification (WQC) requirements during dredging and backfilling operations by the environmental inspector." The applicant goes on to state that "[i]f turbidity levels exceed established tolerances, then procedures outlined in the 401 WQC will be followed." Although that statement may be reasonable and true, it really does not communicate much information to a lay person, and does not provide enough information to make a feasibility finding. The Hearings Officer requested more detailed information concerning the specific WQC requirements, as well as information regarding the "environmental inspector."

In response to these issues, the applicant submitted the Ellis Report, which provides a detailed analysis of the following:

(a) the type and extent of alterations in the aquatic zoning districts that will result from trenching, pipeline construction, installation and backfill (pages 4-6);

(b) types of resources that would be affected within those zoning districts, including vegetation, invertebrates, fish and wildlife (pages 6-10);

(c) expected extent of impacts of construction activities on those resources (pages 11-16); and

(d) methods that could be employed to avoid or minimize adverse impacts (page 16).

The relevant conclusions of the Ellis Report regarding potential impacts on aquatic resources are quoted and/or summarized as follows:

- Plants (eelgrass) – "Therefore, light limitation and direct sedimentation on eelgrass beds is expected to be localized and only result in minor short-term effects on local patches of eelgrass beds proximate to the construction area. Outside of the immediate area, turbidity should not represent an additional indirect source of impact to eelgrass habitats or dependent aquatic species. Thus, the pipeline installation should not affect the ability of the eelgrass beds to function in a manner to protect significant wildlife habitats, natural biological productivity and values for scientific research and education." Ellis Report, page 11.

- Invertebrates – "Following construction, recovery of the benthic community is expected to be rapid, particularly the epibenthic community that provides the majority of the food resources for fish. In a previous study, benthic communities on mud substrates in Coos Bay that were disturbed by dredging activities recovered to pre-dredging levels in four weeks (Newell et al. 1998). It is anticipated that some of the longer lived organisms such as clams and large polychaetes will require up to a year or more to fully recover pre-construction densities." Ellis Report, page 12.

- Fish – The October to February inwater work period will not coincide with the presence of protected sturgeon or salmonids, with the exception of migrating coho salmon adults in the fall. Primary impacts would be due to turbidity, but fish would likely avoid active work areas and would be expected to move to less turbid waters. "The elevated suspended sediment conditions would be short-term during pipeline installation and

would not be continuous at any one location. This would reduce the chances of continuous elevated exposure for any fish that may remain in a localized area." Ellis Report, page 13.

- Oyster Beds – "Four companies lease lands within the bay that they seed with juvenile oysters (spat) and later harvest. Some beds are present in Haynes Inlet near the pipeline corridor. However, all oyster growing areas have been avoided by re-routing the proposed pipeline. Hazardous spills or burial of spat by increased sedimentation have the potential to impact survival and production of these oysters. * * * Adverse effects would be restricted to the short-term period of active construction as sedimentation and erosion control plans would attempt to limit elevated turbidity and suspended sediment near known rearing areas. Any inwater work would comply with turbidity standards as administered under the DEQ Section 401 Clean Water Act certification program.

  " * * * Because oyster beds often occur near the mouths of sediment-laden rivers, oysters are quite tolerant of high suspended sediment loads (Wilbur et al. 2005). Although deep burial can cause mortality, Dunnington (1968) reported that oysters buried 1.25 cm or less could 'usually clear their bills of sediment if the water was warm enough for active pumping.' It is highly unlikely that dredging near the oyster beds will cause sediment deposition significant enough to cause mortality. PCGP is currently in consultation with oyster growers (discussed below) on potential remedies should oyster production be negatively affected." Ellis Report, page 15.

The Ellis Report goes on to describe turbidity monitoring requirements and potential impact minimization practices that could be required in the event that field-testing confirms turbidity standards are being exceeded. In addition, additional safeguards will be provided by virtue of the fact that the applicant will need to obtain permits under the Clean Water Act. Finally, the consultation requirement will provide additional safeguards.

The evidence provided by the applicant constitutes substantial evidence. This is particularly true given that the scientific analysis provided by the applicant has not been rebutted by the opponents. The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995); *Younger v. City of Portland*, 305 Or 346, 357, 752 P2d 262 (1988). "A finding lacks substantial evidence when the record contains credible evidence weighing overwhelmingly in favor of one finding and the agency finds another without giving a persuasive explanation." *Canvasser Services, Inc v. Employment Dept.*, 163 Or App 270, 274, 987 P2d 652 (1999). In this case, the applicant has met its burden of proof. Given the record, to rule against the applicant on this issue would be reversible error. In this regard, there was a complete failure by the opponents to submit credible scientific expert testimony of their own.

ii. Sediment Quality in Coos Bay

More than one opponent testified that the bay is full of hazardous waste that is currently buried in layers of sediment, and that dredging in these areas will cause these substances to be re-introduced into the aquatic environment. The FEIS confirms this may be true. *See* Page 4.5-93 ("Wildlife and Aquatic Resources"). With regard to impacts to fish, the FEIS addresses the

effects of these chemicals on salmon and other fish and concludes that there will be long-term impacts. In the absence of the scientific evidence to the contrary discussed below, the Board would accept the FERC findings in the FEIS as constituting substantial evidence.

The FEIS also states that "suspended sediment may adversely affect filter feeding commercially and recreationally important clams and oysters near the pipeline route in the bay where most of the sediment would be suspended." FERC FEIS at p. 4.5-94. In the Hearings Officer's June 6, 2010 letter to the parties, he opined that "[t]he FEIS goes on to conclude, rather unconvincingly, that '[a]dverse effects would be restricted to the short-term period of active construction as sedimentation and erosion control plans would attempt to limit elevated turbidity and suspended sediment near known rearing areas.'" *Id.* In that same letter, the Hearings Officer stated that "[w]hat concerns me is that there is no *evidence* to conclude that short term exposure to construction-related turbidity is not significant in filter feeding organisms. Common sense suggests that filter-feeding organisms will ingest the toxic compounds, making them inedible or, at the very least, undesirable. The applicant needs to do more to address this issue."

The applicant addresses this issue in its June 24, 2010 final argument, as follows:

> First, as noted in the FEIS, there are no known hazardous waste sites in the area of Coos Bay that would be crossed by the pipeline. FEIS page 4.5-93. In the absence of any contrary evidence provided by opponents regarding the actual presence of contaminated sediments along the route of the pipeline through the bay, the applicant submits that the hearings officer could adopt approval findings based on this evidence alone. However, the FEIS does go on to state that historically there has been boat painting in the general area of Coos Bay that could have resulted in deposits of toxic compounds, and that there is evidence regarding the presence of tributylin in Catching Slough. FEIS page 4.5-93.
>
> In response to these concerns, the applicant submitted a letter from Staff Environmental Scientist Randy Miller dated June 4, 2010. That letter notes that "[t]he proposed pipeline work in Haynes Inlet requires confirmation that the sediment that will be excavated is of sufficient quality that water quality impacts will not occur as a result of chemical constituent concentrations in the sediment." The letter goes on to explain in detail the steps that have been taken by Pacific Connector, and what will be required in the future regarding evaluation of sediment quality.
>
> Pacific Connector has prepared a Level 1 Sediment Quality Assessment that was submitted to the Corps and to the Project Review Group (PRG) for review. The PRG responded in a letter dated December 3, 2009 recommending that Pacific Connector undertake the following steps: (1) preparation of a Sediment Analysis Protocol (SAP) in accordance with the established

Sediment Evaluation Framework (SEF) used for waters of the Pacific Northwest; (2) division of the project area into three dredged material management units; (3) collection of nine sediment cores along the proposed alignment within Haynes Inlet; and (4) physical/chemical analysis of the sediment samples.

Following the recommendations of the PRG, Pacific Connector prepared a January 2010 SAP (copy attached to the letter from Randy Miller), which has been approved by the Corps and the PRG. The purpose of the SAP is to assess whether chemicals of concern are present in sediment in the Haynes Inlet portion of the project area (mileposts 1.7 to 4.1). Chemicals of concern and screening levels established by the SEF are listed on Table 1 of the SAP.

The June 4, 2010 letter from Randy Miller notes that prior sediment testing near the project area indicates that contaminants of concern are not present in the project area at concentrations of concern: "The Coos Bay area studies indicate that there is no reason to believe that chemical contaminants are present in the project area at concentrations greater than SEF screening levels." Miller letter, page 2. Should the sampling to be undertaken by Pacific Connector observe any chemical constituents at concentrations higher than the SEF standards, Pacific Connector will work with the Corps, DEQ, NMFS and the USFWS to apply appropriate mitigation measures or revised construction methods to ensure that no adverse water quality impacts will result from pipeline construction.

The applicant has also submitted a letter dated June 17, 2010 from Robert Ellis, Ph.D., of Ellis Ecological Services (Exhibit 9 to applicant's June 17, 2010 submittal), which responds to concerns stated during the first open record period regarding what steps the applicant will take to evaluate risk posed by contaminated sediments, and the framework that will be applied in order to assess potential risks, including bioaccumulation concerns.

The SAP establishes the methods for sampling and analysis of sediment within the planned pipeline route in order to satisfy the recommendations of the PRG and to ensure that water quality impacts will not occur as a result of sediment contamination. It would be appropriate for the county to impose a condition of approval requiring the applicant to undertake the sampling and analysis set forth in the SAP in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet.

The Board finds that information contained in the June 4, 2010 letter from Mr. Miller, the June 17, 2010 letter from Mr. Ellis, and the SAP constitutes substantial evidence regarding the specific pipeline impacts sufficient to rebut the general conclusions of the FEIS and to respond to concerns expressed by opponents. As quoted above, the applicant proposed the Board impose a condition of approval requiring the applicant to undertake the Sediment Analysis Protocol ("SAP") during dredging operations. The Board finds it is important for the applicant to complete the sampling and analysis of the SAP. However based upon staff recommendation, the timing of these steps should be accelerated in order to identify and address issues as soon as possible. Accordingly, the Board adopts Condition of Approval B.19 to read as follows:

> "Prior to construction, the applicant shall be required to undertake the sampling and analysis set forth in the Sediment Analysis Protocol (SAP) in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet."

Given these extensive avoidance, minimization and mitigation measures proposed by the applicant, and subject to this condition, the Board concludes that any impacts to resources will be temporary and *de minimis*. *Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc.*, __ Or LUBA __ (LUBA No. 2009-100, March 10, 2010).

q. Forest Zone (F) (CCZLDO Article 4.8)

CCZLDO §4.8.300(F)

The proposed pipeline will cross approximately 39.47 miles of Forest-zoned lands within the County (*see* Tables 1 and 2 in the application narrative). Of the 39.47 miles, 10.76 miles are on BLM-managed lands, while the remaining segments are located on privately owned lands. The Environmental Alignment Sheets in Exhibit 1 to the application narrative provide the landowner and zoning information with the parcel data overlaying aerial photography.

The majority of the pipeline route through the County is located on Forest-zoned lands. As shown on Table 1 in the application narrative, the pipeline would cross Forest-zoned lands between the following mileposts: 4.22 to 6.25, 6.44 to 8.28, 8.54 to 10.42, 8.95 to 9.06, 9.10 to 10.12, 10.52 to 10.97, 11.32 to 11.94, 12.04 to 12.47, 12.49 to 14.22, 14.28 to 15.69, 15.73 to 15.89, 15.95 to 19.24, 20.05 to 21.81, 21.87 to 22.59, 23.06 to 29.52, 30.15 to 45.70.

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).[29]

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). *See* Letter from Jan Wilson dated June 8, 2010, at p. 5. They argue that only gas "distribution" lines are allowed, and a distribution line is one that distributes gas to homes in the County. The opponents seek to differentiate the proposed Pacific Connector pipeline on the grounds that it does not "distribute" gas to residents or businesses within the County, but is instead one that "transmits" gas to California and other locales.[30]

The applicant responds to this argument as follows:

> Several opponents have argued that the PCGP is a "transmission" gas pipeline rather than a "distribution" line, and that the pipeline is therefore not allowed under the applicable Goal 4 rule,
>
> The language in [OAR 660-006-0025(4)(q)] expressly and unambiguously defines all new utility lines as "distribution" lines, with the exception of new electric lines, which are identified as "transmission" lines. For purposes of this state rule, and the corresponding county code provision, there is no such thing as a natural gas "transmission" line. While the opponents may disagree with the appropriateness of this characterization, the text of the rule is not ambiguous and cannot be changed by the hearings officer.
>
> The opponents' argument is based on the fact that the PCGP is described in other materials and in FERC documents as an interstate natural gas "transmission" facility. The opponents' argument

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

[30] In their letter dated June 8, 2010, WELC states as follows:

> Because the provision mentions "electrical transmission lines" separately from "distribution lines," which, by the given list of examples, include more than just electrical lines, it is not clear that ***non***-electrical ***transmission*** lines are allowed under the provision. The definitions section of the county code makes no distinction between transmission lines and distribution lines, though it does define utility "service lines" to include "distribution lines" for both electrical and non-electrical utility services. In any event, the applicant has the burden of showing how the proposed natural gas pipeline, which seems to be merely transmitting natural gas through the county (from the proposed LNG import facility to the main north-south interstate pipeline that transmits natural gas though multiple western states between the Canadian and Mexican borders), rather than distributing it to any Coos County users, falls within the defined administrative conditional use.

assumes that the PCGP's classification by FERC must also be consistent with its classification under OAR 660-006-0025(4)(q) and CCZLDO § 4.3.800(F). Following this assumption, opponents argue that interstate natural gas pipelines are prohibited in forest zones because the rules only allow "transmission" lines for electricity. Opponents argue that the PCGP is not a distribution line under their interpretation and therefore is not allowed in forest zones as a conditional use.

It is important to clarify the interpretive issue before the county and the proper scope of analysis. The interpretive issue is limited to the classification of the PCGP under the county's forest zone. The county's forest zone provisions allowing new distribution lines were adopted to implement OAR 660-006-0025(4)(q) and, therefore, must be interpreted consistently with the Goal 4 rules. *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999). Accordingly, the focus of the analysis is on the Goal 4 rule rather than the local code language. *Id.*

Because the issue before the county is the classification of the PCGP under *Goal 4*, the county should not consider FERC's classification of the PCGP under *federal law*. Stated simply, the county's land use review and FERC's review of the PCGP are two separate processes, each applying a different set of definitions and standards. In its review process, FERC does not consider or determine the classification of the PCGP under Goal 4 or the county forest zone. Similarly, the county's land use review process does not involve any definitions or review criteria established by FERC or federal law. FERC's classification of the PCGP, which forms the bulk of the opponents' analysis, has no bearing on the on the classification of the PCGP under Goal 4.

Under the Goal 4 rule, the classification of the PCGP is a question of statutory construction, which must be reviewed under the analysis established in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). The first level analyzes the text and context of the provision. The second level considers legislative history that is offered by the parties, even if the text and context of the provision do not present an ambiguity. *State v. Gaines*, 340 Or 160, 171-72 (2009). "However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* The third level of analysis, maxims of statutory construction, is only considered if the text, context, and legislative history do not answer the interpretive question. *Id.* Under the Goal 4 rule, the classification of the PCGP is a question of statutory construction, which must be reviewed under the

analysis established in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). The first level analyzes the text and context of the provision. The second level considers legislative history that is offered by the parties, even if the text and context of the provision do not present an ambiguity. *State v. Gaines*, 340 Or 160, 171-72 (2009). "However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* The third level of analysis, maxims of statutory construction, is only considered if the text, context, and legislative history do not answer the interpretive question. *Id.*

a. The text and context of the Goal 4 rule establish that the PCGP is a "new distribution line" under OAR 660-0006-0025(4)(q).

OAR 660-006-0025 includes a long list of uses and activities that are either allowed outright or as conditional uses in rural forest zones. Two of those uses are relevant to the classification of the PCGP. OAR 660-006-0025(3)(c) allows "Local distribution lines (*e.g.*, electric, telephone, natural gas) and accessory equipment" as outright permitted uses.[31] OAR 660-006-0025(4)(q) allows, as conditional uses: "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."

The text of OAR 660-006-0025 reflects that separate classification schemes are used for electrical and non-electrical lines. For purposes of Goal 4, electrical lines are classified as either local distribution lines (allowed outright) or transmission lines (allowed as a conditional use with up to 100 feet of right-of-way). Non-electrical lines are classified as either local distribution lines (allowed outright) or new distribution lines (allowed as a conditional use with up to 50 feet of right-of-way). Nothing in the text of Goal 4 identifies either non-local electrical distribution lines or non-electrical transmission lines as a separate classification.[32] Instead, all non-local non-electrical lines are classified as new distribution lines: Such lines are allowed as conditional uses with up to 50 feet of right-of-way.

[31] Identical language is included in CCZLDO § 4.8.200(H) regarding uses permitted outright in the county Forest zone.

[32] When LCDC amended the Goal 4 rules in 1992, "electrical" was deleted from the listed types of distribution lines in OAR 660-006.0025(4)(q) because non-local electrical lines became separately classified as transmission lines.

EXHIBIT A

The opponents interpret Goal 4 to require the same classification schemes for both electrical and non-electrical lines – *i.e.* transmission and distribution lines. The distinction, opponents argue, is that a gas distribution line must be designed to provide local utility customers with supplies of gas. However, this interpretation ignores the fact that OAR 660-006-0025(3)(c) and CCZLDO § 4.8.200(H) specifically allow local distribution lines as a use permitted outright. Consequently, OAR 660-006-0025(4)(q) must be interpreted to allow distribution lines that serve more than just local customers. *See* ORS 174.010 (statutes must be construed to give effect to all provisions). Further, Goal 4 does not identify any non-electrical lines (e.g. telephone, oil, and fiber optic cable) as transmission lines. Under the opponents' interpretation, all non-electrical lines, even telephone phone lines, that are not restricted to local service would be prohibited in the Forest zone. The text of Goal 4 does not support this interpretation.

The statutory context of the Goal 4 rule confirms that the PCGP is properly classified as a new distribution line. The Goal 4 utility line classification scheme is derived from ORS Chapter 772, which establishes the amount of right-of-way that can be condemned for various types of utility lines. ORS Chapter 772 makes clear that "transmission" is a classification used only for electrical lines and electrical utilities.[33] No other type of utility line (*e.g.* gas, oil, geothermal, telephone, fiber optic cable) is classified as a "transmission" line under ORS Chapter 772, including utility lines that might be classified as a transmission line under federal law. Consequently, all non-electrical utility lines, including the PCGP, are properly classified as distribution lines for purposes of the Goal 4 rule.

The opponents' classification scheme erroneously ignores ORS Chapter 772 and, instead, focuses on the classification of the PCGP under other laws and FERC documents. As explained above, this interpretation loses sight of the fact that the proper analysis is whether the PCGP is a distribution line under Goal 4, not FERC's rules or some other source of law. Neither Goal 4 nor ORS Chapter 772 implements either federal law or Williams' classification scheme. Therefore, federal law does not provide context for interpreting Goal 4. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

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[33] In fact, when the Goal 4 rule was adopted, nothing in Oregon law classified gas lines as "transmission lines."

The purpose statements in Goal 4 and the Goal 4 rule also provide context for interpreting the term "new distribution lines."[34] The purpose of Goal 4 and the Goal 4 rule is to conserve and protect lands for timber production. Goal 4 and the Goal 4 rule recognize that five general types of uses may be allowed in forest zones, subject to the standards in Goal 4 and the Goal 4 rule. OAR 660-006-0025(1). New distribution lines are part of the general category of locationally dependent uses allowed by Goal 4. However, the "distribution" label is not what is important for ensuring that these lines are consistent with the purpose of Goal 4. Instead, these lines are made consistent with the purpose of Goal 4 through the 50 foot permanent right-of-way standard in OAR 660-006-0025(4)(q) and the conditional use criteria in OAR 660-006-0025(5). The opponents' labeling distinction between "distribution" and "transmission" lines does not further the purpose of Goal 4 and the Goal 4 rule. In fact, if opponents' arguments were correct, it would be impossible to site an interstate gas pipeline across Forest-zoned land in Oregon.

In short, the Goal 4 rule classifies all gas lines as either local distribution lines or distribution lines. Goal 4 does not recognize a separate classification for gas transmission lines because there is no similar classification under ORS Chapter 772 or any Oregon statute that could serve as relevant context. Therefore, under Goal 4 and CCZLDO 4.8.300(F), the PCGP is a distribution line and is allowed as a conditional use with up to 50 feet of right-of-way width.

b. The legislative history of the Goal 4 rule confirms that the PCGP is properly classified as a distribution line.

The legislative history of the Goal 4 rule confirms that the classification scheme for utility lines was developed based on the classification scheme in ORS Chapter 772, which does not identify gas transmission lines as a separate classification. OAR 660-006-0025 was first adopted by LCDC in 1990 and classified all types of utility lines, including electrical lines, as either local distribution lines or distribution lines. All distribution lines were allowed as conditional uses with up to 50 feet of right-of-way. In 1992, LCDC amended the rule to allow "new electric transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210" and deleted the reference to "electrical" under distribution lines. The apparent reason for this revision was to make the Goal 4 rules consistent with ORS Chapter 772, which

[34] General purpose statements are not approval criteria for a land use decisions. However, purpose statements can provide context for a statutory or regulatory interpretations.

> recognized electric transmission lines as a separate classification and provided for additional right-of-way condemnation authority for such lines. No amendment was necessary for other types of utility lines because ORS Chapter 772 did not classify any other types of lines as transmission lines. Consequently, LCDC's decision to amend the Goal 4 rules to recognize electrical transmission lines does not reflect an intent to classify, and thereby prohibit, any other type of utility line as a transmission line.

See Final Argument, Letter from Mark Whitlow dated June 24, 2010, at p. 5-9.

The opponents appear to be correct that the gas pipeline industry distinguishes between gas transmission lines and gas distribution lines. *See generally*, William A. Mogel and John P. Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, ENERGY LAW JOURNAL, Vol. 4.2, page 155; 157 (1983).[35] In the industry, it is apparently understood that interstate gas pipelines are generally used for the "transmission" of natural gas. *Id.* FERC seems to adopt this distinction as well, as the discussion in the FEIS makes clear.

However, the applicant is correct that there is no indication in Statewide Planning Goal 4 or OAR 660-006-0025(4)(q) that LCDC purposefully intended to use the federal vernacular, and there is no indication that LCDC sought to purposefully exclude interstate gas "transmission" pipelines from Forest zones. As the applicant notes, neither the FERC classification or other federal law is necessarily "context" for interpreting DLCD's administrative rule, because there is simply no evidence to suggest that OAR 660-006-0025(4)(q) implements federal law or was enacted with federal law in mind.

OAR 660-006-0025(4)(q) specifically lists "gas" amongst a list of examples of "distribution lines." Because the rule creates a separate category for "local" gas distribution lines, the only logical inference is that all other gas lines (*i.e.* "non-local gas lines) are a conditional use. By using the term "transmission" lines for electrical lines, the rule is intending to recognize the vernacular used in the state statute. *See* ORS Chapter 772.

The legislative history is also telling because there is really no discussion regarding gas "transmission" lines. If DLCD were making a purposeful decision to exclude interstate gas transmission lines from Forest zones, one would think that such a monumental decision would have generated more debate and attention. Such debate and discussion would be reflected in the legislative history. However, the tenor of the legislative history is much more in line with "housekeeping" changes, and not major shifts in policy.

Moreover, as the Hearings Officer's discussion on preemption makes clear, it is doubtful that DLCD would have the authority to exclude interstate gas transmission lines from the Forest

[35] "There are three major segments of the natural gas industry: production, transmission, and distribution. Essentially, interstate natural gas pipeline companies act as middlemen, buying natural gas from producers at the wellhead, transporting it, and reselling it directly to large end-users or to local distribution companies, which in turn resell it for a variety of end users."

zone in any event. This is particularly true for parts of the state not subject to the CZMA. Along those same lines, the opponents' argument also seems to conflict with the apparent purpose behind ORS 215.275(6), which, as stated elsewhere herein, appears to be a legislative recognition of federal preemption on the issue of interstate gas pipelines in Farm zones.

The Board concludes that the interstate gas pipeline proposed here is a "distribution line" within the meaning of OAR 660-006-0025(4)(q). In any event, the Board further concludes that even if the application is proposing an interstate gas "transmission" line, and even if CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) could be read to bar such gas transmission lines in a Forest zone, those laws would be preempted by federal statute. The Board adopts herein the applicant's argument, as set forth above, as additional findings.

50 Foot Right of Way Corridor and Temporary Right of Way.

Another issue stemming from CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) concerns the fact that the applicant is proposing a temporary construction corridor that exceeds 50 feet. As quoted above, CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) allow "new distribution lines (*e.g.*, gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width." The applicant has testified that the permanent right-of-way for the PCGP will not exceed 50 feet at any point along the pipeline route. As reflected in the FEIS, Pacific Connector originally proposed a right-of-way with varying widths depending upon the underlying land ownership. However, as explained in the applicant's letter dated June 17, 2010, Pacific Connector has adjusted the project right-of-way width to a consistent 50 foot width in response to public comments from FERC and other agencies.

Several opponents argue that the proposed pipeline exceeds the "50-foot right-of-way" requirement because an additional 45-foot temporary construction easement is required during construction of the pipeline. WELC makes the opponent's argument in their letter dated June 8, 2010:

> [I]t is clear that [OAR 660-006-0025(4)(q)] allows for the wider 100-foot right-of-ways only for electrical lines. The non-electrical lines – even if properly characterized as "distribution" lines – are limited to those that can be fit into a 50-foot right-of-way. The provision makes no distinction between "temporary" and "permanent" rights-of-way, and the applicant's attempt to squeeze an unallowed 95-foot right-of-way into the 50-foot right-of-way limit is a blatant attempt to establish an unpermitted use. It is not clear why it would take more than 50 feet of right-of-way to install a three-foot diameter pipe, but, in any event, the county code has clearly determined that, in Forest zones, the maximum linear clearing width that would not significantly interfere with primary forest operations and forest habitat values is 50 feet. The applicant's proposal for a pipeline that ostensibly requires a 95-foot right-of-way – during construction or anytime – is not allowed in the Forest zones.

> The state statutes are to the same effect. ORS 772.210(3)[36] gives gas public utilities condemnation rights "not exceeding 50 feet in width," and specifically note that the 50-foot limit is intended to accommodate all the right-of-way necessary for "constructing, laying, maintaining and operating" the pipeline and "including necessary equipment." There is absolutely no provision in the law for a "temporary" construction easement wider than the 50-foot right-of-way limit.

The applicant responds as follows:

> However, [the opponents'] interpretation is not supported by the text and is inconsistent with a recent decision by the Oregon Energy Facility Siting Council (EFSC). As noted above, the language used in the county code to describe the use category comes directly from the Goal 4 implementing regulation. OAR 660-006-0025(4)(q) provides that gas distribution lines are permitted on forest lands within a 50-foot right-of-way. The

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[36] ORS 772.210. Construction of service facilities, right of entry and condemnation of lands:

(1) Any public utility, electrical cooperative association or transmission company may:

(a) Enter upon lands within this state in the manner provided by ORS 35.220 for the purpose of examining, locating and surveying the line thereof and also other lands necessary and convenient for the purpose of construction of service facilities, doing no unnecessary damage thereby.

(b) Condemn such lands not exceeding 100 feet in width for its lines (including poles, towers, wires, supports and necessary equipment therefore) and in addition thereto, other lands necessary and convenient for the purpose of construction of service facilities. If the lands are covered by trees that are liable to fall and constitute a hazard to its wire or line, any public utility or transmission company organized for the purpose of building, maintaining and operating a line of poles and wires for the transmission of electricity for lighting or power purposes may condemn such trees for a width not exceeding 300 feet, as may be necessary or convenient for such purpose.

(2) Notwithstanding subsection (1) of this section, any public utility, electrical cooperative association or transmission company may, when necessary or convenient for transmission lines (including poles, towers, wires, supports and necessary equipment therefore) designed for voltages in excess of 330,000 volts, condemn land not to exceed 300 feet in width. In addition, if the lands are covered by trees that are liable to fall and constitute a hazard to its wire or line, such public utility or transmission company may condemn such trees for a width not exceeding 100 feet on either side of the condemned land, as may be necessary or convenient for such purpose.

(3) Notwithstanding subsection (1) of this section, a water or *gas public utility* may condemn such lands, not exceeding 50 feet in width, as may be necessary or convenient for purposes of *constructing*, laying, maintaining and operating its lines, including necessary equipment therefore. (Emphasis Added).

(4) 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 and diminution in value to remaining timber caused by increased harvesting costs. (Emphasis Added).

language does not suggest intent by DLCD to limit anything other than the permanent right-of-way corridor.

As noted in my June 17, 2010 correspondence, the EFSC Final Order approving the COB Energy Facility supports the interpretation that the 50-foot width limitation included in OAR 660-006-0025(4)(q) is intended to include only the permanent, operational right-of-way, and not temporary construction areas. In that case, the pipeline crossed through a Klamath County forest zone that applied the OAR 660-006-0025(4)(q) use category. The findings in that decision indicate that construction would require a 120-foot wide corridor along a segment of the pipeline located within a forest zone.[37] Despite a 120-foot construction corridor through the forest zone, EFSC approved the natural gas pipeline as a new distribution line with a right-of-way of 50 feet or less in width, and applied the following condition, "[t]he certificate holder shall limit the width of the *permanent/operations* easement for the natural gas pipeline to no more than fifty feet on lands zoned FR" (emphasis added).

Pacific Connector has proposed conditions of approval designed to ensure (a) that the permanent right-of-way is no wider than 50 feet, and (b) that all temporary construction areas will be restored to their preconstruction condition.

See Applicant's final Argument, at 9-10.

The Klamath County case provides some authority that the standard practice with regard to this issue is to consider temporary construction easements to be separate and distinct from "right of way" as that term is used in the above-cited administrative rule. The case of *Friends of Parrett Mountain v. Northwest Natural Gas Co.*, 336 Or. 93, 79 P.3d 869 (2003) provides similar insight as to the standard practice. In *Friends of Parrett Mountain.* the Oregon Supreme Court noted the following facts pertaining to an intrastate natural gas pipeline authorized by the Oregon Energy Facility Siting Council:

> The certificate authorizes Northwest Natural to construct its pipeline within an approximately 62-mile long, 200-foot wide corridor designed around 10 significant "constraint points." Inside that corridor, Northwest Natural will build the pipeline within an 80-foot wide, temporary construction easement. Upon completion of the project, the width of the easement will be reduced to 40 feet and become permanent. (Emphasis added).

[37] The findings addressing the forest zone review criteria state that "[d]ue to local topography (side slopes), construction of this segment of the pipeline would require 120-foot-wide corridor." Final Order, COB Energy Facility, at 334.

EXHIBIT A

The parties to the *Parrett Mountain* case did not raise the "temporary construction easement" issue to the Supreme Court, so the case cannot be viewed as formal precedent on that issue. Nonetheless, it provides further indication that EFSC does not consider the temporary easement to be "right-of-way" within the meaning of the statute.

WELC's argument assumes that the 45-foot wide "temporary" portion of the easement area is "right-of-way." Indeed, the FEIS refers to this area as the "95 foot wide construction right-of-way." On the other hand, Figure 2.3-1 of the FEIS, page 2-64, makes it fairly obvious that it is not physically possible to build a pipeline within 50 feet of ROW. As the Board has previously noted, state law is generally preempted to the extent it is inconsistent with FERC authorizations. Therefore, the Board rejects the contention that the application must be denied because it proposed a greater right-of-way than may be contemplated by OAR 660-006-0025(4)(q).

WELC also cites ORS 772.210(3), which states that "a water or gas public utility may condemn such lands, not exceeding 50 feet in width, as may be necessary or convenient for purposes of *constructing*, laying, maintaining and operating its lines, including necessary equipment therefore." It does not appear that the applicant is relying on ORS 772.210(3) as the source of its condemnation authority. Rather, the applicant relies on ORS 772.510(3), which provides that "[t]hese pipeline companies may appropriate and condemn such lands, or easements thereon or thereover, *in such width as is reasonably necessary to accomplish their pipeline company purposes*, by proceedings for condemnation as prescribed by ORS chapter 35." This statute appears to allow the pipeline company to condemn pretty much whatever it reasonably needs in terms of right-of-way.

Applying the *PGE v. BOLI* methodology, the text of OAR 660-006-0025(4)(q) could be read to support WELC's position. But a legal standard such as this cannot be read in a vacuum. *State v. Stoneman*, 323 Or 536, 546, 920 P2d 535 (1996).[38] The context of a statute or statutory scheme can sometimes reveal an ambiguity in a particular phrase that, standing alone, appears to have a clear meaning. *Southwood Homeowners Ass'n v. City Council of Philomath*, 106 Or.App. 21, 806 P.2d 162 (1991) (citing *Dennehy v. City of Portland*, 87 Or.App. 33, 40, 740 P.2d 806 (1987).

For the reasons explained elsewhere in this decision, the statutory context, including ORS 215.275 and ORS 772.210(3), supports PCGP, and tilts the balance in favor of the applicant's

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[38] In *Stoneman*, the Oregon Supreme Court stated:

> It is true that, when viewed in isolation, ORS 163.680 (1987) appears to have contained a content-based proscription on expressive material. It forbade commerce in certain forms of expression--films, videotapes, and the like in terms of their content--"sexually explicit conduct by a child under 18 years of age." But a statute cannot be read in a vacuum. An examination of the *context* of a statute, as well as of its wording, is necessary to an understanding of the policy that the legislative choice embodies. *See PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-11, 859 P.2d 1143 (1993) (first level of interpretation of statute involves examining both text and context). A closer look at the provision under examination here, within its statutory context, reveals a different focus. (Emphasis added).

interpretation. Thus, the Board finds that the 45-foot temporary easement area is not "right-of-way" within the meaning of OAR 660-006-0025(4)(q), or in the alternative, that OAR 660-006-0025(4)(q) is inconsistent with both ORS 772.510(3) and federal law and therefore is preempted and without legal force on that issue.

SECTION 4.8.400.

CCZLDO §4.8.400 is entitled "Review Criteria for Conditional Uses in Section 4.8.300," and provides 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*

As the applicant correctly notes, there are several important limitations on this standard. First, it is important to note that this criterion relates to *significant* impacts on farming and forest practices and *significant* cost increases. The applicant is not required to demonstrate that there will be no impacts on farming or forest practices, or even that all impacts that may force a change or increase costs have been eliminated through mitigation or conditions of approval. *See 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 does not require the extensive analysis applied under the similarly-worded provisions of ORS 215.296(1). *Comden v. Coos County*, 56 Or LUBA 214 (2008). 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.*

i. **Accepted Forest Practices.**

Mr. Jake Robinson of Yankee Creek Forestry testified at the May 20, 2010 hearing and submitted a letter dated June 7, 2010. Mr. Fred Messerle of Messerle and Sons also testified and submitted letters dated May 2, 2010 and June 10, 2010. Since the issues raised in these letters overlap, they are considered together.

Mr. Robinson and Mr. Messerle state that the pipeline will force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands. In support of that conclusion, they raise the following issues:

- The limited number of hard crossings across the pipeline easement will increase costs, because it changes the way an entire stand of trees is harvested.
- 95 foot wide easement will fragment timber stands, making them more difficult o log efficiently,
- The "hard edge" will cause tree blow downs, because trees that were previously sheltered from wind will now be fully exposed,
- Corridor will promote trespass, both in terms of vehicles and pedestrians. Additional human traffic will cause an increased risk of damage to trees via disease (including Port Orchard Cedar root rot and Douglas Fir root rot), fire, and vandalism,
- Increased vector for noxious weeds,
- Increased vector for fire,
- Trees on the edge of the easement will be of poor quality because they have more exposure to sunlight and, as a result, grow more limbs, and they will be on a different growth cycle as compared to neighboring trees,
- Pipeline reduces the ability to fight fire because it impedes access to forest via bulldozers and making it more difficult to create "cat lines."
- Reduced ability to use land for conservation easements, etc.
- Increased costs associated with monitoring the construction of the pipeline,

The Board finds Mr. Robinson and Mr. Messerle to be credible expert witnesses and is sympathetic to the concerns they raise. The applicant's expert, Mr. Dallas Hemphill, has 45 years of experience in the forest industry and also is a credible expert witness. In effect, this case presents a "battle of experts," and the Board has the difficult task of choosing to agree with one side over the other. In this case, the Board agrees with the evidence provided by the applicant. The following factors influence this conclusion:

First, it seems that many of the concerns raised are of a type that would be true no matter what kind of pipeline was proposed. For example, in every case where a pipeline traverses forest lands in Oregon, the resulting corridor will result in a new forest edge, and that edge will experience some degree of blow downs due to previously-sheltered trees receiving increased exposure to wind. Despite these types of foreseeable impacts, there has already been a legislative determination, both at the state and county level, that pipelines are an allowed use in the Forest zone. Therefore, it cannot be assumed that standard practices associated with pipeline construction and operation will automatically, in every case, force a significant change in, or significantly increase the cost of, accepted forest practices on forest lands. Otherwise, pipeline uses would have simply been prohibited in Forest zones. Here, the opponents have not asserted that there is something particular about their land or County forest land in general that causes the

pipeline to have anything beyond the typical expected impacts. Their testimony is simply too generalized to be persuasive.

Second, and perhaps more importantly, all of the increased costs can form the basis of an increased just compensation award. In the Hearings Officer's letter dated June 6, 2010, he requested that the parties discuss the applicability or inapplicability of ORS 772.210(4), which addresses the issue of what costs factor into the just compensation analysis:

> ORS 772.210(4) 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 and diminution in value to remaining timber caused by increased harvesting costs. (Emphasis Added).

Although the Hearings Officer questioned the applicability of this statutory section, the applicant appeared to accept the compensation rules set forth in ORS 772.210(4). *See* Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" at p. 3 ("This policy with respect to damages may be interpreted in the specific context of forestry to mean that whatever incremental costs and value losses 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.")

The Hearings Officer found it significant that the landowner would be compensated for both the value of the land taken and the value of the timber removed. The Hearings Officer further understood Mr. Hemphill's testimony to mean that the landowner would be compensated for the timber as if it was already of a mature size ready for harvest. The Hearings Officer deemed this requirement important, since he determined that a stand of 20 year trees probably has little to no *current* value. On the basis of this reasoning, the Hearings Officer determined that the applicant presented substantial evidence that the pipeline would not significantly increase the cost of forestry operations. To ensure compliance with this standard, the Hearings Officer proposed a condition of approval.

Although the Board disagrees with the Hearings Officer's conclusion that a stand of 20-year trees has no current value, the Board otherwise concurs with the Hearings Officer's conclusion on this issue. The Board further finds the condition should be modified to provide compensation for loss of product value due to blow-downs and to apply to all timberlands not only those that are commercial in nature. Accordingly, the Board adopts the modified condition as Condition A.5 to read as follows:

> "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. [*See ORS 772.210(4) and Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010; at p. 5.*]"

Subject to the unrelated modification discussed in more detail below, the Board adopts this condition as Condition of Approval A.5.

In its final argument, Pacific Connector acknowledges that the PCGP will have limited effects on accepted forest practices[39] on the forest lands in the vicinity of the pipeline right-of-way. *See* Applicant's final Argument. However, the Board finds that those limited impacts will not force a *significant* change in the accepted forest practices in the vicinity of the pipeline. Nor will those limited impacts significantly increase the cost of accepted forest practices. As explained in the application narrative, accepted forest practices in the vicinity of the pipeline corridor include timber production and harvesting, hauling harvested timber, logging road construction and maintenance, application of chemicals, and disposal of slash.

The pipeline project will have effects on the timbered areas located in the Forest zone both during and after construction in the form of the cleared corridor. As discussed in the application narrative, the pipeline must maintain a 30 foot cleared corridor directly over the pipeline for safety purposes. However, the remaining 20 feet of permanent right-of-way, as well as the temporary construction areas will be replanted in a manner consistent with Pacific Connector's Erosion Control and Revegetation Plan (ECRP). The permanent removal of a 30-foot strip of trees within the Forest zone will not force a significant change to the surrounding forest practices.

Several opponents argue that the cleared 30 foot strip itself is a significant change. However, as discussed above, if any tree removal required for the footprint of the conditional use itself could be interpreted as forcing a significant change, no use with a permanent tree removal footprint could ever be approved as a conditional use in a Forest zone. The Board finds that is clearly not the intent of this review criterion. Instead the relevant analysis is whether the use contained within that footprint or impact area will force a significant change on forest practices adjacent to the impact area for the use itself.

The PCGP will also have temporary effects on adjacent forest lands and forest practices during construction. The landowner will be unable to conduct accepted forest practices within

[39] The term "forest practices" is defined by the Oregon Forest Practices Act as "any operation conducted on or pertaining to forestland, including but not limited to (a) reforestation of forest land; (b) road construction and maintenance; (c) harvesting of forest tree species; (d) application of chemicals; and (e) disposal of slash." ORS 527.620(5).

the temporary construction easement and work areas during pipeline construction. However, all temporary construction areas and all but 30 feet of the 50-foot right-of-way will be replanted and restored in manner consistent with the final ECRP. Once the restoration occurs, the landowner will be able to continue accepted forest practices in those areas. The Hearings Officer proposed a condition of approval to this effect. The Board agrees that the applicant should replant timberlands; however, the Board finds that the landowner is not required to continue engaging in forest practices in those areas. Accordingly, the Board modifies and adopts the condition as Condition of Approval A.20 to read as follows:

> "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."

Further, the Board finds that the applicant-proposed Condition of Approval B.3 is redundant with Conditions of Approval A.20 regarding forestlands and A.21 regarding farmlands. Accordingly, the Board deletes Condition of Approval B.3 and identifies it as "Intentionally deleted."

Finally, the pipeline will have limited effects on accepted forest practices once construction is complete. Public comments raised concerns related to the following potential effects on forest practices adjacent to the pipeline: future pipeline crossings, location of heavy forestry equipment, fragmentation of parcels owned by smaller private timber operators, spread of invasive species, and off-highway vehicle use. These issues are addressed in detail in the following documents, which are adopted herein as findings:

- The application narrative dated April 14, 2010, at pages 15-17;
- Correspondence dated May 11, 2010 from Rodney Gregory of Pacific Connector, at pages 10-13;
- Correspondence dated June 8, 2010 from Rodney Gregory of Pacific Connector, at pages 1-4 (Exhibit 10 to the applicant's submittal dated June 9, 2010);
- Correspondence dated June 17, 2010 from Mark Whitlow of Perkins Coie LLP, at pages 3-6;
- Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" (attached as Exhibit 3 to the applicant's submittal dated June 17, 2010).

In his report dated June 17, 2010, Mr. Hemphill analyzed the specific size and location of each individual tract that would be impacted by the pipeline, and the potential impacts to forestry operations that could be caused by access restrictions, pipeline crossing restrictions, reduction in the amount of harvestable timber, and fragmentation of specific tracts.

Mr. Robinson's comments are based on the premise that "most of" the impacted forest lands within the County are private, non-industrial timber lands, whose owners do not have the land-base to absorb the increased costs of timber operations. Robinson letter, page 3. However, in his response Mr. Hemphill reviewed the specific list of forestry tracts that will be traversed by the pipeline and determined that, out of 39 miles of forest-zoned land, only approximately 9.4 miles of the pipeline would cross property owned and operated by small "non-industrial" private forest operators.

Mr. Messerle states that the pipeline will encourage trespassing, which will potentially increase the possibility of introducing diseases to trees, including two different types of root fungi. Mr. Hemphill responds with the following testimony:

> Port Orford Cedar root rot is already widespread throughout the second-growth areas of southwest Oregon. Laminated root rot is also naturally widely distributed throughout western Oregon. It is not transmitted by soil on traffic, but "...is only known to spread by root contact between infected trees or infected stumps and susceptible trees." (Thies, W. and R. Sturrock, 1995: *Laminated Root Rot in Western North America*, USDA Forest Service Res. Bull. PNW-GTR-349, Portland.) Therefore the pipeline cannot be expected to accelerate the infestation of either pathogen.

Unfortunately, the Thies / Sturrock report was not included in the record, so the truth of the assertion cannot be verified. Nonetheless, the mere citation to authority indicates confidence in the assertion and itself provides a micron of weight which tips the scales in favor of the applicant regarding a substantial evidence finding.

With regard to the allegation that the pipeline will encourage trespassing, Mr. Hemphill rebuts those assertions as well:

> Trespass is an issue throughout western Oregon timberlands. The additional opportunity provided by the pipeline and its access routes would however be only slightly incremental to the problem. The pipeline operator will install robust traffic controls (gates, etc.) that private landowners are often unwilling or unable to afford, thus likely mitigating the problem. Consequently, there should be a negligible increase in human-caused fires, which in any case are often a result of logging and forestry activities. Similarly, there should not be a significant rise in vandalism and other unauthorized activities.

Mr. Hemphill also adequately rebuts, the "hard edge" problem, as follows:

> This can be an issue on all forest edges, including those cutting lines and road rights-of way created by the landowner itself. The proposed vegetation

management strategy on the easement will serve to limit windfall potential. Vegetation will be controlled only on the central 30 feet of the easement, over the pipeline. Outside this area, on the remainder of the easement natural regeneration can be expected to occur, or the landowner may choose to plant. The 30- foot cleared area is narrow enough—about the same as a road right-of-way—that the trees crowns will soon close in (as Mr. Messerle points out in his submission) sufficiently that windfall should not be a significant issue.

Mr. Robinson and Mr. Messerle both assert that the 30 foot strips that will be re-grown will nonetheless produce trees of poor quality due to excessive limbs. Mr. Hemphill fully rebuts this concern with the following testimony:

> As the landowner will be compensated for the loss of land and original timber on the easement, any timber that he may subsequently be able to produce in the two strips is therefore a bonus, at no cost to the landowner. It can be retained until the landowner's adjacent timber is mature and then logged concurrently; in this sense, the strips on the construction easement do not constitute unmanageable fragments. Limby trees are produced on forest edges, but in this case the edge trees will have grown on land for which the landowner has already been compensated for the land and original timber. As a result, the landowner's trees on the edge of the 95-foot construction easement will not have this edge effect. None of the more valuable 1-3P grade logs are ever produced in a second growth stand.

In response to the argument that the pipeline will hamper firefighting efforts, Mr. Hemphill states:

> Any outbreak of fire would be reported to the pipeline operator concurrently with the landowner. The pipeline operator would be an integral part of the response team. The only time this process would delay fire response would be where the fire was caused by logging or forestry activity...Areas too steep to be accessible by excavator will be hand-slashed on a similar schedule.

Mr. Hemphill further testified that the applicant will conduct routine vegetation maintenance clearing on the 30-foot strip every three to five years and that in the interim, the vegetation will attain only "small dimensions." Staff originally proposed a condition of approval requiring that the pipeline operator mow this vegetation every three to five years; however, the Board finds that it is important to provide the applicant flexibility to identify and implement the most beneficial and cost-effective technique to maintain this vegetation. Accordingly, the Board modifies and adopts this condition as Condition of Approval A.23, which reads as follows:

> "The pipeline operator will conduct routine vegetation maintenance clearing on the 30-foot strip every 3-5 years. [*See Report entitled Forest Practices and Economic Issues related to*

Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE, dated June 17, 2010, at p. 5]"

To summarize on the issue of impact to forest practices, Mr. Hemphill concludes that the incremental increased costs to these timber operators generally amounts to a range of 1-2% of total production costs, which is certainly not an amount that could be described as a "significant" increase in the cost of forestry operations. Second, perhaps more importantly, and as required by Condition of Approval A.5, all of these costs will be included as part of the compensation paid to landowners by the pipeline operator, and therefore such costs will not be borne by the landowners. Therefore, there will be no *actual* increase in costs to the landowners of forestry operations.

Thus, to the extent there are *any* increased costs due to operational changes in the forest practices occurring around the pipeline right-of-way, those costs will be considered in the monetary compensation package paid by Pacific Connector to the landowner. Thus, the Board finds that there will be no significant increase in costs of forest practices to the landowners along the pipeline route.

ii. Accepted Farming Practices.

As explained in the application narrative, and in more detail in correspondence dated May 11, 2010 from Rodney Gregory of Pacific Connector (at pages 6-10), the proposed pipeline will not force a significant change in or significantly increase the costs of accepted farm practices, even on those lands that the pipeline directly crosses.

As described in Pacific Connector's prior submittals, the PCGP will have short-term impacts on farming practices within the temporary construction areas and permanent right-of-way during construction activities. Specifically, farming practices within the right-of-way and the temporary construction areas will be interrupted during construction. However, those short-term construction impacts will not cause a significant change in farming practices because of their temporary nature and because farming practices will be able to continue on lands directly adjacent to the temporary construction areas. Furthermore, Pacific Connector must compensate the landowner not only for the permanent right-of-way, but also for any demonstrated loss in crop production within the temporary construction areas. Consequently, the pipeline will not result in any increased cost in farming practices for the landowner, much less a significant increase in cost.

Following construction, adjacent farming practices, including crop lands and grazing pastures may resume within the temporary construction areas as well as over the permanent right-of-way itself. As explained in Rodney Gregory's correspondence dated May 11, 2010, in EFU areas Pacific Connector will install the pipeline five feet below the surface in agricultural areas to make certain that farming equipment may cross through the right-of-way without impacting the structural integrity of the pipeline. Pacific Connector will undertake many other steps as described in Mr. Gregory's May 11, 2010 letter and in the ECRP that are specifically designed to ensure that impacts on agricultural uses will be minimized.

Except as discussed below, the opponents did not rebut the applicant's evidence or otherwise present substantial evidence of their own explaining how the applicant's proposed efforts to minimize the impacts of the pipeline would be inadequate or ineffective. Therefore, the Board finds that the application satisfies this standard as to accepted farming practices.

The opponents raised two issues – application of herbicides along the pipeline route and potential impacts to groundwater supplies – that, while not specifically directed at this criterion, could be considered impacts on surrounding lands devoted to farm use. Therefore, the Board addresses these issues under this approval criterion below.

(l) Use of herbicides in pipeline corridor

Ms. Jody McCaffree of Citizens Against LNG questioned the applicant's herbicide application policy. Although Ms. McCaffree did not connect her concerns to any applicable approval standards, the applicant presented rebuttal on the record to clarify the applicable herbicide application policy.

As stated on the record, as a general practice during pipeline operations, herbicides will not be used to control vegetation as a means to maintain the permanent 30-foot cleared corridor centered over the pipeline. As set forth in Section 12.6 of the ECRP, where weed control is necessary, the applicant will employ hand and mechanical methods (pulling, mowing, disking, etc.) to prevent the spread of potential weed infestations. However, spot treatments with appropriate herbicides will be conducted where applicable depending on the specific weed and site-specific conditions using integrated weed management principles. The applicant will not use aerial herbicide applications. Spot herbicide treatment would only be utilized when it could be effective (*i.e.*, where plant phenology and effective herbicide treatment windows coincide) prior to and post construction. Any herbicide treatment would be conducted by a licensed applicator using herbicides labeled for the targeted species and registered for the use. The applicant will not utilize herbicides on any right-of-way without landowner consent/approval and will obtain all required permits from the local jurisdictions/authorities.

As detailed in Section 12.6 of the ECRP, in order to prevent impacts to sensitive areas and habitats, herbicides would not be applied during precipitation events or when precipitation is expected within 24 hours or as specified on the label. Herbicides will not be used within 100 feet of a wetland or waterbody, unless allowed by the appropriate agency. To ensure sensitive species/habitats are not adversely impacted, the biological surveys will map any sensitive species proposed and/or listed under the Endangered Species Act, survey and manage species, and federally (BLM and Forest Service) sensitive species. If noxious weed infestations occur in the vicinity of sensitive sites, the proper treatment buffers will be applied to avoid potential adverse impacts to non-targeted species. In these areas site-specific control will be designed (*e.g.* application rate and method, timing, wind speed and direction, nozzle type and size, buffers, etc.) to mitigate the potential for adverse disturbance and/or contaminant exposure.

Thus, the applicant will not apply herbicides to the entire right-of-way to control noxious weeds, but rather spot treatments of herbicides may be used in select areas as summarized above. Ms. McCaffree seems to recommend County oversight of the applicant's herbicide application, if any, within the pipeline corridor. In response to these specific concerns about

herbicide application, the applicant proposed, the Hearings Officer recommended, and the Board adopts a condition of approval requiring the applicant to use weed control and monitoring methods consistent with the Weed Control and Monitoring sections of the final ECRP. The Board further finds that consequences to landowners may potentially be significant if the applicant engages in aerial application of pesticides. Thus, the Board finds that it is appropriate to memorialize the applicant's representation that there will be no such application of pesticides, in Condition of Approval B.5.

(2) Groundwater impacts

Various opponents expressed concern that the pipeline would adversely impact groundwater supplies. Substantial evidence in the record refutes this contention. First, the risk of impacts to the water supply is limited, as there are no public groundwater supply wells or springs within 400 feet of the proposed construction disturbance according to the State Department of Environmental Quality public water supply database. Second, Condition 43.b of the FERC Order attached to the applicant's correspondence dated May 12, 2010 requires the applicant to prepare a Groundwater Supply Monitoring and Mitigation Plan ("Groundwater Plan") to identify, assess, and monitor groundwater supplies; to prevent impacts to groundwater resources; and to mitigate unavoidable impacts. The applicant has prepared the Groundwater Plan pursuant to this condition, which is included as Exhibit 3 to the April 14, 2010 application narrative. The components of the Groundwater Plan are further summarized in the June 3, 2010 letter from Jared Ellsworth, P.E. of Pacific Connector Gas Pipeline, which is attached as Exhibit 7 to the applicant's submittal dated June 9, 2010.

During the deliberations in this matter, the Board expressed concerns whether the Groundwater Plan would adequately protect area groundwater supplies. Specifically, the Board expressed concern that installation and operation of the pipeline could adversely affect water supply to private wells and/or the supply of water from private wells to homes. The Board finds that compliance with the Groundwater Plan will prevent these occurrences for the following reasons. For example, the applicant will contact landowners within 200 feet of the right-of-way prior to construction requesting their cooperation in identifying groundwater wells, springs, or seeps that could potentially be impacted by the project. The applicant will request permission to take field measurements for baseline water quality and yield as well as for the following parameters: temperature, pH, turbidity, and specific conductance. Samples will be analyzed in a laboratory for TPH, fecal coliform, and nitrate. The applicant will also conduct post-construction sampling if requested by the landowner or in disputed situations to determine the effects of construction, if any, on both the yield and quality of the groundwater supply. Moreover, the applicant will engage in various measures to prevent impacts to groundwater resources, including compliance with: (1) a Spill Prevention, Containment, and Countermeasures Plan to prevent the inadvertent release of fuels, solvents, or lubricants used during construction; and (2) blasting plans to minimize impacts to groundwater resources from blasting activities. Finally, the applicant will implement required mitigation measures on a site-specific basis to remedy any adverse impacts on the yield or quality of water supplies. Such mitigation measures may include ensuring a temporary supply of water and, if necessary, replacing permanent water supply.

The Board also finds there is not substantial evidence in the record as to why or how the Groundwater Plan is inadequate, incomplete, or otherwise ineffective. The Board finds that the Groundwater Plan will be sufficient to ensure the pipeline will not adversely impact groundwater supplies or any farm practices that rely thereon.

In sum and for the reasons stated above, the proposed pipeline will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices.

Finally, the Board addresses the proposed conditions of approval requiring compliance with the Groundwater Plan. First, the Board finds that the staff and applicant have proposed nearly identical conditions on this issue. Accordingly, the Board intentionally deletes the applicant's proposed condition (Condition of Approval B.22). Further, in order to ensure compliance with all aspects of the Groundwater Plan, the Board adopts the staff-proposed condition (Condition of Approval A.2) as modified to read as follows:

> "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."

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

The opponents further contended that the proposed pipeline will significantly increase fire hazard, fire suppression costs, and risks to fire suppression personnel. The Board denies these contentions, because the applicant has offered substantial evidence in support of the conclusion that these increases will not occur. Pursuant to CCZLDO 4.8.400, the second standard for conditional use review in the forest zone is:

> *"The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel."*[40]

(i) Fire hazard

The proposed pipeline will not significantly increase fire hazard. The pipeline will be subject to exacting safety requirements that will significantly minimize the risk of a fire caused by the pipeline itself. Specifically, the pipeline and all associated facilities will be designed and maintained to conform with or exceed US Department of Transportation (DOT) requirements found in Title 49 Code of Federal Regulations (CFR), Part 192 *Transportation of Natural and*

[40] The wording for this criterion is taken directly from the Goal 4 rule at OAR 660-006-025(5).

Other Gas by Pipeline: Minimum Safety Standards; 18 CFR § 380.15, *Site and Maintenance Requirements*; and other applicable federal and state regulations.

Comments to the Hearings Officer suggested that FERC had not adequately addressed pipeline safety and fire issues. While not directly relevant to the County's approval criteria, it is important to clarify that the Federal Department of Transportation rather than FERC is responsible for ensuring pipeline safety, while the Pipeline Hazardous Materials Safety Administration Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation of natural gas by pipeline. While FERC is not the agency responsible for pipeline safety, the Reliability and Safety Section of the FEIS does include a pipeline facilities discussion at Section 4.12.10. That section describes the DOT safety responsibilities, as well as the specific safety standards the pipeline must comply with in greater detail.

(1) Fire fuel in pipeline corridor

Several comments raised concerns about fire fuel within the 30-foot cleared corridor created by slash or vegetation that would grow along the right-of-way between maintenance clearings. First, based upon its vegetation maintenance and distribution practices, the applicant does not anticipate increased risk from potentially hazardous fuels, which is assumed to imply woody debris or biomasses distributed on the right-of-way after clean-up and reclamation. As explained in more detail in correspondence from Rodney Gregory dated June 9, 2010, as part of the FERC review process, the applicant worked in conjunction with the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) to develop a standardized set of fuel loading specifications for BLM and private lands, and separate specifications for USFS lands. These fuel loading specifications are set forth in Section 10.2 of the ECRP and are developed specifically for the PCGP project based on the amount of woody material expected to be encountered during construction. 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.

On National Forest Lands the maximum amount of slash that would be scattered across the right-of-way will be 12 tons per acre, which would be distributed over the following fuel loading size classes:

Fuel Loading by Size Class	
Size Class (Diameter)	Tons/Acre
0-1/4"	< 1
1/4– 3"	4-8
3-8"	7-12
Maximum	12

On BLM lands the fuel load specifications are:

Fuel Loading by Size Class	
Size Class (Diameter)	Tons/Acre
0-1/4"	<1 [1]
1/4 -8"	5-8 [1]
>8"	10-15
[1] Adapted from USFS Fuel Loading Standards	

These measures will significantly reduce the risk of fires associated with vegetation remaining in the cleared corridors. In order to ensure that fuel loading measures are consistent across the entire corridor, the applicant would accept a condition of approval requiring the BLM loading standards on private lands. On federal lands, at the discretion of the BLM and USFS, the applicant will remove larger slash pieces (more than eight inches in diameter) from the project area and deck them in designated storage sites, or at road crossings. This material will be made available to the public through the various agencies' firewood programs.

Second, the cleared corridor will have less heavy timber that burns with higher intensities once ignited, and will have a greater percentage of lighter fuels according to the fuel loading specifications designed specifically for the proposed pipeline. While the lighter fuels spread within the project corridor may burn somewhat faster than timbered fuels, the lighter fuels are much easier to suppress, burn at a lower intensity, and react more quickly to changes in humidity and moisture. Additionally, the clear-cut corridor will provide fire suppression personnel with an opportunity to utilize the lighter fuels as a control and access point should a fire start in a forest that includes the pipeline corridor.

Finally, revegetation and maintenance of the corridor, as described in the ECRP, will reduce the risk of fires rather than increase the risk. The applicant has consulted with the Natural Resources Conservation Service ("NRCS") and land management agencies to develop seed mixtures appropriate for the corridor, including seed mixtures (described in Table 10.9-1 of the ECRP) for revegetation of private lands. The seed mixtures emphasize native plants adapted to the site conditions. During right-of-way negotiations, private landowners may request other seed mixtures, and the mixtures specified through those negotiations will be documented in landowner right-of-way agreements. The ECRP describes how the applicant will control noxious weeds, reseed the corridor, and monitor to promote successful revegetation.

In upland areas, vegetation within the permanent easement will be periodically 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. Routine vegetation maintenance clearing shall not be done more frequently than every three years. However, to facilitate periodic corrosion and leak surveys, a corridor not exceeding 10 feet in width centered on the pipeline may be maintained annually in an herbaceous state. In no

case will routine vegetation maintenance clearing occur between April 15 and August 1 of any year.

Outside of this 30-foot corridor, mature trees will be allowed to re-establish. Allowing mature trees to re-establish will promote cooling and shading of the 30-foot corridor, which also reduces fire potential.

(2) ATV / OHV Use in Pipeline Corridor

Based on *Utsey v. Coos County*, 38 Or LUBA 516 (2000), it is clear that ATVs / OHVs can be the type of activity that causes a significant impact on forestry, due to the increased risk of fire from sparks generated in the engines of these vehicles. The Board understands that the applicant proposes to work with landowners on a case-by-case basis to reduce ATV / OHV impacts via the use of dirt and rock berms, log barriers, signs, and locked gates, etc. *See also* Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" at p. 4. The Board agrees with the testimony of the opponents that fences placed in key locations (*i.e.* where access to the pipeline would otherwise be easy) would be an effective means to discourage ATV / OHV use. The Board has proposed a condition of approval requiring the applicant to work with landowners in an effort to provide impediments to access to ATVs and OHVs.

(2) Pipeline Corridor as a Conduit for Fire

Multiple opponents argued that the corridor itself would act as a conduit for fire. No scientific evidence or other clear foundation was presented to support the theory. Substantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based." *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384; 752 P2d 271 (1988).

The applicant admits that the cleared corridor will have less heavy timber that burns with higher intensities once ignited, and will have a greater percentage of lighter fuels according to the fuel loading specifications designed specifically for the proposed pipeline. However, no evidence of that leading to a conduit effect is in the record. Mr. Hemphill downplays the concern in his report dated June 17, 2010 due to the fact that the corridor will be mowed every three to five years, as needed. *See* "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline," at p.5.

The Board notes that this issue was briefed extensively in the Douglas County case, and the County agreed with the applicant's position on that issue. *See* Douglas County Planning Commission Findings of Fact and Decision, at p. 63-5.

(ii) Fire suppression costs and personnel

At the hearing, there was considerable discussion regarding the potential for a forest fire caused by a ruptured gas pipeline. The Hearings Officer agreed with the applicant that such a risk is remote. However, if it did occur it has the potential to be a huge problem, and this type of

event is probably the most likely emergency response scenario in the rural area. The Hearings Officer previously expressed concerns about the capability of small rural fire departments, which are often manned by volunteers, to combat fires in remote areas of the County. *See* letter dated June 6, 2010.

The applicant discussed these issues in its May 11, 2010 submittal. *See* Letter from Rodney Gregory and Derrick Welling dated May 11, 2010, at p. 14-17. The applicant also discussed the fact that there will be personal on call 24 hours a day that can coordinate an immediate response to situations as they develop. *See also* Reliability and Safety Report dated March 2010, at p. 8. The applicant's "Reliability and Safety Report" dated March 2010 stated that various actions will be taken in the future, such as training and meetings with emergency responders. *Id.* The report also stated that "Williams Pacific Operator will use adequate local or contract resources to support the pipeline and facilities if an emergency occurs."

The applicant also addressed the issue in its final argument dated June 24, 2010, as follows:

> For the reasons set forth above and in the applicant's prior submittals, the fire risk associated with the pipeline is low. Therefore, the pipeline will not significantly increase risks to fire suppression personnel, nor will it significantly increase fire suppression costs. The presence of the pipeline will require coordination between the applicant and local fire personnel. In order to comply with federal safety regulations, the applicant must coordinate with local emergency response groups prior to commencing pipeline operations. As detailed in Section 4.12.10 of the FEIS, the applicant will meet with local responders, including fire departments, to review plans and communicate specifics about the pipeline. If requested, the applicant will also participate in any emergency simulation exercises and provide feedback to the emergency responders.
>
> While there will be some additional cost to local fire suppression organizations in order to participate in the coordination efforts, the majority of the education and coordination costs will be borne by the applicant and the costs to local department will not be significant. Furthermore, those efforts will in turn reduce the risk to fire suppression personnel that respond to a fire in the vicinity of the pipeline. As detailed in the Reliability and Safety Report, which is attached as Exhibit 7 to the applicant's May 11, 2010 submittal:
>
> "1.6.1 Emergency Response Capabilities
>
> "Williams Pacific Operator will maintain 24-hour emergency response capabilities, including an emergency-only phone number,

which accepts collect charges. The number will be included in informational mail-outs, posted on all pipeline markers, and provided to local emergency agencies in the vicinity of the pipeline and compressor station.

"In addition, Williams Pacific Operator 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. Williams Pacific Operator will meet with local emergency responder groups (fire departments, police departments, and other public officials) to review plans and will work with these groups to communicate the specifics about the pipeline facilities in the area and the need for emergency response. Williams Pacific Operator will also meet periodically with the groups to review the plans and revise them when necessary. If requested by local public emergency response personnel, Williams Pacific Operator will participate in any operator-simulated emergency exercises and post-exercise critiques. Williams Pacific Operator will use adequate local or contract resources to support the pipeline and facilities if an emergency occurs."

Friends of Living Oregon Waters (FLOW) contends that the application should be denied because the applicant has not yet obtained authorization for use of water that might be needed during construction of the pipeline for fire suppression purposes. First, FLOW does not identify any applicable approval criteria that it believes would authorize the hearings officer to deny the application due to a failure to prove that it can obtain water for fire-fighting purposes a year or more in advance.

Second, this issue is addressed in the letter from Derrick Welling of Pacific Connector (attached as Exhibit 5 to the applicant's June 17, 2010 submittal), which explains that necessary water for fire suppression and other activities will be obtained in accordance with the required federal and state permitting requirements, and that all water withdrawals will meet or exceed all permitting requirements. The applicant 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.

The opponents contend that FERC has not adequately addressed pipeline safety and fire issues, and they have questioned the lack of an emergency response plan in the FEIS. As explained above, the federal DOT rather than FERC is responsible for ensuring pipeline safety, and there is no formal federal requirement to include an emergency response plan at this stage of

the proposal or as part of the FEIS. However, in order to respond to the comments on this issue, the applicant has provided an example of the type of Public Safety Response Manual that will be provided, which was attached as Exhibit 8 to the applicant's submittal dated May 11, 2010. Further, the applicant has provided some information regarding Emergency Response Capabilities in the Reliability and Safety Report, which was attached as Exhibit 7 to the applicant's May 11, 2010 submittal.

It appears that fire protection personnel in the County should already be receiving some training in incident response to natural gas pipeline fires, due to the approval of the 2002 12" pipeline. In that application, the applicant promised to train fire personnel on specific methods for responding to natural gas pipeline fires. The applicant here has also proposed to conduct additional training at the applicant's expense.

The Board finds that it is reasonable to conclude that the pipeline will not significantly increase risks to fire suppression personnel or significantly increase fire suppression costs. After all, a pipeline is expected - on a statistical basis - to have an expected incident rate of one per every 280 years, and one injury can be expected every 1001 years. *See* Hearings Officer Decision, File No. HBCU-02-04, at p. 43. It stands to reason that if no incidents occur, then the cost of responding will necessarily not increase.

Moreover, there was significant expert testimony introduced in the Pipeline Solutions, Inc. case, File No. HBCU-02-04, from first responders that have pipelines located in their district. *See* Hearings Officer Decision, File No. HBCU-02-04, at p. 43. Those first responders were unanimously of the opinion that the cost to their department was little or nothing. The hearings officer in that case found such evidence to be "particularly persuasive." Although this case involved a 36" pipeline instead of a 12" pipeline, the Board does not find that to be a significant difference. While the applicant in *this* case did not provide much in the way of similar testimony, the hearings officer's findings in HBCU-02-04 are themselves substantial evidence that can be relied on to form a conclusion in this case as well. Such evidence might not be afforded as much weight, and could have been overcome by current testimony from first responders expressing negative implications associated with the proposed pipeline, but no testimony of this type was received into evidence. Therefore, the Board finds that substantial evidence exists in the record to support a conclusion in the applicant's favor on this issue.

Specifically, the Board finds that the applicant's evidence is sufficient to support a finding that the standard is either satisfied or that feasible solutions to identified problems exist, and that a condition of approval can be imposed to ensure compliance. *Rhyne v. Multnomah County*, 23 Or LUBA 442,447-48 (1992). As noted in the Reliability and Safety Report, an emergency response plan has not yet been developed for the pipeline. The *sample* report demonstrates the feasibility of creating a similar report for this facility, however. The applicant has proposed a condition of approval requiring submittal of a County pipeline-specific Public Safety Response Manual ("PSRM") to the County prior to construction, and the Hearings Officer recommended imposing this condition. Staff proposed that the condition be modified to require the applicant provide the PSRM prior to commencing operations. The Board agrees that the applicant should provide a PSRM; however, the Board finds that staff's proposal may not provide sufficient time for the applicant to distribute the PSRM and coordinate with area emergency

response personnel. Accordingly, the Board modifies and adopts the condition as Condition of Approval B.19 to read as follows:

> "At least six (6) months' prior to delivery of any gas to the Jordan Cove Energy Project LNG import 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. As detailed in Section 4.12.10 of the FEIS, 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."

For these reasons, the Board finds that the proposed pipeline will not significantly increase fire hazard, fire suppression costs, or risks to fire suppression personnel.

Section 4.8.600, Section 4.8.700 and Section 4.8.750

At the hearing, the parties presented different views regarding the applicability of CCZLDO Sections 4.8.600, 4.8.700 and 4.8.750. Section 4.8.400 provides as follows:

> SECTION 4.8.400. Review Criteria for Conditional Uses in Section 4.8.300 and Section 4.8.350.
>
> A use authorized by Section 4.8.300 and Section 4.8.350 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
>
> B. The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and
>
> C. All *uses*[41] must comply with Section 4.8.600, Section 4.8.700 and Section 4.8.750. (Emphasis added).

By their own terms, however, Section 4.8.600, Section 4.8.700 and Section 4.8.750 only

[41] The term "use" is defined as follows: "USE: The end to which a land or water area is ultimately employed. A use often involves the placement of structures or facilities for industry, commerce, habitation, or recreation."

appear to apply to "dwellings" and "structures." There is a significant ambiguity in the CCZLDO regarding whether a utility is a "structure" as that term is defined in the CCZLDO. The Board resolves this ambiguity and, for the reasons stated below, interprets the CCZLDO to find that a "utility" is not a "structure" for purposes of these applications.

Mark Sheldon and others argue that the proposed pipeline is a "structure" within the meaning of the CCZLDO. His comments cite a CCZLDO definition of "structure" as follows: "Anything constructed or installed or portable, the use of which is required *[sic?]* a location on a parcel of land." He cites "Section 2.1.200" as the source of this quote. However, that is an outdated definition. The current definition in the CCZLDO is as follows:

> "STRUCTURE: Walled and roofed building including a gas or liquid storage tank that is principally above ground."

As stated by staff on the record, the County amended the definition of "structure" on September 8, 2009, through adoption of Ordinance 09-07-003PL. This was one of several legislative CCZLDO amendments initiated in response to Federal Emergency Management Agency ("FEMA") updates. The amendments were necessary in order for the County to continue in the National Flood Insurance Program. As further stated by staff on the record, the current definition of "structure" was taken from the model ordinance provided by DLCD.

The Board must construe the various provisions of the CCZLDO. When construing a statute, the court will first look directly at the text of the statute itself. *See Whipple v. Howser*, 291 Or 475, 635 P2d 782 (1981) (citing *Greyhound Corp. v. Mount Hood Stages, Inc.*, 437 US 322, 330, 98 S Ct 2370, 2375 (1978)). Emphasizing the need to look first to the language of the statute, the *Whipple* court stated:

> "The cardinal rule for the construction of a statute is to ascertain from the language thereof the intent of the law makers as to what the purpose was to be served, or what the objective was designed to be attained."

Whipple, 291 Or at 479 (citing *Swift & Co. and Armour & Cove, Co. v. Peterson*, 192 Or 97, 233 P2d 216 (1951). *See also State of Oregon v. Buck*, 200 Or 87, 92, 262 P2d 495 (1953). The *Whipple* court also cited to *State ex rel. Cox v. Wilson*, 277 Or 747, 562 P2d 172 (1977), in which the court stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute then the words by which the legislature undertook to give impression to its wishes."

There the text of CCZLDO §2.1.200 seems to be clear and unambiguous. The plain text of this definition excludes a subsurface pipeline from being considered a "structure" under the CCZLDO.

However, one factor that complicates the analysis is, as Mr. Sheldon notes, the CCZLDO defines the term "utility" as "public service *structures* * * *." CCZLDO 2.1.200. The meaning of a seemingly unambiguous code provision can be clouded by contextual provisions in the same legislative scheme: "It is true that the context of a statute or statutory scheme can sometimes reveal an ambiguity in a particular phrase that, standing alone, appears to have a clear meaning. *Southwood Homeowners Ass'n v. City Council of Philomath*, 106 Or.App. 21, 806 P.2d 162 (1991) (citing *Dennehy v. City of Portland*, 87 Or.App. 33, 40, 740 P.2d 806 (1987).

One commonly employed first-level maxim of statutory construction is that in the absence of some indication of contrary intent, it is likely that a term is intended to have the same meaning throughout a legislative enactment. *Knapp v. City of North Bend*, 304 Or 34, 41, 741 P2d 505 (1987); *State v. Holloway*, 138 Or App 260, 267-68, 908 P2d 324 (1995)(The fact that a regulatory document uses a term consistently throughout the document strongly suggests that the drafters intended the same meaning in the provision in dispute); *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 141, 20 P3d 837, *rev. den.* 332 Or 518, 32 P3d 898 (2001). Thus, when determining the meaning of a term within a legislative enactment, it is sometimes possible to look to other examples of the use of that term in the same legislative enactment, in order to gather insight as to the overall intended meaning of the term. However, this interpretative maxim often applies with less force where, as here, the legislative enactment is a patchwork of amendments made over time, because the likelihood that the subsequent amendments have made changes using terms and phrases that are not in keeping with the original terms increases.

In addition, when a word used in a zoning ordinance is defined, the definition as set forth in the definition section usually controls over a generalized dictionary definition. However, that is not always the case. In fact, CCZLDO §2.1.100 recognizes that a word used in the ordinance will usually have the meaning as defined in CCZLDO §2.1.200 but provides an exception when "it is plainly evident that a different meaning is intended."

In this case, the Board finds that it is plainly evident that the definition of the term "utility" should not be interpreted in connection with the definition of "structure." Indeed, the use of the defined term "structure" in the definition of "utility" is not very intuitive, given that "structures" are defined as being something that is a "walled or roofed building." Otherwise, the suggestion would be that, in addition to being public service" related a "utility" must be either a building or a gas or liquid storage tank. The question is whether the CCZLDO, as written, evinces a purposeful intent to use the term "structure" in a consistent manner throughout the CCZLDO. It does not.

In this case, the context provided within the definition of "utility" suggests that the term "structure" is being used there in a more broad sense (and consistent with the *earlier* CCZLDO definition). For example, among the list of "utilities" are water, sewer, and gas lines, which are typically routed underground and do not constitute "structures" within the meaning of the new definition. If the Board interprets the CCZLDO such that the term "utility" only includes "structures" that meet the new definition of that term, (*i.e.* a "walled and roofed building including a gas or liquid storage tank that is principally above ground"), then the interpretation would effectively bar all underground utilities. Furthermore, it would effectively require that

EXHIBIT A

each utility had to be a "building." The Board finds that this construction of the CCZLDO is not consistent with legislative intent.

Thus, it is apparent that this inconsistency results from the recent code update process, as there was a failure to cross-check the code to see how the new definition of "structure" affects provisions such as the definition of "utility." Take, as an example of this failure, the language of CCZLDO 4.8.750(B): "all buildings or structures except for fences shall be set back...." This code provision assumes that a fence is a structure; otherwise, there would be no reason to express the "exception." But a fence is clearly not a "walled and roofed building including a gas or liquid storage tank that is principally above ground."

The Board concludes that the CCZLDO contains internal inconsistencies between the formal definition of the term "structure" and the usage of that term throughout the CCZLDO. The applicant discusses the inconsistency as follows:

> Nonetheless, this inconsistency does not override the obvious intent of the drafters to exclude subsurface pipelines from the definition of a "structure" when that definition was recently adopted in 2009. As explained by staff in the supplemental staff report, the Coos County Board of Commissioners adopted the new definition of "structure" on September 8, 2009 as part of a series of code amendments related to flood damage prevention under FEMA requirements. The county adopted the language provided in the "Oregon Model Flood Damage Prevention Ordinance," which was provided by DLCD to local governments to ensure compliance for purposes of participation in the National Flood Insurance Program. The hearings officer appears to be correct that the county's adoption of the model ordinance did not include a cross-check of other uses of the term "structure" in the county code for consistency. However, the ambiguity created by inconsistent use of the defined term in a separate definition does not override the clear intent of the drafters to only apply the term "structure" to walled and roofed buildings.

See letter from Mark Whitlow to Patty Evernden dated June 24, 2010, at p. 11. The Board agrees, and finds that the Code uses the term "structure" differently and inconsistently throughout the CCZLDO. This does not appear to be purposeful, but rather, as discussed above, results from the 2009 amendments to the definition of the term "structure." Therefore, although the CCZLDO definition of "utility" expressly *presumes* that utilities are "structures," the term "structure" in that context means something along the lines of "anything constructed or installed, the use of which requires a location on a parcel of land."

Therefore, based upon this legislative history the Board construes these provisions of the CCZLDO together and interprets the CCZLDO such that the term "structure" as used in Section 4.8.600, Section 4.8.700 and Section 4.8.750 is defined as set forth in the definition section of the CCZLDO, whereas the term "structure" as set forth in the definition of "Utility" means

"[a]nything constructed or installed or portable, the use of which requires a location on a parcel of land."

In addition, the Board finds that the reference to the term "use" at Section 4.8.400(C) does not broaden the applicability of Section 4.8.600, Section 4.8.700 and Section 4.8.750 to include "uses" that are not "structures." Depending upon whether one relies on the definition of "structure" or the definition of "utility," different conclusions arise. The Hearings Officer noted that Section 4.8.600 appears to be a direct codification of OAR 660-006-0029 and 4.8.700 is a direct codification of OAR 660-006-0035. As such, the Hearings Officer found that these provisions of the CCZLDO cannot be interpreted in a manner that is less restrictive than state law. The state administrative rules use the terms "dwellings" and "structures" but do not appear to define the terms. The Hearings Officer did not find any obvious applicable references in state law defining the term "structure." Therefore, the Hearings Officer concluded that state law leaves the task of defining the term to the local governments tasked with implementing OAR Chapter 660, division 6. The Board adopts by reference the Hearings Officer's findings regarding the relationship between state law and these provisions of the CCZLDO.

Regardless of the issue created by the term "use" in Section 4.8.400(C), the question remains whether an underground utility is a "structure." As stated above, the Board finds that Section 4.8.600, Section 4.8.700 and Section 4.8.750 only apply to structures as that term is used in CCZLDO 2.1.200, notwithstanding the definition of the term "utility." In the alternative, the Board has prepared findings set forth below that assume, *arguendo*, that utilities are "structures," and, as a result, CCZLDO 4.8.600, 4.8.700 and 4.8.750 are applicable. As demonstrated below, the analysis under those sections is somewhat awkward when applied to a gas pipeline; but ultimately the applications can satisfy those standards.

CCZLDO §4.8.600

The application narrative dated April 14, 2010 explains how the proposed pipeline will meet the siting standards at CCZLDO §4.8.600, .700, and .750. The Board adopts that portion of the April 14, 2010 application as findings as if fully set forth herein. CCZLDO §4.8.600 is a direct codification of OAR 660-006-0029(1). The administrative rule provides as follows:

> (1) Dwellings and structures shall be sited on the parcel so that:
>
> (a) They have the least impact on nearby or adjoining forest or agricultural lands;
>
> (b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;
>
> (c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and
>
> (d) The risks associated with wildfire are minimized.

The intended purpose of OAR 660-006-0029(1) is clarified by OAR 660-006-0029(2):

> (2) Siting criteria satisfying section (1) of this rule may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.

As an initial matter, OAR 660-006-0029(2) makes clear that OAR 660-006-0029(1) and CCZLDO §4.8.600(A) were not intended to apply to linear features such as gas pipelines. Setbacks and clustering are not consistent with linear features such as gas pipelines. While it is possible to site pipelines "close to existing roads," the applicant has already taken that step.[42] In addition, CCZLDO §4.8.600(A) starts with the premise that one can "site" a structure on a particular property in a location that minimizes the impacts and harms that such a structure will cause on neighboring forest and farm lands, forest operations, etc, as compared to other locations on the site. That type of analysis is really not well-suited towards determining the best location for a linear pipeline feature. With a linear feature such as a pipeline, it is safe to say that, as a general rule, the route that causes the least impact is generally going to be the shortest, most direct route. The applicant certainly has proposed the shortest *feasible* route, and therefore has likely met the intent of this provision. In addition, the applicant testified that it has some latitude under the FERC Order to make site-specific locational adjustments to the general alignment approved by FERC in order to accommodate landowner's preferences. The Board finds that site-specific concerns of that nature are best addressed as part of that process and adopts Condition of Approval A.4 to ensure compliance.

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[42] In its May 11, 2010 submittal, the applicant states:

> Finally, where practicable, the alignment of the PCGP Project utilized existing rights-of-way and pipeline and powerline corridors while providing a safe distance between these existing utilities. A table identifying specific areas where the PCGP is co-located with existing right-of-way and corridors is attached as Exhibit 2 to this letter. While the alignment of the pipeline parallels existing roads and railroads in a number of areas, routing the pipeline entirely within existing right-of-way was not feasible. For example, many existing transportation easements were avoided because of the negative impact to traffic flow during construction. Additionally, many roads are located in valleys or drainage bottoms adjacent to streams where it is not feasible to install a large-diameter, steel pipeline due to large construction area requirements, confining topographic conditions, and waterbodies running parallel to the alignment. Many forest roads are located on steep side slopes where it is impractical to route the pipeline because of constructability/stability requirements and concern with the long-term safety and integrity of the pipeline. To ensure the pipeline is installed properly within consolidated (non-filled) materials and to provide the necessary equipment space, construction on steep side slopes requires significantly more construction areas to accommodate the necessary cuts or excavations. Long-term safety and the potential for third-party damage to the pipeline must be considered. Finally, future road expansions or improvement projects may require the pipeline to be relocated where it has been constructed within road easements, which may create unforeseen environmental, landowner, and system impacts.

Subsections (B) of CCZLDO §4.8.600 requires the applicant to provide evidence that "the domestic water supply" is from a source authorized by law. The Board finds that this section is context supporting the conclusion that an underground utility is not a "structure" within the meaning of the definition of structure in CCZLDO §2.1.200. But even if that is not the case, CCZLDO §4.8.600(B) only applies to uses that require or propose domestic water usage. Obviously, a gas pipeline has no use for a domestic water supply.

Subsection (C) and (D) of CCZLDO §4.8.600 only apply if the use includes a "dwelling," and therefore are not implicated here.

CCZLDO §4.8.700 (Fire Siting Safety Standards).

CCZLDO §4.8.700 contains certain requirements that apply only to dwellings or structures that have a roof. Moreover, the CCZLDO also gives the Planning Director the ability to "authorize alternative forms of fire protection when it is determined that these standards are impracticable." In this case, the applicant proposes a 30 foot cleared corridor, centered on the pipe. *See* Application Narrative, at p. 13. The Board determines that demanding additional primary and secondary firebreaks under CCZLDO §4.8.700 (A)(1) & (3) are not practicable because they are not needed and they conflict with the objectives sought to be achieved by other CCZLDO criteria. Similarly, the garden hose requirement in CCZLDO §4.8.700 (A)(2) is also impracticable. CCZLDO §4.8.700 (B), (C), (D), (E), (F) and (H) are clearly inapplicable. CCZLDO §4.8.700 (G) would be applicable assuming utilities are structures, but should be easily met via a condition of approval. The Board amends Condition of Approval B.17 to ensure compliance with this standard.

CCZLDO §4.8.750 (Development Standards).

CCZLDO §4.8.750 contains development standards for "development" and "structures." The minimum lot size provisions and setback provisions do not apply to linear utility features that must, by their very nature, traverse property lines of all sizes. That is because there is no set of facts under which those criteria could be met. If the County had intended to prohibit linear utility features entirely, it would not have made them administrative conditional uses in the Forest zone. Indeed, these CCZLDO standards are further evidence that utilities are not meant to be considered "structures" within the meaning of CCZLDO 2.1.200. Further, CCZLDO §4.8.750 (C) through (I) do not appear to contain any substantive requirements applicable here.

Jody McCaffree contends that the proposed permanent access road to block valve #4 is not allowed in the Forest zone under Goal 4. OAR 660-006-0025(3) identifies uses that are consistent with Goal 4 and allowed outright on forest lands. Private access roads are not specifically enumerated as an allowed use under this rule. Nevertheless, the Board finds that the access road is a use permitted outright in conjunction with the pipeline.

First, the County's definition of "road" in CCZLDO 2.1.200 indicates that roads are not to be construed as a "use" *per se*, but as a "public or private way created or intended to provide ingress or egress for persons to one or more lots, parcels, areas, or tracts of land." Further, the definition of road "does not include a private way that is created or intended to provide ingress or

egress to such land in conjunction with the use of such land exclusively for forestry, mining, or agricultural purposes."

When the principal use is allowed in the zone, that right carries with it all associated uses which are normally essential, auxiliary and incidental thereto, (as opposed to those uses which are mere non-essential accessory uses). For example, an applicant for a McDonald's restaurant does not have to seek separate approval of an "office" in order to have a room in the structure dedicated to administrative functions. It is understood that all restaurants have an office where administrative matters are attended to, and land use approval for a "restaurant" inherently and automatically includes an incidental administrative office to support that restaurant use (but not for other unrelated commercial functions).

As relevant here, LUBA has held that unenumerated uses that are necessary and accessory to an enumerated forest use are permitted "because they are, in effect, part of uses expressly authorized by Goal 4." *Lamb v. Lane County*, 7 Or LUBA 137, 143 (1983). OAR 660-006-0025(3)(c) allows a pipeline use outright as a "[l]ocal distribution lines (*e.g.*, electric, telephone, natural gas) and accessory equipment." Similarly, OAR 660-006-0025(4)(q) allows new gas distribution lines as a conditional use. As the applicant explains on page four of the application narrative dated April 14, 2010, the proposed road is "necessary for the operation and maintenance of the pipeline." Without this road, the applicant will be unable to access the block valve, which is a necessary component of the pipeline, and ensures that the applicant can operate the pipeline in a safe manner. In this way, the access road is "necessary and accessory" to, and thus effectively a part of, the pipeline use. Therefore, under *Lamb*, the access road is permitted under Goal 4.

Finally, accepting Ms. McCaffree's interpretation of OAR 660, Division 6 runs counter to legislative intent, as it at least curtails, and in many cases effectively nullifies, the use rights granted under the rule. If the Board were to agree that access roads in conjunction with one of the enumerated uses are not allowed, it would effectively preclude development of many of the allowed uses on forest lands that cannot otherwise exist in the absence of developing an access road. For example, many farm uses, private hunting and fishing operations, and caretaker residences — all permitted outright on forest lands under OAR 660-006-0025(3) — could be inaccessible and therefore effectively undevelopable under Ms. McCaffree's interpretation of the rule. Similarly, conditional uses such as cemeteries and firearms training facilities could not exist without road access; neither could any of the dwellings allowed under OAR 660-006-0027. These listed uses all contemplate being able to provide at least a private road for access. There is no evidence that LCDC intended for such a harsh construction of the rule. The Board rejects Ms. McCaffree's contention.

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

CCZLDO §4.9.450 Additional Hearings Body Conditional Uses and Review Criteria:

The applicant notes that the proposed pipeline will cross approximately 3.72 miles of property in Coos County zoned Exclusive Farm Use (EFU), all of which is privately owned. The

3.72 miles of EFU-zoned parcels are interspersed throughout the length of the pipeline within Coos County. The Board concludes that the pipeline is consistent with the requirements of ORS Chapter 215, OAR 660, Division 33, and the applicable approval criteria of the CCZLDO.

CCZLZO §4.9.450 is more or less a direct codification of ORS 215.283(1)(c).[43] CCZLZO §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[44] and 4.9.700.[45]
>
> * * * * * *.
>
> 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.[46] ORS 215.275 provides:

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[43] 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.

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

[45] 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.

[46] 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

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;

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

(c) Lack of available urban and nonresource lands;
(d) Availability of existing rights of way;
(e) Public health and safety; and
(f) Other requirements of state or federal agencies.

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

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

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

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

The exception 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 supposed to be subject to ORS 215.275(1). This subsection contains the requirement that the applicant to 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 660-033000139(16).[47] 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.

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[47] OAR 660-033-0130 (16) provides:

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

(A) Technical and engineering feasibility;

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

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

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

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

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

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

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

WELC addresses this criterion by arguing that "[r]eams of testimony submitted to [FERC] explained how the * * * pipeline is not at all necessary in order for natural gas to be provided to US residents." *See* Letter from WELC staff attorney Jan Wilson dated June 8, 2010, at p. 5. Ms. Wilson goes on to state that California and other states will not need natural gas, and that "the threat of this pipeline being used to bring domestic natural gas * * * to a coastal terminal is very real." *Id.* 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." To the contrary, it seems that if the United States is to be faulted, it is because it fails to export enough goods to other countries. Nonetheless, if "reams of testimony" were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning code 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, 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 CCZLZO §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).

The applicant addresses the issue as follows:

> The PCGP is an interstate natural gas pipeline that has been authorized by and is subject to regulation by FERC under Section 7c of the NGA under which a Certificate of Public Convenience and Necessity has been issued to Pacific Connector to construct, install, own, operate, and maintain the PCGP. The PCGP is a utility facility under CCZLDO Section 4.9.450.C.
>
> Due to its linear nature and the points of connection it must make from the JCEP LNG Terminal site on the North Spit over the 49.72 miles to the interstate pipeline connection near Malin, Oregon, it is necessary for some segments of the pipeline to be situated in agricultural land in satisfaction of this review criterion and the companion criterion of ORS 215.275(1). ORS 215.275(6) exempts interstate natural gas pipelines from the provisions of ORS 215.275(2)-(5) and OAR 660-33-0130 has a similar exemption.
>
> The PCGP is a locationally dependent linear facility that must cross exclusive farm use land in order to provide natural gas service between the Jordan Cove terminal and the existing pipeline system. In order to achieve the project purpose, the pipeline must start at the Jordan Cove terminal and exit Coos County on the county's eastern boundary to eventually connect to the existing pipeline near Malin, Oregon. Given the large expanses of EFU-zoned lands scattered throughout the rural portions of Coos County, even if avoidance of EFU lands were the only

consideration in the pipeline alignment, it would not possible for the pipeline to avoid all EFU zoned lands and maintain a reasonably direct route through Coos County. Therefore, the PCGP must be sited in the Coos County EFU zone in order to provide the planned natural gas service. Under the existing alignment, the impacts to EFU-zoned land is limited, amounting to only 3.72 miles of the total of 49.72 miles crossed within Coos County. Therefore, while not eliminated, impacts to EFU lands were minimized during the alignment selection process. The alignment selection process is discussed in detail in Section 3.4 of the FEIS.

Staff commented on the need issue as follows:

> The pipeline will travel from the North Spit to the Douglas county line for a distance of approximately 50 miles. The pipeline route will travel through 3.72 miles of EFU land. The applicant states that it would not be possible to avoid all EFU zoned lands and maintain a reasonably direct route, and has provided a detailed description of the alternative route analysis that was undertaken as part of the FERC review and approval process in its correspondence dated May 11, 2010, as well as the pipeline location alternatives analysis in Section 3.4 of the FEIS, which is included in the applicant's May 12, 2010 submittal. Given the need to cross most of the county to achieve the project purpose, and the large expanses of EFU land throughout rural portions of the county, there appears to be a need to site the pipeline on agricultural land in order to provide the utility facility service.

In its May 11, 2010 submittal, the applicant states:

> Third, as discussed above, the pipeline is a locationally dependent linear facility that must cross EFU land in order to achieve a reasonably direct route. In order to achieve the project purpose, the pipeline must start at the Jordan Cove LNG terminal and exit Coos County on the county's eastern boundary in order to eventually connect to the existing pipelines near Roseburg, Medford and Malin, Oregon.[48] Given the number and configuration of EFU-zoned lands in the rural portions of Coos County, it is not possible for the pipeline to avoid all EFU zoned lands and maintain a reasonably direct route through Coos County.

The Board agrees with the applicant and staff for the reasons stated above, and frankly finds

[48] The location of the Jordan Cove LNG terminal itself was selected as the result of a separate alternatives analysis approved by FERC.

assertions to the contrary to be frivolous. It seems rather obvious that it would not be possible to build a pipeline from one end of Coos County to the other without traversing any EFU land. To the extent that it could be accomplished, the route would be highly circuitous, and the need to traverse difficult forested terrain would far outweigh any benefit to EFU lands. In any event, the County has no ability to determine that an interstate gas pipeline is not needed or that alternative routes are feasible. As discussed earlier, those issues are within the sole province of FERC to decide.

Various opponents raised the issue that the proposed pipeline is not an "interstate pipe line" for purposes of ORS 215.275(6) because the segment of pipeline being proposed under consideration does not cross state lines. *See e.g.*, Letter from WELC staff Attorney Jan Wilson dated June 8, 2010, at p. 6:

The applicant responds as follows:

> WELC and other opponents continue to argue that the PCGP is not an "interstate" gas pipeline under ORS 215.276(6) because it is only located within the State of Oregon. Although the pipeline itself is only physically located within Oregon, it will transport liquefied natural gas from the FERC-approved LNG import terminal on the North Spit of Coos Bay *into* the interstate pipeline system, and that gas will then be sold in interstate commerce. The PCGP is therefore an interstate natural gas pipeline subject to federal jurisdiction and regulation by FERC. There would be no FERC jurisdiction over this project if it were not an interstate gas pipeline. During the first open record period, Pacific Connector submitted relevant portions of the Natural Gas Act, which explains that the basis for FERC jurisdiction over this project is the fact that it is an interstate pipeline because the pipeline will allow for the "transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." 15 USC § 717(b).[49] Further, that section excludes from

[49] 15 U.S.C. 717(a)-(c) provides as follows:

> (a) Necessity of regulation in public interest
>
> As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) Transactions to which provisions of chapter applicable

> FERC jurisdiction only those truly "intrastate" projects where the natural gas is received "within or at the boundary of a State if all the natural gas so received is ultimately consumed within such state." 15 USC § 717(c). Because the PCGP will transport natural gas into interstate commerce through the interstate pipeline system, it is an "interstate natural gas pipeline" within the meaning of FERC statutes and rules and ORS 215.275(6).

See Final Argument letter from Mark Whitlow dated June 24, 2010, at p. 23. The applicant is correct for the reasons stated above. The term "interstate" in ORS 215.275(6) refers to any segment of a gas pipeline that is interconnected with other segments in a manner that allows gas to flow in interstate commerce. Therefore, the fact that this particular segment of pipeline is located entirely within Oregon does not mean that it is not an "interstate" gas pipeline. *See* NGA, 15 USC § 717(b), and Section 1671(8) of the Natural Gas Pipeline Safety Act of 1968. As the applicants pointed out, the fact that FERC believes that it has jurisdiction over the project is perhaps the most telling evidence that the opponent's argument is plainly wrong.

4. **CBEMP Policies – Appendix 3 Volume II**

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

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

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> (c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence
>
> The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

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.

Staff states that this plan policy applies to 6-WD,[50] 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS and 21-RS. The pipeline is a permitted use in each of these CBEMP zoning districts. Staff asserts that the "pipeline is a necessary component of the approved marine terminal and LNG facility which are water-dependent uses and must be located in these CBEMP shoreland zones." Therefore, the proposal is consistent with this plan policy.

Jody McCaffree's letter of June 10, 2010, disagrees with staff, and asserts that the applications are deficient with respect to CBEMP Policy #14. As the applicant notes, Ms. McCaffree is incorrect for several reasons:

Policy #14 was previously interpreted and applied by the Board of County Commissioners in both the application of Jordan Cove Energy Project, L.P. (Coos County Department File No. #HBCU-07-04, Coos County Order No. 07-11-289PL) and in the application of the Oregon International Port of Coos Bay (Coos County Planning Department File No. #HBCU-07-03, Coos County Order No. 07-12-309PL). Copies of both decisions are included in the documents submitted into the record by the applicant at the public hearing on May 20, 2010. Those decisions provide written findings showing compliance with Policy #14, partially through Board findings from the Board's findings from the adoption of the Coos County Comprehensive Plan (see findings from HBCU-07-03 below). Regarding the Board's decision approving JCEP's LNG terminal application, the Policy #14 finding appears at page 13 and states:

> "The proposed LNG terminal is an industrial and port facility that is water-dependent and consistent with the uses allowed in the 6-WD zoning district. The proposed use satisfies a need that cannot be accommodated on uplands or shorelands in urban and

[50] PCGP and its associated facilities were approved under JCEP's prior LNG Terminal application.

> urbanizable areas or in other rural areas built upon or irrevocably committed to non-resource use. The Board relies upon and adopts the conclusions of the hearings officer regarding consistency with Policy #14. The applicant has provided evidence sufficient to establish that [the] proposed site on the North Spit is the only site available below the railroad bridge with sufficient size and the necessary water-dependent characteristics for the proposed facility, including access to one of the only three deep-draft navigation channels in the State of Oregon."

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

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

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

Under Policy #14, the PCGP would 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" (also see utilization of that term in ORS 215.275(6)). The pipeline would otherwise be described as an "other use" in Policy #14 I.e. As an "other use", the PCGP would be reviewed in each CBEMP zoning district as a low-intensity utility. In either event, Policy #14 I.e requires "a finding by the Board of Commissioners or its designee that such uses satisfy a need which cannot be accommodated on uplands or shorelands in urban or urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use," a finding that was already made by the Board in the prior decisions approving JCEP's LNG terminal and, again, approving the Port's Oregon Gateway Marine Terminal. It is appropriate for the Board to make similar findings in this case for the reasons set out below.

As stated in the application narrative, the pipeline must originate at the Jordan Cove LNG terminal which has been permitted by the County as above described. As also provided in several sections of the applicant's narrative, the pipeline route has undergone extensive analysis. The proposed route has been determined by FERC through the NEPA process, as described in the FEIS. The alternative analysis appears at Section 3.0 of the FEIS, and the pipeline alternative analysis is contained in Section 3.4. Based on the alternative analyses and the FERC-determined route, the pipeline must cross these zoning districts. However, following construction, the subsurface pipeline will not be an impediment to the uses associated with the County's rural shoreland areas. Protection for specific resources in those areas are provided in the applicant's responses to Policies #17, #18 and #22 in the applicant's narrative.

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

This plan policy is met.

b. Plan Policy #16 Protection of Site Suitable for Water-Dependent Uses and Special Allowance for new Non-Water-Dependent Uses in "Urban Water-Dependent (UW) units."

Local government shall protect shorelands in the following areas that are suitable for water-dependent uses; for water-dependent commercial, recreational and industrial uses.

a. Urban or urbanizable areas;
b. Rural areas built upon or irrevocably committed to non-resource use; and

c. Any unincorporated community subject to OAR Chapter 660, Division 022 (Unincorporated Communities).

This strategy is implemented through the Estuary Plan, which provides for water-dependent uses within areas that are designated as Urban Water-Dependent (UW) management units.

I. Minimum acreage. The minimum amount of shorelands to be protected shall be equivalent to the following combination of factors:

a. Acreage of estuarine shorelands that are currently being used for water-dependent uses; and

b. Acreage of estuarine shorelands that at any time were used for water-dependent uses and still possess structures or facilities that provide or provided water-dependent uses with access to the adjacent coastal water body. Examples of such structures or facilities include wharves, piers, docks, mooring piling, boat ramps, water intake or discharge structures and navigational aids.

The only UW zoning applicable to this project is located near Coos Bay which is the site of the Georgia Pacific sawmill and lumber yard. The location is an active sawmill and lumber yard and it is located within zoning district 36-UW. The applicant proposes to establish a contractor yard and location to store pipe on the property. The temporary use will not impact the existing operation or permanently remove any acreage from water-dependent use. Therefore, the proposal is consistent with this plan policy.

II. Suitability. The shoreland area within the estuary designated to provide the minimum amount of protected shorelands shall be suitable for water-dependent uses. At a minimum such water-dependent shoreland areas shall possess, or be capable of possessing, structures or facilities that provide water-dependent uses with physical access to the adjacent coastal water body. The designation of such areas shall comply with applicable Statewide Planning Goals.

As noted above, Pacific Connector would temporarily utilize a portion of the commercial area as a pipe storage yard. The temporary use will have no impact on future water-dependent uses at the site or the designation of water-dependent shoreland areas or the suitability of the shoreland areas to accommodate water-dependent uses.

III. Permissible Non-Water-Dependent Uses. Unless otherwise allowed through an Exception, new non-water-dependent uses which may be permitted in "Urban Water-dependent (UW)" management units are a temporary use which involves minimal capital investment and no permanent structures, or a use in conjunction with and incidental and subordinate to a water-dependent use. Such new non-water-dependent uses may be allowed only if the following findings are made, prior to permitting such uses:

1. Temporary use involving minimal capital investment and no permanent structures:

a. *The proposed use or activity is temporary in nature (such as storage, etc.); and*

b. *The proposed use would not pre-empt the ultimate use of the property for water-dependent uses; and*

c. *The site is committed to long-term water-dependent use or development by the landowner.*

Pacific Connector would temporarily utilize the Georgia Pacific-Coos Bay site as a pipe storage and contractor yard during construction. The location is an active sawmill and lumber yard, owned by Georgia Pacific, and it is located within zoning district 36-UW. Use of a portion of the industrial site as a pipe storage and contractor yard will be temporary in nature (i.e., only during construction) and will not require the development of permanent structures. Further, the temporary use of the existing lumber yard will not pre-empt the ultimate use of the property for water-dependent uses because Pacific Connector will not use the site following construction.

This plan policy is met.

c. Plan Policy #17 Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands.

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

I. *Local government shall protect:*

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

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

c. *"Coastal headlands"; and*

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

As discussed in detail below, the PCGP crosses near two wetlands identified as significant wildlife habitats. Based on Coos County's maps, the PCGP does not cross 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.

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 8-CA, 13A-NA, 11A-NA, 11-RS, 18-RS, 19-D, 19B-DA, 20-CA, 20-RS, 21-RS, 21-CA, and 36-UW.

Policy #17 applies to inventoried resources requiring mandatory protection within each of the CBEMP zoning districts. As noted above, the PCGP alignment is near two wetlands identified as significant wildlife habitats on the CBEMP Shoreland Values Map. The first wetland is located at MP 1. According to Pacific Connector's wetland delineation, there is not currently a wetland located within the mapped area. The current wetland location is east and north of the mapped location. The second wetland is located at approximately MP 4.1..

LUBA discussed CBEMP Plan Policy 17 in its decision in *Southern Oregon Pipeline Information Project, Inc. v. Coos County*, 57 Or LUBA 44 (2008):

> "CBEMP 17 requires that '[l]ocal governments protect from development major marshes and significant wildlife habitat.' If CBEMP Policy 17 stopped there, SOPIP's argument might have merit. But CBEMP Policy 17(II) goes further and expressly explains *how* this mandate to protect certain coastal resources is implemented. CBEMP Policy 17(II)(a) explains that the CBEMP 'limit[s] uses *in these special areas* to those that are consistent with protection of natural values.' (Emphasis added.) CBEMP Policy 17(II)(b) provides that CBEMP Policy 17 is implemented by 'the Special Considerations Map, that identified special areas and restricts uses and activities *therein* to uses that are consistent with the protection of natural values.' (Emphasis added.). CBEMP Policy 17(II)(b) goes on to list some uses that are consistent with those values. With regard to bird sites, CBEMP Policy 17(II)(c) provides that CBEMP Policy 17 is implemented by contacting the Oregon Department of Fish and Wildlife so that it may 'comment on the proposed development *within the area of the 5b or 5c bird sites*.' There is simply nothing in the text of CBEMP Policy 17 that suggests it is to be implemented by limiting uses on properties that adjoin or are located near inventoried major marshes or significant

wildlife habitat to avoid possible impacts on such marshes and habitat." *SOPIP I*, slip op at 8-9 (emphases in original).

As mentioned above, the County's Shoreland Values inventory map notes that there are two inventoried freshwater wetlands along the pipeline route. The applicant is proposing to bore to avoid the first wetland, which is located at MP 1 in the 6-WD zone. The pipeline will cross to the south of the second wetland, which is located near MP 4.1. There are no other inventoried sites requiring protection.

The opponents do not provide any substantial evidence to suggest that these avoidance techniques are insufficient to protect these sites and the resources contained therein.

This plan policy is met.

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

This Plan Policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 8-CA, 13A-NA, 11-NA, 11-RS, 18-RS, 19-D, 19B-DA, 20-CA, 20-RS, 21-RS, 21-CA, and 36-UW.

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 Section 3.1.200 in order to obtain development permits, Policy #18 requires the applicant to submit a "plot plan" under Section 3.2.700, which then triggers the requirement to coordinate with the Tribe to allow for comments when the development is in an inventoried area of cultural concern. The Tribe has 30 days to comment and suggest protection measures. Policy #18 allows for a hearing process should the Tribe and the developer not agree on the appropriate protection measures. In the prior land use approvals related to the LNG project, the Board of Commissioners imposed a condition to ensure compliance with this Plan Policy. The applicant suggests the same condition be imposed for this application. The Board finds that imposition of the condition is consistent with prior approvals and will ensure compliance with this Plan Policy.

This plan policy is met.

e. Plan Policy #20 Dredged Material Disposal Sites

Local government shall support the stockpiling and disposal of dredged materials on sites specifically designated in Plan Provisions, Volume II, Part 1, Section 6, Table 6.1, and also shown on the "Special Considerations Map". Ocean disposal is currently the primary disposal method chosen by those who need disposal sites. The dredge material disposal designated sites on the list provided on Table 6.1, has decreased because the ocean has become the primary disposal method, the in-land DMD sites have diminished and those which have remained on the DMD list are sites which may be utilized in the future and not be cost-prohibitive. Consistent with the "Use/Activity" matrices, designated disposal sites shall be managed so as to prevent new uses and activities which could prevent the sites' ultimate use for dredge material disposal. A designated site may otherwise only be released for some other use upon a finding that a suitable substitute upland site or ocean dumping is available to provide for that need. Sites may

only be released through a Plan Amendment. Upland dredged material disposal shall be permitted elsewhere (consistent with the "Use/Activity" matrices) as needed for new dredging (when permitted), maintenance dredging of existing functional facilities, minor navigational improvements or drainage improvements, provided riparian vegetation and fresh-water wetlands are not affected. For any in-water (including intertidal or subtidal estuarine areas) disposal permit requests, this strategy shall be implemented by the preparation of findings by local government consistent with Policy #5 (Estuarine Fill and Removal) and Policy #20c (Intertidal Dredged Material Disposal). Where a site is not designated for dredged material disposal, but is used for the disposal of dredged material, the amount of material disposed shall be considered as a capacity credit toward the total identified dredged material disposal capacity requirement.

I. This policy shall be implemented by:

a. Designating "Selected Dredge Material Disposal Sites" on the "Special Considerations Map"; and

Within CBEMP zoning district 18-RS, the PCGP will cross DMD 30(b).

b. Implementing an administrative review process (to preclude preemptory uses) that allows uses otherwise permitted by this Plan but proposed within an area designated as a "Selected DMD" site only upon satisfying all of the following criteria:

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

The PCGP will be buried under the 30(b) dredge disposal site and will not entail substantial structural or capital improvements such as roads, permanent buildings and non-temporary water and sewer connections. As discussed above, the PCGP is not a "structure" as that term is defined in CCZLDO Section 2.1.200, and there are no above-ground components within the 30(d) dredge disposal site. Nor is the PCGP a capital improvement to the property which would preclude future use of the site for dredge disposal. The only impacts on future development will be the prohibition of structural improvements within the right-of-way, which is entirely consistent with the stated purpose of Policy #20, preclusion of preemptory uses.

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

Following installation of the PCGP, the site will be restored as closely as possible to its pre-construction contours, reestablishing existing drainage patterns. Following construction, dredge material could still be stored over the PCGP in consultation with Pacific Connector, thereby preserving the usable volume of the site.

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

The PCGP would not require site changes that would prevent the expeditious conversion of the site to estuarine habitat.

c. *Local government's review of and comment on applicable state and federal waterway permit applications for dike/tidegate and drainage ditch actions.*

The PCGP will not include dike/tidegate or drainage ditch actions. Therefore, this provision is not applicable.

II. This strategy recognizes that sites designated in the Comprehensive Plan reflect the following key environmental considerations required by LCDC Goal #16:

a. *Disposal of dredged material in upland or ocean waters was given general preference in the overall site selection process;*

b. *Disposal of dredged material in estuary waters is permitted in this Plan only when such disposal is consistent with state and federal law;*

c. *Selected DMD sites must be protected from preemptory uses.*

As discussed above, the PCGP does not involve disposal of dredged material but will allow for dredged material disposal on site 30(b) and will, therefore, not be a preemptory use.

This plan policy is met.

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

I. This policy shall be implemented by:

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

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

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

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

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

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

The PCGP will be buried within the 30(b) dredge disposal site and will not entail substantial structural or capital improvements such as roads, permanent buildings and non-temporary water and sewer connections. As discussed above, the PCGP is not a "structure" as that term is defined in CCZLDO Section 2.1.200. The PCGP will simply cross the property beneath the surface. The only impacts on future development will be the prohibition of structural improvements within the right-of-way, which is entirely consistent with the stated purpose of Policy #20, preclusion of preemptory uses.

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

Following installation of the PCGP, the site will be restored as closely as possible to its pre-construction contours, reestablishing existing drainage patterns. Following construction, mitigation could still occur over the PCGP in consultation with Pacific Connector, thereby preserving the usable volume of the site for mitigation purposes.

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

The PCGP would not require site changes that would prevent the expeditious conversion of the site to estuarine habitat.

CBEMP 18-RS contains two "high" priority mitigation sites (U-12 and U-16). U-12 is also the site of Dredge Material Disposal Site 30b. The 18-RS Management Objective states that the higher priority is the DMD site.

The presence of the pipeline would not impact the potential for conversion of the site for estuarine habitat.

This plan policy is met.

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

Plan Policy 23 states

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

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

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

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

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

The zoning districts through which the PCGP crosses requiring compliance with Policy #23 are 6-WD,[51] 7-D, 8-WD, 11-RS, 18-RS, 20-RS, 21-RS, and 36-UW (Georgia Pacific Yard).

Various opponents raised CBEMP Plan Policy 23 as a basis for denial. The Board has reviewed Plan Policy 23 and finds that this policy does not create a mandatory approval standard applicable to a quasi-judicial land use process. Rather, the policy is framed in aspirational, hortatory, and non-mandatory language. *Compare Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990) (comprehensive plan policies that "encourage" certain development objectives are not mandatory approval standards); *Bennett v. City of Dallas*, 96 Or App 645, 773 P2d 1340 (1989).

However, Plan Policy 23 states that "appropriate provisions for riparian vegetation are set forth in the CCZLDO Section 4.5.180." Although it is far from clear that the phrase "appropriate provisions for riparian vegetation" is intended to make CCZLDO §4.5.180 an approval standard, the parties all seem to treat it as such.[52]

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[51] As explained above, the PCGP and its associated facilities were approved under JCEP's prior LNG Terminal application.

[52] For example, the applicant states in its application narrative:

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...*

Staff notes 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."

Staff also notes that the applicant must comply with all FERC requirements for wetland and waterbody protection and mitigation both during and after construction, and will restore riparian vegetation 25 feet from the streambanks on either side of waterbodies on private lands where riparian vegetation existed prior to construction, consistent with the ECRP.

The Board has already discussed the public utility exception elsewhere in this decision. As discussed herein, the Board finds that opponents are incorrect when they argue that the public utility exception does not apply.

In addition, subsection II does not apply to this case. While Pacific Connector will restore areas disturbed during construction to their pre-construction condition, the PCGP does not include independent permanent streambank stabilization projects. Staff recommended a condition of approval requiring the applicant to contact the Planning Department to determine the appropriate review for any part of the project involving riprap. In light of the fact that the applicant is not specifically proposing any permanent riprap or stream stabilization as part of the PCGP project and that jurisdiction over such activities may lie with a state or federal agency, the Board modifies and adopts the condition as Condition of Approval A.13 to read as follows:

As indicated under subsection I, this policy is implemented through the requirements of CCZLDO Section 4.5.180, Riparian Protection Standards in the Coos Bay Estuary Management Plan. Section 4.5.180 generally requires that riparian vegetation within 50 feet of a wetland, stream, lake or river, as identified on the Coastal Shoreland Fish and Wildlife habitat inventory maps, shall be maintained. However, the standard provides the following exception, "[r]iparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose." The PCGP qualifies as a public utility, and is therefore exempt from the 50-foot riparian vegetation maintenance requirements of CCZLDO Section 4.5.180 provided the vegetation removal is the minimum necessary for the PCGP installation. However, Pacific Connector has designed the project to minimize impacts to riparian vegetation as much as possible.

"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."

This plan policy is not an applicable approval criterion.

h. Plan Policy #27 Floodplain Protection within Coastal Shorelands

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

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

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

The applicant addresses this policy by showing compliance with the provisions of Article 4.6. The County has indicated that the Flood Insurance Rate Map (FIRM) is consistent with the Federal Emergency Management Agency's (FEMA) flood hazard map for the County. As in the applicant's narrative, the PCGP is consistent with the applicable floodplain approval criteria for all areas identified on the FEMA flood hazard map/FIRM as a designated flood area. The FEMA maps identify the 100-year floodplain, which is typically a larger area than the floodplain[53] and floodway[54] 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.

As a further means to ensure compliance with this policy, staff recommended a condition of approval requiring floodplain certification for "other development" occurring in a FEMA flood hazard area. The Board adopts the staff recommendation in Condition of Approval A.15, subject to an amendment to cross-reference the applicable section of the CCZLDO. As amended, Condition of Approval A.15 reads as follows: "Floodplain certification is required for other

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

[54] "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.

development as provided in CCZLDO 4.6.230 occurring in a FEMA flood hazard area. The applicant must coordinate with the County Planning Department."

CCZLDO SECTION 4.6.210. Permitted Uses.

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

CCZLDO SECTION 4.6.215. Conditional Uses.

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

As detailed above, the PCGP is permitted either outright or conditionally in each of the base zones that it crosses. As described in this section of the narrative, it also satisfies each of the applicable Floodplain Overlay standards. Therefore, it is also a permitted use in the Floodplain Overlay zone.

CCZLDO 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 natural gas pipeline is not 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 following demonstrates that the PCGP is consistent with the "other development" standards.

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.

The PCGP will be installed below existing grades and no permanent structures will be placed above existing grades within the FEMA 100-year floodplain. In addition, at the completion of the PCGP installation, all construction areas will be restored to their pre-construction grade and condition. Flood plain compliance will be verified prior to construction and the issuance of a zoning compliance letter.

CCZLDO 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:

All new construction associated with the PCGP satisfies the following special flood hazard area criteria.

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 PCGP will be constructed with corrosion-protected steel pipe. Where deemed necessary, the PCGP 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 PCGP 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 PCGP does not include electrical, heating, ventilation, plumbing, or air conditioning components. Therefore, this criterion is not applicable.

This plan policy is met.

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

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

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

The "EFU" zoned land within the Coastal Shorelands Boundary shall be designated as "Other Aggregate Sites" inventories by this Plan pursuant to ORS 215.298(2). These sites shall be inventoried as "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).

This policy applies to CBEMP zones 18-RS, 20-RS and 21-RS. These CBEMP zones list the pipeline as a permitted use.

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 narrative, the PCGP is allowed as a utility facility necessary for public service under the agricultural provisions of ORS 215.283(d) and ORS 215.275(6). Therefore, the PCGP is consistent with the Policy #28 requirements for mapped Agricultural Lands.

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

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

A utility facility necessary for public service may be established as provided in ORS 215.275."[55] As discussed in the EFU zone section of this narrative, the PCGP is a utility facility necessary for public service pursuant to ORS 215.275. Therefore, the PCGP is also an allowed use in those areas identified as Agricultural Lands on the CBEMP Special Considerations Map.

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

This plan policy is met.

j. Plan Policy #30 Restricting Actions in Beach and Dune Areas with "Limited Development Suitability" and Special Consideration for Sensitive Beach and Dune Resources (moved from Policy #31)

This plan policy is applicable to CBEMP zone 7-D. However, according to staff, there are no beach or dune areas within zoning district 7-D, and therefore the policy does not apply.

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

This policy applies to CBEMP zones 11-RS, 18-RS, 20-RS, and 21-RS and addresses forest operations in areas of coastal shorelands. There are no identified forest lands in these CBEMP zones, therefore, the policy does not apply.

l. Plan Policy #49 Rural Residential Public Services

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS, and 36-UW and addresses acceptable services for rural residential development. This policy does not apply to the proposal.

m. Plan Policy #50 Rural Public Services

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

[55] The County is not a marginal lands county, 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).

recognizes that LCDC Goal #11 requires the County to limit rural facilities and services

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS and 36-UW and addresses acceptable rural serves. Staff states that "[t]his policy does not apply to the proposal."

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

Mark Sheldon wrote comments suggesting that a gas pipeline should be considered a "high-intensity" utility facility. CCZDO 2.1.200 defines the term "utility" as follows:

> UTILITIES: Public service structures which fall into two categories:
> 1. low-intensity facilities consist 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).
>
> Note: in shoreland units this category also includes sewage treatment plants, electrical substations and similar public service structures. However, these structures are defined as "fill for non-water-dependent/related uses" in aquatic areas. (Emphasis Added).

The code resolves the issue in a manner that is unambiguous and conclusive against Mr. Sheldon's argument. Given the recognition that gas lines are a "low-intensity" facility, Plan Policy 50 does not assist the opponents in any way.

This plan policy is met.

n. Plan Policy #51Public 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:

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS and 36-UW and addresses extension of water and sewer outside of UGBs when necessary for certain development including industrial and exception land development. This policy does not apply to the proposal.

PCGP has received authorization from FERC to construct, install, own, operate and maintain the proposed interstate natural gas pipeline, consistent with applicable state and federal laws and permitting requirements. The county has previously reviewed and approved a series of related applications including a marine terminal and upland LNG facility prior to this matter.

The subsurface pipeline will not impact access to the Estuary. Most impacts from the pipeline will be temporary, and will occur during construction and maintenance of the pipeline. The applicant will work with state and federal agencies on an appropriate plan to mitigate such impacts.

Protection measures will be required as well as mitigation. The applicant will work with state and federal regulators to obtain all necessary permits, which is coordinated with the county through consistency requirements.

C. Miscellaneous Concerns.

1. Evidence of Past Misdeeds by Various Unrelated Pipeline Companies.

The opponents have submitted voluminous testimony discussing past environmental damage done by pipeline companies. For example, Ms. McCaffree also brought to the Hearings Officer's attention the Shell Oil Sakhalin Island LNG project in Russia. As her testimony and accompanying evidence seem to indicate, a large amount of environmental damage occurred with that project. The opponents also bought up the Mas Tec issue as well. As the Board is well aware, Mas Tec Inc. did a horrible job of complying with its permit requirements, and caused extensive environmental damage. Judge Hogan found that there was plenty of fault to go around in that case, and stated that "lack of government oversight" was a factor. Undoubtedly the County has learned valuable lessons from that experience.

The apparent goal of the opponent's testimony is to create doubt whether PCGP can conduct its construction activities as promised. As discussed above, however, this type of testimony can seldom form a basis for a denial, since it necessarily requires the decision-maker to speculate about future events. The decision-maker cannot simply assume that the applicant will fail to live up to its promises. To do so would be mere speculation. *Gann v. City of Portland*, 12 Or LUBA 1, 6 (1984).

In a land use process such as this, the primary goal is to determine if it is feasible for the applicant to meet applicable approval standards. Often, the applicant accomplishes this by demonstrating that he or she has a plan, and that the plan is reasonable and likely to succeed. The issuance of a land use permit cannot, in and of itself, guarantee full compliance with applicable laws. Rather, ensuring full compliance with applicable laws requires leadership from the applicant's management team and vigorous oversight from the various government agencies as well as watchdog groups.

2. Difficulty of Getting Homeowner's Insurance within 900 feet of Pipeline.

Mr. David Gonzales and Ms. Jody McCaffree testified that it would be difficult or impossible for a landowner to obtain homeowner's insurance within 900 feet of a pipeline. Although this could be a potentially important factor, the opponents surprisingly submitted no evidence to substantiate the claim. An assertion of this sort without supporting evidence or documentation is not very useful because it does not constitute substantial evidence. Substantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based." *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988).

3. Hearing is Premature Due to Unresolved Issues related to BLM, the FEIS and Requests pending Before FERC.

Many opponents stated that they believed that this process should be put on hold until other regulatory processes are fully completed. The County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. In addition, the Board is not aware of any approval standard that requires this process to be held up pending favorable results in related but separate process. As was discussed at the hearing, however, this 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.

4. Bentonite as a Carcinogen.

Anita Coppock testified that various construction techniques used by the applicant involve the use of bentonite, which the person identified as a carcinogen. Bentonite is a clay that originates from weathered volcanic ash. *See* FEIS. It is a widely used substance for drilling due to its unique properties. It is sometimes used in the wine industry as a clarifying agent. It is also used for various medical and health-related purposes. It may be dangerous for the user to breath bentonite dust in a pure, out-of-the-bag form, but that is not an issue once it is mixed with water and released into the environment. In short, it is simply not believable that bentonite is a carcinogen, and the Board has not been made aware of any evidence in the record to support the notion that it is dangerous to human health in anything other than as mentioned above.

Unsupported statements are mere conclusions, and do not constitute evidence. For example, in *Palmer v. Lane County*, 29 Or LUBA 436 (1995), LUBA held that on 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. *Id.* at 441. Similarly, in *DLCD v. Curry County*, 31 Or LUBA (1996) LUBA disapproved a finding stating that "[t]here can be no conflict with nearby permitted users on nearby lands." LUBA described the finding as "simply a conclusion" that fails to explain why such conflicts will not occur. Here, there is no evidence, scientific or otherwise, to back up the concern that bentonite is a carcinogen.

5. School Kids Won't Go to School Due to Construction Impacts on Traffic.

One person testified that children will not go to school because of the fact that construction will alter traffic patterns and close roads, etc. The Board is skeptical of this argument for a number of reasons. First, it does not seem to relate to any approval criterion. Secondly, this appears to be a traffic *management* issue that should be addressed by the public works department prior to and during construction. If properly managed, the Board finds that construction activities associated with the pipeline will not cause significant and widespread disruptions to the transportation infrastructure. Even if problems occurred in the past, the solution is better management, not denying development that otherwise satisfies applicable approval criteria.

6. Use of Eminent Domain for "Public Use" Requires a Public Need or a Public Benefit.

Many opponents asserted the belief that eminent domain should not be used unless there is a local "need" for the project or a "benefit" to the community. For example, Ms. McCaffree dedicates eight pages of what appears to be well-researched argument pertaining to the lack of "need" for the pipeline in her final submittal. *See e.g.,* McCaffree Letter dated June 10, 2010, at p. 39-46. However, whatever the merits to these types of arguments, "need" 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).

Even to the extent that "need" could be considered to be a legal requirement, Section 1.3 of the FEIS provides a detailed explanation of the overall need for the PCGP project, and that analysis is hereby incorporated by reference herein. Furthermore, the applicant has obtained a "Certificate of Public Convenience and Necessity," which establishes the particular need for the facility. In addition, 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. Moreover, the precise need for taking individual properties for the public purpose of siting a natural gas pipeline must be successfully demonstrated in each case or the proposed condemnation would not be allowed.

7. State and federal permitting.

Several public comments suggested that the county should require compliance with the Endangered Species Act, the Coastal Zone Management Act[56], the Clean Water Act, and the Clean Air Act. Generally speaking, those issues are outside of Coos County's jurisdiction for purposes of this land use application.

A detailed discussion of the complex and comprehensive state and federal permitting regime for this project is included in the correspondence from Staff Environmental Scientist Randy Miller of Pacific Connector dated June 9, 2010. A list of all state and federal permits, approvals and consultations is attached as Exhibit 5 to the letter on Williams Pipeline letterhead dated May 11, 2010. Also, Section 1.5 of the FEIS details the myriad permits and approvals required for the PCGP and the associated permitting governmental authorities.

For example, it is FERC's responsibility to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act. It is the responsibility of these agencies to protect threatened and endangered species (*i.e.*, northern spotted owl, marbled murrelet, coho salmon, etc.). Additionally, Pacific Connector must submit a certification application to the Oregon Department of Land Conservation and Development and receive certification that the PCGP complies with Oregon's Coastal Management Program. DLCD must in turn consult with other state and local agencies to confirm consistency. Pacific Connector must also apply for and obtain permits under the Clean Water Act (Sections 404, 401, and 402) from the U.S. Army Corps of Engineers and the Oregon Department of Environmental Quality. These permits will regulate activities within and near all waterbodies and wetlands potentially impacted by the PCGP. These permits will include the appropriate TMDL restrictions.

Section 1.5 of the FEIS also details the public process and agency coordination that has occurred to-date in the development of the FEIS. Unless Pacific Connector receives all of the applicable federal permits and approvals FERC will not issue a "Notice to Proceed." Pacific Connector has stated that it would accept a condition that requires the applicant to provide proof of the Notice to Proceed prior to beginning construction, and the Hearings Officer recommended that such a condition be imposed. The Board hereby imposes the recommended condition as Condition of Approval A.14.

8. Federal Forestry Standards

Cascadia Wildlands and other opponents argue that the pipeline will violate requirements of the Northwest Forest Plan on BLM lands, and that the FEIS improperly bases its conclusions

[56] Ms. McCaffree argues that the federal Coastal Zone Management Act of 1972 needs to be "considered and evaluated in with this Permit Application." *See* McCaffree Letter dated June 10, 2010, at p. 2. However, Ms. McCaffree never makes any effort to explain how she believes the Act applies to this application, or how the application violates the Act. She does not even cite any particular section of the Act which she believes applies. Under these circumstances, her arguments are not developed well enough to provide a decision-maker with fair notice as to what issues she intended to raise. Any issue related to the Coastal Zone Management Act of 1972 is waived.

regarding environmental impacts on a BLM management plan called the Western Oregon Plan Revision (WOPR), which was been withdrawn by the Department of the Interior in 2009.

Cascadia Wildlands and other opponents correctly point out that the FEIS incorporates the WOPR, and further that the WOPR was withdrawn after issuance of the FEIS and is no longer being used by the Bureau of Land Management (BLM). It is also true that the PCGP alignment crosses federal lands managed by BLM within Coos County.[57] However, the opponents fail to explain how the provisions of the Northwest Forest Plan or the WOPR withdrawal relate to the land use approval criteria applicable to the application currently pending before the county. In fact, these issues are completely irrelevant to the county's applicable criteria under the CCZLDO. The substantive portions of the FEIS affected by the WOPR withdrawal are limited to Sections 4.6.1.2 (Threatened and Endangered Species/Birds) and 4.7.4.2 (Federal Land Use Plans and Land Allocations). Pacific Connector has not referenced either of these sections of the FEIS in support of the current land use application. Furthermore, the FEIS correctly evaluated the project within the regulatory framework that was in force at the time the FEIS was issued. Therefore, the WOPR withdrawal has no impact on this land use application, nor does it invalidate the evidence Pacific Connector has relied upon to demonstrate compliance with the applicable approval criteria.

9. TEWAs, UCSAs and Hydrostatic Testing

Cascadia Wildlands submitted comments arguing that the applicant has failed to sufficiently identify the size and location of Temporary Extra Work Areas (TEWAs) and Uncleared Storage Areas (UCSAs), which are areas that will be used temporarily for construction of the pipeline. Cascadia Wildlands also asserts that the applicant has failed to fully describe and analyze the hydrostatic testing procedures for the pipeline.

Cascadia Wildlands has not attempted to tie these arguments to any applicable County approval criteria, and has alleged no basis on which their arguments (if true) would necessitate denial by the Board. Nonetheless, detailed information regarding these issues was provided in correspondence from the applicant dated June 17, 2010, at pages 10-14.

D. Additional Issues Discussed During Board Deliberations

1. Condition of Approval A.1

The Hearings Officer recommended that the Board adopt the following condition as Condition of Approval A.1:

> "All promises and recommendations made by the applicant and its consultants during the course of this proceeding for the purpose of demonstrating compliance with approval standards and performance measures shall be binding on the applicant and shall

[57] However, as noted in Pacific Connector's original application narrative, local governments in Oregon do not have direct land use permitting authority over projects located on lands owned and controlled by the federal government. Furthermore, federal lands are excluded from the CZMA boundary definition under both state and federal law.

> constitute a condition of approval for this permit, whether or not that promise or recommendation is specifically set forth herein as numbered condition of approval below. [*See Central Oregon Landwatch v. Deschutes County (Taylor)*, 53 Or LUBA 290 (2007)]"

This condition would essentially make binding all promises and recommendations made by the applicant and its consultants during the application process. County Planning and Legal staff advised that as written, this condition would be troublesome for the County to enforce and administer. They recommended that the Board strike this condition as being too broad. The Board agrees with staff and finds that imposing the remaining conditions of approval hereinbelow incorporate the written representations and promises made by the applicant and ensure that the applicant will implement the project consistent with applicable approval criteria and related performance measures. The Board deletes Condition A.1 and identifies it as "Intentionally deleted" in the conditions below.

2. Condition of Approval A.7

The Hearings Officer recommended that the Board adopt the following condition as Condition of Approval A.1:

> The applicant's plans to protect the 7-NA district from adverse impacts due to the temporary construction phase of the pipeline shall be provided to the Planning Department.

Staff recommended that this condition be deleted. The Board concurs. The applicant addressed this issue in its final argument letter at page 28 by demonstrating that there would be no direct impact to lands located in the CBEMP 7-NA zoning district and that indirect impacts would be avoided through implementation of the mandatory ECRP. Based upon this substantial evidence, the Board deletes this condition and notes it as "Intentionally deleted" in the conditions below.

3. Construction Impacts to County Roads

At the Board deliberations in this matter, Commissioner Stufflebean expressed concern that, although Condition of Approval A.12 requires the applicant to identify construction impacts to County roads, the condition does not ensure that the applicant will address any such impacts in a timely manner. The Board finds that this is an issue of public concern. To ensure that the applicant addresses any impacts to County roads in a timely manner, the Board finds that it is appropriate to require that the applicant file an irrevocable letter of credit or similar instrument with the County. The Board further finds that the letter of credit or similar instrument should remain in place for a five-year period in order to address any impacts identified through that time period. Consistent with CCZLDO 6.5.400 regarding public improvements for new developments, the letter of credit should be in the amount of 120% of the estimated cost of the improvements. Accordingly, the Board modifies Condition of Approval A.12 to add the following two sentences:

"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."

The Board finds that this modified condition addresses this issue.

III. CONCLUSION

For the above stated reasons, and after consideration of the applicable law and all argument and evidence in the record, the Board finds that the applicant has met its burden of proof to demonstrate that the applications satisfy all applicable approval standards and criteria, or that those standards or criteria can be satisfied through the imposition of conditions of approval. Accordingly, the Board hereby approves the application, subject to the following conditions of approval, which are authorized by Section 5.2.800 of the CCZLDO:

A. Staff Proposed Conditions Of Approval

1. Intentionally deleted.

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. The pipeline will be rerouted, where feasible, in order to avoid impacts to the property identified on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4). If requested, the applicant shall work with affected property owners within the pipeline's alignment to make "minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands" pursuant to FERC Order Condition #6 in order to avoid or minimize impacts to structures or the owner's use of the property."

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. [*See ORS 772.210(4) and Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.*]

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

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

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

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

1. Pre-Construction

7. Intentionally deleted.

8. To protect residences and structures, evidence of compliance with FERC's Certificate Order, Condition #43 must be provided prior to issuance of zoning clearance.

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.

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

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. Prior to construction, the applicant shall be required to undertake the sampling and analysis set forth in the Sediment Analysis Protocol (SAP) in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet.

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. [*See Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 1.*]

23. The pipeline operator will conduct routine vegetation maintenance clearing on the 30-foot strip every 3-5 years. [*See Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.]*

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.

2. Intentionally deleted.

3. Intentionally deleted.

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. Fill and removal activities in Coos Bay shall be conducted between October 1 and February 15, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife.

7. The authorized work in Haynes Inlet shall be conducted in compliance with the required U.S. Army Corps of Engineers Section 404 Permit and OR DEQ's 401 Water Quality Certification and 402 NPDES permits, which will mandate turbidity standards, monitoring requirements, and reporting procedures.

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. For dredging activity conducted by clamshell bucket, activity shall be positioned from a floating crane or top-of-bank position. In the closed position, the bucket shall be sealed so as to minimize sediment re-suspension.

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 import 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. As detailed in Section 4.12.10 of the FEIS, 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. (a) This approval shall not become effective as to any affected property until the Applicant has acquired ownership of an easement or other interest in the property necessary for construction of the pipeline, and obtains either: (i) the signature of all owners of the property consenting to the application, or (ii) an order of a court in condemnation of the property interest required for the pipeline that operates to obviate the need for consent of owners of property other than the applicant. In the alternative, should this condition 20(a) be deemed insufficient on appeal to satisfy applicable code requirements, the applicant shall instead be subject to the alternative condition 20(b) immediately below.

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

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

22. Intentionally deleted.

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 issuance of a zoning compliance letter under CCZLDO Section 3.1.200, the County Planning Department shall make initial contact with the affected Tribe(s) regarding the determination of whether any archaeological sites exist within the area proposed for development, consistent with the provisions of CCZLDO Section 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of CCZLDO Section 3.2.700, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources have been identified, the County may approve and issue the requested zoning compliance letter and 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 CBEMP Policy #18 resources on the site and the applicant and the 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 archaeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of Section 5.8.200 of the CCZLDO with the Board of Commissioners serving as the Hearings Body.

5. Miscellaneous

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

Approved this 8th day of September, 2010.

Appendix A. Discussion of Federal Preemption Issues.

The proposed pipeline is authorized pursuant to Section 7 of the Natural Gas Act. ("The Natural Gas Act" or "NGA"), 15 U.S.C. §§ 717 *et seq.* Section 7 of the NGA authorizes the FERC to issue "certificate[s] of public convenience and necessity" for the construction and operation of natural gas facilities for the transportation of gas in "interstate commerce." The standard for evaluating an application for a certificate of public convenience and necessity is stringent: the FERC must find that the proposed project is "necessary or desirable in the public interest." To find that an action is necessary or desirable, the FERC must determine that the applicant is willing and able to satisfy a panoply of requirements enumerated in section 7, and that the action "is or will be required by the present or future public convenience and necessity." This higher standard is consistent with the extraordinary power of eminent domain that accompanies a certificate of public convenience and necessity.

The Supreme Court has held that the Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 1151, 99 L.Ed.2d 316 (1988). This creates an issue of whether state or local laws that conflict with FERC approvals are preempted by federal law.

Zoning laws are an exercise of the state's police power. Generally speaking, a state's exercise of its police power is subject to the rule that such power cannot place "a substantial burden on interstate commerce. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)." Courts have generally found attempts by state and local governments to stop federally authorized gas pipelines on zoning grounds to constitute a substantial and impermissible burden on interstate commerce *New York State Natural Gas Corp. v. Town of Elma*, 182 F.Supp. 1, 6 (W.D.N.Y.1960) (Operation of town zoning ordinance and building code so as to prevent natural gas company operating, in interstate commerce, a federally authorized pipeline, from construction of measuring and regulating station in connection with line at location which was reasonably necessary to accomplish purposes required was unconstitutional as an undue burden on interstate commerce); *Transcontinental Gas Pipe Line Corp. v. Milltown*, 93 F. Supp. 287, 295 (E.D. N.J. 1950). (Zoning authority was unreasonable, arbitrary and without foundation when it prevented interstate pipeline from going through the town.). *Kern River Gas Transmission Co. v. Clark County*, 757 F.Supp. 1110 (D.Nev.,1990); *FERC v. Public Service Commission*, 513 F.Supp. 653 (D.N.D.1981) (state regulation of pipeline route preempted). Some courts have even held that, in light of the federal grant of certificates of convenience and necessity and of the Congressional authorization for use of the eminent domain power to the party pipeline companies, state regulation could not thwart construction of necessary gas pipeline facilities. *See Transcontinental Gas PipeLine Corp. v. Hackensack Meadowlands Development Comm.*, 464 F.2d 1358 (3rd Cir.1972), *cert. denied* 409 U.S. 1118, 93 S.Ct. 909, 34 L.Ed.2d 701 (1973); *National Fuel Gas Supply Corp. v. Public Service Comm'n of State of N.Y.*, 109 P.U.R.4th 383, 894 F.2d 571 (C.A.2 N.Y.,1990).

Unlike the pipeline facility, which is authorized under Section 7 of the NGA, the proposed Jordan Cove LNG terminal itself is authorized pursuant to Section 3 of the Act. *See e.g., AES Sparrows Point LNG, LLC v. Smith*, 470 F.Supp.2d 586 (D.Md.,2007); *AES Sparrow*

Point LNG, LLC v. Smith, 527 F.3d 120 (DC Md. 2008); (LNG Terminals); Subject to the exceptions discussed below, FERC has exclusive authority under Section 3 of the Natural Gas Act to authorize the siting of LNG terminals.[58] That authorization is conditioned on the applicant's satisfaction of other statutory requirements for various aspects of the project. For example, FERC requires a party seeking to construct an LNG terminal to first obtain authorization from FERC. 15 U.S.C. § 717b(a). In order to do so, applicants must comply with the NGA's requirements as well as complete FERC's extensive pre-filing process. *See* 18 C.F.R. § 157.21. FERC must then consult with the appropriate state agency on numerous state and local issues. *See* 15 U.S.C. § 717b-1(b). *See also generally* Jacob Dweck, David Wochner, & Michael Brooks, *Liquefied Natural Gas (LNG) Litigation after the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473 (2006) (describing the history of conflict between federal and state authorities over the siting of LNG terminals).

However, as mentioned above, FERC's authority over LNG terminals is not absolute. The NGA contains a "savings clause" that provides that "nothing in the [NGA] affects the rights of States under" the Coastal Zone Management Act ("CZMA") and [the Clean Water Act and the Clean Air Act].[59] 15 U.S.C. § 717b(d). Although the exception created by the Savings Clause seems to only apply to Certificates issued pursuant to Section 7 of the Act, it does reflect provisions of the CZMA that apply to Certificates issued under Section 7 of the NGA as well.

Thus, the federal preemption issue in this case is complicated by the fact that much of the County is subject to the CZMA and the Oregon Coastal Management Program (OCMP). The CZMA act states: "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1). *See also* 15 CFR § 930.34 *et seq. Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458 (D.C. R.I. 2009).

The U.S. Congress passed the federal CZMA in 1972 to address competing uses and resource impacts occurring in the nation's coastal areas. The Act included several incentives to encourage coastal states to develop coastal management programs. One incentive was a legal authority called "federal consistency" that was granted to coastal states with federally approved coastal management programs. As relevant here, the federal consistency provisions of the CZMA require that any federal action occurring in or outside of Oregon's coastal zone which affects coastal land or water uses or natural resources must be consistent with the Oregon Coastal Management Program. 16 U.S.C. § 1456(c)(3)(A). The federal consistency requirement is a

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[58] "[FERC] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1). The pipeline, however, is apparently not part of a terminal.

[59] Under Section 401 of the Clean Water Act, a certification of compliance with the state's water quality standards is required from DEQ for any activity that may result in a discharge into navigable waters. If the 401 certification is denied, the LNG facility cannot be constructed. Similar permits are required from the U.S. Army Corps of Engineers and DEQ for discharge of dredged and fill material. Section 502 of the Clean Air Act, a permit is required for any person to operate a source of air pollution, as detailed in the Act.

rather unique concept in that state programs for coastal management cannot *generally* be preempted by federal law.

Nonetheless, the exact degree of regulatory power the CZMA exclusion gives the state is somewhat unclear. As mentioned above, under Section 307(c) of the Coastal Zone Management Act, an applicant must certify that the proposed activity in a designated coastal zone complies with the enforceable policies of the affected state's coastal zone management program. This applies to all Federal permits and authorizations, including FERC and the U.S. Army Corps of Engineers. If the state does not concur[60] with the certification, FERC approval to construct may not generally be granted. Having said that, the State's CZMA role is very limited. The Commission's only responsibility under the CZMA is to withhold construction authorization for a project until the state finds that the project is consistent with the state's NOAA-approved coastal zone management plan. In addition, there is also an appeals process established with the CZMA. On appeal, the Secretary of Commerce may determine that there are overriding national security interests that justify approval of the project over the state's objection.[61]

It is unlikely that the applicant in this case would ever have to resort to an appeal to the Secretary, however, since the OCMP does not appear to prohibit the proposed use in any event. Oregon's Coastal Management Program recognizes that water-dependant activities (such as LNG terminals) require priority consideration, and has set up management zones in areas that are suitable for such water-dependant uses. The proposed Jordan Cove LNG terminal is located in an area which the Comprehensive Plan deems suitable for such use. A pipeline itself is generally not a water-dependant use. However, in this case there is no feasible alternative that avoids a significant water crossing in the Coastal Zone.

Another key factor to consider is that Oregon's Coastal Management Program does not have an "alternatives analysis" requirement for evaluating the route of an interstate natural gas pipeline, unless an exception to a Goal is required. The OCMP is implemented via the Statewide Planning Goals (specifically Goals 16-19), which, in turn, have been adopted into the County's Comprehensive Plan. In this regard, the OCMP states:

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[60] DLCD is the state of Oregon's designated coastal management agency and is responsible for reviewing projects for consistency with the OCMP and issuing coastal management decisions. DLCD's reviews involve consultation with local governments, state agencies, federal agencies, and other interested parties in determining project consistency with the OCMP. DLCD's federal consistency decisions are called "coastal concurrences" [approvals] and "coastal objections" [denials]. Objections can be based on an inconsistency with coastal program policies or a lack of sufficient information to determine consistency. In the event of a formal DLCD objection, federal permits, licenses and financial assistance grants cannot be issued, and direct federal activities cannot proceed unless compliance with the OCMP is specifically prohibited by other federal law.

[61] Under Section 307(c)(3)(A), the CZMA provides that the Secretary must override a state's objection to a proposed project that requires a federal license or permit if the project is "necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A). A project is not "necessary in the interest of national security" unless a "national security interest would be significantly impaired were the activity not permitted to go forward as proposed." 15 C.F.R. § 930.122.

> Coastal comprehensive plans have been especially considerate of the national needs for new facilities for energy development, fisheries, development, recreation, ports, and transportation. Major deep and shallow draft ports have identified shoreland areas for new port facilities to support energy resource transshipment, development of new fish processing facilities and areas for expanded marinas.

Even in the event that a pipeline would violate a comprehensive plan standard, the applicant could pursue an exception to a Statewide Planning Goal. As mentioned above, that process would trigger an alternatives analysis.

In addition to other considerations, Congress has also 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 originally directed 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 Act's text,[62] its legislative history,[63] administration implementation,[64]

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[62] For example, 49 U.S.C. Chapter 601 sets out federal safety standards for gas pipelines. 49 U.S.C. § 60104(c) states: "Preemption: A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.

Prior to 1994, there were two Acts controlling the area of interstate pipeline safety - the Natural Gas Pipeline Safety Act of 1968 (NGPSA) and the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA). The NGPSA and the HLPSA were combined and recodified without substantial change at 49 U.S.C. §§ 60101 to 60125 in 1994. *See* P.L. 103-272, 108 Stat. 1371 (July 5, 1994). The two similar provisions from each Act pertaining to preemption were consolidated into what is now 49 U.S.C. § 60104(c). Compare 49 U.S.C. § 60104(c) with 49 U.S.C. § 1672(a)(1) (NGPSA) and 49 U.S.C. § 2002(d) (HLPSA). Title 49 U.S.C. 1672(b) (1972) originally provided for the establishment of minimum federal safety standards for the transportation of gas. The section concluded:

> 'Any State agency . . . may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standard applicable to interstate transmission facilities.'

[63] 'The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse a number of States and uniformity of regulation is a desirable objective. For this reason, section 3 provides for a Federal preemption in the case of interstate transmission lines.' H.R.Rep.No.1390, 90th Cong., 2d Sess. (1968); 3 U.S.Code Cong. & Admin.News, 90th Cong., 2d Sess. pp. 3223, 3241 (1968).

[64] In 1973, the Secretary of Transportation reported to Congress that the Department of Transportation through its Office of Pipeline Safety exercised exclusive authority for safety regulation of interstate gas transmission lines. *See* Federal-State Relations in Gas Pipeline Safety 3, 7, 10 (1973).

and judicial interpretation,[65] attest to federal preemption of the field of safety with respect to the establishment and enforcement of standards regulating the interstate transmission of gas by pipeline. *ANR Pipeline Co. v. Iowa State Commerce Commission,* 828 F.2d 465, 470 (8th Cir.1987) (Iowa may not impose its own safety standards on facilities). The constitutional basis of preemption is the commerce clause,[66] and the supremacy clause.[67]

In addition, FERC has ruled that state agencies could not use state law to "prohibit or unreasonably delay the construction or operation of [LNG] facilities approved by this Commission." *Weaver's Cove Energy, LLC,* 112 F.E.R.C. ¶61070, at ¶ 61,546, *on rehearing,* 114 F.E.R.C. ¶61058, at 61185-6.

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[65] '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).

[66] U.S.Const., art. I, 8.

[67] U.S.Const., art VI.

Map TRS #	Account # (s)	Landowner	Zoning
25S 13W 0 200	3102.00	WEYERHAEUSER NR COMPANY	6-WD
25S 13W 4 101	3097.03	WEYERHAEUSER NR COMPANY	6-WD
25S 13W 4 300	3101.00/3101.90	ROSEBURG FOREST PRODUCTS CO.	6-WD
25S 13W 4 400	3098.01	WEYERHAEUSER NR COMPANY	6-WD
25S 13W 4 100	3097.02/3097.00	WEYERHAEUSER NR COMPANY	6-WD, IND, 7-D
25S 13W 3 200	3096 / 3096.90	WEYERHAEUSER NR COMPANY	7-D, 8-WD, 8-CA
25S 13W 4 500	3098.00	OREGON INT'L PORT OF CB	8-CA, 13A-NA, 11-NA, 11-RS
24S 13W 36B 700	1899.9 / 1899.00	THOMPSON, DONALD J. & CAROL L.	11-RS, RR-2, F
24S 13W 36B 1101	1899.9 / 1899.00	BLOMQUIST, HAL D. & DONNA J.	RR-2, F
24S 13W 36B 1100	1897.00	WEYERHAEUSER COMPANY	F
24S 13W 36B 100	1897.01/1897.91	BLOMQUIST, HAL D. & DONNA J.	F
24S 13W 36 100	1896.00	WEYERHAEUSER COMPANY	F
24S 13W 36 200	1903.00	WEYERHAEUSER COMPANY	F
25S 13W 1 100	3034.00	WEYERHAEUSER COMPANY	F
25S 13W 1D 200	3034.91/3034.01	POWERS, JOHN W.; & POWERS, SHAWNEE	F
25S 13W 1D 100	3046.9 / 3046.00	GARY E. SMITH TRUST	EFU, F
25S 12W 6C 100	2587.00/2587.90	GERTRUDE E. WICKETT TRUST; ETAL OULP, JOANNE E., TRUSTEE TRUST A-CREDIT SHELTER TRUST	EFU, F
25S 12W 6C 601	2587.11	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 500	2605.00	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 400	2587.09	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 1300	2604.00	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 1301	2604.01/ 2604.91	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 1301	13110.02	SPRINT NEXTEL CORP	
25S 12W 7 1301	13982.01	US CELLULAR NW OPERATIONS (154	
25S 12W 7 1301 A02	2604.02	U.S.A. FEDERAL AVIATION ADM	
25S 12W 7 2400	2609.01	SWEET, STEVEN H.	F
25S 12W 18 300	2748.01	SWEET, STEVEN H.	F
25S 12W 18 200	2746.93/2746.03	SWEET, STEVEN H.	F, EFU
25S 12W 17 300	2734.04	SWEET, STEVEN H.	EFU
25S 12W 17 400	2734.02/2734.92	RUTHERFORD, MONTE R.	EFU
25S 12W 17 600	2734 / 2734.90	SHAW, JACKIE L., L/E SHAW, JACKIE; & SHAW, BELINDA	EFU
25S 12W 17 700	2734.01 /2734.91	EDWARDS, WILLIAM R.	EFU
25S 12W 17 900	2736.00	LONE ROCK TIMBERLAND CO.	F, EFU
25S 12W 17 1000	2737.00	WEYERHAEUSER COMPANY	F
25S 12W 20 100	2767.00	WEYERHAEUSER COMPANY	F
25S 12W 29 1100	2887.00/2887.90	FISHER, DONALD & LAURA R.	F, EFU
25S 12W 30 501	2915.06	BRUNSCHMID, MARJORIE A.; ETAL BRUNSCHMID, JAMES V. BRUNSCHMID, YOSHIKO	EFU, 18-RS
25S 12W 30 600	2918.00/2918.90	DEMERS, GREGORY M	18-RS
25S 12W 30D 1501	2918.71	AGRI PACIFIC RESOURCES, INC.	18-RS
25S 12W 30D 508	2919.05	KRONSTEINER, KAY A.; ETAL	18-RS
25S 12W 30 700	2923.00	WEYERHAEUSER COMPANY	19-D
25S 12W 31 100	2931.00	WEYERHAEUSER COMPANY	19-D
25S 12W 32B 300	2984.00	WEYERHAEUSER COMPANY	19-D, 19B-DA, 20-CA

Exhibit "B"
Order 10-08-045PL

EXHIBIT A

Map TRS #	Account # (s)	Landowner	Zoning
25S 12W 32B 600	2982.00	FRED MESSERLE & SONS, INC.	20-RS
25S 12W 32 100	2981.02/2981.90	FRED MESSERLE & SONS, INC.	20-RS, EFU
25S 12W 32 400	2989.03	FRED MESSERLE & SONS, INC.	EFU, F
26S 12W 5 200	4637.90	FRED MESSERLE & SONS, INC.	F
26S 12W 32 300	2987.00/2987.90	MCCARTHY, LOUIS M.; ETAL MCCARTHY, BETTY J. MCCARTHY, WILLIAM H.	F
26S 12W 5 300	4638.01/4638.91	SOLOMON JOINT LIVING TRUST	F
26S 12W 8B 100	4684.01/4684.91	PRUGH, MICHAEL; ETAL PRUGH, DEBRA A. REED, DENISE	F, RR-2
26S 12W 8 900	4682.00	HILL, JEFFREY L.	RR-5
26S 12W 8 1000	4683.02	HILL, JEFFREY L. & GIDGETTE N.	RR-5
26S 12W 8 1100	4683.01/4683.91	RODE, ALVIN & LOU ANN L/E	RR-5, EFU, F
26S 12W 8 500	4679.90	C/O HILL, JEFFREY L. SHELDON, MARK & MELODY	RR-5
26S 12W 8B 1400	4688.00/4688.95	WHEEKER, LARRY & SHIRLEY	F
26S 12W 8 1102	4683.04/4683.94	HILL, JEFFREY L. & GIDGETTE N.	F
26S 12W 8B 1500	4688.01/4688.91	MCGINNIS, MICHAEL L.	F
26S 12W 8 1601	4689.02	GUNNELL FAMILY TRUST GUNNELL, GARY A. & BARBARA E., TRSTE	F
26S 12W 8 1700	4667.90/4667.00	PAUL J. WOYTUS FAMILY TRUST WOYTUS, PAUL J. & YVONNE A., TRSTES	F, 21-RS
26S 12W 7 700	4673.00/4673.90	FRED MESSERLE & SONS, INC.	21-CA, 21-RS, F
26S 12W 18A 100	4760.01/4760.91	WRIGHT LOVING TRUST WRIGHT, W.J. & DOREEN, TRUSTEES	F
26S 12W 18A 200	4762.91/4762.01	WASHBURN, PAUL M. & EURA M.	RR-5
26S 12W 18A 201	4762.13	MCGRIFF, DAVID L. & EMILY J.	RR-5
26S 12W 18B 1900	4766.00	DAVENPORT, JAMES R. & ARCHINA J.	RR-5
26S 12W 18B 1700	4766.92/4766.02	LOVELL, NOVA D. & ELLEN M.	F
26S 12W 18C 103	4767.04	MUENCHRATH, A. JOHN & MARY M.	F
26S 12W 18C 300	4769.21	MAEYENS, EDGAR JR., & MELODY M.	RR-5
26S 12W 18C 200	4768.00	ROSEBURG RESOURCES CO.	F
26S 12W 19 200	4771.01	ROSEBURG RESOURCES CO.	F
26S 12W 19 300	4772.00	RIVER BEND RESOURCES CO.	F
26S 12W 30 100	4951.00/4951.90	MCCAULEY, ROBERT H. & LINDA S.	F
26S 12W 30 600	4951.22	SCOVILLE, ROBERT G.	RR-5
26S 12W 30 1000	4953.00/4953.90	KETCHUM, JIMMIE R. & CAROLYN E.	F
26S 12W 30A 500	4950.01	LONE ROCK TIMBERLAND CO.	F
26S 12W 30 1200	4956.00	MENASHA FOREST PRODUCTS CORPORATION	F
26S 12W 30 1400	4957.00	FRED MESSERLE & SONS, INC.	F
26S 12W 31A 100	4958.00	FOORD, RONALD L. & MOLLY A.	F
26S 12W 32 400	4967.00	FRED MESSERLE & SONS, INC.	F
26S 12W 32 500	4968.00/4698.90	WILLIS, DEE A.	EFU, F
26S 12W 31 700	4963.00	PLUM CREEK TIMBERLANDS, L.P.	F
26S 12W 31 900	4964.00	MANLEY, WARREN	F
27S 12W 6 100	6526.01	LONE ROCK TIMBERLAND CO.	F
27S 12W 6 200	6526.90/6526.00	STALCUP, STEVEN & CAROLE	F
27S 12W 6 300	6527.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 12W 5 100	6521.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 0 (8) 1700	6534.00	ROSEBURG RESOURCES CO.	F

Exhibit "B"
Order 10-08-045PL

EXHIBIT A

Map TRS #	Account # (s)	Landowner	Zoning
27S 12W 0 (8) 1600	6536.01	PACIFICORP NORMAN K. ROSS, PROP TAX MNGR	F
27S 12W 0 (8) 1500	6533.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 12W 0 2500	6588.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 0 (16) 2400	6584.00	COOS COUNTY SHEEP CO.	F, EFU
27S 12W 0 (15) 2300	6580.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 22 100	6616.00	COOS COUNTY SHEEP CO.	F
27S 12W 23 200	6625.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 23 100	6624.00	COOS COUNTY SHEEP CO.	EFU, F
27S 12W 23 300	6627.00/6627.90	HEL BENTREE FARM, INC.	F
27S 12W 24C 1500	6656.94/6656.04	BREUER, JOHN D., III & KARA L.;ETAL BREUER, JOHN D., II & JOANNE W.	F
27S 12W 24C 1600	6661.00	WILLIAMS, VIRGIL D. & CAROL	RR-5
27S 12W 24C 1200	6659.00	METCALF, JAMES I. & MARY C.	RR-5
27S 12W 24C 1700	6659.04/6659.94	WILLIAMS, VIRGIL D. & CAROL F.	EFU
27S 12W 25 200	6667.90/6667.00	SCHLATTER, MARY L. YATES, CHARLES & JOHANNA	EFU
27S 12W 24C 1800	6662.05	DALTON, RODNEY A. WILLIAMS, VIRGIL D. & CAROL F.	EFU
27S 12W 24C 2100	6662.04/6662.94	TED L. FIFE FAMILY TRUST FIFE, TED L., TRUSTEE	EFU
27S 12W 25 201	6667.01 / 6667.91	FISHER, DONALD L. & SHIRLEY J.	F
27S 12W 25 203	6667.03/6667.93	OTTERBACH, DAVE & PATRICIA L. HAZEN, WALTER E. & WENDY A.	F
27S 12W 25 100	6666.00	U.S.A. (C.B.W.R.G.L.)	F
27S 11W 0 (30) 1500	6416.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 11W 0 1400	6356.00	U.S.A. (C.B.W.R.G.L.)	F
27S 11W 0 (29) 1700	6412.00	U.S.A. (C.B.W.R.G.L.)	F
27S 11W 32 1000	6428.00	PLUM CREEK TIMBERLANDS, L.P.	F
27S 11W 32 800	6426.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 11W 32 1300	6431.00	MENASHA FOREST PRODUCTS CORPORATION	F
28S 11W 5 100	8151.00	U.S.A. (C.B.W.R.G.L.)	F
28S 11W 5 200	8152.00	WINDLINX FAMILY TRUST WINDLINX, RUSSELL K & DIANA, TRSTES	F
28S 11W 4 600	8138.00/8138.90	MOORE MILL & LUMBER CO.	F
28S 11W 4 800	8148.00	MENASHA FOREST PRODUCTS CORPORATION	F
28S 11W 0 (9) 400	8179.90	U.S.A. (C.B.W.R.G.L.)	F
28S 11W 10 1000	8185.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 11W 10 900	8186.00	LONE ROCK TIMBERLAND CO.	F
28S 11W 10 901	8186.01	DORA CEMETERY ASSN.	F
28S 11W 10 1300	8189.00/8189.90	GARRETT, CYNTHIA A.	F, EFU
28S 11W 10 1400	8191.00/8191.90	LAIRD TIMBERLANDS, LLC	EFU
28S 11W 15 100	8224.01	LAIRD TIMBERLANDS, LLC	EFU, F
28S 11W 0 (14) 500	8219.00	MOORE MILL & LUMBER CO.	EFU, F
28S 11W 0 700	8217.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 11W 13 900	8213.00	U.S.A. (C.B.W.R.G.L.)	F
28S 11W 24 100	8276.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 11W 0 (25) 1900	8284.00	ROSEBURG RESOURCES CO.	F
28S 10W 0 (19) 3500	8028.00	ROSEBURG RESOURCES CO.	F

Exhibit "B"
Order 10-08-045PL

EXHIBIT A

Map TRS #	Account # (s)	Landowner	Zoning
28S 10W 0 (19) 3400	8025.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 (19) 3600	8030.00	LONE ROCK TIMBERLAND CO.	F
28S 10W 0 (30) 3300	8031.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 10W 0 (19) 3800	8084.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 10W 0 (29) 4100	8080.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 (28) 4200	8072.00	U.S.A. (O & C)	F
28S 10W 0 (27) 4600	8066.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 4500	8068.00	LONE ROCK TIMBERLAND CO.	F
28S 10W 0 (26) 5000	8063.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 10W 0 (26) 4900	8064.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 10W 0 (26) 4800	8065.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 10W 0 (35) 5600	8113.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 (36) 5500	8119.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 10W 0 (36) 5200	8118.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 09W 0 (31) 3500	7869.00	U.S.A. (C.B.W.R.G.L.)	F
29S 09W 0 (6) 300	10558.00	PLUM CREEK TIMBERLANDS, L.P.	F
29S 09W 0 (5) 200	10554.00	U.S.A. (C.B.W.R.G.L.)	F
29S 09W 0 (8) 500	10567.00	LONE ROCK TIMBERLAND CO.	F
29S 09W 0 (8) 600	10566.00	PLUM CREEK TIMBERLANDS, L.P.	F
29S 09W 0 (9) 700	10570.00	U.S.A. (C.B.W.R.G.L.)	F
25S 13W 4 300	3101.00 / 3101.90	ROSEBURG FOREST PRODUCTS CO.	CBEMP
25S 13W 3 200	3096.00 / 3096.90	WEYERHAEUSER NR COMPANY	IND & CBEMP
28S 12W 7 101	8464.05	HW3, LLC	Q-IND
28S 12W 7C 1000	8463.01	HW3, LLC	CREMP & CREMP IND
28S 12W 7C 900	8463.91	HW3, LLC	CREMP & CREMP IND
28S 12W 18B 1500	8463.00 / 8463.90	LBA CONTRACT CUTTING, INC. @ ARRIOLA, BRIAN	CREMP & CREMP IND
27S 12W 26D 1200	6693.01	YATES, SPENCER C. & TRULY R.	EFU
28S 13W 01DB 300	8794.01	CITY OF COQUILLE	CITY
28S 13W 01DB 309	8794.11	CITY OF COQUILLE	CITY
28S 13W 01DB 310	8794.12	CITY OF COQUILLE	CITY
25S 13W 35 400	3952.00	GEORGIA-PACIFIC WEST, INC.	CBEMP
25S 13W 36 1000	4004.00	GEORGIA-PACIFIC WEST, INC.	CBEMP

NOTE: U.S.A = BLM

Exhibit "B"
Order 10-08-045PL

EXHIBIT A

Exhibit B

Final Order No. 12-03-018PL, REM 11-01 (Mar. 13, 2012)

BEFORE THE BOARD OF COMMISSIONERS
OF THE COUNTY OF COOS, OREGON

In the Matter of LUBA Remand of Pacific Connector Gas Pipeline, L.P. REM-10-01 HBCU-10-01	FINAL DECISION AND ORDER NO. 12-03-018PL

Whereas on September 8, 2010, the Coos County Board of Commissioners adopted Final Decision and Order No. 10-08-045PL, approving Pacific Connector's application in county file #HBCU-10-01 to develop 49.72 miles of interstate natural gas pipeline and associated facilities connecting the Jordan Cove LNG terminal to the pipeline segment in adjacent Douglas County.

Whereas the opponents appealed the County's decision to the Land Use Board of Appeals ("LUBA"). On March 29, 2010, LUBA remanded the decision for further consideration of two issues: (1) a procedural issue related to property owner consents under LDO 5.0.150; and (2) potential impacts to Olympia oysters in Haynes Inlet under the two applicable CBEMP Management Objectives.

Whereas Pacific Connector submitted a written request for a remand hearing on May 12, 2011. On June 7, 2011, the Board concluded that no additional evidence was required to address the issue regarding property owner consents. However, the Board determined that the Olympia oyster issue could not be fully resolved without an evidentiary hearing, and appointed a hearings officer to hold a *de novo* evidentiary hearing on remand, with the scope of the hearing limited to the second issue identified by LUBA regarding potential impacts on Olympia oysters.

Whereas Hearings Officer Andrew Stamp conducted a public hearing on September 21, 2011, and held the record open for additional evidence and argument until December 15, 2011. The hearings officer issued his decision on January 30, 2010, recommending that the Board approve the application on remand with conditions, and rejecting the opponents' arguments that the applicable CBEMP Management Objectives were not satisfied.

Whereas the County Planning Director provided the Board with a staff report dated February 15, 2012, which provides two substantive recommendations: (1) revised language for Condition of Approval #20 regarding property owner consents under LDO 5.0.150, as required by LUBA's opinion under Assignment of Error Two; and (2) proposed findings addressing a procedural issue identified by the hearings officer in his decision regarding authorization of witnesses to testify under LDO 5.7.300(4).

Whereas on March 13, 2012, the Board met to review the hearings officer's recommendation "on the record," without accepting additional evidence or argument from the parties, and to deliberate regarding: (1) whether to accept, reject, or modify the hearings officer's recommendation, and (2) whether to accept, reject, or modify the revised findings and conditions provided by staff.

EXHIBIT B

WHEREAS, at the conclusion of the March 13, 2012 meeting the Board reached a decision to adopt the hearings officer's recommendation, with the modifications provided in the February 15, 2012 staff report regarding compliance with LDO 5.7.300(4). The Board finds that the applicant has addressed the remand issues and that all applicable approval criteria are met with the suggested new conditions of approval. The Board finds that staff's suggested revisions to Condition 20 address Assignment of Error Two. The Board hereby adopts the hearings officer's recommendation, as modified and attached as Attachment "A," as its own approval findings, along with the attached conditions of approval. All other findings and conditions of approval in Order No. 10-08-045PL adopted September 8, 2010, remain in full force and effect, except as modified herein.

ADOPTED this 13th day of March, 2012.

BOARD OF COMMISSIONERS

Fred R. Messerle
Commissioner

Cam Parry
Commissioner

Robert "Bob" Main
Commissioner

ATTEST:

Jill Ralph
Recording Secretary

APPROVED AS TO FORM:

Office of County Counsel

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS ON REMAND FROM LUBA

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
COOS COUNTY, OREGON

FILE NO. REM-11-01

EXHIBIT B

I. BACKGROUND

A. Summary of the Remand Process and Due Process Afforded to the Participants.

On September 8, 2010, the Coos County Board of Commissioners (Board) adopted Final Decision and Order No. 10-08-045PL, approving Pacific Connector's application in county file #HBCU-10-01 to develop 49.72 miles of interstate natural gas pipeline and associated facilities connecting the Jordan Cove LNG terminal to the pipeline segment in adjacent Douglas County. Opponents appealed the Board's decision to the Land Use Board of Appeals ("LUBA").

The opponents appealed the County's decision to LUBA. On March 29, 2010, LUBA remanded the decision for further consideration of two issues: (1) procedural issue related to property owner consents under LDO 5.0.150; and (2) potential impacts to Olympia oysters. *Citizens Against LNG vs. Coos County*, ___ Or LUBA ___ (LUBA No. 2010-086, March 29, 2011). Neither party appealed LUBA's decision any further, and therefore LUBA's decision is final and governs this remand proceeding.

Pacific Connector submitted its written request for a remand hearing on May 12, 2011. On June 7, 2011, the Board expressly concluded that no additional evidence was required to address the issue regarding property owner consents. However, the Board determined that the Olympia oyster issue could not be fully resolved without an evidentiary hearing. The Board voted on June 7, 2011 to appoint a hearings officer to hold a *de novo* evidentiary hearing on remand, with the scope of the hearing limited to the second issue identified by LUBA regarding Olympia oysters. The evidentiary hearing on remand is intended to determine: (1) if Olympia oysters currently exist in Haynes Inlet, and if so, (2) determine whether applicant is proposing construction methods, best-management practices, protection efforts, and mitigation techniques that will adequately "protect" Olympia oysters in Haynes Inlet from impacts caused by construction of the pipeline.

The hearings officer instructed the parties that all evidence and testimony in this proceeding must be directed toward the standards set forth in the Notice of Hearing, and must relate exclusively to potential impacts on Olympia oysters.

The review timeline for this application is as follows:

March 29, 2011	Decision remanded by LUBA
May 11, 2011	Applicant initiates remand process.
September 21, 2011	Public Hearing held.
October 10, 2011	First Open Record Period Closed (rebuttal testimony only).
October 17, 2011	Second Open Record Period Closed (for surrebuttal testimony only)

EXHIBIT B

After the initial two rebuttal periods, both parties indicated that they wished to invoke ORS 173.763(6) and submit further rebuttal evidence.[1] For this reason, on October 24, 2011, the hearings officer conducted a conference call with the parties and worked out a schedule for the submission of additional evidence. That schedule was subsequently modified at the parties' request, and ultimately resulted in the following deadlines:

November 14, 2011	Third Open Record Period Closed (for surrebuttal testimony only)
November 28, 2011	Fourth Open Record Period Closed (for surrebuttal testimony only)
December 15, 2011	Applicant's Final Argument
January 30, 2012	Hearings Officer's Recommendation.

B. Why Did LUBA Remand the County's 2010 Decision?

To recap, LUBA remanded the case for two reasons. For easement of reference, the hearings officer will refer to these two issues as the "property ownership" issue, and the "Olympia oyster" issue.

The property ownership issue was procedural in nature, and came about because the code requires all property owners to physically sign the land use application. That code provision created unintended consequences when the use at issue is a linear feature that traverses many properties, as such as a pipeline. The hearings officer essentially created a plan to defer evaluation of whether the application had sufficient signatures to a later stage in the approval process. Although the hearings officer had pointed out that this process may require additional public input *if* the issue of property ownership in any particular case resulted in the exercise of discretion, the County (subsequent to the time the hearings officer's recommendation was issued) argued to LUBA that the property ownership verification process was going to be a strictly ministerial (non-discretionary) process. LUBA agreed with the opponents that such a process might involve discretion, and therefore, *may* require a public hearing. Overall, that aspect of the case is fairly inconsequential and requires no further discussion.

The other remand issue concerned native oysters. In the initial land use proceeding, the opponents had placed into the record an article concerning the recent re-emergence of native Olympia oysters in the Coos Bay area. Specifically, the opponents relied upon an article published in 2009 in the Journal of Shellfish Research by Dr. Groth and Dr. Rumrill, which documented the discovery of Olympia oysters in certain portions of Coos Bay, including Haynes Inlet. Although the hearings officer (and, hence, the Board) adopted detailed findings regarding the absence of impacts from pipeline construction to *commercial* oyster populations in Haynes Inlet, the hearings officer did not specifically address native Olympic oysters. This was an

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[1] LUBA has limited the applicability of ORS 197.763(2), (3), (6), and (8) to the first evidentiary hearing in the initial proceedings, not to proceedings on remand.[1] *Collins v. Klamath County*, 28 Or LUBA 553 (1995) (ORS 197.763(2)(3) and (8)); *Citizens for Responsible Growth v. City of Seaside*, 26 Or LUBA 458, 462 (1994) (ORS 197.763(6)). Nonetheless, LUBA has stated that if a local government considers new evidence on remand, all parties must be given an opportunity to respond to that new evidence. *DLCD v. Umatilla County*, 39 Or LUBA 715, 733 (2001). The hearings officer determined that the processes set forth in ORS 197.763 set forth sufficient due process protection to defeat any process-related attack at LUBA, and therefore followed the framework set forth in the statute for this case.

EXHIBIT B

oversight on the hearings officer's part, who had considered oysters in a more generic fashion, as opposed to adopting "species-specific" analysis.

For this reasons, LUBA correctly held that the findings did not adequately consider potential impacts on this particular species of native oyster:

> Whether the county is obligated to address in its findings the specific issue of impacts on the Olympia oyster is a more difficult question. The 2009 article of course did not consider impacts of the pipeline on the Olympia oyster, and it may well be the case that the same measures and rationales Ellis relied upon to conclude that the pipeline would not significantly impact invertebrates in general and the commercial oyster beds apply equally to the Olympia oyster. However, we cannot tell from the findings and the record whether that is the case. The Ellis study assumed that no Olympia oysters were present in Haynes Inlet, something which is apparently no longer true. One of the specific measures suggested by Ellis was to route the pipeline away from the commercial oyster beds, presumably to reduce impacts to the non-native oysters that occupy the beds. That re-routing may take the pipeline directly through prime Olympia oyster habitat, for all we know. The Olympia oyster apparently depends upon the existence of a hard substrate. There may be no hard substrate on the pipeline route, or the dredging may not affect substrate, or the Olympia oyster may be no different in this regard from any other oyster or invertebrate, but again we do not know. Because the county's findings regarding protection of estuarine resources, including the adopted Ellis report, do not address these issues, which appear to be legitimate issues regarding compliance with applicable criteria, we agree with petitioners that remand is necessary for the county to adopt responsive findings addressing potential impacts on the Olympia oyster.

Citizens Against LNG, slip op 14-15. Thus, this proceeding is necessary to further consider whether the pipeline project will "protect" the existing population of native Olympia Oysters colonizing Haynes Inlet.

C. What Are the Key Issues on Remand?

The applicant's consultants had initially stated that they had not seen any Olympia oysters in the proposed pipeline right of way. As it turns out, additional investigation by the applicant confirmed that certain portions of the pipeline route is inhabited by Olympia oysters. Given that reality, there are ~~three~~ two fundamental questions before the hearings officer and the Board of Commissioners:

1. To what extent is Haynes Inlet populated by Olympia Oysters, and what factor(s) currently inhibit further increases in the population of these native oysters in Haynes Inlet?

Note: Because the parties submitted conflicting evidence on these two points, the Board is tasked with determining which party provided the better evidence regarding the number and location of Olympia oysters in Haynes Inlet.

2. Is there substantial evidence in the whole record to support a finding that the applicant's Oyster Protection Plan and Oyster Mitigation Plan will "protect" the resource productivity of existing Olympia oysters in Haynes Inlet?

Note: The question can be also framed in the following manner: Is there substantial evidence to support a finding that construction of the pipeline will not result in anything other than temporary, insignificant, and *de-minimus* impacts on the population of Olympia oysters due to causes such as loss of habitat / burial and/or loss of reproductive ability due to increased sedimentation?

This overarching question can be further expanded to include a set of more discrete questions:

2a. Will the applicant's "Protection Plan," which calls for the relocation of all oysters in the proposed pipeline right of way to a site a few hundred feet northwest of the right of way, "protect" the resource productivity of existing Olympia oysters?

2b. Will the applicant's "Mitigation Plan," which calls for the addition of 30 cubic yards of Pacific oyster shell to the mudflats (in the vicinity of MP 2.9-3.2), create additional hard substrate that will further enhance the recovery of Olympia oysters in Haynes Inlet?

2c. Will the dredging operations create sedimentation that will result in anything other than temporary, insignificant, and *de-minimis* impacts on the population of Olympia oysters in Haynes Inlet?

D. Scope of Review (Substantial Evidence)

1. Review of General Principles of Substantial Evidence

The outcome of this case turns on questions of substantial evidence; specifically, the question of which evidence the Board of Commissioners finds more credible and compelling. The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995). Stating the rule in the negative gives further insight into its meaning: "A finding lacks substantial evidence when the record contains credible evidence weighing overwhelmingly in favor of one finding and the agency finds another without giving a persuasive explanation." *Canvasser Services, Inc. v. Employment Dept.*, 163 Or App 270, 274, 987 P2d 652 (1999); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 752 P2d 312 (1988).

In a land use proceeding, the applicant has the burden of bringing forth substantial evidence in the whole record to demonstrate that all approval standards are met. When evidence

EXHIBIT B

submitted by various parties conflicts, the County must review all of the evidence in the entire record to see if the undermining evidence outweighs the evidence on which the decision-maker seeks to rely on. *Younger v. City of Portland*, 305 Or 346, 357, 752 P2d 262 (1988).

The Board is allowed to draw inferences from the evidence presented by the parties. An inference has two parts: a primary fact and a logical deduction that arises from that primary fact. *See City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981). In many cases, the deduction may be obvious from common knowledge (such as a wet street indicating a recent rain event), but in other cases, the deduction may be less obvious. In the less obvious cases, the decision-maker should explain in the findings the basis for the deduction, so that a reviewing court can review the inference for substantial reason. *Id.*

As discussed in more detail below, the Board of Commissioners is afforded a great deal of authority to evaluate both the evidence presented by the parties, as well as the credibility of persons presenting that evidence. When faced with conflicting evidence, the decision maker is entitled to select which evidence to rely upon. That decision will not be second-guessed by LUBA or the courts, so long as it is evidence that a reasonable person would rely upon to support a conclusion. *See, e.g., Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258 (1995).[2]

If there is a complete absence of information on a particular point for which the applicant bears the burden of proof, the application must be denied. *Gray v. Clatsop County*, 18 Or. LUBA 561 (1989); *DLCD v. Curry County*, 33 Or LUBA 728 (1997)(local government must make appropriate findings based on substantive evidence, not an absence of findings, point a point that the applicant bears the burden of proof.). At the end of the day, however, the substantial evidence standard is a relatively low standard of proof. Courts consider the "substantial evidence" standard to be a less onerous standard than the "preponderance of the evidence" test and the "clear and convincing evidence" standards used in most civil lawsuits,

In this case, the hearings officer has determined that the applicant has provided the County with both expert and lay person testimony that a reasonable person could rely upon to reach the decision that the Oyster Protection Plan and Oyster Mitigation Plan will adequately protect Olympia oysters in Haynes Inlet. The only question is whether the opponents have provided rebuttal evidence that "so undermines" the applicant's testimony that a reasonable person would no longer rely on it in light of the opponent's testimony. *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff'd* 113 Or App 169, 831 P2d 77 (1992). The hearings officer does not

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[2] In reviewing the evidence, LUBA and the Courts may not substitute their judgment for that of the local decision maker. Rather, LUBA must consider and weigh all the evidence in the record to which it has been directed, and determine whether, based on that evidence, a reasonable person would have relied on that evidence to draw the conclusion the local government arrived at. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). *See also Whitaker v. Fair Dismissal Appeals Board*, 25 Or App 569, 550 P2d 455 (1976) (pointing out that review of whole record for substantial evidence does not authorize a reviewing court to substitute its judgment for that of the agency as to whether an examination of all the evidence justifies the agency's action).

EXHIBIT B

believe that the opponent's evidence does so, but of course the Board is free to arrive at a different conclusion.

2. Expert testimony.

The substantial evidence questions faced in this case generally hinge on "expert" testimony. Expert testimony differs from lay person testimony because an expert is allowed to give his or "opinion" about whether a standard is met. LUBA has often stated that a local government may rely on the *opinion* of an expert in making a determination of whether a proposal satisfies an applicable standard. *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 236 (1990). Additionally, LUBA has also stated that an expert witness is generally not required to explain the basis for assumptions underlying the expert's evidence, nor is evidence supporting those assumptions required to be included in the record. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458, 465 (1994); *Miller v. City of Ashland*, 17 Or LUBA 147, 170 (1988); *Hillsboro Neigh. Dev. Comm. v. City of Hillsboro*, 15 Or LUBA 426, 432 (1987).

Nonetheless, the more that an expert does to back up his opinion with facts and evidence, the more weight that a reasonable person will typically give to that opinion. *Chance v. Alexander*, 255 Or 136, 465 P.2d 226 (1970); *ODOT v. Clackamas County*, 27 Or. LUBA 141 (1994) ("Of course, we recognize that if sufficient evidence undermining an expert's assumptions is submitted during the local proceedings, it may be unreasonable for the local decision maker to rely on that expert's conclusions. In such instances, the local government's decision has a better chance of withstanding a substantial evidence challenge made in an appeal to LUBA if the record includes an explanation of, or evidence supporting, the expert's assumptions.").

An expert's *failure* to back up opinions with facts and evidence can result in his or her opinion being rejected by a decision-maker. An expert's mere conclusion, without and supporting facts or analysis to back it up, may not constitute substantial evidence in all cases. *Liberty Northwest Ins. Corp v. Verner*, 139 Or App 165, 168-69, 911 P2d 271 (1996). Stated another way, the expert's opinion should generally have some sort of clear foundation in order to be relied upon by a decision-maker. *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988); ("[s]ubstantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based."); *Dickas v. City of Beaverton*, 17 Or LUBA 574, 580-85 (1989) (Finding of adequate school capacity not supported by substantial evidence where report by school district's expert was contradicted by other evidence). For example, in *Worchester v. City of Cannon Beach*, 10 Or LUBA 307 (1983) LUBA held that when an expert witness does not offer any supporting documentation and does not state how he arrived at his conclusions, and does not explain how he is qualified to make conclusions of a scientific nature, LUBA will not find the testimony to be convincing. *Id.* at 310.

It is also important to note that lay-person testimony can, under the right set of facts, undermine contradictory expert testimony. *See Johns v. City of Lincoln City*, 35 Or LUBA 421, 428 (1999); *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999). For example, local residents may often have a better understanding of local conditions and patterns, and can use such information to undermine factual assumptions in the expert's analysis.

EXHIBIT B

3. **"Battle of the Experts."**

This case presents a classic "battle of the experts" situation: both parties have presented dueling expert testimony from scientists and other professionals. In a "battle of the experts" case, the decision-maker is tasked with the difficult decision of deciding which of two experts is presenting the more believable and substantial testimony. This involves a complex weighing process. There are no set rules for how conflicting evidence is to be weighed, and the question may boil down to which expert the decision-maker finds to be more believable. In *Westside Rock v. Clackamas County*, 51 Or. LUBA 264, 286-7 (2006), LUBA stated:

> Finally, we note that we agree with petitioner that in a case like this one, the testimony of experts is likely to be critical. Boards of county commissioners can understand most of the fundamental concepts that are in play here, even if they are not trained as engineers or geologists. * * *.
>
> But while a board of county commissioners (or the Land Use Board of Appeals for that matter) may be able to grasp these fundamental concepts, it takes experts to collect and analyze data and draw scientific and engineering conclusions from that data. In such cases it frequently will come down to which of the experts the decision maker finds more believable.

Some factors that *may* give a decision-maker reason to choose one expert's testimony over another include:

- Does one expert lack the correct qualifications to give an opinion on a particular topic? *Tipperman v. Union County*, 44 Or LUBA 98 (2003); *Westside Rock v. Clackamas County*, 51 Or. LUBA 264, 286-7 (2006).
- Are any of the expert's key factual or legal assumptions incorrect, or cast in doubt by other evidence in the record? *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or. LUBA 261 (2006); *Ekis v. Linn County*, 19 Or LUBA 15 (1990).
- Is there solid "foundation" evidence which the expert relies on to draw his or her conclusion? (For example, a conclusion based on one "study" may, in some cases, not be a reliable as a conclusion based on many studies. Conversely, a conclusion based on one study may be more substantial than opposing conclusions based on many other conflicting studies, if there is something that distinguishes that lone study, such as newer, more refined sampling technique, etc.). *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988); *Bartels v. City of Portland*, 20 Or LUBA 303 (1990) ("[i]n view of the undisputed develop constraints present on this site, the largely unexplained expressions of confidence by [geologists] that the proposed residential development is feasible are not sufficient to comply with [the code.]").

EXHIBIT B

- Does the expert fail to consider alternatives? *Wal-Mart Stores v. City of Hillsboro*, 46 Or LUBA 680 (2004).
- Are there internal inconsistencies in the expert's testimony? *Concerned Citizens of the Upper Rogue and Don Carroll v. Jackson County*, 33 Or LUBA 70 (1997).

Finally, a decision-maker may take into account some less tangible factors as well:

- How confident and decisive is the expert in his or her assessments? Does the testimony contain significant qualifying language? Vague, waffling, or hair-splitting testimony may lead a decision-maker to question the expert's conclusions.
- Does the expert come across as non-credible for any reason?
- Is the expert's opinion entitled to less weight because of the fact that he or she has a track record of being wrong in the past?
- Is the expert someone who is particularly renowned in his or her field?
- Is the expert's opinion entitled to less weight because he or she is being paid, or because he or she is clearly aligned with a certain political philosophy, particular industry, or advocacy group, etc. Note: just because an expert is being paid or is associated with a particular policy perspective or "camp" does not necessarily make their testimony inherently unreliable or unsubstantial. However, these types of intangible factors are things that a decision-maker may take note of when undertaking the process of weighing conflicting testimony.

The above-list is not intended to be exhaustive. Rather, it is a non-exclusive list of the types of consideration that a decision-maker might reasonably take into account when weighing expert testimony.

If the County determines that either parties' expert testimony was credible and sufficiently substantial to support a conclusion, then the choice of which expert evidence to believe is up to the County. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to on recons* 151 Or App 16, 949 P2d 1225 (1997); *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002); *Eugene Sand & Gravel v. Lane County*, 44 Or. LUBA 50 (2003).

4. The Opponent's Conundrum: Provide Direct Evidence of Non-Compliance, or Present Evidence Intended to Critique the Applicant's Evidence.

In its arguments to the hearings officer, the applicant repeatedly chastises the opponents for not coming up with much in the way of *direct* evidence of a failure to protect the oyster resource, but instead merely offering critiques of the applicant's evidence. The hearings officer does, in this opinion, express a certain degree of agreement with the applicant's sentiment in this regard. At the same time, the hearings officer recognizes that opponents often do not have the financial resources to commission their own independent studies. It is important to remember that the applicant has the burden of proof on issue of whether its construction will protect the

EXHIBIT B

resource. The opponents' evidence should not be discounted, *in and of itself*, merely because it is a critique and not direct evidence of non-compliance.

In *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or. LUBA 261 (2006), the hearings officer denied a conditional use permit for a Wal-Mart store. The hearings officer chose to believe the opponents' testimony over that provided by the applicant's experts. The applicant, Wal-Mart, appealed to LUBA, and argued that the opponents' testimony should have been discounted because it consisted solely of a critique of the Wal-Mart's evidence. LUBA rejected that argument, as follows:

> Neither do we agree with petitioner's suggestion that the opponents' experts' testimony should be discounted significantly because it is largely a critical review of the work that petitioner's experts have done rather than an original effort by those experts to predict how the expected traffic will affect transportation facilities. As we have already noted, that difference in approaches is largely a function of, and dictated by, the fact that the applicant has the burden of proof and the opponents do not.

LUBA concluded by stating:

> The critical issue for the local decision maker will generally be whether any expert or lay testimony offered by * * * opponents raises questions or issues that undermine or call into question the conclusions and supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts.

Id. at 276. Thus, although an opponent's direct evidence will often be much more persuasive than a mere critique, an effective critique can be enough to put an expert's evidence into question. *See, e.g., Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008), *aff'd w/o op.* 219 Or App 429, 182 P.3d 325 (2008).

5. Conclusion.

The hearings officer believes that the conclusions made herein would be affirmed if appealed. However, the Board of Commissioners does not have to accept the conclusions of the hearings officer. The Board has the authority to: (1) re-weigh the evidence, and (2) modify or overturn the hearings officer's conclusions. There are other conclusions that could be drawn from the evidence, as well as other plausible interpretations that could be adopted by the Board. As discussed above, the Board has fairly wide latitude under state law to draw its own conclusions about the evidence.

E. What are the Applicable Legal Standards?

On remand, there is only one core legal standard that the Board of Commissioners must apply. As a short-hand, the hearings officer will refer to this standard as the "protect" standard.

As relevant here, the "protect" standard is found in two places in the County's zoning code: the management objectives for the two aquatic zoning districts at issue: 11-NA and 13A-NA.

1. Overview of the Management Objective Standards: Aquatic Zoning Districts 11-NA and 13A-NA.

Under LUBA's remand order, the two applicable substantive standards are the management objectives for the aquatic zoning districts 11-NA and 13A-NA. Zoning district 11-NA is located on the east side of the Highway 101 Bridge, and consists primarily of intertidal mud flat areas. Zoning district 13A-NA is generally located on the west side of the bridge, and consists primarily of sub-tidal areas. The management objective for zoning district 11-NA is set forth at Coos County Zoning and Land Development Ordinance (LDO) 4.5.405, and provides, in relevant part:

> Management objective: This extensive intertidal/marsh district, which provides habitat for a wide variety of fish and wildlife species shall be managed to protect its resource productivity. (Emphasis added).

The management objective for zoning district 13A-NA is set forth at LDO 4.5.425, and provides, in relevant part:

> Management objective: This district shall be managed to allow the continuance of shallow-draft navigation while protecting the productivity and natural character of the aquatic area. (Emphasis added).

These two standards are nearly identical – 11-NA requires the county to "protect" resource productivity, and 13A-NA requires the county to "protect" the productivity and natural character of the aquatic area. Under LUBA's remand order, the County is required to consider potential impacts of the pipeline on the Olympia oyster, and to evaluate the extent to which the applicant's proposal will "protect" such oysters under the two objectives quoted above. Thus, the scope of this proceeding is narrow.

2. LUBA Case Law Interpreting the "Protect" Standard.

LUBA discussed what is required to "protect" aquatic resources in its final opinion remanding this case:

> Petitioners also argue that the obligation to 'protect' aquatic resources requires reducing harm to such a degree that there is at most a *de minimis* or insignificant impact on aquatic resources, including both commercial oyster beds and Olympia oysters, under the reasoning in *Columbia Riverkeeper v. Clatsop County*, ___ Or LUBA ___ (April 12, 2010), *aff'd* 238 Or App 439, 243 P3d 82 (2010), and that measures that simply reduce or mitigate impacts on estuarine resources are not sufficient to 'protect' those resources,

EXHIBIT B

> for purposes of local comprehensive plan provisions that implement Statewide Planning Goal 16 (Estuarine Resources).
>
> Turning to the last argument first, intervenor argues that the county did not attempt to rely on measures that simply reduce or mitigate impacts, as was the case in *Columbia Riverkeeper*, but instead found, based on substantial evidence, that the impacts will be 'temporary and insignificant' and thus estuarine resources will be 'protected.' We agree with intervenor that the county did not misunderstand its obligation to 'protect' estuarine resources, and that findings that impacts will be 'temporary and insignificant' are focused on the correct legal standard for purposes of the comprehensive plan management district language that implements Goal 16.

Citizens Against LNG vs. Coos County, ___ Or LUBA ___ (LUBA No. 2010-086, March 29, 2011), slip op 13-14. Thus, LUBA concluded that Coos County's findings that impacts on Olympia oysters would be "temporary and insignificant" are sufficient to satisfy the "*de minimis*" standard of *Columbia Riverkeeper*.

The LUBA opinion in the *Columbia Riverkeeper* case is also instructive on the meaning of "protect" within the context of Goal 16. That case involved a proposed rezoning of 46 acres of submerged land from "Aquatic Conservation" to "Aquatic Development" in order to allow dredging of the river for a proposed LNG facility within the rezoned area. The submerged lands at issue would be permanently impacted by the proposal. The project proposed a new channel, turning basin and docking facility in a location identified as a "traditional fishing area" in the Columbia River. The county comprehensive plan included a requirement that traditional fishing areas "shall be protected when dredging, filling, pile driving or other potentially disruptive activities occur."

The county found that the resources could be adequately "protected" through use of very general minimization and mitigation measures designed to either reduce harm to general estuarine values or to attempt to reduce harm to the specified resources. One example of "protecting" the resource cited by the county was the fact that applicants designed the dredge footprint "to maximize efficient use of the current basin, minimize the amount of dredging and reduce impacts to fisheries, thereby reducing the area impacted and protecting the habitat as a whole." *Columbia Riverkeeper*, footnote 6. In other words, the applicant merely proposed to make the impacted area a little bit smaller.

LUBA noted that the word "protect" is defined in Goal 16 as "save or shield from loss, destruction, or injury or for future intended use," and that "the county's interpretation of the meaning of 'protect' appears to conclude that protection of specific resource can be accomplished through use of some measures that either reduce harm to general estuarine values or attempt to reduce harm to the specified resources." *Id.* at slip op 16. LUBA then discussed the meaning of the word "protect" within the context of Goal 16, and held:

EXHIBIT B

> Thus, the development that is to be allowed by the disputed rezone is not consistent with the Goal definition of 'protect' unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a degree that there is at most a de- minimis or insignificant impact on the resources that those policies require to be protected."

Id. at slip op 18-19.

As discussed in more detail below, the applicant's proposal fits within the parameters of the type of measures described by LUBA that can "protect" resources within the meaning of Goal 16. Unlike the situation in *Columbia Riverkeeper*, where the proposal was just to *minimize* impacts on resources that would without question be permanently harmed by development, in the present case the evidence supports a finding that the Olympia oysters will - as a whole - not be impacted, either temporarily or permanently, by pipeline construction. Even the temporary impacts will be offset by the proposed mitigation plan, which will increase the population densities of Olympia oysters within Haynes Inlet.

In considering the question, the hearings officer notes that no party here argues that the "protect" standard is so strict that it absolutely precludes any individual oysters from being be killed or harmed (*i.e.* "taken."). The fact that the Code allows development of utilities, bridge crossings, and aquaculture in the 11-NA zone precludes such as strict interpretation. The standard allows some individuals to be "taken" so long as the overall level of harm to the population is *de minimis* or insignificant.

a. The Meaning of "*De minimis.*"

The hearings officer asked the parties to research Oregon case law to see if there is any useful guidance which would tend to give meaning to the phrase "*de minimis.*" The hearings officer attempted some independent research on the issue as well. Neither the hearings officer or any other party was able to come up with any research that was particularly enlightening.

The phrase "*de minimis*" is defined as follows in Black's Law Dictionary, Sixth Edition:

> "De minimis non curat lex. The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles. Provision is made under certain criminal statutes for dismissing offenses which are "de minimis." *See, e.g.,* Model Penal Code §2.12."

The opponent's attorney, Ms. Corrine Sherton, cites to the Meriam Webster's On-Line Dictionary, which defines "*de minimis*" as "lacking significance or importance: so minor as to merit disregard. Along those same lines, the term "insignificance" is defined as "not worth considering, unimportant." Unfortunately, all of these are value-laden definitions that provide little in the way of concrete guidance.

Ms. Sherton has also points out that "temporary" impacts cannot be presumed, as a matter of law, to be "insignificant." *See Hashem v. City of Portland*, 34 Or LUBA 629, 632 (1998). While *Hashem* does say exactly that, the context in which the statement arises in that case makes it weak precedent for this case. Nonetheless, the hearings officer does agree, to a certain extent, with the general thrust of the argument. It is possible that a temporary impact on a resource could potentially be substantial. For example, a one-time release of toxic chemicals that kills a large quantity of oysters, would be substantial even though it only happens one time. To Ms. Sherton's point - excessive sedimentation could be the equivalent of a release of toxic chemicals in terms of its effects on the oyster population.

The applicant's attorney, Mr. Roger Alfred, states that "a detailed analysis of what constitutes "*de minimis* or insignificant impacts" is not necessary in this proceeding." According to the applicant:

> The applicant has provided substantial evidence to support a finding that there will be *no* negative impacts on Olympia oysters resulting from construction of the pipeline. The applicant's proposed relocation and mitigation plan will not merely *protect* existing oysters in Haynes Inlet, but will actually result in a significant increase in native oyster populations by expanding the amount of hard substrate habitat in the inlet.

In a letter dated October 10, 2011, Ms. Corrine Sherton agrees with Mr. Alfred that it is not important to parse out a precise definition of *de minimis*, but for diametrically opposed reasons. She believes that the evidence in the record leads to a clear finding of significant impact on the Olympia oysters and their habitat.

The hearings officer is not in agreement with the applicant that "that there will be *no* negative impacts on Olympia oysters resulting from construction of the pipeline." Certainly, it stands to reason that some of the Oysters proposed for relocation will be missed and ultimately killed. It is possible, though unlikely, that others may not survive transport and relocation. Finally, there may be some overall disruption with the rate of recovery of the oyster population, resulting from sedimentation and other effects. For this reason, the hearings officer believes that the concept of "*de minimis*" harm is highly relevant here. Thus, the hearings officer seeks to ensure that the applicant's plan is feasible and likely to "protect" the resource productivity of the Olympia oyster by demonstrating that the overall level of harm to the population is *de minimis* and insignificant.

II. LEGAL ANALYSIS

According to the applicant, there is a legitimate question as to whether the management objectives for both the 11-NA and 13A-NA zoning districts must be considered. Direct evidence provided by professional divers hired by the applicant indicates that there are *no* Olympia oysters, or suitable habitat, located within the pipeline right of way in the 13A-NA zoning district. However, there is evidence in the record of some Olympia oysters being located on the riprap along the southern edge of the Trans-Pacific Parkway, which is within the 13A-NA zoning district; therefore, the management objectives for both zoning districts should be applied.

EXHIBIT B

A. Compliance with 11-NA Management Objective (Intertidal Mudflats East of Hwy 101).

The potentially applicable standards on which LUBA remanded are the management objectives for the 11-NA and 13A-NA aquatic zoning districts. The 11-NA zoning district is generally contiguous with the boundaries of Haynes Inlet, on the east side of the Highway 101 bridge, which is predominantly an intertidal mud flat area. The 13A-NA zoning district is located on the west side of the Highway 101 Bridge and to the south of Trans-Pacific Parkway, and includes more subtidal areas.

For purposes of this proceeding, the primary standard is the 11-NA management objective for Haynes Inlet. As noted in the Ellis Oyster Survey, Olympia oysters are typically most abundant in shallow subtidal areas but are also found on the lower elevation portions of subtidal flats. In Haynes Inlet, conditions appear to favor a portion of the intertidal mud flat habitat rather than subtidal habitat because no evidence of suitable substrate or Olympia oysters were found in the subtidal portion of the pipeline right of way. Figure 7 in the Ellis Oyster Survey depicts the grab sample locations in the subtidal areas of the 13A-NA zoning district, which did not reveal the presence of any Olympia oysters or the hard substrate that is required for their habitat.

1. Issues Related to the Density of Olympia Oysters Along the Pipeline Route.

a. Applicant's Initial Evidence on Remand: the "Ellis Oyster Survey."

In support of its application for approval by the Coos County Planning Department, PCGP submitted a report that was flawed with respect to how the proposed Pacific Connector Gas Pipeline might impact the Olympia oyster (*Ostrea lurida*) and the "resource productivity" of Haynes Inlet. Page 8 of the original 2010 report stated:

> "The only native oysters to Coos Bay are Olympia oysters * * *. However, they are not known to inhabit the Project Action Area (ODLCD, 1998)"

The applicants now concede that that the above statement is incorrect insomuch as it suggests that Olympia oysters are not present in the Project Action Area.[3]

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[3] Ms. McCaffree takes Dr. Ellis to task for this oversight, noting that Dr. Ellis and his team had previously opined that no Olympia oysters were found along the pipeline route. Ms. McCaffree challenges the credibility of Dr. Ellis based on a statement included in his March 2009 Wetland Mitigation Plan that no native oysters were observed on mudflat habitat or other habitat types along the pipeline route. This is addressed by Dr. Ellis in his letter dated October 17, 2011:

> "The prior statement that no Olympia oysters were observed on mudflat habitat or other habitat types along the pipeline route was included in our March 2009 Wetland Mitigation Plan, and was based on observations made during the eelgrass survey of the pipeline right of way. The eelgrass survey was conducted primarily from a boat when water depth was sufficiently low to allow observation of eelgrass on the substrate. The primary focus of the survey was to

In response to the LUBA remand, the applicant again hired Ellis Ecological Services to undertake a more specific survey of the 11-NA and 13A-NA zoning districts to identify the locations of any Olympia oysters in or around the proposed pipeline route.

The applicant's biologist, Bob Ellis of Ellis Ecological Services, undertook a survey of the intertidal portions of Haynes Inlet east of the Highway 101 bridge on June 28-30, 2011. Mr. Ellis and his two-person team spent two long days traversing, on foot, the entirety of the intertidal portions of the 250-foot right of way, using GPS units to map their tracks and the specific locations where they found Olympia oysters.

After completing the survey, Ellis Ecological produced a technical memorandum dated September 13, 2011 entitled "Pacific Connector Gas Pipeline: Olympia Oyster Survey," ("Ellis Oyster Survey"). Sections 1 and 2 of the Oyster Survey provide introductory and background information regarding Olympia oysters in general and their presence in the Coos Bay area. Section 3 of the Ellis Oyster Survey provides a detailed description of the survey methods and results, with Figure 8 illustrating specific locations within the 250-foot pipeline right of way where Olympia oysters were found. Section 4 provides an analysis regarding the potential impacts from pipeline construction on Olympia oysters. Section 4.1 provides proposed protection methods that will protect existing oysters from any adverse impacts, and will ensure the continued viability of Olympia oysters in Haynes Inlet.

The Ellis Oyster Survey provides the following direct evidence regarding the number and location of Olympia oysters within the pipeline right of way:

- The vast majority of the Haynes Inlet intertidal areas are mudflats with no hard substrate habitat that would support Olympia oysters.

- There are, generally speaking, only very low densities of Olympia oysters within the 0.3-mile section of the pipeline route between mileposts 2.9 and 3.2. Specifically, the surveyors found 79 Olympia oysters within the 0.3-mile segment and only 10 Olympia oysters in the remaining 2.1 miles. Oyster Survey, Figure 8.

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identify the location of eelgrass beds along the proposed pipeline crossing of Haynes Inlet. However, during the eelgrass survey no concentrations of substrate that would be suitable for Olympia oyster (*e.g.* Pacific oyster shells, large pieces of bark, rocks or gravel) and no Olympia oyster were observed. Observations made during the eelgrass survey provided the best available site-specific information at the time the previous testimony was submitted. The prior statement was accurate, because we observed no native oysters or their habitat in the mudflat areas during the eelgrass survey. Also, the statement is not inconsistent with our current survey because we encountered virtually no Olympia oyster or their habitat in the mudflat areas east of MP 3.2." Oct. 17 letter from Bob Ellis, page 2.

The applicant has provided direct and credible evidence regarding the amount and location of Olympia oysters in Haynes Inlet; meanwhile, the opponents have provided only estimates based largely on unsupported assumptions which are contradicted by their own evidence. The weight of the evidence strongly favors recognition that the applicant's Oyster Survey constitutes substantial evidence that can relied upon by the County.

their work and found that Ellis' crew had under-reported oyster densities in any significant manner.[5] This is particularly true since Ellis' prior reporting on the issue had been found to be inaccurate.

b. Discussion of Dr. Rumrill's Oyster Survey Relied on By the Opponents.

On June 29th and June 30th, 2011, a team led by Dr. Steven Rumrill, Research Program Coordinator, South Slough National Estuarine Research Reserve Estuarine and Coastal Science Laboratory in Charleston, Oregon undertook a survey of Olympia oysters at nine sites within Haynes Inlet. It does not appear that the Rumrill survey was undertaken for the specific purpose of rebutting the applicant's evidence. Rather, the Rumrill survey appears to have undertaken independent of the PCGP case, and seems to merely be aimed at confirming the presence and densities of Olympia Oysters at selected locations within Haynes Inlet. That fact gives the Rumrill survey a high degree of reliability as evidence, as far as it goes, but it severely limits its usefulness in answering the key questions presented in this case.

Dr. Rumrill and his team chose nine (9) locations in which to look for Olympia Oysters, The locations selected for their search seems to be based on ease of access to those locations. Four of the nine locations were on the riprap along the sides of the Highway 101 bridge and the Trans-Pacific Parkway (opponents' locations numbered 1-4). High populations of adult and juvenile Olympia oysters (up to 28 individuals per a ~10" by 10" square) were found in the rip-rap. Another four of the nine locations were on rocky shorelines. Patchy populations of adults and juveniles were found at these four other sites. At one site, a mudflat the opponents call "site number 9," Olympia oysters were not found. That site is the only location that is actually within the pipeline's right of way. Dr. Ellis and his team found one Olympia oyster in that general vicinity.

Thus, the overall conclusion of the 2011 Rumrill survey is that the Olympia oysters in Haynes Inlet show a clear preference for rip-rap, and, presumably, other large rocky outcroppings. This is consistent with the findings of the article by Kerstin Wasson entitled *Informing Olympia Oyster Restoration: Evaluation of Factors that Limit Populations in a California Estuary*, Wetlands, 4 May 2010, at p. 455, 457.

Inexplicably, the opponents did not commission a targeted survey that searched for oysters along the proposed pipeline's actual route. Rather, the opponents cite to the Rumrill survey and state:

> Abundant adults and juveniles were found at four of the nine sites, including one site (Site 3) that is directly in the path of the proposed route of the Pacific Connector Gas Pipeline. At this site, the density of Olympia oyster was 448 individuals per square meter.

[5] In this regard, this case differs from the typical land use case because opponents have equal access to the site. In most land use cases, opponents cannot gather evidence on the applicant's site without running the risk of being found guilty of criminal and/or civil trespass.

EXHIBIT B

at those locations. However, the hearings officer specifically rejects any effort to estimate the total population of Olympia oysters in Haynes Inlet or in the pipeline route based off of the 2011 Rumrill Survey, the 2006 survey, or any other survey. It seems rather obvious that locations that feature similar habitat to that identified in the Rumrill survey will potentially have similar densities of oysters, all other environmental factors being equal. However, estimates of oyster densities on rip-rap or rocky shorelines says little about the population densities of oysters living in the mudflats or in the sandy subtidal areas of Haynes Inlet.

If the opponents really wanted to credibly challenge the Ellis Oyster Survey, it was incumbent upon them to conduct a survey of their own *along the pipeline route*. At the very least, the opponents should have spot-checked the Ellis Oyster Survey. Any evidence of underreporting in the Ellis study would have been highly damning evidence. However, the opponents never generated such direct evidence. At the hearing, the hearings officer went out of his way to indicate the need for such evidence, and gave both parties enough time to develop this sort of evidence.

The opponents' failure to present direct evidence about the density of Olympia oysters in the proposed pipeline route severely undermines their approach to this case. The opponents seek to use the Rumrill survey as evidence of overall population densities, but that would only work if the habitat along the route were both (1) fairly uniform, and (2) similar to the areas in the Rumrill study where oysters were found. The hearings officer is reminded about the old joke about the guy who looked for his keys at night in an area where the light was plentiful, even though he knew he lost his keys in a different location.[8] A similar analogy occurs here: the opponents point to high populations of Olympia Oysters in the rip-rap next to the causeway, and yet seem to have been unwilling or unable to look for Olympia oysters along the actual pipeline route.

Jody McCaffree states that the hearings officer should believe the opponent's experts over PCGP's "hired gun" experts: "It would seem more reasonable and reliable to have the word of an Olympia Oyster expert over someone who is paid by the very industry wanting to do to the development, particularly since it would be in the best interest of the Pacific Connector Gas Pipeline to find that there were no Olympia oysters or very few that would have to be dealt with." *See* McCaffree letter dated Oct. 10, 2011.

In the abstract, the hearings officer is sympathetic with the sentiment set forth in Ms. McCaffree's statement quoted above. After all, it can be expected that all experts hired by

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[8]The joke goes as follows:.

> A drunk was crawling about on the sidewalk under a lamppost at night.
> A police officer came up to him and inquired, "What are you doing?"
> The drunk replied, "I'm looking for my car keys."
> The officer looked around in the lamplight, then asked the drunk, "I don't see any car keys. Are you sure you lost them here?"
> The drunk replied, "No, I lost them over there", and pointed to an area of the sidewalk deep in shadow.
> The policeman then asked, "Well, if you lost them over there, why are you looking over here?"
> The drunk looked at him and said, "Because the light is better over here."

advocates to a land use proceeding are going to present evidence in a light favorable to their clients, at least to the extent that they can credibly do so. However, the hearings officer must make a decision based on the evidence in the record, while keeping in mind that the applicant bears the burden of proof. In this case, there are only two pieces of direct evidence that provide information about the presence of Olympia oysters along the pipeline route: the Ellis Oyster Survey and the portion of the 2011 Rumrill study addressing "Site 9." There has been no "Olympia Oyster expert" that has actually walked the proposed right of way. None of the opponent's "critique evidence" sufficiently undermines the direct evidence set forth in either of the two surveys mentioned above. As Dr. Ellis correctly notes, "it is interesting that * * * the opponents prefer to criticize the methodology of the [Ellis] survey and challenge its results, rather than simply conducting their own survey of the pipeline right of way." *See* Ellis letter dated Oct. 17, 2011. Moreover, while it seems true that Dr. Rumrill is very credible expert on Olympia oysters, he specifically does not provide his "word" (opinion) regarding the presence of Olympia oysters along the pipeline route.

Again, had the opponents actually provided evidence that proved that the PCGP scientists had actually missed significant quantities of oysters in their survey, then the Ellis Oyster Survey would not constitute substantial evidence. However, merely providing evidence that oysters are abundant in the nearby rip-rap and rocky shoreline, combined with evidence that Olympia oysters are hard to visually locate and identify on the mudflats, is not sufficient to undermine the Ellis Oyster Survey to the point where it can be said that a reasonable person would not rely on the Ellis Oyster Survey to support a conclusion regarding the rough number of oysters in the pipeline right of way. The applicant has met its burden of proof to demonstrate that the amount of oysters in the actual pipeline route is so low as to be insignificant to the overall productivity of the resource.

To some extent, the Rumrill survey actually supports the applicant's case. First, the fact that the Rumrill survey found no Olympia oysters in the single mudflat location they surveyed supports a finding that the mudflat areas do not typically provide hard substrate habitat, and therefore do not contain significant numbers of Olympia oysters. Indeed, the fact that the Ellis Oyster Survey actually found an oyster in that same general location lends further credibility to the Ellis Survey.

Second, the presence of relatively large number of adult Olympia oysters in the rip-rap, indicates that these mature oysters will be able provide an ample supply of larvae to populate the Pacific oyster shells that will be deposited over the pipeline route by PCGP after the construction is complete. The hearings officer finds, in this regard, that it is the lack of hard substrate that is the primary factor that is inhibiting the expansion of Olympia oyster habitat in Haynes Inlet. *See* Groth & Rumrill (2009), at p. 57 ("Our field observations indicate that the availability of suitable substrate is likely a key limiting factor that hinders further recovery [of Olympia oysters] in Coos Bay."); Chernaik Leteter dated Oct. 10, 2011, at p. 7 (Quoting USACE study). There is no evidence of other limiting factors, such as predation by snails or flatworms, competition from other space occupants, water pollution, or disease. *See Factors Preventing the Recovery of Historically Overexploited Shellfish Species Ostrea Lurida*, (Trimble 2009). In this regard, the oft-repeated real estate adage "built it, and they will come," seems to be particularly instructive: if the goal is to increase the density of Olympia oysters in Haynes Inlet, the solution is more hard substrate. *See* Groth email dated Nov. 10, 2011. *Compare* Wasson, *Informing Olympia Oyster*

EXHIBIT B

Restoration: Evaluation of Factors that Limit Populations in a California Estuary, Wetlands, 4 May 2010, at p. 457 (noting that the *presence* of hard substrates in a California estuary did not guarantee the presence of oysters, the *absence* of hard substrate in the same estuary did guarantee the absence of oysters).

2. Issues Related to the Applicant's Oyster Protection/Relocation Plan (11CA Zone)

a. Relocation of Olympia Oysters who Currently Live in the Pipeline's Proposed Right of Way

In order to avoid impacts from pipeline construction, the applicant is proposing to protect the Olympia oysters by collecting all live oysters within the 250-foot wide pipeline right of way and relocating them by hand to adjacent mud flat areas to the northwest of the pipeline route. Because Olympia oysters typically attach themselves to hard substrate such as rocks, shells, and metal, the applicant's proposal essentially involves moving all of the hard substrate in the route which harbor oysters.

The applicant's three-person team found 89 Olympia Oysters along the pipeline route over a two-day period (not including the 1400 s.f. "hotspot" caused by the man-made introduction of hard substrate in the form of discarded Pacific oyster shells). At the hearings, Dr. Ellis estimated the number of oysters that would need to be relocated as a "bucketful." Even if Dr. Ellis's team found only 10% to 25% of the Olympia oysters in the right of way, it still seems feasible for a larger team to capture most, if not all, of the oysters in one or two days.

i. The Applicant Can Feasibly Train a Team to Locate Oysters.

The opponents do not believe that the applicant's relocation plan is feasible. The opponents argue that Dr. Ellis and his team of workers will miss too many oysters during the removal process, because they may have an insufficient level of training in locating and identifying oysters. The hearings officer agrees that it would be inappropriate to use untrained day laborers to conduct this task. However, with a reasonable amount of training and supervision, a team of college undergraduate or graduate-level biology students or other similar personnel could easily master the task. In the case of the Glenbrook Nickel site, the oyster removal was conducted by personnel from ODFW and the South Slough National Estuarine Reserve (SSNERR). It is not clear from the record whether these personnel had any specialized training in oyster location / identification.

The opponents take great pains to explain that oysters can be hard to detect and identify. In a letter dated October 8, 2011, Dr. Danielle Zacherl points out that "[o]ysters are notoriously morphologically plastic; difficult to identify, and in the case of the species of the genus *Ostrea*, cryptic in appearance." She further states that Olympic oysters have additional features that make them hard to spot, including: small size, heavily fouled shells, muddy habitat, and their preference for the underside of hard substrates. Dr. Chernaik uses Dr. Zacherl's statement to cast doubt on Bob Ellis' team's ability to locate oysters.

Dr. Ellis responds to in his letter dated October 17, 2011, where he acknowledges that it could be difficult to locate and identify Olympia oysters in Dr. Zacherl's study sites in Newport Bay, California. The Newport Bay site varied between 48% and 85% hard substrates. *Compare* photograph of Newport Bay, CA site, Figure 1 of Ellis Letter dated Oct, 17, 2011. However, Dr. Ellis notes that "this is a much different situation than Haynes Inlet, which is essentially a vast mudflat that contains little or no rocks, shells or other substrates, as illustrated in Figures 2 through 5." Dr. Ellis's argument seems intuitively correct to the hearings officer.

Dr. Zacherl rebuts Dr. Ellis's comments with the following discussion excerpted from her letter dated November 14, 2011:

> If the conditions are as the expert of PCGP contends ("essentially a vast mudflat that contains little or no rocks, shells, or other substrates"), then significant training would be even more essential for finding and identifying Olympia oysters in Haynes Inlet. The visual profiles of Olympia oysters can be more difficult to discern in mudflats , where individuals can be partially submerged, or otherwise obscured by the muddy floor of the intertidal zone, than in areas with large amounts of hard substrate . When we survey for oysters, the easiest locations to survey are those containing hard substrate, particularly vertically oriented substrate where mud deposition is much reduced. (Emphasis in Original)

See Zacherl Letterdated Nov. 14, 2011, at p.2. This last statement lacks credibility, in part because Dr. Zacherl has not visited Haynes Inlet and is not familiar with the conditions at that site. All of the previous testimony from both parties' experts was universally consistent in stating that the oysters generally *required* hard substrate to settle on and grow, and were only rarely found lying directly on the mud. *See e.g.,* Wasson, *Informing Olympia Oyster Restoration: Evaluation of Factors that Limit Populations in a California Estuary,* Wetlands, 4 May 2010, at p. 457 (noting that the *presence* of hard substrates in a California estuary did not guarantee the presence of oysters, the *absence* of hard substrate did guarantee the absence of oysters). Hard substrate, whether it is rocks, shells, or scrap metal, is particularly easy to spot on the mudflats in Haynes Inlet, in part because of color differences, but also because the water traveling around the objects creates long indentations in the sand and mud that are easy to spot.

Dr. Zacherl's comment, quoted above, seems to imply that Olympia oysters can routinely grow *without* the presence of hard substrate. If this is indeed the correct interpretation of the above quoted language, then the conclusion is rejected as being inconsistent with all of the other expert testimony in the record, including the Wasson article cited above. If, on the other hand, the suggestion is that both the oyster itself as well as the hard substrate to which it is attached can be concealed by the mud, that suggestion is contradicted by the photographic evidence in the record. In particular, the photographs included with the Ellis Oyster Survey seem to provide convincing evidence that the Olympic Oysters in Haynes Inlet are relatively easy to spot on the mudflat.

In this regard, Dr. Ellis's ultimate point on this issue is well-taken: even if the Olympic oyster it itself hard to identify, the hard substrate that it lives on is certainly not hard to identify.

Indeed, the photos included in the Ellis letter Dated Oct. 17, 2011 depict a large flat expanse of mud with no rocks or other obvious hard substrate. *See Id.* at Figure 2-5. In layman's terms, the primary job of the Ellis team in conducting its survey was to look for anything sticking out of the mud and turn it over. As more scientifically stated by Dr. Ellis, "the surveyors examined both the upper and lower sides of all hard substrates that were encountered, and hard substrates were exceedingly rare." Oct. 17 letter from Bob Ellis, page 4.

If Dr. Chernaik, Dr. Zacherl, Dr. Trimble, or any of the other experts had taken the time to physically photograph an example of one of these hard-to-spot oysters on the mudflat, then the hearings officer's opinion might be different. However, all the hearings officer can base his opinion on is the evidence in the record. In this case, the two PhD-level scientists who actually walked the same portion of right of way (*i.e.* site 9), did not find any significant quantities of Olympia oysters. The hearings officer is not prepared to find that a California biologist with no known experience in Haynes Inlet is somehow better at finding these oysters than the two Oregon biologists with specific experience in Haynes Inlet (*i.e.* Dr. Rumrill and Dr. Ellis).

In conclusion on this issue, the hearings officer finds the opponents' concerns about "hard to find" oysters is somewhat overblown. The hearings officer finds that the credibility of the opponent's argument is lessened due to the fact that none of the opponent's experts actually traversed the actual right of way in question. While Dr. Rumrill's team did search site 9, they found no oysters at that location. It's one thing to say that oysters in a rocky intertidal area in Southern California are difficult to survey, but that does not lead to the conclusion that oysters on an Oregon mudflat lacking hard substrate are difficult to spot. As Dr. Trimble notes, "locations are different." *See* Trimble letter dated October 5, 2011, at p. 2.

Dr. Chernaik's attempt to discredit the Ellis survey team is further hampered by the fact that, at site 9, the Rumrill survey found no Olympia oysters, whereas the Ellis team located and identified several Olympia oysters on two Pacific oyster shells. *See* Ellis letter dated Nov. 23 2011, at p. 2.

The hearings officer also finds that it is feasible for the applicant to train a team of workers to identify and collect all of the oysters along the pipeline right of way between milepost 4.1 and 2.8, and then relocate those oysters to the proposed relocation site. If nothing else, the team can be trained to pick up all hard substrate which might support Olympia oysters. Granted, it is going to take more than a three-person team to do a thorough job. The hearings officer would anticipate that a 10-15 person team is needed if the job is going to get done correctly in one or two sets of negative tides.

ii. The Relocation Plan is Feasible.

The next issue concerns the issue of whether the relocation area is a suitable environment for the survival of the displaced Olympia oysters. The Ellis Oyster Survey notes that the mud flats to the northwest of the pipeline, on the east side of Highway 101 are a good area for relocation due to the similarity to the right of way site:

> [The relocation site] is indistinguishable in terms of habitat from those areas within the right of way, and were observed by EES staff to contain

> Olympia oysters in densities at least as high as those within the right of way. Therefore, the proposed relocation area provides habitat that is known to support a population of Olympia oysters and is a viable relocation area. The occurrence of Olympia oysters in this area suggests that oysters relocated from the construction zone would have a high probability of survival.

Ellis Oyster Survey, at p. 21. A proposed relocation area is shown in the shaded area of Figure 19 in the Oyster Survey. That area is in close proximity to existing Olympia oyster colonies inhabiting the Highway 101 riprap area.

Dr. Chernaik contends that the area proposed for relocation is at a higher elevation than the oyster's current location in the right of way, which will preclude their survival. Opponents cite to alleged discrepancies in the elevations shown on figures provided by Coast & Harbor Engineering and Ellis Ecological.

Again, the opponents seem to grasping at straws with this testimony, which undermines their credibility. First, and most fundamentally, there is direct evidence in the Mitigation Plan describing the on-site observations of Dr. Ellis's team regarding the relocation area:

> The mud flats that are adjacent to the northwest of the pipeline right of way, on the east side of Highway 101, are indistinguishable in terms of habitat from those areas within the right of way. These adjacent areas were observed by EES staff to contain Olympia oysters in densities at least as high as those within the right of way. Therefore, the proposed relocation area provides habitat that is known to support a population of Olympia oysters and is a viable relocation area. The occurrence of Olympia oysters in this area suggests that oysters relocated from the construction zone would have a high probability of survival.

Mitigation Plan, at p. 4. This evidence, based on direct observation, constitutes substantial evidence which is not sufficiently undermined by the opponents' conjecture about elevations based on various unrelated maps and figures in the record.

But perhaps even more importantly, Olympia oysters *are currently living in the relocation area.* Even Dr. Trimble admits that "[t]he most informative measure of local and historical conditions as they relate to *Ostrea lurida* is the presence / absence of adults." Trimble letter dated Oct. 53, 2011, p. 5. Dr. Trimble goes on to say that "[i]t is ecologically safe to say that locations containing oysters are different than locations that don't." *Id.* Thus, a reasonable person would find that the presence of live Olympia oysters is a very strong indicator that Olympia oysters can live in that area.

The hearings officer finds that Dr. Chernaik's arguments to the contrary lack credibility. His arguments are particularly weak given that neither Dr. Chernaik or any other person testifying on behalf of the opponents personally conducted a site visit of the proposed re-location area. After all, if Dr. Chernaik has not physically visited the relocation site, why would anyone

believe his opinion testimony concerning that site over that of Dr. Ellis, who specifically walked the relocation site? Were the relocation site somehow physically off limits to the opponent's experts, the hearings officer might be less critical of their failure to conduct a site visit. But when the site is open to the public, it seems inexcusable for the opponents' experts not to have physically traversed the right of way prior to opining on the density of oysters in that location.

Also, the fact that the elevation in the pipeline right of way is virtually identical to the elevation in the adjacent relocation area is photographically depicted in the aerial photo included in the letter from Dr. Ellis dated October 17, 2011. On page 13 of that letter (Figure 7), Dr. Ellis includes an aerial photo of Haynes Inlet during the early stages on an incoming tide. That aerial photo includes overlays showing the location of the pipeline route, existing Olympia oysters, and the proposed relocation area. The relative depth of the mudflat area is readily discernible because the deeper areas are darker and the higher areas are lighter. As shown on that photo, several Olympia oysters were found by the Ellis team at the far end of the pipeline route in areas that are significantly higher than the relocation area (and therefore not yet touched by water when the photo was taken). That fact directly contradicts the opponents' assertion that the relocation area is too high for Olympia oysters to survive. Dr. Ellis states:

> The edge of the incoming water is visible and extends beyond the relocation area and the area where Olympia oysters were found in the pipeline right of way . Note that both areas are under water at this early stage in the incoming tide, and that the relocation area appears to be slightly deeper than the adjacent pipeline right of way . Therefore, the photographic documentation is in agreement with our observations in the field. As discussed in the mitigation plan, oysters removed from the right of way would be placed toward the southern end of the relocation area, which is slightly lower in elevation than the northern end. However, the entire area within the relocation area presently supports adult Olympia oyster and would be suitable habitat for relocation of oysters from the right of way.

See Ellis Letter dated Oct. 17, 2011, at p. 12.

Dr. Chernaik's argument premised on one piece of data that is originally cited at page 11 of his October 10, 2011 submittal; however, the significance of this data as it relates to the proposed relocation plan is never explained:

> At three sites, more than half of the tiles at +0.3 m MLLW had lost 90% of their oysters by the time photographs were taken in October 2002. In any case, juvenile oysters fare poorly when exposed to air for even short periods of time ([out of water] 2-10% [of the time], Fig. 8), with survival dropping by half or more.

See Chernaik letter dated Oct. 10, 2011, at p. 11. These facts lead to the following conclusions: (1) 90% of half of the oysters located at a certain elevation died within some unidentified time

EXHIBIT B

frame, and (2) survival of juvenile oysters drops by half or more when they are out of the water 2-10% of the time. However, as the applicant points out:

> [A]t no point does Dr. Chernaik attempt to explain how this applies to the relocation area, *e.g.*, would the oysters proposed for relocation be anywhere near the elevation cited in the study? Or would the oysters being relocated (which are likely not juveniles as in the study) *actually be* out of water between 2 and 10% of the time based on their new elevations? Based on the evidence provided, there is no way to know how or why the results of this study would actually apply to the applicant's proposal. Dr. Chernaik's entire argument is flawed because he fails to connect the dots between the cited study and the proposed relocation area. His entire line of evidence and argument fails to undermine the direct evidence submitted by Ellis Ecological on the issue of the viability of the relocation plan.

The hearings officer agrees with the applicant's analysis on this point.

Moving on, Dr. Chernaik's memorandum dated November 28, 2011 leads off with the following statement: "There is no evidence in the record that relocating oysters is a successful mitigation measure." The hearings officer disagrees.

There is substantial evidence in the record that relocating existing oysters will be successful. First, Dr. Chernaik previously pointed out that the Olympia oysters in Coos Bay were extinct until they were accidentally reintroduced in the 1950s as hitch-hikers during commercial transport of Pacific oysters from Willapa Bay. It stands to reason that transport from Willapa Bay would be more stressful to those oysters than a move of a few hundred feet.

Second, the evidence shows that the state of Oregon thinks re-introduction techniques can be successful, as the South Slough NERR has "re-introduced about 4,000,000 juvenile oysters to the Slough." *See* Native Shellfish Recovery, at p. 1. It stands to reason that the reintroduction techniques used by South Slough NERR cause more trauma to individual oysters than by simple moving adult oysters and their hard substrate a few hundred feet.

Even more important than the evidence discussed above, however, is the fact that native oysters are currently found at the relocation site. This evidence is sufficient to draw an inference that the relocation site is suitable Olympia oyster habitat. Furthermore, there is no evidence in the record that suggest that the oysters are too fragile to survive the short relocation process,[9] or that they will otherwise die in transport. There is also no evidence to suggest that oysters need to

[9] Dr. Trimble briefly mentions that "moving oysters (and other organisms) increases mortality; hundreds of millions of *Ostrea lurida* adults have been moved within and between estuaries since the 1850s * * * with the vast majority of events resulting in massive mortalities." *See* Trimble letter dated Oct. 5, 2011 at p. 3. The hearings officer does not find Dr. Trimble's comments to constitute substantial evidence to support a conclusion that oysters would not survive a move of a few hundred feet to similar habitat in Haynes Inlet. Dr. Trimble's comments are simply to vague and too unspecific to give a clear understanding of the context of the transportation-related mass mortalities he refers to. An expert's opinion does not constitute substantial evidence if the foundation for the opinion is not provided, or if it is contradicted by other facts in the record. *1000 Friends of Oregon v. LCDC*, 83 Or App at 286.

EXHIBIT B

be oriented in any particular way. Obviously, it would not be advisable to place an oyster "face down" or buried in the mud, but presumably Dr Ellis can train the relocation team on the proper way to orient the oysters in their new home, to the extent there is a "proper" way. Indeed, Dr Ellis has testified that "oysters will be picked up by hand, and placed "in the same orientation within the substrate as they had in their original location." Mitigation Plan at 4. Additional evidence includes:

- There are undoubtedly no more than a few bucketfuls of oysters that require relocation.
- The contour map recently provided by Dr. Ellis shows that, at most, there is an approximate 1.5-foot difference in the elevation of the relocation area, and less than a foot difference in the area where most of the oysters would be placed. Nov. 23 letter from Bob Ellis, page 3 (Figure 1).
- The relocation area is directly adjacent to the oysters' existing location, and is "indistinguishable habitat" where there are currently Olympia oysters in densities at least as high as those within the right of way . Mitigation Plan at 4.
- As stated by Dr. Ellis, "the occurrence of adult oysters in the proposed relocation zone indicates that an appropriate microclimate is present" and relocated oysters would therefore have a high probability of survival. Oct. 17 letter from Bob Ellis, page 11; *Id.*.
- Rex Miller testimony: "In my opinion, based on my experience with growing native Olympia oysters in the Coos Bay area, any oysters that exist along the pipeline route can be easily protected by relocating them to nearby portions of Haynes Inlet." Sept. 9 letter from Rex Miller, page 2.

In addition to Rex Miller's project, the record contains evidence regarding two other successful oyster restoration projects that have recently occurred in Coos Bay: the Glenbrook Nickel site and the Isthmus Slough bridge. These projects provide evidence that native Olympia oysters can thrive in Coos Bay under restoration plans that are properly designed and managed.

Dr. Chernaik relies heavily on a statement from Dr. Alan Trimble in support of his argument that oysters cannot possibly survive relocation; however, Dr. Chernaik has quoted very selectively from Dr. Trimble's response. Dr. Chernaik has repeatedly quoted the following portion of Dr. Trimble's letter:

> While it is trivial to suggest that moving existing oysters from locations where they currently exist to locations where they don't is sufficient to preserve them, this isn't a fact based on solid evidence.

See Chernaik letter dated Oct. 10, 2011, at p. 10. However, as noted by Dr. Ellis in his response, the applicant's proposal is *not* to relocate Olympia oysters *to a place where they do not exist*; rather, the proposal is to move them to a nearby location that is currently inhabited by adult and juvenile Olympia oysters. As discussed earlier, Dr. Trimble does cite to two studies conducted in 1892 and 1896 for the proposition that transportation of oysters increases their mortality, but does nothing to explain the context of those studies or explain why the facts in this case are

similar. Dr. Trimble's letter does not constitute substantial evidence to support the conclusion that the relocation plan is not feasible, because an adequate foundation for Dr. Trimble's comments and opinion has not been provided.

The opponents also attempt to argue that, by the time construction of the pipeline commences in 2014, there will be substantially more Olympia oysters than currently exist. However, as explained by Dr. Ellis, there is no firm evidentiary basis for opponents' assertion that there will be an exponential increase in the number of Olympia oysters in the mudflat in that timeframe. Dr. Chernaik's assertions are based on the fact that a 2006 survey revealed many more oysters than were found in a 1996 survey. However, the primary impediment to oyster population increases in the right of way portion of Haynes Inlet, as the applicant correctly points out, is that there is very little hard substrate habitat in the mudflats. Thus, as explained by Dr. Ellis, even if there were an increase in the numbers of Olympia oysters in the next two years, any such increase would be limited to existing substrates: "In other words, there would simply be larger clumps of oysters on the existing substrates," which would not result in much more effort to relocate. *See* Ellis letter dated Oct. 17, 2011, at p. 11.

Finally, it is worth noting that even if the applicant's protection / relocation plan were to completely fail, it does not appear that the overall resource productivity of the oysters in Haynes Inlet would suffer. With the exception of the one 1400 s.f. hot spot, the applicant has identified only 89 oysters in the pipeline right of way. Even if those 89 oysters were killed, that would be inconsequential to the overall population of Olympia oysters in Haynes Inlet. Given that predators such as sea otters, sharks, rays, crabs, native snails (small whelks and moon snails) could predate 89 oysters in a few days, it does not seem like the loss of 89 oysters (or even a few thousand oysters, for that matter) would be significant.

3. The Applicant's Oyster Mitigation Plan.

a. The Applicant's Plan is Feasible.

At the time of the public hearing, the applicant initially proposed an "Oyster Protection Plan," which was intended to meet, but not exceed, the requirements of the applicable management objective requirements by *protecting* the existing Olympia oysters within the pipeline right of way . The applicant proposed to simply relocate every single Olympia oyster within the pipeline right of way to similar habitat adjacent to the construction area, which is also currently populated with Olympia oysters. Because the relocated oysters would be protected from the direct impacts of construction, and because the evidence from Coast & Harbor Engineering indicates a lack of impacts from sedimentation, the applicant's original relocation plan would have been sufficient to "protect" the resource under applicable standards.

However, after the public hearing the applicant decided to go beyond "protecting" the resource. Rather, the applicant decided to make an attempt to assist in the overall recovery of the Olympia oyster. During the public hearing, the hearings officer asked a significant question of the opponents' primary witness, Mark Chernaik. The hearings officer asked Dr. Chernaik if the opponents would support the pipeline application if the applicant could provide additional habitat that would hypothetically triple or quadruple the amount of Olympia oysters in Haynes Inlet. The hearings officer was primarily interested in assessing the credibility of the witness,

and was trying to solicit a response that would indicate whether Dr. Chernaik's focus was on protecting oysters or simply stopping the PCGP project. Although Dr. Chernaik protested the premise behind the question, he ultimately agreed that if the applicant could provide habitat that would ensure such a population increase, that he would, in theory, support the application.

The applicant took note of Dr. Chernaik's response, and in light of other suggestions from the hearings officer, the applicant submitted a revised plan dated October 7, 2011, which is entitled Olympia Oyster Mitigation Plan (the "Mitigation Plan"). The Mitigation Plan goes beyond the protection of existing Olympia oysters and their habitat by providing mitigation in the form of new additional habitat within the pipeline right of way that will result in a significant *increase* in the numbers of Olympia oysters in Haynes Inlet. Specifically, in addition to relocating existing oysters prior to pipeline construction, the Mitigation Plan calls for the placement of 30 cubic yards of Pacific oyster shell in the area of existing oyster colonization between MP 2.9 to 3.4. Mitigation Plan, at p. 4. The proposed placement of new hard substrate for recruitment of oyster larvae would necessarily occur *after* pipeline construction is complete.

The hearings officer finds that there is substantial evidence in the record to support the conclusion that the applicant's Mitigation Plan will, at a minimum, "protect" the resource productivity of Olympia oysters in Haynes Inlet.

b. Responses to arguments raised by opponents regarding the mitigation component of the Mitigation Plan.

The opponents have raised numerous arguments challenging the likelihood of success of the mitigation component of the plan. None of the evidence submitted by the opponents on this topic is sufficient to compel a conclusion that the applicant's testimony would not be relied upon by a reasonable person.

i. "Recruitment sink"

Dr. Chernaik argues that placing Pacific oyster shells in the pipeline right of way to provide new habitat could result in a "recruitment sink" that actually harms Olympia oyster recovery efforts. *See* Chernaik letters dated October 10 and Oct 17, 2011, (discussing Trimble letter dated Oct. 5, 2011.). Dr. Chernaik first suggests that evidence shows that Olympia Oysters growing on Pacific oyster shells are less vital than if those Olympic oysters were instead to grow on Olympia oyster shells. He states that "there are several reasons for these observations one being greater competition from 'fouling organisms' that preferentially cover Pacific Oyster shells." *See* Chernaik letter dated Oct. 10, 2011. However, the photos of the oysters in the Ellis Oyster Survey do not appear to have any attached "fouling organisms" that would impede the growth of Olympic oysters. Without any direct evidence indicating that fouling organisms are an issue in Haynes Inlet, the hearings officer is inclined to discount the significance of this issue. Again, the only direct evidence in the record is that there is a colony of Olympia oysters colonizing discarded Pacific oyster shells at MP 2.9. That evidence strongly suggests that the habitat is good for the continued survival of the Olympia oyster at this particular location.

The remainder of Dr. Chernaik's "recruitment sink" argument is based on data from an out-of-state study (Willapa Bay, WA) which concluded that native oyster larvae were attracted

to Pacific oyster shells in the higher elevation intertidal areas, rather than lower subtidal areas where theire survival rates were higher. *See* Chernaik letter dated Oct. 10, 2011, at p. 12. Dr. Chernaik attempts to rely on this study to argue that the applicant's proposed placement of Pacific oyster shells as new habitat could similarly "fool" juvenile oysters to settle in poor habitat where they are ultimately less likely to survive. *Id.*

As the applicant notes, Dr. Chernaik loses credibility when he contradicts himself via the "recruitment sink" argument. For example, Dr. Chernaik originally claimed that (a) there are an estimated 1.5 million Olympia oysters *along the pipeline route*, and (b) Olympia oysters can expect "exponential" population growth in Haynes Inlet in the next three years. In direct contrast to that argument,[10] his "recruitment sink" argument is based on a completely different premise: that the intertidal portions of Haynes Inlet are actually *poor* habitat for Olympia oysters as compared to other nearby habitat in the rip-rap and rocky outcroppings found in sites 1-8 because they are too high in elevation. He argues that placing more Pacific oyster shells in the mud-flat area will basically lure native oyster larvae to that location where they will ultimately experience a pre-mature death due to being frozen, or being out of the water too long, etc.

If that were indeed the case, then the hearings officer questions why the County would even be undertaking this entire exercise. Taking the recruitment sink argument to its logical conclusion, the applicant would presumably help protect the Olympia oysters by destroying all of the hard substrate in that portion of the pipeline route. Indeed, this entire hearings officer recommendation goes into great detail on the various issues raised in this case based on a core assumption to the contrary: that the pipeline route traverses good (or at least potentially good) Olympia oyster habitat from approximately milepost 4.1 to milepost 2.8. That core assumption is based entirely on the presence of a relatively small quantity of Olympia oysters found within the pipeline route. If the hearings officer were to buy in to the "recruitment sink" argument in tandem with Mr. Chernaik's 1.5 million oyster population estimate, then the logical conclusion would be that the death of a few thousand oysters out of a potential population of millions in Haynes Inlet is a *de minimis* loss, and that the pipeline ideally should destroy the marginal oyster habitat in its route in order to prevent further recruitment sinks on the mud-flats. The hearings offer does not accept the premise behind this argument. For this reason, the hearings officer firmly rejects the entire "recruitment sink" argument.

The "recruitment sink" issue is more thoroughly repudiated by Dr. Ellis in his October 17, 2011 letter at pages 13-14. Also, the November 10, 2011 email message from Scott Groth of ODFW explains that "all uses of [Pacific oyster] shell to attract [Olympia oyster] larvae in Coos Bay have been successful, numerous projects show this." The hearings officer adopts the discussion concerning recruitments sinks and Pacific oyster shells contained in those two sources as additional findings, and incorporates those discussions herein by reference.

To close on this issue, it appears, based on the evidence in the record, that the only real "recruitment sink" occurring in Haynes Inlet is the commercial culturing and harvesting of

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[10] Lawyers are, of course, allowed to make what are seemingly contradictory *legal* arguments "in the alternative." Scientists are not afforded that same luxury. When a scientist makes contradictory *fact-based* arguments, he or she simply loses their credibility.

EXHIBIT B

Pacific oysters, particularly to the extent that live Pacific oysters are actually present and growing in the Inlet during the Olympic oyster's spawning season. *See, e.g.* Chernaik letter dated Sept. 21, 2011, at p. 11; Trimble, *Factors Preventing the Recovery of a Historically Overexploited Shellfish Species, Ostrea Lurida Carpenter1864.* Journal of Shellfish Research, Vol 28, No. 1 (2009), at p. 105 (identifying commercial harvest of Pacific oyster as a recruitment sink). When these commercial oysters are harvested, any native oysters that have selected the harvested oyster as a host will necessarily be killed. Based on the studies conducted in Willapa Bay, it appears that commercial oyster farming is much more harmful to the recovery of native oyster stocks than the construction of a gas pipeline. In comparison, the placement of Pacific oyster shells (or any other suitable hard substrate) in the right of way portion of the Haynes Inlet mudflats will surely result in viable colonies of Olympia oysters.

ii. Placement of Pacific Oyster Shells.

Dr. Chernaik contends that "there is no evidence in the record that evenly distributing 30 cubic yards of Pacific oyster shell over 15 acres of recently disturbed sediment would be a successful mitigation measure." See Chernaik Letter dated Nov. 28, 2011, at p. 2. Dr. Chernaik contends, in part, that the proposed distribution is not sufficiently deep to provide locations on the underside of the new substrate for Olympia oysters to attach. Dr. Chernaik is incorrect.

Most notably, the fact that Dr. Ellis and his team found a 1,400 s.f. bed of live Olympia oysters at milepost 2.9 which had colonized a pile of discarded Pacific oyster shells is proof that Olympia oyster larvae in Haynes Inlet will use discarded Pacific oyster shells as recruitment sites.

In addition, there is evidence in the form of the November 10, 2011 email message from Scott Groth stating that, based on Mr. Groth's review of the proposed Mitigation Plan (including the expressly stated proposal to spread 30 cubic yards of shells over 15 acres), that plan will "certainly achieve" an increase in the density of native oysters at the project site. Curiously, Dr. Chernaik does not attempt to explain his failure to recognize Mr. Groth's unequivocal statement as evidence, despite the fact that he directly quotes this same portion of the email from Mr. Groth later in his argument.

Moreover, the hearings officer has read Dr. Chernaik's rebuttal dated Nov 28, 2011, as well as the exhibits accompanying that submittal, and finds that none of the information presented therein alters the hearings officer's conclusions in any way.

Dr Zarchel's research conducted in Newport Bay, California, does indicate that Olympic oysters survive at a higher rate if they can attach to the underside of hard substrate. *See* Zercherl comments quoted on page 3 of Dr. Chernaik's November 28, 2001 letter. The applicant seems to concede this fact. However, that fact does not mean that Olympia oysters will not attach to the tops of hard substrate. The best evidence in the record as to whether Olympic oysters will attach and grow on discarded Pacific oyster shells comes the Ellis Oyster Survey. As mentioned above, the Ellis Oyster survey found a 1400 s.f. hot spot of Olympia oyster attached to discarded Pacific oyster shells. There is no evidence to suggest that the 1400 s.f. pile of discarded shells at MP 2.9 created high degrees of vertical habitat. Based on the fact that those Pacific oyster shells were discarded at random, there does not appear to have been any effort made to maximize the

made to maximize the potential for larval recruitment. Moreover, too much "vertical" habitat at this location might simply result in oysters that are out of the water for longer durations, which Dr. Chernaik admits will result in increased mortality rates.

The opponents also assert that the Pacific oyster shells will sink in the sediment above the pipeline. This argument is highly speculative and is not supported by any substantial evidence. In a letter dated November 3, 2011, Pacific Connector Project Manager Randy Miller rebuts the opponents' testimony:

> The trench will be excavated into unconsolidated sandy sediments washed into Haynes Inlet from the various streams that deposit their sediment-laden runoff into the Inlet. Following laying of the pipeline into the trench, the trench will be backfilled by excavation equipment that picks up the spoil mound material and places it back into the trench. The backfill technique includes the use of the excavator bucket to put compaction pressure on the material to assure that the pipe is completely covered and the trench backfilled in a stable condition. This backfilling technique will result in trench materials placed in a more compacted state than that existing prior to excavation.
>
> Ms. McCaffree's suggestion that Pacific oyster shells will sink in the mud is nothing more than imaginative speculation based on unrelated testimony. At the prior public hearing, Lili Claussen stated that the Haynes Inlet mudflats are like "quicksand" that are difficult to walk in. This is a true statement – it is difficult for a person to walk on the mudflats without special shoes like the ones worn by Bob Ellis and his team when they conducted their oyster survey. Based solely on this prior statement, Ms. McCaffree now suggests that Pacific oyster shells would also sink in the mud in the same manner as people. One does not need to be a physicist to understand that just because a 160-pound person might sink above their ankles in mudflats does not mean that a two-ounce oyster shell would also sink. Further, the present existence of significant numbers of Pacific oyster shells on the bed of Haynes Inlet indicates that Ms. McCaffree's alleged concerns are without basis.
>
> "Further, even if there were an evidentiary basis for Ms. McCaffree's suggestion that the backfilled area will become so unstable that even an oyster would sink (which is incorrect as addressed above), it should be noted that the backfilled trench area will only occupy between 22 and 30 feet of width within the entire pipeline right of way where Pacific oyster shells are proposed to be distributed as habitat.

See Miller letter dated Nov. 3, 2011, at pp. 1-2. Mr. Miller's discussion constitutes substantial evidence to support the conclusion that the replacement shell habitat will not sink into the mud of Haynes Inlet.

In their final November 28 submittal, Dr. Chernaik offers detailed suggestions in order to ensure that the Mitigation Plan will be a success. In response, the applicant proposes a series of conditions of approval incorporating these suggestions, in order to ensure the successful implementation of the Mitigation Plan. These proposed conditions address the new issues raised by Dr. Chernaik and incorporates the suggestions raised in the related Groth & Rumrill memorandum dated November 28, 2011.

PROPOSED CONDITION OF APPROVAL

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

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

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

c) Unless modified under the direction of ODFW during the consultation described above, the applicant will establish appropriate baseline conditions for the Olympia oyster mitigation effort in Haynes Inlet using the following guidelines for a before-after control impact study design in order to ensure that any impacts to Olympia oysters are insignificant or *de minimis*:

i. The "Before" conditions shall be determined by field surveys of the distribution, abundance, status, and condition of existing

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

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

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

Adoption of this condition of approval addresses all of the issues discussed in paragraphs numbered 2 through 6 of the memorandum from Steve Rumrill and Scott Groth that is attached to Dr. Chemaik's November 28, 2011 submittal regarding creation of the best possible habitat for Olympia oysters in the applicant's mitigation area.

This condition of approval also recognizes that the applicant is required, under existing conditions of approval from the county's original decision, to obtain all necessary state and federal permits for removal and fill in Haynes Inlet necessary to construct the pipeline. Under that condition, all such approvals must be obtained prior to commencing construction of the pipeline. That condition was not challenged by opponents in the LUBA appeal. The condition set forth above recognizes that the applicant's proposed Mitigation Plan will need to be incorporated into those state and federal permitting requirements, and also expressly requires the applicant to consult with ODFW on some of the finer details of the plan regarding methods for placing new hard substrate and background monitoring.

For the reasons addressed above, there is substantial evidence in the record to support a finding that, in conjunction with the applicant's Protection Plan, the Oyster Mitigation Plan will "protect" existing Olympia oysters in Haynes Inlet. The opponents have not provided evidence that undermines the evidence such that it would not be relied upon by a reasonable person in making a decision.

4. History of Previous Oyster Relocation Efforts.

There is substantial evidence in the record to support a finding that several Olympia oyster restoration projects similar to the applicant's proposal have been successful in Coos Bay. The applicant submitted direct evidence on this issue in the form of: (1) a memorandum from Scott Groth, a Shellfish Biologist with the Oregon Department of Fish and Wildlife dated August 10, 2010, regarding "Coos Bay native oyster restoration project updates" ("ODFW Memo"); (2) a letter from Rex Miller dated September 9, ~~2001~~ 2011; (3) a short DVD prepared by Rex Miller that describes the success of his Olympia oyster restoration project in Isthmus Slough; and (4)

email exchanges with Scott Groth of ODFW regarding Mr. Groth's review of the proposed Mitigation Plan and his comments regarding the likely success of the final plan.

As explained in the Oyster Survey, and in the ODFW Memo at least three similar Olympia oyster relocation and protection efforts have been completed to date: (1) the Glenbrook Nickel site, (2) Rex Miller's property, and (3) the reconstruction of the Isthmus Slough bridge.

a. Glenbrook Nickel Project

The ODFW Memo includes a detailed description of the work that has been done at the Glenbrook Nickel site regarding restoration of Olympia oyster habitat. The ODFW Memo states that the project "has been tremendously successful and an excellent learning experience that will guide future native oyster restoration efforts in Coos Bay." ODFW Memo at 2.

b. The Rex Miller Restoration Project

The applicant also submitted the testimony of Mr. Rex Miller, who undertook a successful Olympia oyster restoration project on his own property near Isthmus Slough.

Mr. Miller's restoration project is summarized in correspondence to the hearings officer from Rex Miller, ("Miller Letter"), and also in a video prepared by Mr. Miller on a DVD entitled "Isthmus Slough Oysters: Living on the Edge." It involved the placement of approximately 20 cubic yards of Pacific oyster shells on his tideland areas in Isthmus Slough. Mr. Miller also placed hard substrate (structures he calls "gabions") in the water. These gabions consist of large chain link bags of Pacific oyster shells with Olympia oysters attached, for the purpose of "pollinating" the area with Olympia oyster larvae. As described in his letter, and shown in the pictures included on his DVD, Mr. Miller's project has been successful:

> "As shown on the DVD, my efforts have resulted in a healthy new colony of Olympia oysters in Isthmus Slough. This project has been very successful, even though there is a relatively high amount of silt in the Isthmus Slough area (as compared to Haynes Inlet). I have reviewed the Oyster survey and proposal prepared by Bob Ellis of Ellis Ecological regarding the relocation of Olympia oysters from the proposed pipeline route. In my opinion, a project in the Haynes Inlet area like the one being proposed by Bob Ellis would also be very successful.
>
> "The Haynes Inlet area is actually a better location for native oysters than Isthmus Slough because the tideland areas are sandier, with less mud and silt. One of the potential problems for oysters is freshwater arising out of heavy rain events. I believe that would be less of a problem in Haynes Inlet because the area is more of a channelized mudflat area, and the freshwater would be able to flow through the area faster than in Isthmus Slough. Finally, as shown on my DVD and in the Ellis survey, there is already a very healthy colony of Olympia oysters inhabiting the rip rap along the eastern edge of the highway, which will provide a good seed crop of larvae

> that will 'pollinate' the area adjacent to the pipeline after completion of construction.
>
> In my opinion, based on my experience with growing native Olympia oysters in the Coos Bay area, any oysters that exist along the pipeline route can be easily protected by relocating them to nearby portions of Haynes Inlet. If substrate along the pipeline route is replaced, I believe the applicant's proposed efforts will not only completely protect the existing oysters but will also result in an increase in the further colonization of Olympia oysters in the *area adjacent to the proposed pipeline.*

See Rex Miller letter dated Sept. 7, 2011, at pp. 1-2. The hearings officer finds the Miller letter and DVD constitutes substantial evidence. In fact, it is some of the most compelling evidence in the entire file. As an initial matter, the Miller site appears in the video to a very muddy site. Mr. Miller's DVD includes photos and video of Pacific oyster shell habitat for Olympia oysters at Mr. Miller's site, clearly showing that many of the shells are covered in mud and silt. Mr. Miller is seen in the video washing mud off of his oyster bundles. Nonetheless, despite these less-than-ideal conditions, Mr. Miller has experienced success in his efforts to propagate Olympia oyster colonies on his submerged lands.

The opponents have made no attempt to rebut or otherwise challenge any of the testimony provided by Mr. Miller regarding the likelihood of success of the applicant's proposal. This photographic and video evidence, which has not been challenged by the opponents, directly contradicts the expert testimony that even the slightest amount of silt (*i.e.*, 50 microns) on a Pacific oyster shell will prohibit Olympia oyster larvae from attaching.

After reviewing the Miller DVD, it seems clear that Haynes Inlet provides more likely habitat for Olympia oysters than the Isthmus slough area, and would be an excellent location for a project designed to protect and restore native oysters and their habitat in the general vicinity of the pipeline alignment.

c. Use of Methods Similar to those Proposed by the Applicant Have Been Found to be Successful in these Three Previous Efforts.

The methods proposed by the applicant in the Mitigation Plan are largely modeled after the methods and success of the Glenbrook Nickel project, which also involved the collection and relocation of existing Olympia oysters, and the distribution of Pacific oyster shells for habitat enhancement. As described in more detail below, Dr. Ellis provided a draft of the proposed Mitigation Plan to Scott Groth for his review and comment, and incorporated Mr. Groth's suggestions into a revised plan.

Finally, prior to finalizing the Mitigation Plan, Dr. Ellis forwarded a draft of the plan to Scott Groth of ODFW for his review and comment. Mr. Groth's email response dated October 6, 2011 is included in the record as Exhibit 6 to the applicant's October 10, 2011 submittal. In that response, Mr. Groth states his professional opinion that "the plan looks very good" and that "I would expect positive results." Mr. Groth goes on to state a number of questions and

suggestions for Dr. Ellis, and those suggestions were largely incorporated into the final version of the Mitigation Plan.

After finalizing the Mitigation Plan and reviewing some of the challenges being raised by the opponents, Dr. Ellis sent an email inquiry to Mr. Groth asking for his opinion regarding certain aspects of the Mitigation Plan and opponents' attempts to challenge the success of the Glenbrook Nickel project. Mr. Groth sent an email response on November 10, 2011, which is attached to the applicant's November 14, 2011 submittal, and states:

> "If the goal of your project is to increase the density of native oysters at the site, the mitigation plan (for native oysters) you presented will certainly achieve that. Every Olympia oyster habitat restoration project I am aware of includes the addition of hard substratum (e.g., Crassostea gigas shell), as Ostrea lurida are known to prefer hard substrates. All uses of C. gigas shell to attract O. lurida larvae in Coos Bay have been successful, numerous projects show this.
>
> "In the Glenbrook nickel project, the relocated oysters were in fact outside of the surveyed area. Therefore the preliminary results of that project show significant increases in population after 2 years when the baseline population was completely removed. This was easily related to the increased availability of appropriate settlement substrate via the restoration (mitigation) effort."

This message from Mr. Groth states his professional belief that the proposed Mitigation Plan will "certainly achieve" an increase in the density of native oysters at the site. It also notes that the Glenbrook Nickel project showed "significant increases in population after 2 years" due to increased availability of new substrate at the site. These statements from Mr. Groth of ODFW constitute substantial evidence to support a finding that the applicant's Mitigation Plan will result in increased density of Olympia oysters, and that it is appropriate to rely upon the success of the Glenbrook Nickel project as evidence regarding the likely success of the applicant's proposal.

On October 10, 2011 the applicant submitted a letter dated September 9, 2011 from Nancy Pustis, the Western Region Manager for the Oregon Department of State Lands (DSL), which provides the basis for a finding that it is feasible for the applicant to obtain the short-term access agreement that would be necessary to relocate the existing Olympia oysters onto adjacent state-owned tidelands. This is the method typically used by DSL to allow access for mitigation projects that require the addition of new habitat (*e.g.*, eelgrass) on state-owned submerged and submersible land. The opponents have not raised any issues questioning the applicant's ability to obtain necessary state approvals to relocate oysters onto state lands.

The applicant will also be required to obtain many state and federal environmental permits in order to construct the pipeline, all of which are identified as conditions of approval attached to the county's prior approval of the pipeline. As described in more detail below, the applicant is proposing a new condition of approval that would require coordination with ODFW in the specific details regarding the placement of Pacific oyster shells in the mitigation area, and would involve incorporating the applicant's Mitigation Plan into the DSL permitting process.

B. **Compliance with 13A-NA Management Objective (Subtidal Sandy-Bottomed Areas West of Hwy 101).**

1. Ellis Oyster Survey of the Subtidal zone

Dr. Ellis and his team searched for Olympia oyster in the subtidal portion of the pipeline right of way located to the west of the Highway 101 bridge, between Milepost 2.8 and 1.8. Dr. Ellis's team took a series of approximately 38 sediment grab samples in this subtidal area. Those grab samples were evenly spaced across the right of way approximately every tenth of a mile. These grab samples revealed no evidence of Olympia oysters or the hard substrate that is necessary for Olympia oyster habitat. Ellis Oyster Survey, Figures 7, 18. The applicant's key finding is as follows:

> Grab sampling of substrate along the pipeline route in subtidal areas (Figure 7) recovered no evidence of Olympia oysters or their preferred substrate habitat. As reported by Coast and Harbor (2011) the bottom velocity in some subtidal areas of the pipeline route is quite high (up to 3.0 feet per second) during maximum tidal exchange. Consequently, the substrates in this area are generally coarse sand, grading to finer sand at the west end of the right of way . Under the Highway 101bridge, sediments appear to be dense sands; so dense that the sampler was only able to partially penetrate the surface layer. Most samples from this area were empty, with a few containing medium sand. Likewise, elsewhere along the pipeline route, samples consisted of sand with only rare shell fragments. The only soft sediments were found near MP 1.9. Figure 8 illustrates a typical sediment sample from subtidal areas of the pipeline route. No Olympia oysters, or Olympia oyster shells were recovered in the grab samples.

Ellis Oyster Study, at p. 19.

The opponents presented no direct evidence concerning the presence or absence of Olympia oysters in the portion of the Project Action Area that traverses the subtidal zone between mileposts 2.8 and 1.7. However, at the public hearing, the opponents complained that the grab sample approach could conceivably have missed some oysters or viable habitat. Dr. Chernaik repeats these arguments in his letter dated October 10, 2011. He enlists the opinion of Dr. Alan Trimble, who concludes that using 38 grab samples is not "continuous or exhaustive" and, as a result, individuals could have been missed.

The hearings officer finds that negative results from 38 grab samples, conducted at representative points along the pipeline right of way, provides a sufficient evidentiary basis to draw an inference that no significant levels of Olympia oysters reside in the subtidal portion of the right of way. While it is true that the grab samples could very well have missed an individual oyster or two (or more), it is reasonably clear from the grab samples that there are no large or

significant quantities of native oysters in the subtidal areas. The destruction of minor amounts of individual oysters does not prevent a finding that the pipeline use does not "protect[ ] the productivity and natural character of the aquatic area."

Even so, the applicant decided not leave opportunity for doubt, and hired professional divers to survey the entire length of right of way's subtidal area. The results of the two-day underwater survey are documented in the report from Dale Foster and Bob Ellis dated October 7, 2011 ("Diver Survey"). That survey notes that the entire subtidal portion of the pipeline right of way is composed entirely of sand and includes no Olympia oysters, and virtually no hard substrate habitat: "the divers described the area as an underwater desert with very little evidence of benthic invertebrate life." Diver Survey, page 2. The diver survey constitutes substantial evidence that confirms that the pipeline's construction activities in that area will "protect[ ] the productivity and natural character of the aquatic area" as it relates to oysters.

The opponents criticize the Diver survey for two reasons. *See* Chernaik Letter dated October 1417, 2011, at p. 3-4. First, the opponents argue that the divers might not have been trained sufficiently to recognize oysters under water. Second, the opponents argue that the Diver survey was not comprehensive enough because the divers could only see a portion of the 250 foot right of way.

If the standard were "clear and convincing" evidence, or "evidence beyond a reasonable doubt," then perhaps the opponents' points *might* have merit. However, the standard is "substantial evidence," which is a relatively low standard of proof. Substantial evidence is evidence that a reasonable person could rely on to draw a conclusion, after considering all countervailing evidence in the record. In employing this standard, the decision-maker is allowed to draw inferences from the evidence. Considering the results of the grab samples and diver survey in tandem, the hearings officer believes that a reasonable person could draw an inference and conclude that no significant quantity of oysters (or oyster habitat) exists in the subtidal portion of the proposed right of way. Had the opponents brought forth evidence that the terrain and habitat were highly variable in that portion of the right of way, or have provided evidence of actual oysters living in the subtidal portion of right of way , then they might have been successful in undermining the applicant's evidence. However, the best the opponents can do is provide evidence that oysters have been found in other portions of the subtidal lands in Coos Bay. Based on this record, the opponents' efforts to cast doubt on the applicant's evidence simply fail.

Despite the diver's direct evidence to the contrary, opponents continued to argue that the pipeline right of way could contain over a million Olympia oysters. *See* Oct. 17 memo from Mark Chernaik, page 8. The hearings officer finds that the opponent's expert testimony on this particular point is not convincing, and does not create sufficient doubt to cause the hearings officer to believe that the applicant's evidence regarding the absence of oysters or oyster habitat in the subtidal zone is not substantial.

C. Sedimentation (Joint Discussion of Both 11-NA-~~11~~ and 13A-NA Management Districts.

1. There is Substantial Evidence to Support a Finding that Construction of the Pipeline will not Result in Significant Impacts on Olympia Oysters Due to Sedimentation.

There appears to be agreement among the parties that there are two potential ways that Olympia oysters could be harmed as a result of pipeline construction: (1) direct impacts on oysters within the pipeline route due to pipeline construction, and (2) impacts from sedimentation resulting from pipeline construction. The first item is addressed above via the applicant's Protection Plan, which will protect all of the oysters within the pipeline route by relocating them to an area that will not be impacted by construction; and by the Mitigation Plan, which will provide additional habitat in the form of new hard substrate within the pipeline right of way after construction of the pipeline. The second item concerns the effect of sedimentation.

To be frank, this is the most difficult aspect of the case, because the evidence is the most difficult to decipher.

The opponent's chief scientist, Dr. Mark Chernaik, estimates that the hard substrate in Haynes Inlet would be covered by "a few millimeters of sediment." *See* Chernaik Letter dated Sept. 14, 2011, at p. 9. He asserts that such sedimentation could settle on hard surfaces and last for "several seasons." Even though he provides little to support his opinion, it does seem intuitive, at first glance, that he could be correct.

Conversely, the applicant relies primarily on a study by Vladimir Shepsis, Ph.D., P.E., and his company, Coast & Harbor Engineering ("CHE"),[11] to support findings that construction of the pipeline will not result in turbidity or sedimentation that will cause harm to existing Olympia oysters or impact their ability to reproduce.[12] The study is highly technical, and difficult for a layperson to understand.

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[11] As stated in his letter dated October 10, 2011, Vladimir Shepsis is a Coastal Engineer with 39 years of experience in coastal engineering project. He is a principal with Coast and Harbor Engineering ("CHE"). Mr. Shepsis's specialty is in the field of coastal hydrodynamics and sediment transport.

[12] Dr. Shepsis makes one statement that the opponents latch onto, in an effort to undermine his work. Dr. Shepsis discussed the scope of his analysis as follows:

> I am not a biologist and I cannot provide any specific conclusions regarding impacts of sedimentation on oysters. My analysis is limited to the question of whether the effect of flow velocities resulting from pipeline construction will cause an increase in suspended sediment concentration and deposition in Haynes Inlet.

See Shepsis letter dated October 10, 2011. The hearings officer interprets this statement to mean that Dr. Shepsis's analysis is not intended to evaluate how well oysters can survive the effects of sedimentation. Rather, Dr. Shepsis focuses his analysis on whether there will be a detectable increase in sedimentation as a result of the pipeline

EXHIBIT B

Dr. Shepsis made a particularly impressive, high-tech, Powerpoint™ presentation at the September 21, 2011 public hearing. As some of the opponents correctly noted afterwards, it is easy to get dazzled by the "wow factor" of the special effects associated with Dr. Shepsis's presentation, and lose sight of the core concepts that are being addressed. *See, e.g,* Jan Dilley letter from dated October 10, 2011. In reviewing these materials, the hearings officer has made every effort to focus on the core of the argument to make sure it meets the substantial evidence standard.

Dr. Shepsis and CHE were originally hired to assist the LNG terminal applicant, Jordan Cove Energy Project (JCEP), in responding to information required by Oregon DEQ regarding potential sedimentation impacts that would result from construction of the JCEP terminal, dredging the access channel, and constructing the pipeline. In response to the DEQ request, CHE undertook a detailed sediment transport modeling analysis for much of Coos Bay, and produced a two-volume Technical Report to DEQ dated December 1, 2010 summarizing the results of that analysis. According to the applicant, those two volumes provided much of the background modeling that was relied upon by Dr. Shepsis in his presentation at the public hearing, and the two-volume report is included in the record as Exhibit 3 to applicant's October 17, 2011 submittal.

Prior to the public hearing, opponents raised concerns regarding potential impacts on Olympia oysters that due to increased sedimentation generated by pipeline construction. In order to respond to these concerns at the hearing, the applicant asked Dr. Shepsis to undertake a specific sediment transport analysis that was focused on potential impacts from construction of the pipeline within Haynes Inlet and specific locations where Olympia oysters had been identified by the applicant and the opponents. Dr. Shepsis completed this analysis and summarized his methods and conclusions in a detailed presentation at the public hearing on September 21, 2011. That presentation is included in the record in both video and hard copy format.

The methodology and results of Dr. Shepsis' study are summarized in his letter dated October 10, 2011. The analysis is based on a three-dimensional hydrodynamic model that shows the hourly flow velocities and directions for all of Coos Bay, and specifically, Haynes Inlet. The data supporting the model was calibrated against tides measured by NOAA at the Charleston Tide Station and actual currents recorded near the proposed LNG terminal in 2005 via Acoustic Doppler Profiler.

The analysis undertaken by Dr. Shepsis resulted in a qualitative study showing: (1) existing tidal and current flow velocities in and out of Haynes Inlet, and (2) the extent to which constructing the pipeline would result in any *increase* in suspended sediment concentration and sediment deposition in Haynes Inlet. As shown on slide #22 of the Shepsis Powerpoint™ presentation, his study considered potential impacts from stockpile placement in two locations that would be the most likely to result in sedimentation impacts. The first is located at

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construction. This statement does not provide much fodder for criticism. Other evidence in the record, including the Rex Miller video, provides substantial evidence supporting the conclusion that Olympia oysters will survive and multiply in relatively muddy environments.

approximately milepost 3.2, close to where Dr. Ellis found the highest concentration of Olympia oysters. The second is located at approximately milepost 2,8, close to the Highway 101 bridge where tidal flow velocities are highest and close to locations where Olympia oysters were identified on the rip rap and shorelines (see slide #30).

The results regarding the first location are shown on power point slides #24 through #28, and on the animation file on the CD submitted by the applicant that is titled "Haynes.avi." The tidal flow animation in that file shows no change in sedimentation levels that is visible to the naked eye. However, a closer review of the data shows that during two time periods of less than 15 minutes, at approximately hours 27.75 and 52.5, there is an increase in suspended sediment that is very limited in scope, and is only present in the immediate area of the base of the pipeline trench. This is shown by the red areas on slide #27. Thus, the only area potentially affected by sediment in this area is the immediate vicinity of the stockpile itself, and the small volume of increased turbidity will remain in that area and will not be detected in any other portion of Haynes Inlet.

The results regarding the second location are shown on power point slides #30 through #34, and on the animation file on the CD that is titled "Oyster.avi." The animation in that file shows very brief increases in suspended sediment, primarily during the outgoing tide, coinciding with the time of highest flow velocities. Timing of turbidity spikes corresponding with tidal velocities for four specific locations where oysters have been identified is shown on slides #31-#34.

As the applicant points out, there are four significant points regarding the increases in turbidity shown on the "Oyster.avi" animation file:

(1) the time period for the increase is very short, *i.e.*, less than 15 minutes per day;

(2) that short time period coincides with the period of highest velocity of water flowing west, and *out* of the intertidal area where virtually all of the Olympia oysters are located;

(3) although the areas of turbidity are larger than in the first study area (where they are miniscule), they are still very limited in scope and are located primarily in a small area immediately to the west of the stockpile; and

(4) as explained by Dr. Shepsis, the corresponding high velocity during this period of turbidity will ensure that sediments would not be able to settle on the hard substrate shorelines where Olympia oysters are present in that area.

The overall results of the study are summarized in the October 10, 2011 letter from Dr. Shepsis, which concludes:

> Based on the results of our detailed three-dimensional modeling, my conclusion is that pipeline construction will not result in any detectable increase of suspended sediment concentration and deposition in Haynes Inlet. Overall, our modeling indicates that changes in suspended sediment concentration during construction

> of the pipeline will be negligible compared to existing conditions in Haynes Inlet. Although there may be very temporary and localized increases in suspended sediment concentration due to high velocities in the area of the bridge, the sediment would not be able to deposit on the identified oyster locations.

See Shepsis letter dated Oct. 10, 2011, at p.4. The hearings officer finds that the expert testimony of Dr. Shepsis constitutes substantial evidence on which the County may rely to reach a conclusion that pipeline construction will not result in increases in sedimentation that will negatively impact Olympia oysters.

The only remaining question is whether the opponents have submitted evidence or argument that "so undermines" the testimony of Dr. Shepsis and the data provided by CHE that it is no longer evidence a reasonable person would rely upon. The remainder of this section provides responses to specific arguments raised by the opponents in challenging Dr. Shepsis's testimony and the CHE data.

2. The Opponents' Evidence Intended to Underline Dr. Shepsis's Testimony Does Not Accomplish Its Goal.

Sadly, the opponents have provided no actual modeling of their own regarding how much sedimentation they believe will be caused by construction of the pipeline. As the opponents point out, this is a bit of a "David and Goliath" fight, and it seems apparent that the opponents do not have the resources to provide their own study. Unfortunately, this is a common dilemma in land use proceedings.

Rather, the opponents attempt to critique Dr. Shepsis's work, hoping that the County will find sufficient flaws to warrant a denial based on a failure to meet the burden of proof. This is a risky approach in an administrative proceeding, because the substantial evidence standard is a very low standard. The opponents would have ultimately been better served by providing substantial evidence, in the form of modeling, to support their position that the sedimentation will be significant and will necessarily result in harm to oysters. At the end of the day, it is apparent that the applicant has met its burden of proof to demonstrate that the effects on the Olympia oyster from sedimentation, if any, will be temporary and insignificant.

a. Chernaik materials dated October 10, 2011, Including Comments by Dr. Trimble dated Oct. 5, 2011:

The opponents challenge the studies and testimony provided by Dr. Shepsis and CHE by having them informally peer reviewed by Dr. Thomas Ravens, a hydrologist from the University of Alaska Specializing in hydrodynamics and sediment transportation. In his October 10, 2011 memorandum, Dr. Chernaik first argues that the CHE modeling results for sedimentation in Haynes Inlet are not "negligible" because (1) only 50 microns of sediment can impair attachment of oyster larvae, and (2) Mr. Shepsis's presentation shows spikes of sedimentation increase "lasting several hours."

i. 50 Microns of Sediment.

Dr. Chernaik's assertion regarding the "50 micron" figure is based on personal conversations with Dr. Alan Trimble. *See* Chernaik letter dated Oct. 10, 2011, at p. 8; Trimble letter dated Oct. 5, 2011, at p. 3. The opinion does not appear to be supported scientifically, and is directly contradicted by other evidence submitted by Dr. Chernaik. The 50 micron figure seems to be rather outlandish, as it a thickness that more or less approximates the width of human hair. A layer of sediment that thick would barely be visible to the human eye. Given the success that Rex Miller has experienced in waters that produce much higher rates of sedimentation, the hearings officer finds the 50 micron figure to either be wrong, or used out of context in this case.

But even if it is true, Dr. Shepsis's response to this argument is as follows:

> Dr. Chernaik does not attempt to explain the significance of the 50 micron figure as it relates to my presentation. Note that 50 microns is 0.05 mm. Dr. Chernaik provides an analysis of dredging-induced sedimentation in Newark Bay prepared by T. Lackey, et al. (Chernaik Exhibit 7), which shows accumulation of sediment in the most unfavorable conditions at a maximum of only 0.03 mm or 30 microns. Based on actual conditions in Haynes Inlet, as discussed in my presentation and in responses below, my conclusion is that the maximum theoretical deposition in the Haynes Inlet area would be at a much lower detectable level than 30 microns.

See Shepsis letter dated Oct. 17, 2011, at p.4. The opponents never rebut Dr. Shepsis' response.

ii. Spikes of Sedimentation Concentration Lasting Several Hours.

Dr. Chernaik also states that Dr. Shepsis' analysis reveals "spikes of concentration lasting several hours." Dr. Shepsis responds as follows:

> As explained in my presentation at the public hearing, spikes of sediment concentration coincide with highest flow velocities. Durations of high velocities exceed the durations of suspended sediment spikes, which results in no deposition of sediment in these areas. I do not understand why Dr. Chernaik believes that my presentation shows spikes of sedimentation "lasting several hours." Slides 31-34 of my presentation show only one sedimentation spike of any theoretical significance, which was at the opponents' site 4 (slide 31). Slide 31 shows one spike lasting less than 15 minutes during every 24-hour tide cycle.

See Shepsis letter dated Oct. 17, 2011, at p.4. Given that Dr. Chernaik is a biologist and Dr. Shepsis is an engineer, the hearings officer's tendency would be to defer to Dr. Shepsis on

engineering issues such as this, particularly since Dr. Chernaik has been demonstrably wrong on various other issues in this case.

iii. Source Terms.

Next, Dr. Chernaik argues that the County should not rely on the testimony of Dr. Shepsis as evidence, because the modeling results are unsubstantiated insomuch as the study does not identify "source terms" regarding specific rates of expected sediment release. *See* Chernaik letter dated October 10, 2011, at p. 14. Dr. Chernaik submits an article regarding sedimentation impacts from a dredging project on winter flounder habitat in Newark Bay, and points out that it includes certain "source term" data that is missing from Dr. Shepsis's analysis. In his October 17, 2011 submittal, Dr. Chernaik raises the same "source terms" issue again, this time relying on comments provided by Dr. Thomas Ravens. *See also* Chernaik letter dated October 17, 2011, at p. 1, Raven Letter dated October 14, 2011, at p. 2-3. [13]

In his letter dated October 14, 2011, Dr. Ravens states:

> Sediment transport modeling of dredging operations should generally include a sediment production term that accounts for the introduction of suspended sediment into the water column. Data such as that cited [in the Newark Bay study] – showing the mass rate of sediment introduction due to clam shell dredging – should be used to assess the sediment transport impacts of dredging operations. However, a close reading of the statement provided by Vladimar Shepsis indicates that such an accounting of the particle generation of the dredging operation was not undertaken.

See Ravens letter dated Oct. 14, 2011, at p. 3. Stated in lay person terms, the hearings officer understanding Dr. Ravens to be finding fault with Dr. Shepsis's analysis because it fails to define a value representing how much sediment enters into the water column when the crane's bucket scoops mud out of the pipeline trench.

In his letter dated October 17, 2011, Dr. Shepsis responds to Dr. Ravens by explaining the differences between his studies and the Newark Bay Study, as well as by explaining the absence of "source terms" from his study:

> The analysis provided in the Lackey study of the Newark Bay project is very different from our study because that involved a project where dredged materials would be permanently removed from the bay by a clamshell dredge. In that type of project,

[13] The letter from Dr. Ravens stating his qualifications includes what the applicants see as a "significant admission" that only "*some* of the work that I have done *tangentially* addressed sediment transport impacts of dredging." Oct. 14 letter from Dr. Ravens, page 1. The applicant states that "[t]his does not exactly provide a ringing endorsement regarding Dr. Ravens's qualifications for review of this project." It is noteworthy that none of Dr. Ravens's scholarly articles appear to involve sediment transport impacts from dredging. Unfortunately Dr. Ravens did not appear before the hearings officer to offer testimony, so questions regarding his credibility and qualifications must be based on his resume and comments alone.

> potential turbidity is measured based on the impact of the dredging bucket on the bottom and amounts of sediment that come out of the bucket during ascent and descent. Those are the 'source terms' referenced and measured in Table 1 of the Lackey study. In contrast, the current project involves trenching and placement of a stockpile mound adjacent to the trench prior to placement of the material back in the trench. As explained in my letter dated October 10, 2011, turbidity arising from placement of dredged material in the mound and impacts from tidal currents on the mound will be significantly higher than impacts from dredging the same material. Therefore our analysis considers the 'worst case scenario' of sedimentation in the form of impacts of hydrodynamic flow on trenched material, but the different type of 'source terms' from the Lackey study regarding rates of sediment dispersal during dredging and removal are not part of our analysis. Instead, the computer model that we prepared provides the rate of release of sediment from the trenched stockpile material. The model allows constant erosion and re-suspension of trenched material in the water column instead of period releases of this sediment from the bucket. (Emphasis added).

See Shepsis letter dated Oct. 17, 2011, at p. 5. In essence, Dr. Shepsis states that the "source terms" for the crane's bucket do not matter in this case because, unlike a typical dredging operation where sediments are removed from the water, the dredge spoils in this case will be placed temporarily on the floor of the estuary. Dr. Shepsis notes that that much more sedimentation will occur from both the placement of dredged material in the mound as well as the corresponding impacts from tidal currents as it laps up against the mound and dislodges sediment from the pile.

Both Dr. Raven and Dr. Chernaik fail to reply to Dr. Shepsis's explanation set forth above regarding why this particular project did not require the same "source term" inputs as the Newark Bay dredging project.

iv. Actions Which Cause the Most Sedimentation.

To a certain degree, it seems that Dr. Shepsis and Dr. Ravens are talking past each other. One particular exchange between Dr. Shepsis and Dr. Ravens illustrates this problem. On page 2 of his Oct. 10, 2011 letter, Dr. Shepsis states:

> "Results from our analysis on this project and many other projects indicate that turbidity during placement of dredged material on an open (non-confined) bottom of a water body and storing this material under impact from current velocities is significantly higher than that during the digging of the same material."

Dr. Ravens responds as follows:

EXHIBIT B

> "Although his statement is ambiguous, Vladamir Shepsis implies that more particles are generated following placement of dredged materials than during the dredging and placement process. If this is true, it is not common knowledge amongst sediment transport specialists." (Endnote omitted, Emphasis in original).

See Ravens Letter dated Oct. 14, 2011. Reading these two passages side by side, it is apparent that Dr. Ravens misreads and misquotes Dr. Shepsis. In his various materials, Dr. Shepsis identities four different periods of potential turbidity releases:

A = turbidity generated when the crane's bucket "digs the material" (*i.e.* removes mud from the trench and lifts it into the air)
B = turbidity generated when the crane's bucket places / deposits the removed mud on an open (non-confined) bottom of a water body (i.e. when the crane bucket opens and releases mud onto the storage pile).
C = turbidity generated from "storing this material under impact from current velocities" (i.e. when tidal currents lap up against the mud mound).
D = turbidity generated when the crane's bucket fills the trench back in.

In the quote set forth above, Dr. Shepsis is saying: B + C > A. However, Dr. Ravens states that Dr. Shepsis is wrong to assume that C > B + A. (Note that Dr. Ravens refers to A + B as the "dreging and placement process."). Therefore, it is clear that Dr. Ravens either did not understand what Dr. Shepsis was saying, or Dr. Ravens purposefully misquotes Dr. Shepsis. Either way, it is a misreading that is fatal to Dr. Ravens' credibility in this case.

"Substantial evidence" in the land use context is "evidence a reasonable person would rely upon in making a decision." It is a relatively low standard, as mentioned above. In this case, Dr. Shepsis's analysis constitutes substantial evidence, in part because he responds to Dr, Raven's testimony in a manner that does not seem to be unreasonable, at least to a lay person, and because Dr. Shepsis comes across as having greater expertise and greater credibility.

b. Dr. Raven's Letter dated October 14, 2011.

In his letter dated October 14, 2011, Dr. Ravens suggests that the CHE analysis is also faulty because: (1) it does not provide data regarding particle size of sediments; (2) it focuses on turbidity increases resulting from tidal flow effects on stockpiled material, but not from dredging; and (3) Dr. Shepsis's conclusion that any suspended sediments will not result in detectable accumulations in Haynes Inlet is not credible.

i. Grain Size.

The applicant responds to issue 1 as noting that specific data regarding sediment grain size is provided in Volume 1 of the CHE Technical Report at Section 5.2, and is discussed in more detail below.

ii. Impacts Related to Turbidity Caused by the Crane's Bucket.

With regard to issue 2, the applicant notes that Dr. Shepsis and CHE have explained the basis for their methodology concerning conducting turbidity modeling based on impacts on the stockpiled materials. The applicant cites to Volume 2 of the CHE Technical Report, at Section 10.1:

> "10.1 Methodology
>
> "The objective of analysis and modeling conducted in this section is to determine the potential impact of pipeline construction through Haynes Inlet on increases in turbidity (suspended sediments) at the area of interest. The location of the pipeline and area of interest for investigation of potential impact were defined in CHE (2010b) and are shown in Figure 10-1.
>
> "There will be three elements of dredging operations during pipeline construction that may generate turbidity in the water column:
>
> "1. Dredging (excavation) of the pipeline trench.
>
> "2. Placing (dumping) dredged material adjacent to the pipeline trench for temporary stockpiling.
>
> "3. Replacing material back into the pipeline trench following pipeline construction.
>
> "In order to address the worst case scenario of maximum turbidity and highest likelihood of impact, analysis and modeling of turbidity were conducted for the dredged material placement (dumping) adjacent to the pipeline trench. Results from the analysis and modeling suggest that turbidity during placement of dredged material on the open (non-confined) bottom is significantly higher than that during dredging of the same material. Similarly, re-placement of dredged material in the pipeline trench will create smaller amounts of turbidity because the material is more confined within the trench."

This methodology was adopted by CHE based on its modeling results for this particular project in Haynes Inlet, which involves not just dredging but also stockpiling and replacement of dredged material. According to the applicant: "this is a scientifically accepted methodology that has been accepted by DEQ for purposes of its review of potential water quality impacts from this project in Haynes Inlet."

The applicant further notes that Dr. Ravens admits that he has only "tangentially" reviewed dredging projects in "some" of his work, and it appears that he has *no* experience regarding this type of pipeline project involving not only dredging but also stockpiling and

replacement of material. For this reason, the applicant surmises that it is not surprising that Dr. Ravens is not familiar with the methodology. Under these circumstances, the hearings officer accepts the more specific expert testimony and conclusions of Dr. Shepsis and CHE regarding the appropriateness of their "worst case scenario" methodology for purposes of this particular project.

Further, even if the County looks past the "worst case scenario" methodology to also consider what the potential effects on turbidity could be from dredging and replacement of material in the pipeline trench, the evidence in the record from CHE and Dr. Shepsis support a finding that even if all three activities are considered, there would be no negative impacts from sedimentation on Olympia oysters. The analysis and reports prepared by CHE and Dr. Shepsis conclude that (1) turbidity resulting from tidal flows on stockpiled materials would not result in *any* detectable increase of sedimentation in Haynes Inlet, and (2) turbidity resulting from tidal flows on stockpiled materials would be "significantly higher" than that resulting from dredging or re-placement of the same material. CHE Technical Report Section 10.1, quoted above. Therefore, it is reasonable to conclude that if the activity causing "significantly higher" amounts of turbidity will result in no detectable sedimentation, then the activities that would cause significantly lower amounts of turbidity will also cause no increases in sedimentation in the area.

iii. Suspended Sediments Will Not Likely Result in Detectable Accumulations in Haynes Inlet.

The applicant responds to the third issue raised by Dr. Ravens by noting that Dr. Shepsis concluded that any suspended sediment caused by pipeline construction will disperse and not result in detectable accumulations of sedimentation in Haynes Inlet. Dr. Ravens states that this conclusion is "not credible." However, Dr. Ravens provides no analysis or explanation other than to say that "small concentration of particles can lead to significant deposition over time." See Ravens letter dated Oct. 14, 2011, at p. 3. A review of the specific results of Dr. Shepsis's study reveal that his conclusion is both credible and well-documented in his letter dated October 10, 2011.

The Shepsis study analyzed two potential stockpile locations, one at approximately milepost 3.2 and the other at approximately milepost 2.8. The modeling results for the milepost 3.2 location show a small volume of increased turbidity that is extremely limited in location to the immediate vicinity of the stockpile itself, and also limited to two time periods of less than 15 minutes per day. Therefore, it is certainly reasonable for Dr. Shepsis to conclude, as stated in his letter to the hearings officer, that any sediments in this area "will essentially remain in the immediate stockpile area and will not spread to the rest of Haynes Inlet." *See* Shepsis letter dated Oct. 10, 2011, at p. 3.

The second study area, located at milepost 2.8, is subject to much higher tidal velocities, and is therefore the more critical of the two sample locations. The modeling results in that location show very short increases in turbidity (less than 15 minutes per day) that coincide exactly with the highest outgoing tides. Therefore, to the extent there will be a very brief increase in suspended sediment in that area, such sediment would be immediately dispersed with the extremely fast-moving tidal currents of up to 4 feet per second and, essentially flushed out and under the Highway 101 bridge into an area where there is no documented evidence of

Olympia oysters. Therefore, Dr. Shepsis reasonably, and credibly, concluded his letter to the hearings officer as follows:

> 3. Conclusion
>
> Based on the results of our detailed three-dimensional modeling, my conclusion is that pipeline construction will not result in any detectable increase of suspended sediment concentration and deposition in Haynes Inlet. Overall, our modeling indicates that changes in suspended sediment concentration during construction of the pipeline will be negligible compared to existing conditions in Haynes Inlet. Although there may be very temporary and localized increases in suspended sediment concentration due to high velocities in the area of the bridge, the sediment would not be able to deposit on the identified oyster locations.

See Shepsis letter dated Oct. 10, 2011, at p. 4. The only evidence that Dr. Ravens presents on this subject is his statement that "small concentration of particles can lead to significant deposition over time." However, the timeframes associated with construction of the pipeline and the existence of stockpiled material in Haynes Inlet are relatively short for each segment of construction. As explained in the CHE Technical Reports, the total duration of trenching operations (excavation, placement of pipeline and trench refill) for each 800-foot pipeline reach is approximately seven days. CHE Technical Report, Volume 2 page 17, Section 11.1. As described in that report: "Considering the above, the objective of this analysis is narrowed to determining the possible dispersion of sediment and turbidity resulting from a stockpile of dredged (excavated) material along the pipeline route during seven days of construction." *Id.*

Thus, while Dr. Ravens is correct that even tiny concentrations of particles can result in significant deposition over significant periods of time, Dr. Ravens has not provided any evidence to suggest that the small amounts of turbidity referenced in Dr. Chernaik's study could actually result in significant deposition given that their duration is less than 15 minutes per day, and the stockpiled material will only be located in the water for an estimated seven days.

c. Chernaik Materials dated November 17, 2011.

There are three sediment-related issues raised in the opponents' November 17, 2011 submittal.

i. Newark Bay, NY Study.

As an initial matter, there is continued discussion regarding the details of the Newark Bay project and how it compares to the applicant's project. However, as the applicant's attorney Roger Alfred notes, this "back-and-forth between the two doctors regarding the Newark Bay project has gone beyond its significance to this proceeding." As discussed above, that study was originally provided by Dr. Chernaik solely to provide an example of the type of "source terms" that he believed should have been included in Dr. Shepsis's work. The debate regarding

comparisons of the amounts of sediment likely to be generated by that project versus the Haynes Inlet project is not particularly relevant to the issues at hand.

Moreover, in this particular exchange, Dr. Shepsis clearly gets the better of Dr. Chernaik. The Newark Bay study involved dredging, rather than trenching and stockpiling, and the dredging operation would produce much higher amounts of sediment because the dredging bucket pulls sediment out of the bottom of the bay and all the way through a 30-40 foot water column. On the other hand, this project involves the temporary removal of material from the bottom of the inlet, in water that is no more than 8 feet deep, and the temporary placement of that material in a stockpile right next to the dredged area.

ii. "Unvalidated" Sediment Transport Model Regarding Background Levels of Turbidity.

The report prepared by Dr. Ravens titled "Limitations of the Haynes Inlet sediment transport study" dated November 13, 2011 challenges two aspects of the Technical Report prepared by CHE that provides the background data for this study. Specifically, Dr. Ravens states that the CHE analysis is faulty because: (1) it relies upon an "unvalidated" sediment transport model regarding background levels of turbidity; and (2) it incorrectly relies upon an assumption of uniform sediment size despite data showing that sediments are smaller than assumed.

The two issues raised by Dr. Ravens are discussed by Dr. Shepsis in his letter dated November 23, 2011. First, Dr. Shepsis explains that the CHE sediment transport model is being used for qualitative purposes only, and does not apply the type of absolute quantitative values that would require the modeling results to be validated or calibrated against measurements of background turbidity from the subject site. In other words, the CHE analysis compares a model of background levels of turbidity against what would be generated by project construction, and reports the extent to which there will be an increase, decrease, or no change in turbidity resulting from construction. The applicant states that: "[i]n this type of qualitative analysis it is an accepted scientific practice to rely upon modeled background data that has not been independently verified at the site, because the point of the study is only to establish the extent project conditions will result in an increase over existing conditions; therefore, knowing the actual quantitative amount of background turbidity is not essential." Dr. Shepsis further states:

> I have clearly stated from the beginning of the project (see Technical Report entitled Jordan Cove Energy Project and Pacific Connector Gas Pipeline - Volume 1, Page 40) and have repeated several times in Volume 2 of the same technical report, that the model used for sediment transport and related parameters as turbidity, sediment concentration, etc..., has not been validated or calibrated for this study and that the modeling results for sediment transport and related parameters are used <u>qualitatively for comparative analysis only</u>. This means that the analysis is performed in terms of "relative to existing conditions." No quantitative absolute values are considered for this analysis. The study provides results of potential impact from the project

construction in respect to existing conditions (background conditions). The increase, decrease, or no-change of sediment concentration, turbidity etc... in respect to the modeled background conditions has been provided as output of this study. This approach, use of a non-validated model in qualitative mode, is typical in the industry and has been previously used in many credible studies.

Further, the argument used in Dr. Ravens' example is flawed because I did not perform the analysis in quantitative terms. In Dr. Ravens' example, the wrong assumption is to consider my results as absolute values. For example, if the modeled background concentration was even five times larger than the actual background concentration (as Dr. Ravens supposes in his example), then also the modeled post-project concentration would be five times larger than the actual post-project concentration. Therefore, the relative comparison between background and post-project would remain the same in nature as in the model. Regardless of what the actual background conditions are in nature, my results provide an increase, decrease, or no-change of the modeled parameter (turbidity, sediment concentration, etc...) for modeled post-project conditions in respect to modeled background conditions.

See Shepsis letter dated Nov. 23, 2011, at p. 2. Dr. Ravens does not respond to this testimony. The hearings officer finds Dr. Shepsis' analysis to be more credible and further finds that it constitutes substantial evidence that is not undermined by Dr. Raven's testimony to the contrary.

iii. Grain Size.

Next, regarding the allegations concerning improper assumptions of sediment size, Dr. Ravens argues that Dr. Shepsis' analysis is flawed because he assumes a single uniform grain size in his model (.27 mm), which is a typical size for a fine grain of sand. According to Dr. Ravens, the model should have used grain sizes that approximate silt and clay as well (i.e. grain sizes in the range of .10 mm and .05 mm). Dr. Ravens attributes two problems with this error: (1) "the calculation of background turbidity distribution at the study site would be inaccurate," and (2) the modeling of dredging-derived turbidity would be inaccurate. *See* Ravens letter dated Nov. 13, 2011, at p. 5-6.

The hearings officer notes that of the three representative grain sizes that Dr. Ravens places at issue. Of those three, the .10 mm grains are most likely to result in higher turbidity, according to his calculations. *See* Table 1 of Ravens letter, at p. 5. Table 1 shows .10 mm silt grains having an "average suspended sediment concentration" of 3000 mg/ltr, which is much higher than the sand sized-gains (10 mg/ltr), or the smallest silt sized grains (200 mg/ltr.). The hearings officer understand that the .05mm grains produce less turbidity than the .10 grains because the .05mm sized grains are "cohesive" in nature, which means that inter-particle forces start to dictate the resistance to motion, as opposed to mere gravitational forces. *Id.* at p. 5.

EXHIBIT B

Nonetheless, Dr. Ravens conclusions do not seem to hinge specifically on the .10 mm sediments. Rather, Dr. Ravens' point is simply that finer grained silts and clay sediment will disburse farther than sand:

> The time a given dredging turbidity plume is suspended can be estimated based on the ratio of depth over the fall velocity. The fall velocity for .27 mm and .05 mm sediments is about 30 mm/sec and 2 mm/sec respectively. Consequently, the finer sediment would be suspended for about 15 times as long and would be dispersed over 15 times the distance.

Id. at p. 6. Essentially, Dr. Ravens point is that sand falls through water much faster than silt, which means that silt stays in suspension longer than sand, and, as such, has more time to get carried away in the tides than will the sand.

Dr. Shepsis responds that Dr. Chernaik and Dr. Ravens are factually wrong to assume that the CHE Technical Report only uses one grain size (*i.e.* the larger .27 mm grain size). The CHE Technical Report states that numerical modeling of sediment transport was conducted with two sediment sizes, 0.27 mm grain diameter (sand) and 0.05 mm grain diameter (silt), which the report says is representative of the typical sediment sizes present in Coos Bay including Haynes Inlet. *See, e.g.*, CHE Technical Report at p. 41. Dr. Shepsis states:

> These two sediment sizes are representative of the typical sediment sizes present in Coos Bay including Haynes Inlet, as it results from the study conducted by GeoEngineers (August 2010), referenced by Dr. Ravens. I was aware of the fact that the sediment size distribution in Coos Bay including Haynes Inlet was spatially variable, ranging from silt to sand. The modeling results presented in Section 10.1 of the Technical Report entitled Jordan Cove Energy Project and Pacific Connector Gas Pipeline - Volume 2 (quoted by Dr. Ravens) were conducted with 0.27 mm grain diameter because this is the type of sediment present in the majority of the study area. Dr. Ravens' statement that '*However, the sediment characterization study conducted by GeoEngineers (August 2010) indicates that the sediments are significantly finer than this in large portions of the study area*' is not supported by the GeoEngineers study of August 2010. According to the GeoEngineers study, the only section where the percentage of silt (50.4%) is comparable to the percentage of sand (48.4%) is section DMMU-1 (and not DWWU-1, as erroneously quoted by Dr. Ravens). This section is located in the north part of Haynes Inlet, far from the oyster relocation area. The other two sections (DMMU-2 and DMMU-3) have 67.0% and 86.2% of sand and only 33.0% and 13.1% of silt, respectively.
>
> I have shown in the paragraph above that the use of 0.27 mm sand is a reasonable assumption for our study and not a '*wrong grain*

> *size*' as Dr. Ravens commented. Nevertheless, I want to reiterate that Dr. Ravens is again reasoning in absolute terms ('... *the calculation of the background turbidity distribution at the study site would be inaccurate if the wrong grain size is assumed...*'), while my analysis was performed in terms of 'relative to existing conditions.' My study was a qualitative/comparative analysis. My modeling results are produced as "concentration in excess of ambient concentration.
>
> Again, the 0.27 mm grain size used in my modeling efforts is a reasonable sediment size, given the information in the Geo-Engineers study. Furthermore, not only did I use a reasonable grain size for analysis of sedimentation, but using a larger grain diameter (0.27 mm versus 0.05 mm) is conservative in terms of potential impact to oyster beds. Dr. Ravens should have known and should have educated Dr. Chernaik that larger sediment particles may deposit in close vicinity of the source of suspension and is more indicative factor for sedimentation of oyster beds.

See Shepsis letter dated Nov. 23, 2011, at p. 3. Thus, Dr. Shepsis states that the portions of the Haynes Inlet that have the most sand (as opposed to silt) are also the areas that have the highest flow velocities. Obviously, that is not a coincidence: the smaller sediment will not settle in high-velocity environments. The areas of low flow velocities will likely create less far-reaching turbidity, even though the percentage of silt is higher, due to the fact that the tides have less energy in those locations. Conversely, in areas where the flow velocities are the highest, the fact that the majority of the sediment is sand limits the distance that such sediments will travel. Dr. Shepsis seems to be of the opinion that the larger particles are the most dangerous in terms of potential impact to oysters for the simple fact that will deposit in close vicinity to the dredging location, and, therefore, will create thicker layers of sediment.

Although this issue presents somewhat of a close call due to its technical nature, the hearings officer finds Dr. Shepsis' analysis to be more credible and further finds that it constitutes substantial evidence that is not undermined by Dr. Raven's testimony to the contrary. Three issues factor into this conclusion. First, although Dr. Ravens criticizes Dr. Shepsis's study, he never really addresses the ultimate issue, which is to say that he never concludes that the dredging operations will fail to "protect" the oysters. Second, He never really accounts for, or weights in on, the use of best management practices such as silt curtains, etc. Third, the hearings officer does not believe that Dr. Ravens has done enough to make the case that the fine sediment (.05mm) will harm the oyster beds. As discussed elsewhere, Dr. Ravens does state that "small concentration of particles can lead to significant deposition over time," but he makes no effort to quantify what he means by "small quantities" or explain how much time he is referring to. In short, his statements and analysis are simply to vague and too perfunctory to cause a reasonable person to disregard Dr. Shepsis' analysis.

EXHIBIT B

2. **Even with some sedimentation, there will be only "temporary and insignificant" impacts on Olympia oysters.**

The applicant argues that "the sedimentation issue is a red herring, because the opponents have greatly overstated the potential impacts of sedimentation from this project on Olympia oysters." The applicant points out that "the bucketful of Olympia oysters that will be relocated by the applicant are, generally speaking, already attached to hard substrate." There is substantial evidence in the record that (a) adult oysters can tolerate relatively high amounts of sedimentation (several millimeters), (b) Olympia oysters prefer to locate on the undersides of hard substrate, where sedimentation is not as much of an issue, and (c) the post-construction mitigation being proposed by the applicant will be successful, and obviously will not be impacted by sedimentation from the project, since it occurs after pipeline construction is complete.

Therefore, even if the opponents were somehow correct that Dr. Shepsis has underestimated the amount of sedimentation, that would not require the conclusion that there will be anything more than temporary or insignificant impacts on Olympia oysters. This is particularly true, given the applicant's proposal to provide post-construction mitigation in the form of new Olympia oyster habitat. Turbidity resulting from the project must be monitored as part of DEQ requirements. The hearings officer recommends a condition of approval requiring the use of turbidity curtains if monitored levels of turbidity exceed threshold levels mandated by DEQ,.

The opponents attempt to cast doubt on the Shepsis /CHE analysis by having the study informally peer reviewed by Dr. Zarcherl and Dr. Ravens. The opponents also rely on data from a sedimentation study for a dredging project in Newark Bay.

There is evidence in the record to support the conclusion that Olympia oysters can survive some amount of sedimentation. For example, there is evidence in the record, in the form of the opponents' own statements, the testimony of Dr. Ellis, and the video submitted by Rex Miller, that sedimentation is not necessarily going to harm Olympia oysters (particularly adult Olympia oysters) or their ability to reproduce. First, the opponents themselves submitted the following statement from a 2005 Corps of Engineers study:

> Although a thin layer (several mm) of sediments may not be fatal to adult oysters, it may affect reproduction. Because larval oysters require hard substrata for settlement, the presence of even a few millimeters of sediment covering an oyster reef may inhibit larval recruitment.

See Chernaik letter dated Oct. 10, 2011, at p. 8. Thus, opponents admit that several millimeters of sediment is not necessarily fatal to adult oysters, and that the real threat from sedimentation is on reproduction. However, even regarding reproduction, the above-quoted statement suggests that a millimeter or two of sediment is not going to "inhibit larval recruitement" on hard substrate. Thus, the opponents' later assertion that even 50 microns of sediment will prevent attachment of larvae is contradicted by their own evidence (one millimeter is a thousand microns, so 50 microns = 0.05 mm).

The Olympia oysters to be *relocated* under the Mitigation Plan are, by definition, adults that are already attached to hard substrates. Therefore, the evidence submitted by opponents indicates that those oysters can survive under "several millimeters" of sediment.[14] Also, as discussed below, Dr. Zacherl's restoration project in Newport Bay shows significant increases in Olympia oyster density in six months where Pacific oyster shell was placed, *in spite of an average mud deposition of 0.8 mm (800 microns) on the shells.*

This is also consistent with the oysters shown in the DVD submitted by Rex Miller (at approximately 6:50 through 9:15), which are covered in relatively thick layers of mud. According to Mr. Miller, those oysters are "doing pretty well" and are even continuing to reproduce.

Based on this evidence, the hearings officer finds that even some amount of sedimentation will not impact the oysters being relocated by the applicant, or other existing adult Olympia oysters in Haynes Inlet. This is particularly true regarding the Olympia oysters in the areas near the bridge where high tidal flow velocities will prohibit accumulation of sediment.

Meanwhile, the mitigation being proposed by the applicant will be specifically designed in consultation with ODFW to attract larval settlement of Olympia oysters (see proposed condition of approval above), and will obviously occur *after* construction. Therefore, there will be *no* sedimentation impacts from pipeline construction on the ability of larvae to attach on the new hard substrate that will be provided by the applicant. As a result, the hearings officer finds that some sedimentation will not result in impacts to adult oysters, and larval attachment in the mitigation area will not be impacted because that will occur post-construction.

The opponents submitted arguments that a sediment covering of less than 50 microns (1/500th of an inch) is enough to impair the attachment of Olympia oyster larvae to hard substrate. Oct. 10 memo from Mark Chernaik, page 7. However, this figure is not based on any scientific study, it is merely based on a personal estimate provided by a biologist, Dr. Ravens, recruited by the opponents (*Id.* at 8). This evidence is directly contradicted by the 2005 Corps of Engineers study quoted above. Moreover, Dr. Ellis provided data to the contrary from Dr. Zacherl's project in Newport Bay, which is actually based on a scientific study. As stated by Dr. Ellis:

> "Dr. Chernaik fails to mention that Olympia oyster spat have a strong preference for the undersides of hard substrates (Sawyer, 2011), which would be unaffected by sedimentation. Zacherl et al., (2011) found that six months after placement of Pacific oyster shell in Newport Bay, Olympia oyster density was up to 20-30 times greater than the control (where no Pacific oyster shell had been placed) in spite of an average mud deposition on that shell of 0.8 mm. The results of this study have not been published, but a presentation was given at the 2011 Headwaters to Ocean

[14] Dr. Shepsis included an estimate that any sedimentation resulting from the pipeline construction in Haynes Inlet would be "a much lower detectable level than 30 microns." Oct. 17 letter from Dr. Shepsis, page 4.

Conference, and this presentation (Zacherl, et al., 2011) is included as attachment A."

See Ellis letter dated Oct. 17~~m~~ 2011, at p. 10. Thus, Dr. Zacherl's own study found that Olympia oysters were thriving and reproducing despite an *average* sediment coverage of 0.8 mm. By way of contrast with the opponents' 50 micron figure, 0.8 mm is 800 microns. Dr. Zacherl admits that oyster larvae prefer attaching to the underside of hard substrate, and therefore relatively high levels of sedimentation cover on the topside of a shell is "less of an overall impediment" for the attachment of Olympia oyster larvae. *See* Chernaik letter dated Nov. 14, 2011, at p. 4.

The opponents' only substantive response is that the applicant's mitigation plan would distribute shells too diffusely for there to be any available undersides on which larvae can attach. *Id.* However, this misses the obvious fact that the applicant's proposed mitigation will occur *after* construction of the pipeline – when construction-related sediment will no longer be an issue. Moreover, it also ignores the fact that discarded Pacific oyster shells have been successfully colonized by Olympia oysters in Haynes Inlet.

Regardless, based on comments of this nature submitted by the opponents regarding a need for deeper dispersal of Pacific oyster shell to provide available "underside" for attachment, the applicant is proposing the condition of approval set forth above that requires the applicant to consult with ODFW regarding the best methods for and location of shell dispersal in order to ensure successful colonization, including greater depths of shells and placing thick groups in "bags" as documented in the Zacherl study. The hearings officer findings this proposed condition to be reasonable and likely to be effective. The hearings officer is satisfied that the applicant can work with the appropriate agencies to determine the best distribution of shells to maximize the recruitment / settlement of oyster larvae.

3. Discussion of Miscellaneous Arguments Associated with the Sedimentation Issue.

a. Reliance on 2005 data.

Jody McCaffree and other opponents challenge CHE's reliance on tidal flow data from June 2005, arguing that the data should have considered the months of October through February when construction of the pipeline will occur. Dr. Shepsis rebuts this assertion in his letter dated October 17, 2011. He states that tide fluctuations (*i.e.*, differences between highest and lowest tides) during the modeling period from June 18, 2005 through July 18, 2005 are similar to fluctuations during the month of October. Also, the maximum tide amplitudes for June are relatively high (11.12 feet), and are virtually the same or less for the months of October through February, with the exception of November which is only 0.2 feet higher. Therefore, as explained by Dr. Shepsis in his October 17, 2011 letter, tidal flow velocities during construction months would be lower or insignificantly higher than what is predicted in the model. Given this discussion, the hearings officer finds that the use of June 2005 data does not make the Shepsis analysis less "substantial."

b. Impact of Pipeline Trenching and Stockpiling on Flow Velocity.

Ms. McCaffree argues that the CHE analysis did not consider what the impact of the construction activities (*i.e.*, trenching and stockpiling) would be on flow velocities in Haynes Inlet. Dr. Shepsis responds in his letter dated October 17, 2011 by pointing out that the modeling does include consideration of trenched and stockpiled material on flow velocities, and the resulting turbidity analysis is therefore based on velocities that will occur upon trenching and stockpiling. Thus, the hearings officer finds that this concern does not ~~made~~ make the Shepsis analysis less "substantial."

c. Consideration of Proposed Port channel and LNG terminal.

Ms. McCaffree contends that the CHE analysis should have included (a) potential effects from the Port's proposal to deepen and widen the Coos Bay Channel, and (b) impacts from removal of material required to construct the new slip for the LNG terminal. Dr. Shepsis argues in his letter dated October 17, 2011 that the Port's proposal was not considered as part of the CHE analysis because it is, as of that date, just a speculative project that may or may not actually occur. Also, Dr. Shepsis further points out that the two-volume Technical Report prepared by CHE provides a detailed analysis of flow velocities related to dredging for the LNG terminal, and shows that construction of the terminal and dredging the access channel would not alter tidal flow velocities in the area of Haynes Inlet.

The hearings officer finds that, with regard to this very technical issue, that Dr. Shepsis's second response to this issue seems reasonable and constitutes substantial evidence. Again, it would be much more effective for the opponents to have brought forth evidence tending to show that the deepening of the Coos Bay channel would in fact alter tidal flow velocities in the area of Haynes Inlet.

d. Timing of Construction During Oyster Spawning Season.

One of the more significant and potentially meritorious issues in this case was raised by Dr. Chernaik in his oral presentation at the Sept. 21, 2011 hearing. This argument is essentially repeated in his October 10, 2011 memorandum. Therein, Dr. Chernaik cites a Master's thesis published by a graduate student with the Oregon Institute of Marine Biology (K. Sawyer 2011) which determined that the "settlement" season for Olympia oyster larvae begins in earnest in September, peaks in October and lasts until early December. This study conflicts with other studies from the Puget Sound, cited by the applicant, which concluded that settling begins in the first week of September and lasts until the second week of October. *See* Ellis Oyster Survey, at p. 4. Dr. Chernaik summarized Ms. Sawyer's results are summarized below.

> "Table 4 indicates that the maximum numbers of Olympia oyster settlers were counted on October 5, 2010 for almost all substratum types; this can be seen in the graph of total settlers per treatment (Figure 12) which illustrates the average density of settlers for all treatments on each collection date. Settlement varies significantly among the 20 collection dates with increased settlement from

September- November and a distinct settlement peak in October."[15]

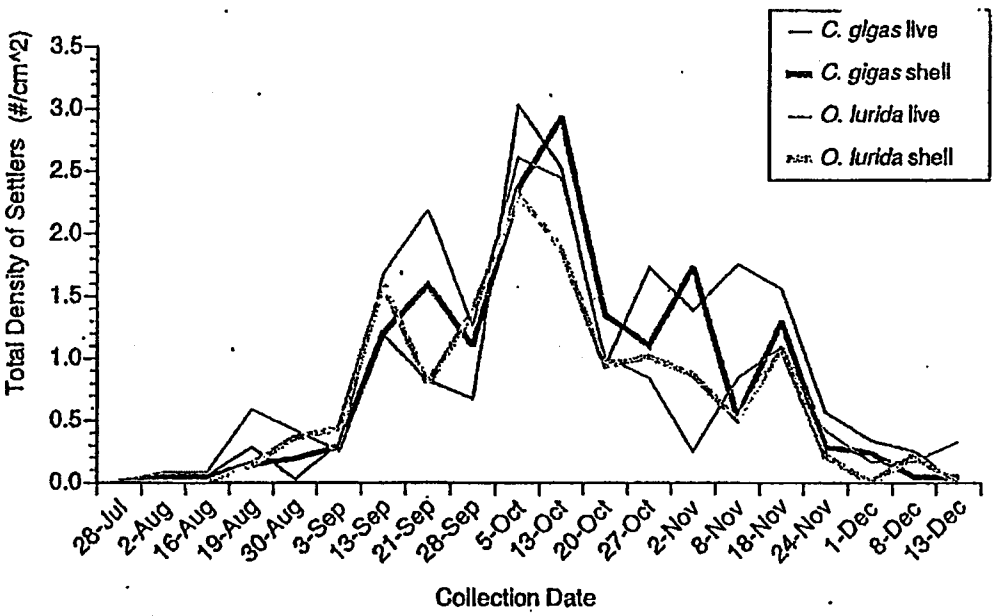

Figure 12. Total densities of Olympia oyster settlement (#/cm2) on each substratum throughout the season Settlement on all four substratum types follows the same temporal pattern.

Dr. Chernaik concludes as follows:

> The significance of these results is certain: not only would conditions placed on the construction of the Pacific Connector Gas Pipeline fail to protect Olympia oysters in Coos Bay, the timing of in-water work, beginning on October 1, would maximize the harm dredging activities in Haynes Inlet would have on the reproduction of Olympia oysters.

As a result, Dr. Chernaik contends that in order to protect Olympia oysters, pipeline construction should not be allowed to begin until the spawning season ends in early December.

Dr. Ellis rebuts Dr. Chernaik's argument in a letter dated October 17, 2011, which explains as follows:

> [Dr. Chernaik] contends that since the ODFW work period for Coos Bay is from October 1 to February 15 that suspended sediment generated during pipeline construction would occur at the.

[15] Sawyer, K. (2011) " Timing of Settlement and Substrate Selection by Larvae of the Olympia Oyster (Ostrea lurida) in Coos Bay, Oregon." MsC Thesis, University of Oregon – Oregon Institute of Marine Biology, Charleston, OR. 53 pp.

EXHIBIT B

most sensitive period for the larval oysters and cause widespread detrimental effects on Olympia oyster recruitment. This issue was addressed in our rebuttal testimony and is briefly summarized as follows:

> "1. Results of detailed 3-dimensional water velocity and sediment modeling indicate that dispersion of fine sediments will be spatially limited to the immediate vicinity of the trenching, stockpiling and backfilling areas of activity.
>
> "2. If fine sediments were to settle on hard substrates nearby to the construction area, it would be a very thin layer on the surface of the hard substrates and would not preclude larvae from attaching on the unaffected underside of hard substrates, which is their preferred location.
>
> "3. Placement of Pacific oyster shells in the right of way as mitigation for direct impacts to Olympia oyster habitat (i.e., MP 2.9 to 3.2) will occur post-construction and therefore, will not be subject to any construction-related sedimentation."

See Ellis letter dated Oct. 17, 2011, at p.10. Dr. Steve Rumrill weighs in on this issue in his letter dated November 28, 2011. His letter is notable by its matter-of-fact tone and a general lack of advocacy for either party.[16] Dr. Rumrill states:

> The data generated by [Ms. Saywer's] thesis work documented that Olympia oysters exhibited a distinct peak in larval settlement in October that was preceded by a smaller period of elevated larval settlement in August. The thesis work by Ms. Sawyer has excellent reliability and represents the best available science regarding the timing of larval settlement by Olympia oysters in Coos bay. From the perspective of the Olympia oysters, it is advisable to avoid activities that disrupt deposited sediments and/or increases in the load of suspended sediments in October because the suspended sediments may become deposited on the limited surfaces of suitable hard substrate (*i.e.* oyster shall, rock, cobble) and interfere with the settlement and attachment of the Olympia Oyster larvae.

[16] Dr. Rumrill has, surprisingly, not taken center stage in this proceeding, despite the fact that he likely has more expertise on Haynes Inlet Olympia Oysters than any of the other scientists. No doubt, he faced a concerted lobbying effort by both sides to solicit his testimony. Nonetheless, it is difficult to assess what to make of his overall lack of active participation in this process. Overall, the hearings officer believes that his lack of participation tends to favor the applicant, as it suggests a lack of concern on Dr. Rumrill's part.

EXHIBIT B

See Rumrill letter at p. 6. The hearings officer assigns a high degree of credibility to the statements of Dr. Rumrill, due to his specific expertise with this particular bi-valve species. Nonetheless, it is unfortunate that Dr. Rumrill does not address the issues set forth in the Oct. 17, 2011 Ellis letter.

The hearings officer finds that that this is one of the more difficult issues in the case, and one that requires considerable thought and careful examination. The 2011 K. Sawyer study, viewed in light of Dr. Rumrill's endorsement, constitutes substantial evidence supporting the conclusion that pipeline construction could have negative effects on larval attachment if it results disrupted deposited sediments and/or increases in the load of suspended sediments in October. Since the Sawyer study is specific to Haynes Inlet, it carries with it substantial evidentiary weight. The only real weakness in the Sawyer evidence is that it only documents one season's worth of data (*i.e.* 2010). Since we know from the record that spawning is temperature dependent, and we know from common experience that 2010 was a cool summer throughout Oregon, one can draw an inference that 2010 may have been a late spawning season as compared to other years. That fact alone may account for the difference between Sawyer's results and the results of other studies from Puget Sound. Nonetheless, there is nothing to say that the year that pipeline construction takes place might not also be a late spawning season, and therefore the hearings officer is not dismissive of the Sawyer study on those grounds alone.

However, even if one assumes that the dredging activity will interfere, to some extent, with one spawning season, it does not follow that the construction activities result in management of the district that fails to "protect [the zoning district's] resource productivity." Under an unlikely worse-case scenario, the pipeline construction could - in theory - cause the complete failure of one spawning season in the portion of Haynes Inlet affected by siltation. Even that potential result, though unfortunate if it happened, would only set back the *recovery* of the Olympia oyster. It would not be expected have an effect on the adult Olympia oysters in the remaining portions of Haynes Inlet, nor would it reduce the overall population of Olympia oysters, given their long life spans.

The hearings officer finds it difficult to imagine a scenario where sedimentation from the construction activities will result in long-term or permanent siltation of Olympia oyster habitat. Given the effect of tidal activity in the bay and the high rainfall experienced in the Coos Bay area, there is sufficient hydraulic activity occurring in the Haynes Inlet to cause sediment to wash off of hard substrate. This is particularly true since the causeway creates a funneling effect that increases flow velocities in the southern portion of Haynes Inlet. Thus, under this worst-case scenario, the biggest effect on Olympia oysters would be a flat-lining of the population in a portion of the Haynes Inlet for one season. Such an effect would be temporary, and, in the hearings officer's estimation, insignificant to the overall population of Olympia oysters in Haynes Inlet.

Moreover, the applicant has already indicated that it would use turbidity curtains if needed to isolate in-water work zones and contain increased suspended sediment to a defined area. *See* Ellis Oyster Survey, §4.1.3 at p. 25. While these turbidity curtains are not likely

going to contain *all* sediment,[17] their effect would be substantial in limiting harm to Olympia oyster beds.

The hearings officer finds, in addition, that the "worst case scenario" set forth above is unlikely to occur. As an initial matter, Olympia oyster larvae will still be able to attach to the underside of hard substrate, even if the top and sides of such substrate are silted too heavily to allow for attachment. Moreover, even under the opponent's "October-peak" hypothesis, a significant number of oyster spat will have settled in the August and September time frame. It is assumed from the general discussion by the parties, that these early-settlers will not be affected by late season (October and later) siltation. Third, the applicant's statement that the "dispersion of fine sediments will be spatially limited to the immediate vicinity of the trenching, stockpiling and backfilling areas of activity," is reasonable and likely correct.

One final point warrants discussion. The applicant is already operating under a reduced work-window of 1 October to 15 February. Assuming that the applicant starts its in-water construction activities on October, it seems unlikely that the construction activities will have progressed far enough to reach the areas of oyster habitat (near the causeway, from Milepost 2.6 to MP 3.2.). Regardless from which direction construction begins, it will have to install at least one mile of pipe before reaching these critical areas. The applicant estimates that it can install 800 feet of pipe per week, which means that, at best, the applicant will only have traversed 3200 feet by the end of October. The high-density oyster beds near the causeway are fully a mile from either starting point within Haynes Inlet. Thus, given that schedule, it is unlikely that construction would reach the critical oyster habitat areas near the bridge until December at the earliest.

The hearings officer makes a number of recommendations:

1. It seems that the mitigation plan should be effectuated either in late-July or early August following the construction season. This would ensure that the oyster shells have been in the water only a short time prior to the time the larval oysters seek to attach to the shells.

2. Based on the potential for the larval settlement peak in October, PCGP should not be allowed to conduct dredging operations between Milepost 2.6 to MP 3.2. during the month of October.

These conditions will ensure that the potential harm is reduced to such a degree that there is at most a *de minimis* or insignificant impact on aquatic resources such as the Olympia oyster.

4. Discussion of Other Issues Raised by Opponents.

This section responds to issues raised by opponents that do not fit within the other sections set forth above.

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[17] *See* discussion on Chernaik letter dated Sept. 14, 2011, at p. 13.

a. Alternative Routes.

In her letter dated October 10, 2011, Jody McCaffree invites the hearings officer to apply Plan Policy 14 in a manner to compel an alternative route. However, that issue was not raised to LUBA and therefore the issue is waived on remand. The local government is entitled to limit the scope of the remand proceedings to issues that were the basis of the remand. *Hearne v. Baker County*, 89 Or App 282, 748 P2d 1016, *rev denied*, 305 Or 578 (1988); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419 (1990), *aff'd*, 106 Or App 266, *rev denied*, 311 Or 349 (1991). Coos County did so in this case.

Even if the issue were not waived, Ms. McCaffree's argument is wrong on the merits. In this case, FERC decided that the route it approved was better than a host of alternative routes. The County is not in a position to second guess FERC on this issue. But even if it were, Plan Policy 14 was not written in a manner that makes it obvious that it applies to linear features such as a pipeline. The policy sets up a preference for using urban or urbanizable lands as well as exception lands prior to using lands subject to Policy 14. The Plan policy simply has no applicability to linear features such as pipelines that traverse multiple zoning districts.

In her letter dated October 17, 2011, Ms. McCaffree presents additional arguments in favor of an alternative route for the pipeline. The hearings officer finds that these arguments are beyond the scope of issues in this remand proceeding, and are waived.

b. Impacts Results from other Pipeline Projects.

Some of the opponents, including Mr. Robert Fischer, submit photos and articles related to negative environmental consequences from other pipeline construction projects in other states and countries. In Mr. Fischer's case, much of this evidence comes from what the hearings officer assumes is a newspaper or periodical ("The Courier Mail") and a website with the domain name of www.dredgingtoday.com.

There are three primary problems with this kind of anecdotal evidence. First, the persons submitting this evidence have not provided a foundation to support the reliability and credibility of the source, its political perspective, etc. Depending on the source, the information presented in such materials could be one-sided, misleading, taken out of context, or completely false.

Second, the articles themselves provide varying theories as to what is causing the negative effects on the environment, and do not conclusively fault the LNG-related construction. Third, even making the huge leap of faith that the negative facts stated in these articles are true, there is no evidence to suggest that the situations are sufficiently analogous to support the conclusion that the adverse effects happening in those cases will necessarily happen in this case.

Thus, while it is possible that newspaper articles and other reporting can constitute substantial evidence in some cases, the hearings officer finds that a reasonable decision-maker would not draw any conclusions concerning the PCGP case based on this evidence. While interesting, that is not evidence a reasonable person would rely upon to make a decision regarding potential impacts on Olympia oysters in the current project.

c. **Scour.**

Ms. McCaffree points out that in some cases, pipelines have been scoured out by big storm events. However, this issue is beyond the scope of ~~eth~~ the remand proceedings. Moreover, this pipeline is going to be encased on four feet of concrete, a feature which was apparently not present on the other pipelines she mentioned that were affected by scouring action.

d. **Pipeline Companies Don't Keep Their Promises.**

Ms. McCaffree states that "gas and oil companies are notorious for promising all sorts of things but * * * they do not always follow through with the things they promise." McCaffree Letter dated October 10, 2011. Ms. McCaffree is undoubtedly correct that things do not always go according to plan. However, the suggestion that land use applications should be denied because the applicant *may* not comply with conditions of approval is not well taken. As an initial matter, the success or failure of the project will, to some degree, depend on how aggressive the County is with regard to its enforcement of conditions. The hearings officer cannot assume that the applicant will not comply, or that the county's enforcement of problems will be ineffective. More importantly, the land use process is not intended to guarantee that things will go according to plan. The reality is that the land use process only ensures that there IS a plan, and that engineering solutions to potential problems have been devised and are feasible and likely to succeed. If the hearings officer believed that the applicant's plan was not feasible and likely to succeed, a recommendation for denial would have been forthcoming.

e. **Sediments from New Carissa.**

Ms. McCaffree notes that contaminates from the New Carissa may be re-suspended by the PCGP pipeline. McCaffree Letter dated October 10, 2011, at p. 3. This issue was not preserved sufficiently to be considered on remand. On the merits, the issue is speculative, in the absence of something more in the way of scientific evidence tending to substantiate the claim. *Palmer v. Lane County*, 29 Or LUBA 436 (1995) (unsupported statements are mere conclusions, and do not constitute evidence). Even if the contaminants exist in the sediments, there is no information regarding their concentration

f. **Dredging of Coos Bay Navigation Channel.**

In her letter dated October 17, 2011, Ms. McCaffree argues that there will be a need to dredge the Coos Bay navigation channel to accommodate the transit of LNG vessels in Coos Bay, and that such dredging should have been considered as part of the CHE modeling. Mr. Bob Braddock of JCEP addresses this issue in his letter dated October 30, 2011. Therein, Mr. Braddock explains that Ms. McCaffree has her facts wrong and there is no need for additional channel dredging to accommodate LNG tankers. The Braddock letter is attached as Exhibit 2 to the applicant's November 14, 2011 submittal.

The hearings officer finds that "the navigational channel within the Coos estuary is routinely dredged to maintain adequate depths for commercial shipping." Groth & Rumrill 2009. Given this fact, the hearings officer finds that the results of routine dredging activity would already be accounted for in the data sets used by CHE modeling. Even if the channel

EXHIBIT B

needs to be deepened to accommodate LNG-related shipping, there is no evidence in the record that suggests that that deepening channel would invalidate Dr. Shepsis's model. To the extent that Ms. McCaffree is asking the hearings officer to draw an inference based on common sense, the hearings officer finds that the issue is ~~no~~ not so obvious that such a deduction necessarily flows from the stated proposition.

g. Compliance with CCZLDO 5.7.300(4)(B).

On page 5 of her letter dated October 10, 2011, Ms. McCaffree argues that the applicants have not complied with CCZLDO 5.7.300(4)(B), because "it does not appear the record contains proper authorizations for written and oral testimony by Randy Miller, Vladimir Shepsis or Robert Ellis on behalf of the Pacific Connector Gas Pipeline, L.P...." The provision at issue states:

> *4. Representatives*
>
> *A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses[18] for any party, but may not appear as a legal representative.*
>
> *B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:*
>
> *(1) Be written on the group, company, or organization's official letterhead;*
>
> *(2) Name the person authorized to appear on behalf of the group, company or organization;*
>
> *(3) Specify the scope of the authorization; and*
>
> *(4) Contain the signature of a person with authority to grant the authorization.*

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[18] CCZLDO 5.7.300(6) is entitled "Definitions," and provides:

> *As used in this Article the following definitions shall apply:*
>
> *A. "Party" means any person, organization or agency who has established standing under the provisions of this Article 5.8.*
>
> *B. "Witness" means any person who appears and is heard at a hearing and is not a "party". A witness shall not be considered a "party" unless the Board of Commissioners determines that the person is a party in accordance with Article 5.8.*

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

i. Failure to Raise in LUBA Appeal

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

ii. Interpretation of Authorization Requirement

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

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

The interpretation being urged by the opponents is not the outcome intended by the county when this code provision was adopted. Clearly the individuals who appeared and testified on behalf of the applicant were authorized to do so, and the opponents have not attempted to explain how the failure to include the letters from the applicant has harmed their rights to a full and fair hearing.

An analysis of the language of LDO 5.7.300(4) reveals that the more plausible interpretation of that section is that, where a party to the proceeding is represented by an attorney,

that attorney may provide any necessary authorization regarding individuals who submit evidence on behalf of the represented party. LDO 5.7.300(4) provides, in relevant part:

4. Representatives

A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.

B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

(1) Be written on the group, company, or organization's official letterhead;
(2) Name the person authorized to appear on behalf of the group, company organization;
(3) Specify the scope of the authorization; and
(4) Contain the signature of a person with authority to grant the authorization.

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

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

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

III. CONCLUSION

For all the reasons set forth above, the hearings officer finds 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 management objectives for the aquatic zoning districts 11-NA and 13A-NA require to be protected.

EXHIBIT B

PCGP REMAND – CONDITIONS OF APPROVAL

Property Owner Signatures amended Condition 20

No. 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

CONDITIONS ON REMAND

Oyster Mitigation Plan

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"), as supplemented and modified by the following mitigation measures:

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

b) As part of the state permitting process for the pipeline discussed in subsection (a) above, the applicant shall consult with ODFW and OIMB on the specific details regarding how best to accomplish the actual amount and placement of Pacific oyster shells addressed in Section 4.2.1 of the Mitigation Plan in order to ensure success of the

EXHIBIT B

project, including ideal depth and breadth of coverage of new hard substrate, specific methods for dispersal (*e.g.*, bagged vs. loose), and best locations for placement of substrate within the pipeline right of way .

c) Unless modified under the direction of ODFW during the consultation described above, the applicant will establish appropriate baseline conditions for the Olympia oyster mitigation effort in Haynes Inlet using the following guidelines for a before-after control impact study design in order to ensure that any impacts to Olympia oysters are insignificant or *de minimis*:

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

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

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

No. 2. In-Water Work Periods

(a) If the applicant's mitigation plan is approved by other regulatory agencies, the dispersal of Pacific oyster shells within the pipeline right of way will be effectuated either in late July or early August following the construction season.

(b) Based on the potential for the larval settlement peak in October, the applicant should not be allowed to conduct dredging operations between Milepost 2.6 to MP 3.2 during the month of October, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife.

No. 3. Turbidity

The applicant must comply with all DEQ regulations and requirements regarding turbidity. The applicant shall employ turbidity curtains and/or other appropriate control measures to assure that turbidity does not exceed the levels specified in the applicant's DEQ water quality permit.

EXHIBIT B

EXHIBIT B

Exhibit C

Final Order No. 14-09-063PL, ACU 14-08/AP 14-02 (Oct. 21, 2014)

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.

EXHIBIT C

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

EXHIBIT C

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
EXHIBIT C

EXHIBIT A
EXHIBIT C

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

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

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

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

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

EXHIBIT A
EXHIBIT C

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)*

[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]

EXHIBIT A
EXHIBIT C

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*

EXHIBIT A
EXHIBIT C

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

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

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

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

> "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.

EXHIBIT A
EXHIBIT C

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

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

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

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

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."

EXHIBIT A
EXHIBIT C

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*

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

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]

[10] *See* McCaffree letter dated July 11, 2014, at 13 (citing 49 C.F.R. § 192.3).

[11] CCZLDO 2.1.200:

EXHIBIT A
EXHIBIT C

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.

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.").

EXHIBIT A
EXHIBIT C

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).

EXHIBIT A
EXHIBIT C

> 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

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[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.

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

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.

EXHIBIT A
EXHIBIT C

EXHIBIT A
EXHIBIT C

Exhibit D

Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP, 139 FERC ¶ 61,040 (2012)

139 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Pacific Connector Gas Pipeline, LP — Docket Nos. CP07-441-001, CP07-442-001, CP07-443-001

Jordan Cove Energy Project, L.P. — Docket No. CP07-444-001

ORDER GRANTING REHEARING IN PART, DISMISSING REQUEST FOR STAY, AND VACATING CERTIFICATE AND SECTION 3 AUTHORIZATIONS

(Issued April 16, 2012)

1. On December 17, 2009, the Commission issued an order in this proceeding authorizing Jordan Cove Energy Project, L.P. (Jordan Cove) under section 3 of the Natural Gas Act (NGA) to site, construct, and operate a liquefied natural gas (LNG) import terminal on the North Spit of Coos Bay in Coos County, Oregon.[1] The Commission also issued a certificate of public convenience and necessity to Pacific Connector Gas Pipeline, LP (Pacific Connector) under section 7 of the NGA to construct and operate a 234-mile-long, 36-inch-diameter interstate natural gas pipeline extending from the outlet of the Jordan Cove LNG terminal to a point near Malin, in Klamath County, Oregon on the Oregon/California border, as well as blanket construction and transportation certificates under subpart F of Part 157 and subpart G of Part 284 of the Commission's regulations.

2. Requests for rehearing of the December 17 order were timely filed by Pacific Connector; the National Marine Fisheries Service (NMFS); the State of Oregon (Oregon) acting by and through the Oregon Department of Energy (Oregon DOE); and the Western

[1] *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, L.P.*, 129 FERC ¶ 61,234 (2009) (December 17 Order).

Environmental Law Center (WELC).[2] NMFS also filed a request to stay the December 17 Order.

3. This order grants rehearing, in part, and vacates the December 17 Order.

I. Background

4. As approved, the Jordan Cove terminal would be located on approximately 159 acres of land on the North Spit of Coos Bay, north of the Cities of North Bend and Coos Bay, Oregon. The Jordan Cove terminal would consist of an access channel from the existing Coos Bay navigation channel to the terminal slip; a slip and berth at the terminal, including a dock for tugs and a dock for unloading LNG carriers, with three unloading arms and one vapor return arm; a 2,600-foot-long, 36-inch-diameter cryogenic transfer pipeline capable of a maximum unloading rate of 12,000 cubic meters (m^3) per hour, between the berth and the storage tanks; two full-containment LNG storage tanks, each with a capacity of 160,000 m^3 (1,006,000 barrels) or approximately 3.3 Bcf; an LNG transfer system from the storage tanks to the vaporizers, consisting of six LNG booster pumps (including one spare), each sized for 2,200 gallons per minute; a vaporization system consisting of six submerged combustion vaporizers capable of regasifying a total of 1.2 Bcf/d of LNG; a natural gas liquids extraction facility; a 37-megawatt natural gas-fired, simple cycle combustion turbine power plant to provide electric power for the LNG terminal; a boil-off gas and waste heat recovery system; an emergency vent system, LNG spill containment system, firewater system, utility system, hazard detection system, and control system; associated buildings and support facilities; and metering facilities capable of handling up to 1.2 Bcf/d of natural gas for delivery into the Pacific Connector pipeline.

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[2] WELC filed on behalf of a number of groups and individuals (referred to collectively as WELC): Citizens Against LNG, Friends of Living Oregon Waters, Klamath Siskiyou Wildlands Center, Umpqua Watersheds, Oregon Wild, Ratepayers for Affordable Clean Energy, Oregon Citizens Against the Pipeline, Southern Oregon Pipeline Information Project, Oregon Shores Conservation Coalition, Institute for Fisheries Resources, Pacific Coast Federation of Fisherman's Association, Oregon Women's Land Trust, Jody McCaffree, Bob Barker, Harry S. Stamper, Holly C. Stamper, Pacific Environment, and Francis Eatherington. Under Rule 713 of the Commission's rules of practice and procedure, a request for rehearing may be filed only by a party to the proceeding. 18 C.F.R. § 385.413 (2011). Neither Pacific Environment nor Francis Eatherington ever filed a motion to intervene. Therefore, they are not parties to this proceeding and have no standing to seek rehearing. However, their concerns will be addressed in answering WELC's request for rehearing.

5. The 234-mile-long Pacific Connector pipeline would originate at an interconnection with Jordan Cove's LNG facilities and interconnect at the proposed Clarks Branch Delivery meter station with Northwest Pipeline's Grants Pass Lateral and at the Shady Cove meter station with Avista Corporation, a local distribution company regulated by the Oregon Public Utilities Commission. At the Oregon/California border, the pipeline would terminate at interconnections with Gas Transmission Northwest Corporation, Tuscarora Gas Transmission Company, and Pacific Gas and Electric Company at the proposed Buck Butte, Russell Canyon, and Tule Lake meter stations, respectively.

6. The Commission's December 17 Order granted the requested authorizations subject to 128 conditions. In the order, the Commission found that with the adoption of the proposed mitigation measures recommended in the final EIS prepared for the project, construction of the project would result in limited adverse environmental impacts. The Commission also concluded that the project was required by the public convenience and necessity to meet the projected energy needs of the Pacific Northwest, northern California, and northern Nevada.

II. Rehearing Requests

7. Pacific Connector requests rehearing only of the December 17 Order's denial of its request to accrue Allowance for Funds Used During Construction (AFUDC) on certain expenditures it made prior to the filing of its application for a certificate of public convenience and necessity. Pacific Connector argues that the Commission erred in rejecting its request to begin accruing AFUDC prior to September 4, 2007, the date Pacific Connector filed its certificate application. Pacific Connector asks the Commission to replace AR-5 with the Generally Accepted Accounting Principles, specifically the Statement of Financial Accounting Standards No. 34 (FAS 34).

8. The requests for rehearing filed by NMFS, Oregon, and WELC essentially fall into three categories. The first category involves allegations that the Commission improperly concluded, under its Certificate Policy Statement[3] and otherwise, that the Jordan Cove LNG terminal and the Pacific Connector pipeline (referred to collectively as the Jordan Cove Project) was needed to serve the needs of the Pacific Northwest, northern California, and northern Nevada, contending that the natural gas needs for the region could adequately be met through domestic sources of natural gas.

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[3] *Certification of New Interstate Natural Gas Pipeline Facilities* (*Certificate Policy Statement*), 88 FERC ¶ 61,227 (1999), *orders clarifying statement of policy*, 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094 (2000).

9. The second category involves allegations that the Commission erred in issuing a decision authorizing the Jordan Cove Project prior to action by various agencies on other necessary permits required under federal law or prior to the completion of various consultations or studies. Specifically, Oregon and WELC argue that the Commission should not have issued its final order until other agencies had reached decisions on necessary permits and approvals, insisting that doing so violates: (1) the NGA and the Administrative Procedure Act (APA),[4] by not considering the entire administrative record before issuing a decision; (2) section 401 of the Clean Water Act (CWA),[5] because a water quality certification under section 401 had not been issued; (3) the Coastal Zone Management Act (CZMA),[6] because Oregon has not issued a consistency determination; (4) the Clean Air Act (CAA),[7] because the applicants have not secured the required permits; (5) section 404 of the CWA[8] and section 10 of the Rivers and Harbors Act,[9] because a dredge and fill permit from the U.S. Army Corp has not yet been acquired; and (6) the National Historic Preservation Act (NHPA),[10] because consultations are not yet completed. They assert that approval of the Jordan Cove Project before the issuance of these and perhaps other authorizations invalidates the Commission's environmental conclusions because the public has been unable to evaluate and comment on the effects of the proposed mitigation measures. Similarly, Oregon, WELC, and NMFS assert that the Commission erred by issuing the December 17 Order before initiating formal consultation with NMFS as required by section 7(a)(2) of the Endangered Species Act (ESA)[11] and section 305(b) of the Magnuson-Stevens Fishery Conservation Act (Magnuson-Stevens Act).[12]

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[4] 5 U.S.C. § 551 *et seq.* (2006).

[5] 33 U.S.C. § 1251 *et seq.* (2006).

[6] 16 U.S.C. § 1451 *et seq.* (2006).

[7] 42 U.S.C. §§ 7401-7671q (2006).

[8] 33 U.S.C. § 1344 (2006).

[9] 33 U.S.C. § 403 (2006).

[10] 6 U.S.C. § 470 *et seq.* (2006).

[11] 16 U.S.C. § 1536(a)(2) (2006).

[12] 42 U.S.C. §§ 4321-4347 (2006).

10. The third category comprises allegations that the Commission's environmental review or final EIS was inadequate to support the Commission's action in these proceedings. In particular, Oregon and WELC assert that the final EIS: (1) does not give a "hard look" in its analysis of many environmental and cumulative impacts of the project, as required by the National Environmental Policy Act;[13] (2) fails to document compliance with Migratory Bird Treaty Act, the Marine Mammal Protection Act, the NHPA, the National Forest Management Act, the Northwest Forest Plan, the Federal Land Policy Management Act, and the Oregon and California Lands Act; and (3) must be supplemented to evaluate the impacts of the post-authorization design plans and future studies.

III. Procedural Issues

A. Other Pleadings

11. On March 2, 2010, Jordan Cove and Pacific Connector filed a motion seeking leave to answer and an answer to the requests for rehearing filed by NMFS, Oregon, and WELC. Jordan Cove and Pacific Connector assert that their answer clarifies misstatements and misunderstandings raised in the rehearing requests regarding the legal sufficiency of the Commission's environmental review. In response, WELC filed a motion on March 9, 2010, asking the Commission to strike Jordan Cove's and Pacific Connector's answer to the requests for rehearing, or, in the alternative, to allow WELC to respond to the answer.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure provides that, unless otherwise ordered by the decisional authority, an answer may not be made to a request for rehearing or to an answer.[14] The Commission may find good cause to waive this rule, if the answers provide additional information to assist in our decision-making. We do not find good cause to waive the rule with respect to the subject pleading since the Commission finds no need for additional information to address the arguments raised in the rehearing requests regarding the legal sufficiency of the Commission's environmental review of the Jordan Cove Project. Therefore, we reject Jordan Cove's and Pacific Connector's answer to the requests for rehearing and dismiss as moot WELC's request for permission to respond to the answer.

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[13] *See* Oregon's *Request for Rehearing* at 27 and WELC's *Request for Rehearing* at 124 (*citing Robinson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-353 (1989)).

[14] 18 C.F.R. § 385.213(a)(2) (2011).

B. Request for Stay

13. In its request for rehearing, filed on January 26, 2010, NMFS requests that the Commission stay its December 17 Order until the Commission and the applicants have completed formal consultation with NMFS under section 7(a)(2) of the ESA[15] and section 305(b) of the Magnuson-Stevens Act.[16] NMFS argues that the Commission's decision to authorize the Jordan Cove Project prior to completing these consultations deprives NMFS of its right to seek rehearing with respect to issues that may arise in these consultations.

14. As discussed below, we are granting rehearing and vacating our December 17 Order's authorization of the Jordan Cove Project. Therefore, NMFS' request for stay of the order until completion of formal consultation is dismissed as moot.

C. Request to Reopen the Proceeding

15. On December 9, 2011, Oregon filed a motion to reopen the record. Specifically, Oregon seeks to present the following facts: (1) on July 27, 2011, the Commission authorized the construction of the Ruby Pipeline to transport natural gas from Rocky Mountain production areas to west coast markets; (2) on September 22, 2011, Jordan Cove applied to DOE for authorization to export natural gas and intends to ask the Commission to amend its existing authorization to add export facilities; and (3) the current price of domestic natural gas is significantly lower than the price relied upon by project proponents and the Commission to justify a benefit in the public interest from importation of LNG. Oregon states that in light of changed circumstances, any public benefit that existed at the time the Jordan Cove Project was proposed no longer exists.

16. On December 13, 2011, Jordan Cove and Pacific Connector filed a response to Oregon's motion stating that the facts cited by Oregon do not rise to the level of extraordinary circumstances to warrant a reopening of the record.

17. As discussed below, we are granting rehearing and vacating our December 17 Order's authorization of the Jordan Cove Project. Therefore, Oregon's request to reopen the record is dismissed as moot. However, as discussed below, we do find statements which were made by Jordan Cove in filings related to obtaining authorization to export LNG germane to our reconsideration of the authorizations granted in the December 17 Order.

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[15] 16 U.S.C. § 1536(a)(2) (2006).

[16] 16 U.S.C. § 1855(b)(2) (2006).

IV. Commission Determination

18. In deciding whether to authorize the construction of new natural gas facilities, the Commission balances the public benefits of a proposed project against the potential adverse consequences. The December 17 Order identified benefits associated with the Jordan Cove LNG terminal – giving the Pacific Northwest, northern California, and northern Nevada markets long-term access to an additional supply source, resulting in greater supply reliability for those markets and ensuring supply adequacy[17] – and found that those benefits outweighed any limited adverse effects the project might have.[18] The order also noted that Commission policy is to allow the market to drive decisions as to which gas infrastructure projects will go forward.[19]

19. The Commission's general policies as described in the December 17 Order remain unchanged. Long-term Commission policy dictates that, once the Commission has determined that a project would not result in substantial adverse impacts, the market is allowed to determine which gas infrastructure projects will actually be constructed.[20]

20. However, in this proceeding we are faced with the fact that Jordan Cove has expressed an intent, and begun the process of seeking the necessary approvals, to use the facilities authorized solely for the purpose of importing natural gas to instead export natural gas to foreign markets. On September 22, 2011, Jordan Cove filed an application with the Department of Energy's Office of Fossil Energy for long-term, multi-contract authorization to export the equivalent of up to 1.2 Bcf/d of LNG from the Jordan Cove LNG terminal, which, we note, equals the full capacity of its facilities previously

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[17] *December 17 Order*, 129 FERC ¶ 61,234 at P 25.

[18] *Id.* at P 28.

[19] *Id.* at P 26 (*citing Certificate Policy Statement,* 88 FERC ¶ 61,227 at p. 61,276 (1999).

[20] *Certificate Policy Statement,* 88 FERC ¶ 61,227 at 61,746 (1999) ("[a] number of commenters . . . urged the Commission to allow the market to decide which projects should be built, and this requirement [that a project be able to stand on its own financially without subsidies] is a way of accomplishing that result"). *See, also, AES Sparrows Point, LNG*, "we affirm our previously stated preference permitting determinations on the number, type, timing, and location of energy facilities to be guided by market forces, and not by Commission fiat." 61 FERC ¶ 61,245 at P 52. We note that the Certificate Policy Statement does not apply specifically to terminal and storage facilities authorized under section 3 of the NGA, although the rationale of balancing benefits against burdens is the same.

authorized for import usage. In its application to the Office of Fossil Energy, Jordan Cove states that it has developed modified plans to make use of the Jordan Cove LNG terminal as an export facility for domestically produced natural gas and that it is in the process of negotiating Liquefaction Tolling Agreements[21] with prospective customers for the export of LNG. Jordan Cove specifically states in that application that "[t]he terminal facilities already authorized by the FERC Order that will be used for exports include two 160 cubic meter LNG full-containment storage tanks, a single marine berth capable of accommodating LNG vessels up to Q-flex size, and on-site utilities and services."[22] On December 8, 2011, the Office of Fossil Energy issued an order granting Jordan Cove long-term, multi-contract authorization for the export of LNG.[23]

21. In addition, on February 29, 2012, Jordan Cove filed an application with the Commission to initiate a pre-filing review of a proposed Liquefaction Project to be located at the site of Jordan Cove's previously-certificated Jordan Cove LNG import terminal.[24] Jordan Cove states that "[g]iven current market conditions" it is seeking authorization to construct and operate export facilities.[25] Jordan Cove also states that it "does not intend to construct the facilities specific to importation of LNG at this time, but would add the equipment necessary for import of LNG should the natural gas market conditions change in the future."[26]

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[21] Liquefaction Tolling Agreements are commercial arrangements under which an individual customer that holds title to natural gas will have the right to deliver that gas to Jordan Cove's LNG terminal for liquefaction services and to receive LNG in exchange for a processing fee paid to Jordan Cove.

[22] Application of Jordan Cove Energy Project, L.P. to Department of Energy Office of Fossil Energy for Long-Term Authorization to Export Liquefied Natural Gas to Free Trade Agreement Nations, FE Docket No. 11-127-LNG, at p. 3.

[23] *Jordan Cove Energy Project, L.P.*, Department of Energy's Office of Fossil Energy Order No. 3041, *available at* http://www.fossil.energy.gov/programs/gasregulation/authorizations/2011_applications/Jordan_Cove_Energy_Project,_L.P..html.

[24] Application of Jordan Cove Energy Project, L.P. for pre-filing review in Docket No. PF12-7-000, filed on February 29, 2012.

[25] *Id.* at p. 2.

[26] *Id.*

22. The Commission recognizes that it is possible for LNG terminal facilities to be used for both the importation and exportation of natural gas, and that such operations might even occur simultaneously. However, the Commission's ability to rely on the usually valid assumption that a project sponsor will not go forward with construction of a project (in this case, an import terminal) for which there is no market is compromised here. Jordan Cove has explicitly stated that it is not desirable under current market conditions to construct facilities necessary for the importation of natural gas. It instead proposes to seek authorization to enable the use of the Jordan Cove terminal facilities for only the exportation of natural gas. Given that Jordan Cove no longer intends to implement the December 17 Order's authorization to the construct and operate an import terminal, we will vacate that authorization.

23. We note that Jordan Cove's decision that the construction and operation of an import facility is not viable under current market conditions is consistent with changes observed in the North American natural gas supply situation. The changes in the market go far beyond mere fluctuations in economic projections of prices and supply. In 2007, domestic natural gas production in the lower 48 states was reported at 18.88 Tcf.[27] In comparison, domestic natural gas production in 2011 was expected to reach 20.71 Tcf.[28]

24. The growth in domestic production has had a significant impact on LNG imports. Actual imports of LNG have dropped by almost 23 percent in the last two years, from 452 Bcf in 2009 to 349 Bcf through December 2011.[29] As a result, only 3 of the 12 existing United States LNG terminals are operating at more than 5 percent of their capacity.[30] Two of the 12 terminals, including one of the three with a utilization rate of over 5 percent (Golden Pass LNG, which operated at 6.14 percent of capacity), completed construction and received an initial cargo, thus, initiating service, but have

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[27] *See EIA Outlook 2009*, at Table 114, *available at* http://www.eia.gov/oiaf/archive/aeo09/supplement/supref.html.

[28] *See EIA Outlook 2011*, at Table 62, *available at* http://www.eia.gov/oiaf/aeo/tablebrowser/#release=AEO2011&subject=0-AEO2011&table=72-AEO2011&region=0-0&cases=ref2011-d020911a.

[29] *See* U.S. Department of Energy, Office of Fossil Energy, 2010 4th Quarter and December 2011 Monthly Reports on Natural Gas Imports and Exports.

[30] *Id.* The highest utilization rate was 32.27 percent, for the Distrigas of Massachusetts terminal in Everett, MA.

received no additional cargos to date.[31] Three of the other existing terminals have sought and/or received authorization to install additional facilities to enable them to preserve plant operations in the absence of imported LNG supply.[32] Four companies which where granted authorization to construct and operate LNG facilities in the past six years have allowed their authorizations to lapse, without ever starting construction,[33] and two others requested that the Commission vacate their authorizations prior to commencing construction, due to changes in market circumstances.[34]

25. Based on the foregoing, we vacate our December 17 Order's authorization for the Jordan Cove LNG import terminal. In addition, since the Pacific Connector pipeline was proposed as an integral part of the larger Jordan Cove Project, the stated purpose of the pipeline being to transport gas sourced from the Jordan Cove terminal, we will also

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[31] *See* Golden Pass LNG Terminal, LLC in Docket No. CP04-386-000 and Gulf LNG Energy, LLC in Docket No.CP06-12-000. We also note that Excelerate Energy, has announced that the Gulf Gateway Deepwater Port, another of the 12 existing terminals (completed in 2005 under authorization issued by the Department of Transportation's Maritime Administration), will be decommissioned in 2012, "due to the dramatic shift in the supply demand balance in the United States." *See* http://www.excelerateenergy.com/past-projects.

[32] *See Dominion Cove Point LNG, LP*, 135 FERC ¶ 61,261 (June 24, 2011). *See also* the Phase II Development Project proposed in Docket No. CP12-29-000 by Freeport LNG Development, L.P. for its Freeport LNG import terminal; and the Elba BOG Compressor Project proposed in Docket No. CP12-31-000 by Southern LNG Company L.L.C. for its Elba Island LNG Project.

[33] *See Port Arthur LNG, L.P. and Port Arthur Pipeline, L.P.*, 136 FERC ¶ 61,196 (2011); *Creole Trail LNG, L.P.*, 136 FERC ¶ 61,122 (2011); *Ingleside Energy Center, LLC and San Patricio Pipeline, LLC*, 136 FERC ¶ 61,114 (2011); *Vista del Sol LNG Terminal LP and Vista del Sol Pipeline LP*, 132 FERC ¶ 61,157 (2010).

[34] *See Weaver's Cove Energy, LLC and Mill River Pipeline, LLC*, 136 FERC ¶ 61,015 (2011); *Bayou Casotte Energy LLC*, 132 FERC ¶ 61,158 (2010). *See also State of Oregon v. Federal Energy Regulatory* Commission, 636 F. 3d 1203 (9th Cir. 2011) (vacating the Commission's section 3 authorization and section 7 certificate of public convenience and necessity issued to Bradwood Landing, LLC and NorthernStar Energy, LLC as a result of NorthernStar Energy, LLC bankruptcy proceeding) and *Southern LNG Company, L.L.C.*, 137 FERC ¶ 61,034 (2011) (Commission granting request by company to vacate authorization to construct previously-authorized expansion of existing LNG terminals).

vacate our authorization to construct those facilities, as well as the related blanket construction and transportation certificates.[35]

26. Given this action, we dismiss as moot the requests for rehearing filed by Pacific Connector and NMFS. To the extent that Oregon and WELC requested the Commission to vacate the December 17 Order, their requests are granted. However, the remaining issues raised by Oregon and WELC on rehearing are dismissed as moot.

27. Our actions here are without prejudice to Jordan Cove submitting a new application to construct and/or operate facilities to import natural gas should there develop a market need for import service in the future. We also note that Jordan Cove's pre-filing application for export authorization pursuant to section 3 of the NGA is pending in Docket No. PF12-7-000 and will be considered on its own merits in that separate proceeding.[36]

The Commission orders:

(A) The authorization under section 3 of the NGA, in Docket No. CP07-444-000, issued to Jordan Cove to site, construct, and operate an LNG terminal in Coos Bay County, Oregon is vacated.

(B) The certificate of public convenience and necessity under section 7(c) of the NGA, in Docket No. CP07-441-000, issued to Pacific Connector to construct and operate the Pacific Connector Pipeline is vacated.

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[35] We acknowledge that the proposal for the Pacific Connector pipeline was supported by precedent agreements for the full amount of the proposed capacity and that the December 17 Order conditioned commencement of construction of the pipeline on execution of service agreements at levels and equivalent to those represented in the precedent agreements. However, as stated, we view the Jordan Cove Project as an integrated project, comprising both the terminal and the pipeline. Accordingly, since we are vacating authorization for the LNG import terminal as proposed, we are also vacating our authorization for the Pacific Connector pipeline.

[36] Depending on the details of the proposed project, it is possible that portions of the environmental information and analysis developed in conjunction with the import terminal may remain viable for resubmission and use for the contemplated export terminal and associated pipeline facilities.

(C) The blanket construction certificate, in Docket No. CP07-442-000, issued to Pacific Connector under subpart F of Part 157 of the Commission's regulations is vacated.

(D) The blanket transportation certificate, in Docket No. CP07-443-000, issued to Pacific Connector under subpart G of Part 284 of the Commission's regulations is vacated.

(E) The requests for rehearing filed by Pacific Connector and the National Marine Fisheries Service are dismissed as moot.

(F) The requests for rehearing filed by the State of Oregon and the Western Environmental Law Center are granted in part and dismissed as moot in part, to the extent discussed in this order.

(G) The answer filed on March 2, 2010, by Jordan Cove and Pacific Connector is rejected.

(H) The motion to strike filed on March 9, 2010, by Western Environmental Law Center is dismissed as moot.

(I) The request for stay filed on January 6, 2010, by the National Marine Fisheries Service is dismissed as moot.

(J) The request to reopen the record filed on December 9, 2011, by the State of Oregon is dismissed as moot.

By the Commission. Chairman Wellinghoff concurring with a separate statement attached.
Commissioner Moeller dissenting with a separate statement attached.

(SEAL)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Connector Gas Pipeline, LP	Docket Nos. CP07-441-001 CP07-442-001 CP07-443-001
Jordan Cove Energy Project, L.P.	Docket No. CP07-444-001

(Issued April 16, 2012)

WELLINGHOFF, Chairman, concurring:

Today's order vacates the Commission's previous order granting authorization for siting, constructing, and operating the Jordan Cove Project. In addition to the reasons discussed in the order, I believe the decision to vacate authorization is further supported by concerns raised in the FEIS regarding the safety of locating the Jordan Cove Project less than one mile from the Southwest Oregon Regional Airport. As noted in my earlier dissent, such close proximity of an LNG terminal to an airport could result in the accidental or intentional crash of an aircraft into the LNG terminal. The absence of sufficient information on this issue reinforces my belief that the record does not support a finding that authorization of the Jordan Cove Project is in the public interest.

For this reason, I concur in today's order.

Jon Wellinghoff
Chairman

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Connector Gas Pipeline, LP	Docket Nos.	CP07-441-001 CP07-442-001 CP07-443-001
Jordan Cove Energy Project, L.P.	Docket No.	CP07-444-001

(Issued April 16, 2012)

MOELLER, Commissioner, *dissenting*:

Revoking an authorization to build during the third year of a five-year authorization could fundamentally change how the public views whether this Commission will stand by its decisions. This new policy could hardly have been anticipated by employees and investors in Jordan Cove, as this Commission has long followed a policy of allowing individual investors to decide what investments in energy made the most sense for them --- that is, this Commission did not "pick winners and losers". Had investors in Jordan Cove known that their continuing investment in that facility over the last three years would eventually be subject to a finding by the Commission about unfavorable market conditions, they certainly would have valued the Commission's approval differently.

Natural gas prices have a long history of changing. Jordan Cove recognizes this fact by asserting that it "would add the equipment necessary for import of LNG should the natural gas market conditions change in the future."[1] Yet somehow this is evidence to the current Commission that "Jordan Cove no longer intends to implement the December 17 Order's authorization to construct and operate an import terminal."[2]

Millions of people across the country are looking for employment. Millions of people across the country are looking for ways to invest their money in business activity that leads to more employment. But before people can invest their money into business plans, and before people can be hired to implement business plans, the public needs confidence that the government will not arbitrarily revoke its authorizations to conduct those business plans.

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[1] P21 of this Order.

[2] P22 of this Order.

On the same day that we revoke this authorization, this Commission is granting another five-year authorization to construct a facility capable of exporting LNG at Sabine Pass. While that five-year authorization is undeniably valuable, investors need certainty that the Commission will not revoke the Sabine authorization if it later finds that the "facility is not viable under current market conditions."[3] Investors need greater profits when the return of their investment becomes more doubtful, if they invest at all. And because greater profits require higher prices, government regulators should work to minimize risk through consistent decisions that are not second-guessed at a later time.

Because this order revokes a five-year authorization to build at year three, based upon little more than statements about current market conditions by Jordan Cove and the market views of three Commissioners, I respectfully dissent.

Philip D. Moeller
Commissioner

[3] See P23 of this order.

Exhibit E

***Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015)**

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project LP	Docket No. CP13-483-000
Pacific Connector Gas Pipeline LP	Docket No. CP13-492-000

NOTICE OF REVISED SCHEDULE FOR ENVIRONMENTAL REVIEW OF THE JORDAN COVE LIQUEFACTION AND PACIFIC CONNECTOR PIPELINE PROJECTS

(February 6, 2015)

This notice identifies the Federal Energy Regulatory Commission staff's revised schedule for the completion of the environmental impact statement (EIS) for Jordan Cove Energy Project LP's and Pacific Connector Gas Pipeline LP's Jordan Cove Liquefaction and Pacific Connector Pipeline Projects. The first notice of schedule, issued on July 16, 2014, identified February 27, 2015 as the final EIS issuance date. However, additional information was required to complete our review which delayed the issuance of the draft EIS. As a result, staff has revised the schedule for issuance of the final EIS.

Schedule for Environmental Review

Issuance of Notice of Availability of the final EIS	June 12, 2015
90-day Federal Authorization Decision Deadline	September 10, 2015

If a schedule change becomes necessary, an additional notice will be provided so that the relevant agencies are kept informed of the project's progress.

Additional Information

In order to receive notification of the issuance of the EIS and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription (http://www.ferc.gov/docs-filing/esubscription.asp). Additional information about the project may be obtained by contacting the Environmental Project Manager, Paul Friedman, by telephone at 202-502-8059 or by electronic mail at paul.friedman@ferc.gov.

Rich McGuire, Acting Director
Division of Gas – Environment
and Engineering

Exhibit F

Major Permits, Approvals, and Consultations for the JCE & PCGP Project, Table 1.5.1-1, *Jordan Cove Energy and Pacific Connector Gas Pipeline Project Draft EIS* (Nov. 7, 2014)

Other federal laws or regulations that require permits and approvals before this Project could be constructed include compliance with the RHA, CWA, CAA, Coastal Zone Management Act (CZMA), and Coast Guard regulations relating to LNG waterfront facilities. Some of these federal permits or approvals, such as Section 401 of the CWA, CAA, and CZMA, have been delegated to state agencies, as discussed below. For example, the ODEQ has been delegated CWA 401 and 402 responsibilities under the CWA and CAA, and the Oregon Department of Land Conservation and Development (ODLCD) has delegated responsibilities under the CZMA.

In accordance with Section 313(d) of the EPAct, the FERC is required to keep a complete consolidated record of all actions or decisions made by agencies undertaking federal authorizations. On October 19, 2006, in Order No. 687, the FERC issued implementing regulations regarding the maintenance of a consolidated record. Section 313(c) of the EPAct requires that the FERC establish a schedule for federal authorizations. Pursuant to Order No. 687, the FERC issued an initial Notice of Schedule for *Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects* on July 16, 2014. That notice stated that the FERC's target goal for producing the FEIS for the Project would be February 27, 2015, with the 90-day deadline for other federal authorizations projected to be May 28, 2015.

While the EPAct amended the NGA to give exclusive authority to the FERC to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal, it specified that nothing in the Act was intended to overrule other federal authorities. This includes the protection of the rights of states with federally delegated responsibilities under the CZMA, CAA, and CWA.

Table 1.5.1-1 lists the major federal, state, and local permits, approvals, and consultations identified for the Project.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
FEDERAL Federal Energy Regulatory Commission (FERC)	Sections 3 and 7 of the Natural Gas Act (NGA) [Title 15 United States Code [U.S.C.] 717] Section 311 of the Energy Policy Act of 2005 (EPAct) Title 18 Code of Federal Regulations (CFR) 153, 157, 375, and 385	Order Granting Section 3 Authorization and Issuing Certificate of Public Convenience and Necessity.	On May 21, 2013, Jordan Cove filed an application with the FERC under Section 3 of the NGA. On June 6, 2013, Pacific Connector filed an application with the FERC under Section 7 of the NGA. The FERC's decision is pending until after the FEIS is issued.
	Order No. 687 National Environmental Policy Act (NEPA) 42 U.S.C. 4321 et seq. 40 CFR 1500-1508 18 CFR 380.12	Produce Environmental Impact Statement (EIS).	On August 2, 2012, the FERC issued Notice of Intent (NOI) to Prepare an EIS. On July 16, 2014, the FERC issued its Notice of Schedule for Environmental Review with a projected FEIS date of February 27, 2015.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Advisory Council on Historic Preservation (ACHP)	Section 106 of the National Historic Preservation Act (NHPA) 16 U.S.C. 470 36 CFR 800	Opportunity to comment on the undertaking.	On August 30, 2011, the FERC submitted its Memorandum of Agreement (MOA) to the ACHP for original Pacific Connector project in Docket No. CP07-441-000. If the newly proposed Pacific Connector Project (Docket No. CP13-492-000) is authorized by the FERC, the MOA would be amended.
Federal Communication Commission	License for fixed microwave stations and service 47 U.S.C. 303 47 CFR 101	Review proposals for new or additions to existing communication towers.	Pending.
U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS)	Farmland Protection Policy Act 7 U.S.C. 4201-4209 7 CFR Part 658	Determine if the Project would result in the permanent conversion of prime farmland.	On August 30, 2012, the NRCS commented on the FERC's NOI. NRCS comments on impacts on prime farmland pending review of EIS.
USDA Forest Service (Forest Service)	Mineral Leasing Act (MLA) 30 U.S.C. 181 et seq. 43 CFR 2882	Concur with Right-of-Way (ROW) Grant.	On April 17, 2006, Pacific Connector submitted its initial SF 299 ROW Grant application. On February 25, 2013, Pacific Connector amended that application. Decision on ROW Grant pending until after issuance of FEIS.
	36 CFR 219.17	Amend Land and Resource Management Plans (LRMP).	On September 21, 2012, Forest Service and BLM issued a Supplemental NOI. Amendments pending review of EIS.
U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS)	Section 7 of the Endangered Species Act (ESA) 16 U.S.C. 1531 et seq. 50 CFR 222 50 CFR 224 50 CFR 402	Provide a biological opinion (BO) if the Project is likely to adversely affect federally listed threatened or endangered aquatic species or their habitat.	Concurrent with issuance of draft EIS (DEIS), the FERC would submit its biological assessment (BA) and essential fish habitat (EFH) assessment to the NMFS. The NMFS would issue its BO pending review of the FERC's BA and EFH Assessment.
	Marine Mammal Protection Act (MMPA) 16 U.S.C. 1361 et. seq. 50 CFR 82 50 CFR 216	Consult on protected marine mammals.	On October 8, 2014, Jordan Cove and Pacific Connector submitted their draft application for incidental harassment authorization to the NMFS. Review pending.
	Magnuson-Stevens Fishery Conservation and Management Act (MSA) 16 U.S.C. 1801-1884 50 CFR 600	Provide conservation recommendations if the Project would adversely impact EFH.	Pending review of the FERC's EFH Assessment.
U.S. Department of Defense (DOD)	Section 311(f) of the EPAct and Section 3 of the NGA 15 U.S.C. 717b 18 CFR 153, 157, 375, and 385 MOU between FERC and DOD	Consult with the Secretary of Defense to determine whether an LNG facility would affect the training or activities of an active military installation.	On September 27, 2012, the FERC sent a letter about the Project to the DOD Siting Clearinghouse. On November 2, 2012, the DOD replied that the Project would have minimal impact on military operations in the area.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
U.S. Department of the Army, Corps of Engineers (COE)	Section 10 of the Rivers and Harbors Act (RHA) 33 U.S.C. 403 33 CFR 320 to 330	Process permit application for structures or work in or affecting navigable waters of the United States.	On June 13, 2013, and July 8, 2013 Jordan Cove and Pacific Connector respectively submitted separate Joint Permit Applications (JPA) with the COE. On August 15, 2013, COE requested that a single comprehensive JPA be resubmitted for the complete Project. On October 15, 2013, Jordan Cove and Pacific Connector submitted a single comprehensive JPA. Permit pending review of JPA.
	Section 404 of the Clean Water Act (CWA) 33 U.S.C. 1344 33 CFR 320 to 330	Process permit application for the placement of dredged or fill material into waters of the United States.	On June 13, 2013, and July 8, 2013 Jordan Cove and Pacific Connector respectively submitted separate JPAs with the COE. On August 15, 2013, COE requested that a single comprehensive JPA be resubmitted for the complete Project. On October 15, 2013, Jordan Cove and Pacific Connector submitted a single comprehensive JPA. Permit pending review of JPA. Between March 2013 and March 2014, Jordan Cove submitted various wetland delineation reports to the COE. On March 13, 2014, the COE concurred with the boundaries and extent of Waters of the U.S. depicted in the Jordan Cove wetland delineation report. On June 26, 2013, Pacific Connector submitted its wetland delineation report to the COE. On August 5, 2014, the COE concurred with the boundaries and extent of Waters of the U.S. depicted in the Pacific Connector wetland delineation report.
	Section 103 of the Marine Protection, Research, and Sanctuaries Act (MPRSA) 33 U.S.C. 1401 et. seq. 33 CFR Part 324	Issue a permit for the ocean disposal of dredged material under MPRSA consistent with EPA criteria and subject to EPA concurrence.	Jordan Cove included a dredged material management plan with its JPA to the COE. Permit pending review of JPA.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
U.S. Department of Energy (DOE) Office of Fossil Energy	Section 3 of the NGA 15 U.S.C.§717b 18 CFR 153, 157, 375, and 385	Authority to export LNG to Free Trade Agreement (FTA) Nations.	On September 22, 2011, Jordan Cove filed an application with the DOE in FE Docket No. 11-127-LNG. On December 7, 2011, DOE issued DOE/FE Order No. 3041 granting authority for Jordan Cove.to export LNG to FTA Nations.
	Section 3 of the NGA 15 U.S.C.§717b 18 CFR 153, 157, 375, and 385	Authority to export LNG to Non-FTA Nations.	On March 23, 2012, Jordan Cove filed an application with the DOE in FE Docket No. 12-32-LNG. On March 24, 2014, DOE issued DOE/FE Order No. 3413 granting authority for Jordan Cove.to export LNG to non-FTA Nations.
DOE, Bonneville Power Administration (BPA)	Encroachment permit for electric transmission line crossings	Permit review.	Decision Pending.
U.S. Environmental Protection Agency (EPA)	Section 404 of the CWA 33 U.S.C. 1412 40 CFR 227, 228	Co-administers CWA 404 program with the COE. EPA retains veto authority for wetland permits issued by the COE.	On October 29, 2012, EPA commented on the FERC's NOI. Review pending issuance of COE permit.
	Section 103 of the MPRSA 33 U.S.C. 1344, and 40 CFR Part 230	COE issues a permit for the ocean disposal of dredged material under MPRSA consistent with EPA criteria. The permit is subject to EPA concurrence if disposal is proposed at an EPA ocean dredged material disposal site designated under Section 102 of the MPRSA.	Jordan Cove included a dredged material management plan with its JPA to the COE. EPA concurrence pending issuance of permit by COE.
	Section 309 of the Clean Air Act (CAA) 42 U.S.C. 7401 et seq. 40 CFR 1503.1(a)	Reviews and evaluates EIS for adequacy in meeting the procedural and public disclosure requirements of the NEPA.	Review of EIS pending.
U.S. Department of Homeland Security, Coast Guard	Ports and Waterway Safety Act 33 U.S.C. 1221 33 U.S.C. 1231 33 CFR 160 33 CFR 127	Captain of the Port (COTP) issues a Letter of Recommendation (LOR) and Waterway Suitability Report (WSR) recommending the suitability of the waterway for LNG marine traffic.	On July 1, 2008, COTP issued a WSR. On April 24, 2009, the Coast Guard issued an LOR.
		Review Emergency Manual.	On June 25, 2010, Coast Guard reviewed document and marked it "Examined."
		Review Operations Manual.	Pending. Must be completed prior to receiving first LNG vessel.
	33 CFR 165	Establish safety and security zones for LNG vessels in transit and while docked.	On May 17, 2011, Security Zone noticed in 76 FR 28317.
	Maritime Transportation Security Act 46 U.S.C. 701 33 CFR 105	Review and Approve Facility Security Plan.	Pending. Must be completed 60 days prior to receiving first LNG vessel at the facility

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
	Navigation and Vessel Inspection Circular – Guidance related to Waterfront Liquefied Natural Gas (LNG) Facilities NVIC 05-05 NVIC 05-08 NVIC 01-11	Develop LNG Vessel Transit Management Plan.	Pending. Must be completed prior to receiving first LNG vessel.
		Validate WSA and produce WSR.	On July 1, 2008, the Coast Guard issued a WSR for original LNG import project. On February 21, 2012, the Coast Guard acknowledged validity of the current WSR when the facility changed from import to export. The WSA was updated as part of Jordan Cove's annual review in October 2012 and was updated to change the proposed terminal from import to export. On January 13, 2014, Jordan Cove submitted its most recent annual review of the WSA to the COTP. On February 24, 2014, COTP stated that the risk associated with the waterway and facility has not changed since the Project was originally evaluated.
U.S. Department of the Interior (USDOI), Bureau of Land Management (BLM)	Section 28 of Mineral Leasing Act of 1920 (MLA) 30 U.S.C. 181 43 CFR 2880	Issue ROW Grant for crossing federal lands.	On April 17, 2006, Pacific Connector submitted its initial SF 299 ROW Grant application. On February 25, 2013, Pacific Connector amended that application.
	Federal Land Policy and Management Act of 1976, as amended 43 CFR 1610	Resource Management Plan Amendments.	On September 21, 2012, BLM and Forest Service issued a Supplemental NOI. Decision pending review of EIS.
USDOI Bureau of Reclamation	MLA 30 U.S.C. 181 et seq. 43 CFR 288.23(l)	Concur with issuance of the ROW Grant	On April 17, 2006, Pacific Connector submitted its initial SF 299 ROW Grant application. On February 25, 2013, Pacific Connector amended that application.
USDOI Fish and Wildlife Service (FWS)	Section 7 of the ESA 16 U.S.C. 153 et seq. 50 CFR 402.02	Provide a BO if the project is likely to adversely affect terrestrial federally-listed threatened and endangered species or their habitat.	On September 4, 2012, FWS commented on FERC's NOI. Concurrent with issuance of DEIS, the FERC would submit its BA to FWS.FWS would issue its BO pending review of the FERC's BA.
	Fish and Wildlife Coordination Act (FWCA) 16 U.S.C. 661-667(d) 23 CFR Part 773	Provide comments to prevent loss of and damage to wildlife resources.	FWS generally addresses FWCA issues via comments on FERC NEPA and COE 404 permit processes.
	Migratory Bird Treaty Act (MBTA) 16 U.S.C. 703 Executive Order 13186	Consultation regarding compliance with the MBTA.	Pending review of this EIS and review of applicants' Migratory Bird Conservation Plan.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
U.S. Department of Transportation (DOT), Pipeline and Hazardous Materials Safety Administration (PHMSA)	Natural Gas Pipeline Safety Act (NGPS) 49 U.S.C. 601 49 CFR Parts 190-199	Administer national regulatory program to ensure the safe transportation of natural gas.	On September 19, 2013, Jordan Cove submitted to PHMSA data related to the analysis of a potential LNG leak source. On June 18, 2014, PHMSA stated it had no objections to Jordan Cove's methodologies for identifying credible leakage scenarios in siting its LNG terminal.
DOT, Federal Aviation Administration (FAA)	18 CFR Subchapter E Federal Aviation Regulations (FAR) Part 77 IAW FAA Order 7400.2G, 6-1-6	Aeronautical Study of Objects Affecting Navigable Airspace. Feasibility Study for Hazard Determination.	On May 8, 2007, the FAA issued an aeronautical study for the communication tower at the Jordan Cove Meter Station proposed under Docket No. CP07-444-000. On November 1, 2008, the FAA issued a limited aeronautical review of the LNG tanks proposed in Docket No. CP07-444-000. Continuing consultations with FAA are pending.
U.S. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms	Explosives User Permit 27 CFR 555	Issue permit to purchase, store, and use explosives during project construction.	Permits to be obtained by Jordan Cove and Pacific Connector, as necessary, before construction.
STATE – OREGON			
Oregon Department of Agriculture (ODA)	Oregon Endangered Species Act Oregon Senate Bill 533 and Oregon Revised Statute (ORS) 564	Consult on Oregon listed plant species, and ODA would review botanical survey reports covering non-federal public lands prior to ground-disturbing activities where state listed botanical species are likely to occur.	On September 15, 2008, ODA informed Jordan Cove that it was in compliance with state laws, and no species should be adversely affected. On July 24, 2006, ODA provided Pacific Connector with a list of state listed species. In September 2007 and November 2008 Pacific Connector submitted botanical survey reports to ODA. ODA's review of these botanical reports is pending.
Oregon Department of Energy (ODE)	State Authorities under Section 311 of the EPAct	Furnish an advisory report on state safety and security issues to the FERC regarding the Jordan Cove LNG Terminal proposal, and conduct operational safety inspections if the facility is approved and built.	On October 29, 2012, ODE filed environmental comments as part of the State of Oregon's response to the FERC's NOI issued August 2, 2012. On June 20, 2013, ODE filed a motion to intervene in response to the FERC's Notice of Application (NOA) issued May 30, 2013. ODE did not submit a State Safety Report to the FERC within 30 days of the NOA. On June 14, 2014, ODE entered into an MOU with Jordan Cove regarding LNG emergency preparedness at the export terminal. Safety inspections pending operation of facilities.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
ODE – Energy Facility Siting Council (EFSC)	Oregon State Siting Standards ORS 469.300 Oregon Administrative Rule (OAR) 345	Authority to review proposals for power plants generating more than 25 MW and issue a Site Certificate.	On November 30, 2012, Jordan Cove filed amended Notice of Intent for the South Dunes Power Plant. On February 14, 2013, EFSC issued Project Order. Site Certificate Pending.
	OAR 345-21 & 22	Enforce Oregon's CO_2 Standards. Enforce Oregon's Retirement Bond Requirements.	On June 10, 2014, ODE entered into a Memorandum of Understanding (MOU) with Jordan Cove regarding CO_2 and Facilities Retirement.
Oregon Department of Environmental Quality (ODEQ)	Water Quality Certification Section 401 of the CWA ORS 468B OAR 340-48	Issue a license or permit to achieve compliance with state water quality standards.	Pacific Connector submitted water quality information to ODEQ concurrent with its JPA to the COE. Review pending.
	Section 402 of CWA ORS 468B OAR 340-45	Issue National Pollutant Discharge Elimination System (NPDES) permits for discharge of stormwater.	On July 22, 2014, Jordan Cove submitted its modified NPDES permit application to ODEQ. Review pending. One year prior to construction, Pacific Connector intends to submit its NPDES permit applications to ODEQ.
	Ballast Water Management ORS 620-992 OAR 340-143	Review liabilities and offences connected to shipping and navigation.	Pending review of this EIS.
	CAA – Title V 40 CFR 98 ORS 468A OAR 340-215, 216, 218, 222, & 228	Issue Title V Air Quality Operating permit. Issue Title V Acid Rain permit. Enforce Greenhouse Gas (GHG) Reporting Requirements.	In March 2013, Jordan Cove submitted an air quality permit application to the ODEQ. Pacific Connector anticipates submitting an air quality permit application to ODEQ in 2014. GHG analysis pending review of this EIS.
	Prevention of Significant Deterioration CAA ORS 468B OAR 340-224 & 225	Review Best Available Control Technologies to minimize discharges from new major sources, and review air quality analyses to ensure compliance with National Ambient Air Quality Standards.	In March 2013, Jordan Cove submitted an air quality permit application to the ODEQ. Pacific Connector anticipates submitting an air quality permit application to ODEQ in 2014. Pending review of this EIS.
	Hazardous Waste Activity ORS 466 OAR 340-102	Review plans for storage and management of hazardous waste	Pending review of this EIS.
Oregon Department of Fish and Wildlife (ODFW)	Fish and Wildlife Coordination Act and the Oregon Endangered Species Act under ORS 496, 506, and 509 OAR 635	Consult on sensitive species and habitats that may be affected by the Project and, in general, regarding conservation of fish and wildlife resources.	In June 2014, Jordan Cove produced its latest revision of its Wildlife Habitat Mitigation Plan. ODFW Review pending. Pacific Connector has not yet submitted its Wildlife Habitat Mitigation Plan to ODFW.
	Fish and Wildlife OAR 345-22 & 60	Consult on and approve fish and wildlife mitigation plan.	On January 29, 2014, Jordan Cove submitted its Draft Wildlife Salvage Plan to ODFW. Review pending.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
	Fish Screening Criteria at Stream Crossings OrS 509-580 through 910 OAR 635-412-5 through 40	Review stream crossing plans for consistency with Oregon fish passage law and ODFW fish passage rules	Pacific Connector submitted its Fish Passage Waiver Application and Fish Passage Plan for Road and Stream Crossings. ODFW review pending.
	ORS 509-140, et al.	Consider issuance of in-water blasting permits.	Pacific Connector submitted In-Water Blasting Permit Application. ODFW review pending.
Oregon Department of Forestry (ODF)	Easement on State lands Oregon Forest Practices Act OAR 629 ORS 477 ORS 527	Management of State Forest lands for Greatest Permanent Value, develops Forest Management Plans, stewardship under State's Land Management Classification System, monitors harvests of timber on private lands, and protects non-federal public and private lands from wildfires.	Pacific Connector anticipates submittal of final plans to ODF during the first quarter of 2015.
Oregon Department of Geology and Mineral Industries (DOGAMI)	Building Code Section 1802.1 ORS 455-446 OAR 517	Review of structural designs in tsunami zones. Review of geotechnical investigations for geological hazards. Review of mining and reclamation activities.	Review and decision pending.
State Historic Preservation Office (SHPO)	Section 106 of the NHPA 36 CFR 800 ORS 338-920	Review cultural resources reports and comments on recommendations for National Register of Historic Places eligibility and project effects. Issue permits for excavation of archaeological sites on non-federal lands.	On June 3, 2011, the Oregon SHPO signed the FERC's MOA for the original Pacific Connector project in Docket No. CP07-441-000. If the FERC authorizes the newly proposed Pacific Connector Project (in Docket CP13-492-000) the MOA would be amended. SHPO review of future cultural resources investigations reports pending.
Oregon Department of Land Conservation and Development (ODLCD)	Coast Zone Management Act (CZMA) 15 CFR Part 930 ORS 196.435	Determine consistency with CZMA program policies.	On August 1, 2014, Jordan Cove and Pacific Connector submitted their applications for Certification of Consistency to the ODLCD. The six-month review period regarding federal consistency provisions of the CZMA began on August 1, 2014 and will end on February 1, 2015.
Oregon Department of State Lands (ODSL)	Submerged and Submersible Land Easement OAR 141-122	Grant submerged land easements.	On May 15, 2014, Pacific Connector submitted its easement Application. ODSL Review pending.
	Joint Removal-Fill Law ORS 196-795-990 OAR 141-85	Approve removal or fill of material in waters of the state.	On February 19, 2013, ODSL issued Amended Proposed Order allowing dredging of Jordan Cove access channel and slip. On December 2, 2013, ODSL found Pacific Connector's application to be complete.
	Compensatory Wetland Mitigation Rules OAR 141-85-121	Review and approve wetland mitigation plans.	On July 15, 2013, Pacific Connector filed an application with ODSL. Decision Pending.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Oregon Department of Transportation (ODOT)	Section 303(c) DOT Act 49 CFR 303	Consultation and clearance letter regarding recreational land disturbance and construction-related traffic impacts.	On August 2, 2012, ODOT commented on Jordan Cove's Traffic Impact Analysis. ODOT's review of Pacific Connector's Transportation Management Plans is pending.
	State Highway ROW ORS 374-305 OAR 734- 55	Permits to be issued from each DOT District Office to allow construction within State Highway ROW and use of State Highways for Project access.	Applications for ODOT road crossing permits would be submitted prior to and during construction on an as-needed basis.
Oregon Department of Water Resources (ODWR)	New Water Rights ORS 537 OAR 690-310	Issue permits to appropriate surface water and groundwater.	Pacific Connector submitted an application for a license to temporarily use surface waters for pipeline construction and testing. ODWR review pending.
	Temporary Water Use ORS 537 OAR 690-340	Issue limited licenses for temporary use of surface waters.	Pacific Connector anticipates submitting an application during the first quarter of 2015.
Oregon Public Utilities Commission (OPUC)	OAR 860-031	Authorize intrastate electric transmission lines. Inspect the natural gas facilities for safety.	Pending Pacific Connector's submittal of appropriate applications to OPUC. Pending operation of facilities.
LOCAL – COUNTIES			
Coos County	Coos County Zoning and Land Development Ordinance, Coos County Comprehensive Plan, and Coos Bay Estuary Management Plan (CBEMP) ORS 197.015(10)(b)(H)	Issue Conditional Use Permits. Zoning Changes and Verifications. Issue Land Use Compatibility Statement (LUCS) under Statewide Planning Goals.	On December 5, 2007, Coos County issued a Conditional Use Permit for the Jordan Cove LNG terminal. On January 3, 2008, Coos County approved conditional use of Jordan Cove's access channel and marine slip. On August 21, 2009, Coos County approved conditional use of Jordan Cove's upland terminal facilities, after remand from Oregon's Land Use Board of Appeals (LUBA). On September 23, 2009, Coos County approved Comprehensive Plan amendment and Zoning Map amendment for Jordan Cove's future use of the former Kentuck Golf Course for wetland mitigation. On December 16, 2009, Coos County approved a correction of maps of wetlands within CBEMP zoning district 6-WD for Jordan Cove's terminal. March 22, 2012, Coos County partly approved a correction of the Coastal Shoreline Boundary in the 7-D zone at the former Weyerhaeuser linerboard property.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
			On July 25, 2012, Coos County approved Jordan Cove's Notice of Planning Directors Decision – Administrative Boundary Interpretation for 6-WD and Administrative Conditional Use Request for Fill in 6-WD. On September 17, 2012, Coos County approved Jordan Cove's Notice of Planning Directors Withdrawal and Reissuance of Administrative Conditional Use and Boundary Interpretation ABI for CBEMP/To Allow Fill. On October 4, 2012, Coos County approved Jordan Cove's Notice of Planning Directors Decision – To Allow Fill in IND Zone, To Allow Fill in CBEMP 7-D Zone, Vegetative shoreline Stabilization in CBEMP 7-D. On December 13, 2012, Coos County approved Jordan Cove's Site Plan Review for Integrated Power Generation and Process Facility. On September 8, 2010, Coos County issued a Conditional Use Permit to Pacific Connector. On June 14, 2013, Coos County issued a LUCS to Pacific Connector.
	Section 311 of EPAct	Review and provide consultation regarding Jordan Cove's Emergency Response Plan.	On July 16, 2009, Jordan Cove signed concept agreements with the Coos County Sheriff's Office, Emergency Management, and Health Department.
Douglas County	Douglas County Comprehensive Plan and Douglas County Land Use and Development Ordinance ORS 197.015(10)(b)(H)	Issue Conditional Use Permits Issue LUCS	On December 11, 2009, Douglas County issued a Conditional Use Permit to Pacific Connector. On March 20, 2014, Douglas County Planning Commission approved a Major Amendment to its 2009 decision to allow the Pacific Connector pipeline to cross 7.3 miles within the Coastal Zone in Douglas County. That decision was affirmed by the Board of Commissioners for Douglas County on April 30, 2014. Douglas County then issued a revised LUCS on June 2, 2014 for the 7.3-mile portion of the pipeline within the Coastal Zone Management Area within Douglas County.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Jackson County	Jackson County Comprehensive Plan and Jackson County Land Development Ordinance ORS 197.015(10)(b)(H)	Issue Conditional Use Permits Issue LUCS	On June 18, 2013 Jackson County provided a LUCS for the Project. The LUCS indicated that the Project was not subject to the land development standards of the Jackson County Land Development Ordinance because it would be authorized by the FERC. Therefore, no conditional use permits would be necessary.
Klamath County	Klamath County Land Development Code ORS 197.015(10)(b)(H)	Issue Conditional Use Permits Issue LUCS	On August 21, 2012, Klamath County responded to the FERC NOI with a list of local permits that Pacific Connector should apply for. On June 10, 2013, Klamath County provided a LUCS for the Project. The LUCS indicated that if not authorized by FERC the Project would require county applications and review. Therefore, no conditional use permits would be necessary.
All Counties	Road Crossing Permits	Review permits to cross county roads.	To be submitted prior to construction.
	Grading Permits	Review permits for excavation and grading activities.	To be submitted prior to construction.
	Solid Waste Disposal	Review permits for disposal of solid waste generated by construction.	To be submitted prior to construction.
LOCAL – CITIES City of Coos Bay	CBEMP	Issue Conditional Use Permit Zoning Verification	On June 15, 2007, the City approved the establishment of a 2-acre eelgrass mitigation site in aquatic unit 52-NA.
City of North Bend	North Bend Comprehensive Plan	Conditional Use Permit Amend Chapters 18.04 and 18.44	On October 8, 2013, the City approved Jordan Cove's request to amend the M-H Heavy Industrial Zone to allow conditional use for temporary work force housing.
City of North Bend	North Bend City Code	Conditional Use Permit Amend Chapter 18.80	On February 14, 2014, the City approved variances to allow vehicle parking at drainage at Jordan Cove's proposed temporary work force housing site.
City of North Bend	North Bend City Code	Conditional Use Permit Amend Chapters 18.84 and 18.88	On March 25, 2014, the City approved an amendment to North Bend Shorelands Management Unit 48 to allow for bridge at Jordan Cove's temporary work force housing site.

1.5.1.1 Endangered Species Act

Section 7 of the ESA, as amended, states that "Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act," and any project authorized, funded, or conducted by a federal

Exhibit G

***McCaffree v. Coos County*, __ Or LUBA __, LUBA No. 2014-102 (Feb. 3, 2015)**

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JODY MCCAFFREE
and JOHN CLARKE,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

PACIFIC CONNECTOR
GAS PIPELINE, L.P.,
Intervenor-Respondent.

LUBA No. 2014-102

FINAL OPINION
AND ORDER

Appeal from Coos County.

Kathleen P. Eymann, Bandon, represented petitioners.

Josh Soper, County Counsel, Coquille, represented respondent.

Richard H. Allan, Portland, represented intervenor-respondent.

HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

DISMISSED 02/03/2015

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Holstun, Board Member.

Petitioner requests that this appeal be dismissed. Accordingly, this appeal is dismissed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2014-102 on February 3, 2015, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Josh Soper
Coos County Counsel
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Coquille, OR 97423

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Portland, OR 97204

Dated this 3rd day of February, 2015.

Kelly Burgess
Paralegal

Kristi Seyfried
Executive Support Specialist

Exhibit H

Final Order No. 14-09-12PL, AM-14-11 (Jan. 20, 2015)

BEFORE THE BOARD OF COMMISSIONERS
OF THE COUNTY OF COOS, OREGON

IN THE MATTER OF AMENDING THE COOS COUNTY ZONING & LAND DEVELOPMENT ORDINANCE CHANGES TO CHAPTER V (FILE NUMBER AM-14-11)	))))	FINAL DECISION AND ORDINANCE 14-09-012PL

WHEREAS, pursuant to Article 1.2 of the Coos County Zoning and Land Development Ordinance (hereinafter referred to as the "CCZLDO"); the Coos County Board of Commissioners initiated a text amendment to Chapter V Administration;

WHEREAS, staff drafted the proposed text amendment to address reorganization, clarification of process, readability issues and necessary updates to be in compliance with land use laws and to reorganize;

WHEREAS, staff presented the proposed text to the Citizen Advisory Committee, Planning Commission, and Board of Commissioners in work sessions;

WHEREAS, staff completed the draft and provided 35 day notice to Department of Land Conservation and Development and 20 day notice to the required land owners, interested parties and agencies;

WHEREAS, pursuant to the procedures as set forth in Article 1.2 of the CCZLDO, the proposed text amendments were considered by the Planning Commission at a public hearing on October 2, 2014 and a recommendation to the Board of Commissioners was made;

WHEREAS, on October 16, 2014 the Board of Commissioners held a public hearing for testimony on the matter and reviewed the Planning Commission recommendation. At said hearing the time period for written comments was extended until November 17, 2014;

WHEREAS, on December 19, 2014 after review of the record the Board of Commissioners deliberated on the proposed changes. The Board of Commissioners approved the proposal with modifications and instructed staff to make the changes and correct any typos; and

NOW THEREFORE, IT IS HEREBY ORDERED that the Coos County Board of Commissioners hereby adopts the proposed changes found in Attachment A, attached hereto and incorporated by reference herein. Also, attached in Attachment B are the findings that address the testimony received.

ADOPTED this 20th day of January 2015.

BOARD OF COMMISSIONERS

Commissioner

Commissioner

Commissioner

APPROVED AS TO FORM:

Office of County Counsel

CHAPTER V - ADMINISTRATION

ARTICLE 5.0 ADMINISTRATION AND APPLICATION REVIEW PROVISIONS

SECTION 5.0.100 PRE-APPLICATION CONFERENCE:

The purpose of a pre-application conference is to familiarize the applicant with the provisions of this Ordinance and other land use laws and regulations applicable to the proposed development.

A pre-application is strongly recommended prior to submission of plan or ordinance amendment application or rezone application. For other types of applications an applicant may request a pre-application conference under this Ordinance.

A pre-application conference shall be requested by filing a written request along with the applicable fee to the Planning Department. The written request should identify the development proposal, provide a description of the character, location and magnitude of the proposed development and include any other supporting documents such as maps, drawings, or models.

The Planning Department will schedule a pre-application conference after receipt of a written request and the appropriate fee. The Planning Department will notify agencies and persons deemed appropriate to attend to discuss the proposal. Following the conference, the Planning Department will prepare a written summary of the discussion and send it to the applicant.

SECTION 5.0.150 APPLICATION REQUIREMENTS:

(Chapter 6 Land Divisions have additional submittal requirements)

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

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 ~~the following~~ **all applications** ~~reviews:~~.

~~Amendment/Rezone 19 copies~~

~~Planning Commission (including appeals) 14 copies~~
~~Board of Commissioner (including appeals) 6 copies~~
~~Administrative 1 copy.~~

~~The County may, at its sole discretion, reject materials that do not contain the requisite number of copies. It may be requested that the County make the requisite number of copies subject to the submitter paying applicable copy charges.~~ An application may be deemed incomplete for failure to comply with this section.

The burden of proof in showing that an application complies with all applicable criteria and standards lies with the applicant.

This was moved from Section 5.2

SECTION 5.0.175 Application Made by Transportation Agencies, Utilities or Entities:

1. A transportation agency, ***utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35*** may submit an application to the Planning Department for a permit or zoning authorization required for a ~~transportation~~ project without landowner consent otherwise required by this ordinance.
2. ***For any new applications submitted after the effective date of this section, such*** ~~A~~ transportation agency, ***utility, or entity*** must mail certified notice to the Planning Department and any owner of land upon which the ~~transportation~~ proposed project would be constructed at least ten (10) days before submitting an application to the Planning Department. Said notice shall state the transportation agency, ***utility, or entity's*** intent to file the application and must include a map, brief description of the proposed ~~transportation~~ project, and a name and telephone number of an official ***or representative of the project*** ~~with the transportation agency~~ available to discuss the proposed project.
3. ~~A~~ ***Such*** transportation agency, ***utility or entity*** (applicant) must comply with all ***other*** applicable requirements of this ordinance~~; however, a property divided by the sale or grant of property for state highway, county road, City Street or other right-of-way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned.~~ ***including property owners that were provided with notice of any hearing on any hearing on the application pursuant to ORS 197.763***
4. Notwithstanding any other requirement of this ordinance, approvals granted to ~~a~~ ***such*** transportation agency ~~for a transportation improvement~~, ***utility or entity*** shall not become effective ***for construction on a property under the approval*** until ***the transportation agency, utility or entity obtains either the written consent of the property owner or the property rights necessary for construction on that property*** ~~the subject property is acquired for the project.~~
5. Any permit subject to this section will be ~~effective~~ ***valid*** for two (2) years unless a request for renewal for another two (2) years is received from the transportation, ***utility or entity*** agency within 2 years ***after the date of approval***, ~~is received from the transportation agency within 2 year period~~, in which case renewal will be automatic to a maximum of 5 renewals. ***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.***[OR-92-07-012PL]

SECTION 5.0.200 APPLICATION COMPLETENESS (ORS 215.427):

1. An application will not be acted upon until it has been deemed complete by the Planning Department. In order to be deemed complete, the application must comply with the requirements of Section 5.0.150, and all applicable criteria or standards must be adequately addressed in the application. If the County Road Department recommends traffic impact analysis (TIA) the application will not be deemed complete until it is submitted.
2. ***For land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision, including resolution of all appeals under ORS 215.422 (Review of decision of hearings officer or other authority), within 120 days after the application is deemed complete unless an application has been deemed incomplete, voided or extended as discussed in this section. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422 (Review of decision of hearings officer or other authority), within 150 days after the application is deemed complete, unless an application has been deemed incomplete, voided or extended as provided for in this section.***
3. ***If an application for a permit or limited land use decision is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection 2 upon receipt by the governing body or its designee of:***
   a. ***All of the missing information;***
   b. ***Some of the missing information and written notice from the applicant that no other information will be provided; or***
   c. ***Written notice from the applicant that none of the missing information will be provided.***
4. ***If the application was complete when first submitted or the applicant submits additional information, as described in Subsection 3, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251 (Compliance acknowledgment), approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.***
5. ***If the application is for industrial or traded sector development of a site identified under Section 11 below, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with Section 4 above.***
6. ***On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (3)of this section and has not submitted:***
   a. ***All of the missing information;***

b. Some of the missing information and written notice that no other information will be provided; or

c. Written notice that none of the missing information will be provided.

7. The period set in Subsection 2 of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in Section 12 of this section for mediation, may not exceed 215 days.

8. The period set in Section 2 of this section applies:

a. Only to decisions wholly within the authority and control of the governing body of the county; and

b. Unless the parties have agreed to mediation as described in Section 11 of this section or ORS 197.319(2)(b) (Procedures prior to request of an enforcement order)

9. Timelines as described in this section do not apply to a decision of the county making a change to an acknowledged comprehensive plan or dependent on the approval of a comprehensive plan amendment.

10. Except when an applicant requests an extension of the timelines, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

11. A county may not compel an applicant to waive the period set in ORS 215.429 (Mandamus proceeding when county fails to take final action on land use application within specified time) as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

12. The periods set forth in this section may be extended by up to 90 additional days, if the applicant and the county agree that a dispute concerning the application will be mediated. [1997 c.414 §2; 1999 c.393 §§3,3a; enacted in lieu of 215.428 in 1999; 2003 c.800 §30; 2007 c.232 §1; 2009 c.873 §15; 2011 c.280 §10]

~~13. Within 30 days of the date the application is filed, the Planning Department will notify the applicant, in writing, specifying the information that is missing. The application will be deemed complete upon receipt of the missing information.~~

~~14. An applicant will have 180 days from the date of filing of the application to provide the Planning Department any information requested to make an application complete. When an applicant fails to submit the requested information, the application will be deemed withdrawn on the 181st day after the application was filed.~~

~~15. If the applicant who receives notice of an incomplete application refuses, to submit the missing information, the application will be deemed complete on the 31st day after the Planning Department first received the application.~~

~~16. In the event the Planning Department fails to notify the applicant within 30 days of the date the application was filed, the application will be deemed complete on the 31st day.~~

SECTION 5.0.250 TIMETABLE FOR FINAL DECISIONS (ORS 215.427):
(Legislative decisions are not subject to the time frames in this section)

1. For lands located within an urban growth boundary, and all applications for mineral or aggregate extraction, the County will take final action within 120 days after the application is deemed complete.
2. For all other applications, the County will take final action within 150 days after the application is deemed complete.
3. These time frames may be extended upon written request by the applicant.
4. Time periods specified in this Section shall be computed by excluding the first day and including the last day. If the last day is a Saturday, Sunday, legal holiday or any day on which the County is not open for business, the time deadline is the next working day. [OAR 661-010-0075]
5. The period for expiration of a permit begins when the appeal period for the final decision approving the permit has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.
6. ~~Land use permits that have been approved by the county shall be held in abeyance until the decision is final and all fees are paid: That is, until the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.~~

SECTION 5.0.300 FINDINGS REQUIRED [ORS 215.416(9)-(10)]:
Approval or denial of an application shall be in writing, based upon compliance with the criteria and standards relevant to the decision, and include a statement of the findings of fact and conclusions related to the criteria relied upon in rendering the decision.

SECTION 5.0.350 CONDITIONS OF APPROVAL:

1. 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.
2. An applicant who has received development approval is responsible for complying with all conditions of approval. Failure to comply with such conditions is a violation of this ordinance, and may result in revocation of the approval in accordance with the provisions of Section 1.3.300.
3. At an applicant's request, the County may modify or amend one or more conditions of approval for an application previously approved and final. Decisions to modify or amend final conditions of approval will be made by the review authority with the initial jurisdiction over the original application using the same type of review procedure in the original review.

SECTION 5.0.400 CONSOLIDATED APPLICATIONS:

1. Applications for more than one land use decision on the same property may be submitted together for concurrent review. If the applications involve different review processes, they will be heard or decided under the higher review procedure. For example, combined applications involving an administrative review and hearings body reviews, will be

subject to a public hearing.

2. Applications that are paired with a Plan Amendment and/or Rezone application shall be contingent upon final approval of the amendment by the Board of Commissioners. If the Board denies the amendment, then any other application submitted concurrently and dependent upon it shall also be denied.

SECTION 5.0.450 COORDINATION WITH DIVISION OF STATE LANDS (DSL) STATE/FEDERAL WATERWAY PERMIT REVIEWS:

If the County is notified by DSL that a state or federal permit has been requested for a use or activity requiring County review, the County shall:

1. If the applicant has received prior County review (pursuant to this Article) for a use or activity requiring a state or federal waterway permit, Coos County shall notify DSL that the project was or was not found to be consistent with this Ordinance;
2. If the applicant has <u>not</u> received prior County review for a state or federal waterway permit, and if Coos County is notified by DSL requesting County comment on a <u>proposed project, Coos County shall respond to DSL and the applicant within 3 working</u> days. Said notification shall state that local authorization is required pursuant to the Coos County Comprehensive Plan or this Ordinance;
3. Notice shall be provided to the Division of State Lands, the applicant and owner of record within 5 working days for any permit or approval required under this ordinance for the following developments within wetlands as shown on the National Wetland Inventory Map:
   a. Subdivision or planned unit developments;
   b. New Structures;
   c. Conditional use permits or variances that involve physical alterations to the land or construction of new structures.

SECTION 5.0.500 INCONSISTENT APPLICATIONS:

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.

SECTION 5.0.550 HEARINGS BODY REVIEW OF ADMINISTRATIVE DECISIONS:

Notwithstanding Article 5.8 (Appeals), a contested quasi-judicial hearing shall be held to review ***all noticeable*** Planning Director's decision~~s regarding an administrative conditional use~~, when, within ~~fifteen (15) days of notice of the decision~~, ***the appeal period,*** two or more members of the Planning Commission advise the Planning Director, orally or in writing, of their desire for a public hearing to review the application.

Said hearing shall be held pursuant to Article 5.7.

SECTION 5.0.600 BOARD OF COMMISSIONERS REVIEW OF APPLICATIONS AND APPEALS:

A decision of the Planning Director or Hearings Body may be called up by the Board of Commissioners at any time prior to the expiration of the appeal period. Hearings will be one of

following:

1. Full de novo hearing. If there has been no hearing prior to the initial decision, a full de novo hearing is required for an appeal. New issues may be raised and new testimony, arguments, and evidence may be accepted and considered by the Board;
2. Limited evidentiary hearing. Evidence presented at the hearing shall be limited to only specific issues, criteria or conditions specifically identified by the Board;
3. Review of the record. Only the evidence, data and written testimony submitted prior to the close of the record will be reviewed. No new evidence or testimony related to new evidence will be considered, and no public hearing will be held.
4. The Board of Commissioners reserves the right to pre-empt any permit review process or appeal process and hear any permit application or appeal directly. The Board also reserves the right to appoint a Hearings Officer or Hearings Body to hear and consider any permit application or appeal. Notice of appeals of administrative actions shall be promptly forwarded to the Board of Commissioners, which may elect to hear the appeal instead of the Planning Commission.
5. ***The Board of Commissioners may elect to hire a hearings officer to conduct one or more hearings on any matter. The hearing will follow all notification requirements and timelines listed in this Chapter. After the hearings are complete and the record is closed:***
   - ***a. The hearings officer shall supply a recommendation with findings for the Board of Commissioners;***
   - ***b. The Board of Commissioners will review the recommendations in a public hearing but will not take further testimony unless the record is reopened in which a new public hearing will be scheduled;***
   - ***c. Planning Staff will provide a report to the Board of Commissioners at which time Planning Staff may suggest modifications;***
   - ***d. After reviewing the record, recommendations and staff's report the Board of Commissioners may:***
     - ***i. Accept the recommendation;***
     - ***ii. Accept the recommendation with modification;***
     - ***iii. Reject the recommendation and send it back to the hearings officer for new findings;***
     - ***iv. Reject the recommendation and instruct County Counsel to consult with Planning Staff to make new findings.***

The following section will be moved to 5.2

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

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

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

~~B. The Planning director finds:~~

~~i. that there have been no substantial changes in the land use pattern of the area or other~~

~~circumstances sufficient to cause a new conditional use application to be sought for the same use; and~~

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

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

SECTION 5.0.900 NOTICE REQUIREMENTS (ORS 197.763):

1. Notice Public Hearing :
   a. The Planning Department shall forward a copy of the application to any affected city or special district pursuant to applicable provisions of this Ordinance;
   b. The Planning Department shall mail a copy of the staff report to the city, special district, applicant and Hearings Body at least seven (7) days prior to the scheduled public hearing.
   c. Notice shall be mailed at least twenty days prior to the hearing, or ten before the first evidentiary hearing if there will be or more hearings. Notice shall:
      i. Describe the nature of the application and the proposed use or uses that could be authorized;
      ii. Set forth the address or other easily understood geographical reference to the subject property;
      iii. Include the name of the local government representative to contact and a telephone number where additional information may be obtained;
      iv. State that a copy of the application, all documents and evidence relied upon by the applicant, and applicable criteria are available for inspection at no cost, and will be provided at reasonable cost;
      v. List the applicable criteria that apply to the application;
      vi. State the date, time, and location of the hearing;
      vii. State that failure of an issue to be raised, in person or in writing, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals based on that issue;
      viii. State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and
      ix. Include a general explanation of the requirements of submission of testimony and the procedure for the conduct of the hearings.
      x. The Planning Director shall cause notice of the hearing to be mailed to ~~all affected property owners pursuant to this section,~~ **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**
         1) Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth

boundary;

2) **Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;**
3) **Within 500 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone**

d. Notice of the decision shall be afforded to the applicant and those persons participating in the public hearing.

2. Notice of Administrative Decisions
   a. Notice of an Administrative Decision will be provided to the following:
      i. The applicant and the owners of the subject property, affected cities, special districts, Hearings Body members and other parties requesting notification;
      ii. The owners of record of property as described in ORS 215.416(11)(c), **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**
         a. **Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;**
         b. **Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;**
         c. **Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.**
      iii. Notice of an Administrative Decision shall:
         1) Describe the nature of the application and the proposed use or uses that could be authorized;
         2) Set forth the address or other easily understood geographical reference to the subject property;
         3) Include the name of the local government representative to contact and a telephone number where additional information may be obtained;
         4) State that a copy of the application, all documents and evidence relied upon by the application, and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;
         5) State that any person who is adversely affected or aggrieved or who is entitled to notice under (i) may appeal the decision by filing a written appeal within fifteen days of the date the Notice was mailed;

6) State that the decision will not become final until the fifteen day period for filing an appeal has expired; and
7) State that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

3. Plan Map Amendment/Rezone
   a. If the application includes an exception to a goal, notice shall comply with ORS 197.732. The notice shall be published at least 20 days prior to the date of the hearing. All notice requirements in "A" of this Section shall apply.
   b. At least 35 days prior to the initial hearing, notice shall be provided as required by ORS 197.610. [OR 04 12 013PL 2/09/05]
   c. Notice of decision shall be afforded to the applicant and those participating in the process. Notice of the decision shall also be afforded to any witness participating in the public hearing and requesting such notification.
   d. Requirements for hearings on a rezone of property containing a mobile home park shall be provided pursuant to ORS 215.223(7).
   e. Special notice requirements for zone changes within the environs of public use airports shall be provided pursuant to ORS 215.223(4), (5), and (6).
4. Legislative Amendment
   a. The Board of Commissioners shall conduct one or more public hearings with 10 days advance published notice of each of the hearings.
   b. The public notice shall state the time and place of the hearing and contain a statement describing the general subject matter of the ordinance under consideration. (ORS 215.060 & ORS 215.223)
   c. Notice to DLCD shall be provided 35 days prior to the initial hearing per ORS 197.610. Notice of adoption is subject to ORS 197.615. [OR 04 12 013PL 2/09/05]
   d. Notice to Cities and Districts.
5. For conditional use applications within Urban Growth Boundaries and Areas of Mutual Interest, the Planning Department shall comply with the notice requirements contained in the Urban Growth Management and Special Districts Coordination Agreements.
6. The following agencies shall be notified of all Conditional Use determinations involving waterway permits:
   a. State Agencies: Department of State Lands
      Department of Fish & Wildlife-Charleston, OR
      Department of Environmental Quality
      Department of Forestry
      South Slough Estuarine Sanctuary Commission
   b. Federal Agencies: Army Corps of Engineers
      National Marine Fisheries Service
      U.S. Fish & Wildlife Service
   c. Other Notification: State Water Resource Department (uses including appropriation of water only)
      State Department of Geology and Mineral Industries (mining and mineral extraction only)
      State Department of Energy (generating and other energy facilities only)

Department of Economic Development (docks, industrial and port facilities, and marinas only)
Coquille Tribe
Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians

SECTION 5.0.950 FAILURE TO RECEIVE NOTICE:
The failure of the property owner to receive notice as provided in this Article shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice was given. The notice provisions of this Article shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television.

ARTICLE 5.1 PLAN AMENDMENTS AND REZONES

SECTION 5.1.100 LEGISLATIVE AMENDMENT OF TEXT ONLY:
~~SECTION 1.2.100.~~ An amendment to the text of this ordinance or the comprehensive plan is a legislative act within the authority of the Board of Commissioners. [OR 04 12 013PL 2/09/05]

SECTION ~~1.2.200~~ *5.1.110* WHO MAY SEEK CHANGE:
A text amendment may be initiated by the Board of Commissioners, Planning Commission or by application of a property owner or their authorized agent. An application by a property owner shall be accompanied by the required fee. [OR 04 12 013PL 2/09/05] **Text amendments initiated by the Board of Commissioners shall comply with ORS 215.110(2).**

SECTION ~~1.2.300~~ *5.1.115* ALTERATION OF A RECOMMENDED AMENDMENT BY THE PLANNING DIRECTOR:
The Planning Director may recommend an alteration of a proposed amendment if, in the director's judgment, such an alteration would result in better conformity with any applicable criteria. The Planning Director shall submit such recommendations for an alteration to the Hearings Body prior to the scheduled public hearing for a determination whether the proposed amendment should be so altered.

SECTION ~~1.2.325~~ *5.1.120* PROCEDURE FOR LEGISLATIVE AMENDMENT:
The Board of Commissioners shall conduct one or more public hearings with 10 days advance published notice of each of the hearings. The public notice shall state the time and place of the hearing and contain a statement describing the general subject matter of the ordinance under consideration. (ORS 215.060 & ORS 215.223). Notice to DLCD shall be provided 35 days prior to the initial hearing per ORS 197.610. Notice of adoption is subject to ORS 197.615. [OR 04 12 013PL 2/09/05]

SECTION ~~1.2.350~~ *5.1.125* MINOR TEXT CORRECTIONS:
The Director may correct this ordinance or the Comprehensive Plan without prior notice or hearing, so long as the correction does not alter the sense, meaning, effect, or substance of any adopted ordinance. [OR 04 12 013PL 2/09/05]

SECTION ~~1.2.400~~ *5.1.130* NEED FOR STUDIES:
The Board of Commissioners, Hearings Body, or Citizen Advisory Committee may direct the

Planning Director to make such studies as are necessary to determine the need for amending the text of the Plan and/or this Ordinance. When the amendment is initiated by application, such studies, justification and documentation are a burden of the initiator.

SECTION ~~1.2.650~~ *5.1.135* STATUS OF HEARINGS BODY RECOMMENDATIONS TO THE BOARD OF COMMISSIONERS:
A Hearings Body recommendation for approval or approval with conditions shall not in itself amend this Ordinance or constitute a final decision.

SECTION ~~5.1.100~~ *5.1.200* REZONES:
Rezoning constitutes a change in the permissible use of a specific piece of property after it has been previously zoned. Rezoning is therefore distinguished from original zoning and amendments to the text of the Ordinance in that it entails the application of a pre-existing zone classification to a specific piece of property, whereas both original zoning and amendments to the text of the Ordinance are general in scope and apply more broadly.

SECTION ~~5.1.200~~ 5.1.210 RECOMMENDATION OF REZONE EXPANSION BY THE PLANNING DIRECTOR:
The Planning Director may recommend an expansion of the geographic limits set forth in the application if, in the Planning Director's judgment, such an expansion would result in better conformity with the criteria set forth in this Ordinance for the rezoning of property. The Planning Director shall submit a recommendation for expansion to the Hearings Body prior to the scheduled public hearing for a determination whether the application should be so extended.

SECTION ~~5.1.250~~ 5.1.215 ZONING FOR APPROPRIATE NON-FARM USE:
Consistent with ORS 215.215(2) and 215.243, Coos County may zone for the appropriate non-farm use one or more lots or parcels in the interior of an exclusive farm use zone if the lots or parcels were physically developed for the non-farm use prior to the establishment of the exclusive farm use zone.

SECTION ~~5.1.350~~ 5.1.220 PROCESS FOR REZONES:
1. Valid application must be filed with the Planning Department at least 35 days prior to a public hearing on the matter.
2. The Planning Director shall cause an investigation and report to be made to determine compatibility with this Ordinance and any other findings required.
3. The Hearings Body shall hold a public hearing pursuant to hearing procedures at Section 5.7.300.
4. The Hearings Body shall make a decision on the application pursuant to Section ~~5.1.400~~ *5.1.225*.
5. The Board of Commissioners shall review and take appropriate action on any rezone recommendation by the Hearings Body pursuant to Section ~~5.1.550~~ *5.1.235*.
6. A decision by the Hearings Body that a proposed rezone is not justified may be appealed pursuant to Article 5.8.

SECTION ~~5.1.400~~ 5.1.225 DECISIONS OF THE HEARINGS BODY FOR A REZONE:
The Hearings Body shall, after a public hearing on any rezone application, either:
1. Recommend the Board of Commissioners approve the rezoning, only if on the basis of the

initiation or application, investigation and evidence submitted, all the following criteria are found to exist:

a. The rezoning will conform with the Comprehensive Plan or Section ~~5.1.250~~ *5.1.215*; and
b. The rezoning will not seriously interfere with permitted uses on other nearby parcels; and
c. The rezoning will comply with other policies and ordinances as may be adopted by the Board of Commissioners.

2. Recommend the Board of Commissioners approve, but qualify or condition a rezoning such that:
   a. The property may not be utilized for all the uses ordinarily permitted in a particular zone;
   b. The development of the site must conform to certain specified standards; or
   c. Any combination of the above.

   A qualified rezone shall be dependent on findings of fact including but not limited to the following:
   i. such limitations as are deemed necessary to protect the best interests of the surrounding property or neighborhood;
   ii. Such limitations as are deemed necessary to assure compatibility with the surrounding property or neighborhood;
   iii. Such limitations as are deemed necessary to secure an appropriate development in harmony with the objectives of the Comprehensive Plan; or
   iv. Such limitations as are deemed necessary to prevent or mitigate potential adverse environmental effects of the zone change.

3. Deny the rezone if the findings of 1 or 2 above cannot be made. Denial of a rezone by the Hearings Body is a final decision not requiring review by the Board of Commissioners unless appealed.

SECTION ~~5.1.450~~ 5.1.230 STATUS OF HEARINGS BODY RECOMMENDATION OF APPROVAL:
The recommendation of the Hearings Body made pursuant to 5.1.~~400~~ *225*(1) or (2) shall not in itself amend the zoning maps.

SECTION ~~5.1.550~~ 5.1.235 BOARD OF COMMISSIONERS ACTION ON HEARINGS BODY RECOMMENDATION: Not earlier than 15 days following the mailing of written notice of the Hearings Body recommendation pursuant to Section 5.1.~~400~~ *225*, the Board of Commissioners shall either:

1~~A~~.adopt the Hearings Body recommendation for approval or approval with conditions;
2~~B~~.reject the Hearings Body recommendation for approval or approval with conditions and dismiss the application;
3~~C~~.accept the Hearings Body recommendation with such modifications as deemed appropriate by the Board of Commissioners; or
4~~D~~.if an appeal has been filed pursuant to Article 5.8, the Hearings Body recommendation shall become a part of the appeal hearing record, and no further action is required to dispense with the Hearings Body recommendation.

SECTION ~~5.1.600~~ 5.1.240 REQUIREMENTS FOR "Q" QUALIFIED CLASSIFICATION:
Where limitations are deemed necessary, Board of Commissioners may place the property in a

"Q" Qualified rezoning classification. Said "Q" Qualified Classification shall be indicated by the symbol "Q" preceding the proposed zoning designation (for example: Q C-1).

SECTION ~~5.1.650~~ 5.1.450 PERMITS AND APPLICATIONS MORATORIUM:

1. After a proposed rezoning has been set for public hearing, no building or ~~septic~~ ***sewage disposal system permits*** shall be issued until final action has been taken. Final action constitutes either:
   a. Withdrawal of the application by the applicant;
   b. Expiration of the County's appeal period without an appeal having been filed; or
   c. Final order of Board of Commissioners upon hearing the appeal.
2. Following final action on the proposed rezoning, the issuance of a verification letter shall be in conformance with the application approval.

ARTICLE 5.2 CONDITIONAL USES

SECTION 5.2.100 Conditional Uses.

1. Hearings Body Conditional Uses (HBCU or C). A Hearings Body conditional use is a use or activity which is basically similar to the uses permitted in a district but which may not be entirely compatible with the permitted uses. An application for a conditional use requires review by the Hearings Body to insure that the conditional use is or may be made compatible with the permitted uses in a district and consistent with the general and specific purposes of this Ordinance.
2. Administrative Conditional Uses (ACU). An Administrative Conditional use is a use or activity with similar compatibility or special conservation problems. An application for an administrative conditional use requires review by the Planning Director to insure compliance with approval criteria.

~~**SECTION 5.2.250 APPLICATION MADE BY TRANSPORTATION AGENCIES**~~ (Move to chapter 5.0)

SECTION 5.2.400 PROCESS FOR CONDITIONAL USES: 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 Planning Director, may at his or her discretion, refer any administrative conditional use to the Hearings Body. If such a referral is made the process for review and decision shall be the same as a conditional use otherwise reviewed by the Hearings Body.

SECTION 5.2.500 CRITERIA FOR APPROVAL OF APPLICATIONS: An application for a conditional use or an administrative conditional use shall be approved only if it is found to comply with this Article and the applicable review standards and special development conditions set forth in ~~Tables 4.2-a through 4.2-f, and Table 4.3-a~~ ***the zoning regulations*** and any other applicable requirements of this Ordinance.

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

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

1. ~~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 the proposal from beginning or the development from continuing within the approval period; and~~
2. ~~The Planning director finds:~~
   a. ~~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~~
   b. ~~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)~~

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.

ARTICLE 5.3. VARIANCES

SECTION 5.3.100 GENERAL: Practical difficulty and unnecessary physical hardship may result from the size, shape, or dimensions of a site or the location of existing structures thereon, geographic, topographic or other physical conditions on the site or in the immediate vicinity, or, from population density, street location, or traffic conditions in the immediate vicinity. Variances may be granted to overcome unnecessary physical hardships or practical difficulties. The authority to grant variances does not extend to use regulations, minimum lot sizes or riparian areas within the Coastal Shoreland Boundary.

SECTION 5.3.150 SELF-INFLICTED HARDSHIPS: A variance shall not be granted when the special circumstances upon which the applicant relies are a result of the actions of the applicant, ~~or~~ **current** owner(s) or previous owner(s) willful violation ~~including but not limited to:~~.

- ~~self created hardship~~
- ~~willful or accidental violations~~

- ~~manufactured hardships~~

This does not mean that a variance cannot be granted for other reasons.

SECTION 5.3.200 VARIANCE: The Planning Director shall consider all formal requests for variances for zoning and land development variances.

Section 5.3.350 CRITERIA FOR APPROVAL OF VARIANCES: No variance may be granted by the Planning Director unless, on the basis of the application, investigation, and evidence submitted;

1. Both findings "a" and "b" below are made:
    a. That a strict or literal interpretation and enforcement of the specified requirement would result in unnecessary physical hardship and would be inconsistent with the objectives of this Ordinance;
    b. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply to other properties in the same zoning district; or
    c. That strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges legally enjoyed by the owners of other properties or classified in the same zoning district;
2. That the granting of the variance will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity.
3. In addition to the criteria in (1) above, no application for a variance to the Airport Surfaces Floating Zone may be granted by the Planning Director unless the following additional finding is made: "the variance will not create a hazard to air navigation".
4. In lieu of the criteria in (1) above, an application for a variance to the /FP zone requirements shall comply with Section 4.6.227.
5. ***Variance regulations in CCZLDO Article 5.3 shall not apply to Sections 4.11.400 through 4.11.460, Chapter VII and Chapter VIII.***

SECTION **5.3.360 EXPIRATION AND EXTENSION OF** VARIANCES:
Any Variance not initiated within the time frame set forth in subsection (3)of this section may be granted a an extension provided that an applicant has made a request and provided the appropriate fee for an extension prior to the expiration of the variance approval. Such request shall be considered an Administrative Action and shall be submitted to the Director.

5. ***Extensions on Farm and Forest 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 division 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. ***CoosCounty 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 (s) 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.*

6. *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 variance criteria have not changed under the 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 variance then that variance is deemed to be invalid and a new application is required.*

c. *If an extension is granted, the variance will remain valid for the additional two years from the date of the original expiration.*

7. *Time frames for variances and extensions as follows:*

f. *All variances within non-resource zones are valid four (4) years from the date of approval; and*

g. *All variances within resource zones are valid (2) years from the date of approval.*

h. *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.*

i. *Additional extensions may be applied.*

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

ARTICLE 5.4 VESTED RIGHT (MOVED FROM CHAPTER 1)

A parcel shall be considered vested for completion of the construction of a nonconforming use when an administrative conditional use is granted, based on findings establishing:

1. **The good faith of the property owner in making expenditures to lawfully develop his property in a given manner;**
2. **The amount of reliance on any prior zoning classification in purchasing the property and making expenditures to develop the property;**
3. **The extent to which the expenditures relate principally to the use of an applicant claims is vested, rather than to ancillary improvements, such as but not limited to roads, driveways, which could support other uses allowed as of right;**

4. **The extent of the purported vested use as compared to the uses allowed in the subsequent zoning ordinances;**
5. **Whether the expenditures made prior to existing zoning regulations show that the property owner has gone beyond mere contemplated use and has committed the property to the purported vested use which would in fact have been made on the subject property but for the passage of the existing zoning regulation; and**
6. **The ratio of the prior expenditures to the total cost of the proposed use.**

ARTICLE 5.5 TEMPORARY PERMITS

SECTION 5.5.100 TEMPORARY USES: **A temporary use permit may be approved to allow the limited use of structures or activities which are temporary or seasonal in nature and do not conflict with the zoning district in which they are located. No temporary use permit shall be issued which would have the effect of permanently rezoning or granting a special privilege not shared by other properties in the same zoning district. A temporary use permit is not required for events and gatherings permitted in the in a zoning district.**

SECTION 5.5.200 TEMPORARY EVENTS: **Temporary Events are events held outside of a public park or fairgrounds, that have an expected attendance of 1,000 or less people that will not continue for more than three days in any three month period, and that will be located in a rural or resource area. Temporary Events are exempt from administrative review, provided that proof of compliance with the following standards is demonstrated prior to the event, and ministerial authorization is obtained from the Director:**

1. **It must be demonstrated that health standards are met, including, County food handling requirements, a method for waste disposal, and provision for portable sanitation.**
2. **Off street parking shall be provided at no cost for all vehicles associated with the gathering.**
3. **There must be a plan for safe and adequate access to the event site. The plan for access shall be approved by the County Roadmaster.**
4. **It shall be demonstrated that fire protection and suppression will be provided by a public entity or that fire protection equipment will be on site and approved by the appropriate fire district or association.**
5. **Event organizers shall sign an agreement holding themselves responsible for any incidents of trespass or vandalism on adjacent or nearby properties.**
6. **Except for events sponsored by non-profit organizations, there shall be no commercial aspect including admission charges or vendors at the event.**

SECTION 5.5.300 TEMPORARY STRUCTURES, ACTIVITIES OR USES:
Temporary structures, activities or uses may be authorized, subject to notice pursuant to administrative notice procedures found in Article 5.0, as necessary to provide for housing of personnel on large construction sites, storage and use of supplies and equipment, or to provide for temporary sales offices for uses permitted in the zoning district. Other uses may include temporary signs, outdoor events, short term uses, roadside stands, or other uses not specified in this ordinance and not so recurrent as to require a specific or general regulation to control them.

No temporary permits shall be issued except upon a finding that approval of the proposed

structure, activity or use would not permit the permanent establishment within a zoning district of any use which is not permitted within the zoning district, or any use for which a conditional use permit is required.

Conditional Approval of Temporary Use Permits may have reasonable conditions imposed by the approving authority. The conditions of approval for temporary permits shall be directly related to minimizing the potential impact of the proposed use to other uses in the vicinity.

1. Guarantees and evidence may be required that such conditions will be or are being complied with. Such conditions may include but are not limited to:
    a. Special yards and spaces.
    b. Fences or walls.
    c. Control of points of vehicular ingress and egress.
    d. Special provisions on signs.
    e. Landscaping and maintenance thereof.
    f. Maintenance of the grounds.
    g. Control of noise, odors or other nuisances.
    h. Limitation of time for certain activities.
2. Any temporary permit shall clearly set forth the conditions under which the permit is granted and shall clearly indicate the time period for which the permit is issued. No temporary permit shall be transferable to any other owner or occupant, but may be renewable through the ministerial process as long as the circumstances of the request have not changed.
3. All structures for which a temporary permit is issued:
    a. Shall meet all other requirements of the zoning district in which they are located;
    b. Shall meet all applicable County health and sanitation requirements;
    c. Shall comply with state building codes requirements; and
    d. Shall be removed upon expiration of the temporary permit unless renewed by the Director, or used in conjunction with a permitted use.
4. Temporary permits shall be issued for the time period specified by the Approving Authority but may be renewable upon expiration as an Administrative Action if all applicable conditions can again be met. In case shall a temporary permit be issued for a period exceeding one (1) year, unless the temporary permit is renewed.
5. Renewal of a temporary permit shall follow the same procedure as the initial application.
6. If a use is permitted in a zoning districted then a temporary permit may not be issued for that use. All structures must comply with floodplain and airport requirements.

ARTICLE 5.6 NONCONFORMING

SECTION 5.6.100 NONCONFORMING USES:

The lawful use of any building, structure or land at the time of the enactment or amendment of this zoning ordinance may be continued. Alteration of any such use may be permitted subject to Sections 5.6.120 and 5.6.125. Alteration of any such use shall be

permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215 (Reestablishment of nonfarm use), a county shall not place conditions upon the continuation or alteration of a use described under this Section when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

As used in this Section, alteration of a nonconforming use includes:

1. **A change in the use of no greater adverse impact to the neighborhood; and**
2. **A change in the structure or physical improvements of no greater adverse impact to the neighborhood.**

SECTION 5.6.105 EXCEPTIONS TO RESTORATION OR REPLACEMENT OF NONCONFORMING USES:

Restoration or replacement of any use described in Section 5.6.100 may be permitted outright when the restoration is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster. If restoration or replacement is necessary under this Section, restoration or replacement shall be done in compliance with any Special Development Considerations of Article 4.11 that apply to the property.

SECTION 5.6.110 INTERRUPTION OR ABANDONMENT OF NONCONFORMING USES:

A non-conforming use or activity may not be resumed if it was subject to interruption or abandonment for more than one (1) year, unless the resumed use conforms to the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

SECTION 5.6.115 SURFACE MINING:

Surface mining use continued under Section 5.6.100 shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

1. **The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and**
2. **The surface mining use was not inactive for a period of 12 consecutive years or more.**
3. **For purposes of this subsection, inactive means no aggregate materials were excavated, crushed, removed, stockpiled or sold by the owner or operator of the surface mine.**

SECTION 5.6.120 ALTERATIONS, REPAIRS OR VERIFICATION:

Alterations, repairs or verification of a nonconforming use requires filing an application for a conditional use (*See* CCZLDO Article 5.2). All such applications shall be subject to the provisions of Section 5.6.125 of this ordinance and consistent with the intent of ORS 215.130(5)-(8). Alteration of any nonconforming use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. The County shall not

condition an approval of a land use application when the alteration is necessary to comply with State or local health or safety requirements, or to maintain in good repair the existing structures associated with the use.

SECTION 5.6.125 CRITERIA FOR DECISION:
When evaluating a conditional use application for alteration or repair of a nonconforming use, the following criteria shall apply:

1. **The change in the use will be of no greater adverse impact to the neighborhood;**
2. **The change in a structure or physical improvements will cause no greater adverse impact to the neighborhood; and**
3. **Other provisions of this ordinance, such as property development standards, are met.**

For the purpose of verifying a nonconforming use, an applicant shall provide evidence establishing the existence, continuity, nature and extent of the nonconforming use for the 10-year period immediately preceding the date of the application, and that the nonconforming use was lawful at the time the zoning ordinance or regulation went into effect. Such evidence shall create a rebuttable presumption that the nonconforming use lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of the application.

SECTION 5.6.130 GENERAL EXCEPTIONS TO MINIMUM PROPERTY SIZE REQUIREMENTS:
If a single parcel, lot or contiguous units of land existing in a single ownership were created in compliance with all applicable laws and ordinances in effect at the time of their creation and have an area or dimension which does not meet the property size requirements of the zone in which the property is located, such lots or units may be occupied by a use permitted in the zone.

1. **Nothing in this ordinance shall be interpreted to limit the conveyance of such lots or contiguous units of land, provided that such holdings are sold as a single ownership.**
2. **Nothing in this ordinance shall be deemed to prohibit construction of conforming uses on such lots or units or the sale of such lots or units within subdivisions or land partitioning approved prior to the adoption of this ordinance, subject to other requirements of this ordinance.**

ARTICLE 5.7 PUBLIC HEARINGS

SECTION 5.7.300 Quasi-Judicial Land Use Hearings Procedures

1. The presiding officer shall provide an opportunity for members to announce conflicts or abstain from participating and allow challenge to any member participating as a decision maker in a quasi-judicial hearing.
2. At the beginning of a hearing under the Comprehensive Plan or land use regulations of Coos County, a statement shall be made to those in attendance that:
    a. Lists the applicable substantive criteria;
    b. States that testimony and evidence must be directed toward the criteria listed or other criteria in the Plan or implementing ordinances which the person believes to

apply to the decision; and

c. States that failure to raise an issue with statements and evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals.

3. Presentation of Testimony (for hearings other than appeals on the record):
   a. ***For First Evidentiary Hearing including an appeal of a Planning Director's decision:***
      i. ***Staff Report;***
      ii. ***Applicant;***
      iii. ***Additional testimony by other parties in support of the application;***
      iv. ***Testimony by opponents;***
      v. ***Neutral parties;***
      vi. ***Applicant's rebuttal arguments;***
      vii. ***Upon completion of evidence and testimony, if there has been no request to continue the hearing or leave the record open, the Chair will close the public hearing. A request for continuance or an opportunity to submit additional evidence is subject to provisions of Section 5.7.400;***
      viii. ***After closing the record, the Hearings Body will deliberate and reach a decision. The final decision will be reduced to writing and will include the findings upon which the decision is based. Notice of the decision will be mailed to all parties; and***
      ix. ***Appeals of Planning Director's decision will be de novo and processed in accordance with § 5.7.300.***
   b. ***For Appeals of a Hearings Body decision (testimony may be limited to parties only):***
      i. ***Staff Report;***
      ii. ***Applicant or, in the case of an appeal of a prior decision, appellant;***
      iii. ***Additional testimony by other parties in support of the application or appeal;***
      iv. ***Testimony by opponents or, in the case of an appeal, the applicant and others in support of the application;***
      v. ***Neutral parties;***
      vi. ***Applicant's rebuttal arguments, or in the case of an appeal of a prior decision, appellant's rebuttal arguments;***
      vii. ***Upon completion of evidence and testimony, if there has been no request to continue the hearing or leave the record open, the Chair will close the public hearing. A request for continuance or an opportunity to submit additional evidence is subject to provisions of Section 5.7.400; and***
      viii. ***After closing the record, the Hearings Body will deliberate and reach a decision. The final decision will be reduced to writing and will include the findings upon which the decision is based. Notice of the decision will be mailed to all parties.***
4. Representatives
   a. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.
   b. Any person presenting *written* testimony on behalf of a group, company or any

other organization, except an attorney, **consultant, owner, officer, or employee of that group, company, or organization** must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

i. ***Be written on the group, company, or organization's official letterhead;***
ii. ***Name the person authorized to appear on behalf of the group, company, or organization;***
iii. ***Specify the scope of the authorization; and***
iv. ***Contain the signature of a person with authority to grant the authorization.***

Failure of a person to submit such written authorization shall cause the group, company, or organization to not achieve party status for the purposes of the proceeding and shall preclude the group, company, or organization from having standing to file an appeal.

c. ***Any person presenting oral testimony on behalf of a group, company or any other organization, with the exception of an attorney, shall present a letter of authorization at that time to show that the person testifying does in fact represent that group, company or organization. If the letter is not presented at the time the hearings body or designee shall in its discretion, allow the person to submit that authorization prior to the close of the record.***

Failure to provide written proof of authorization to represent a group, company or organization shall result in the group, company or organization not having standing in the event of an appeal. The person who provided the testimony shall be the only one to achieve party status in the event of an appeal. The hearings body or designee has discretion to not consider the testimony as part of the record if a person presenting testimony on behalf of a group, company, or organization fails to comply with the rules of Section 4. If this is the decision of the hearings body or designee then it will be made part of the final order and decision. If the determination is made that testimony was disqualified under this subsection then standing has not been achieved. That party may not appeal the matter unless other forms of testimony accepted forms of testimony was received and granted them standing under CCZLDO Section 5.8.160.

i. ~~Be written on the group, company, or organization's official letterhead;~~
ii. ~~Name the person authorized to appear on behalf of the group, company or organization;~~
iii. ~~Specify the scope of the authorization; and~~
iv. ~~Contain the signature of a person with authority to grant the authorization.~~ ~~[Amended OR 08-09-009PL 5/13/09]~~

5. Submission of Written Evidence
   a. Petitions: Any party may submit a petition into the record as evidence. The petition shall be considered as written testimony of the party who submitted the petition. A petition shall not be considered to be written testimony of any individual signer. To have standing, a person must participate orally at the hearing or submit other individual written comments. Anonymous petitions or petitions that do not otherwise identify the party submitting the petition, shall not be

accepted as evidence.

b. Required Number of Copies: Submission of written materials for consideration shall be provided ~~as follows for hearings before the:~~ ***in the form one original hard copy and one exact copy or one original hard copy and one electronic copy.***

   i. ~~Planning Commission—15 copies~~
   ii. ~~Board of Commissioners—7 copies~~

   The County may, at its sole discretion, reject any materials that do not contain the requisite number of copies. It may be requested that the County make the requisite number of copies subject to the submitter paying the applicable copy charges.

c. E-mail testimony may be submitted; however, it is the responsibility of the person submitting the testimony to verify it has been received by Planning Staff by the applicable Deadline.

d. All written testimony must contain the name of the person(s) submitting it and current mailing address for mailing of notice.

e. The applicant bears the burden of proof that all of the applicable criteria have been met; however, in the case of an appeal, the appellant bears the burden of proving the basis for the appeal, such as procedural error or that applicable criteria have not in fact been met. [Amended OR 08-09-009PL 5/13/09]

6. Definitions: As used in this Article the following definitions shall apply:
   a. "Party" means any person, organization or agency who has established standing under the provisions of this Article 5.8.
   b. "Witness" means any person who appears and is heard at a hearing and is not a "party". A witness shall not be considered a "party" unless the Board of Commissioners determines that the person is a party in accordance with Article 5.8.

SECTION 5.7.400. Requests to Present Additional Evidence.

1. Prior to conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. If such a request is received, the Hearings Body will either continue the public hearing, in accordance with subsection (~~B~~*2*), or leave the record open for additional written arguments, evidence or testimony, in accordance with subsection (~~C~~*3*).
2. If the Hearings Body grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial hearing. At the continued hearing, parties may present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, prior to the conclusion of the hearing any person may request that the record be left open for at least seven days to submit additional written evidence, arguments or testimony, but such additional evidence shall be limited to responding to the new written evidence submitted at the continued hearing.
3. If the Hearings Body leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any party may file a written request for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the Hearings Body shall reopen the record to a date and time certain to admit new evidence, argument or testimony but

any additional evidence shall be limited to responding to the new written evidence submitted during the period the record was left open. While the record is open, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria which apply to the matter.

4. Unless waived by the applicant, the Hearings Body will allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period will not be counted towards the 120- or 150-day decision time-frame.
5. Except for the time frame identified in Section 5.7.400(~~D~~ *4*), a continuance or extension granted pursuant to this section is subject to the 120- or 150- day decision time-frame unless the continuance is requested or agreed to by the applicant.
6. If the Hearings Body leaves the record open, prior to the conclusion of the initial evidentiary hearing they will specify the date the record will close and the date, time and location when they will reconvene to deliberate and make a decision on the application.

ARTICLE 5.8 APPEAL REQUIREMENTS

SECTION 5.8.100 Appeals General

Coos County has established an appeal period of ***fifteen*** (15) days from the date written notice of administrative or Planning Commission decision is mailed ***with the exception of Property Line Adjustments and lawfully created parcel determinations, which are subject to a twelve (12) day appeal period.***

The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article. [OR 04 12 013PL 2/09/05]

SECTION 5.8.150 Standing to Appeal a Planning Director's Decision:

A decision by the Planning Director to approve or deny an application shall be appealed as identified in the Sections below. The appeal must be filed within the appeal period and meet one of the following criteria:

1. In the case of a decision by the Planning Director, the ~~petitioner~~ **appellant** was entitled to notice of the decision; or
3. The person is aggrieved or has interests adversely affected by the decision.

SECTION 5.8.160 Standing to Appeal a Hearings Body, Appointed Hearings Officer(s) or Board of Commissioner Decision:

A decision by the Hearings Body, Appointed Hearings Officer(s) or Board of Commissioners to approve or deny an application shall be appealed as identified in the Sections below. The appeal must be filed within the appeal period. In the case of an appeal of a Hearings Body decision to the Board of Commissioners, the ~~petitioner~~ **appellant** must have appeared before the Hearings Body ***or appointed Hearings Officer(s)*** orally or in writing. [OR 04 12 013PL 2/09/05]

SECTION 5.8.170 Appeal procedures:

An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section. If an appellant fails to correctly fill out the form, and there has already been a public hearing on the matter, the Board of

Commissioners may deny the appeal based on failure to comply with this section. In the event the appeal is denied based on a failure to comply with this section, a refund of unexpended fees shall be returned to the appellant.

The appeal form shall contain the following:

1. *The name of the applicant and the County application file number;*
2. *The name and signature of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single Contact Representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative;*
3. *The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160;*
4. *The date that the notice of the decision was mailed as written in the notice of decision;*
5. *The nature of the decision and the specific grounds for appeal citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule.*
6. *The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application.*
7. *Appeals of Planning Director's decision will be de novo;*
8. *Appeals of Planning Commission's or appointed Hearings Officer(s) decision shall be reviewed by the Board of Commissioners or Hearings Officer if the Board of Commissioners so chooses. The Board of Commissioners shall, provided there has been an initial evidentiary hearing:*
    a. *Decline to hear the matter and enter an order affirming the lower decision; or*
    b. *Accept the appeal and:*
        i. *Make a decision on the record without argument;*
        ii. *Make a decision on the record with argument;*
        iii. *Conduct a hearing de novo; or*
        iv. *Conduct a hearing limited to specific issues.*
    c. *In the decision, the Board shall affirm, modify, or reverse the lower decision, and accept any or all of the findings and conditions in the Hearings Body decision, or modify or adopt new findings and conditions on a permit.*
    d. *If the Board allows argument only on the record, no new evidence shall be submitted.*
    e. *Any legal issues not specifically raised are considered waived for purposes of appeal to the Land Use Board of Appeals (LUBA).*
    f. *Where a hearing is limited to specific issues, any evidence or argument submitted must be relevant to the specific issue.*
    g. *All items to be submitted to the County must actually be received by the County Planning Department no later than 5:00 p.m. on the on the last day of the appeal period. If the last day of the appeal period falls on a weekend or County holiday, then the item must actually be received by the County Planning Department no later than 12:00 p.m. on the next County business day following*

the deadline date. All items to be mailed to another party must be postmarked no later than the end of the appeal period.

h. The decision of the Board of Commissioners shall not be final for the purpose of appeal until reduced to writing and signed by the Board.

~~**SECTION 5.8.200. Appeals of Administrative Decisions.**~~

~~1. Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee. Upon receipt of an appeal, the Department shall schedule a public hearing before the Hearings Body and provide public notice as provided in Section 5.0.900(A). The hearing on appeal of an administrative decision shall be de novo (ORS 215.416).~~

~~2. The appeal hearing procedure shall be in accordance with Section 5.7.300.~~
~~[OR-04-12-013PL 2/09/05]~~

SECTION 5.8.223 ~~Appeal of Hearings Body Decision to Board of Commissioners.~~

~~1. The review of the decision of the Hearings Body by the Board of Commissioners shall include:~~

~~a. All materials, pleading, memoranda, stipulations, and motions submitted by any party to the proceeding and received or considered by the Hearings Body as evidence;~~
~~b. All materials submitted by the Planning Department with respect to the application;~~
~~c. Minutes of the public hearing of the Hearings Body; and~~
~~d. The findings and action of the Hearings Body and the notice of decision.~~

~~2. A Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee.~~

~~3. The Planning Staff shall notify the Board of Commissioners of the Notice of Appeal and within ten days of receipt. Then planning staff shall provide the record to the Board of Commissioners for review. Provided there has been an initial evidentiary hearing, the Board of Commissioners Shall:~~
~~a. Decline to hear the matter and enter an order affirming the lower decision; or~~
~~b. Accept the appeal and:~~
~~(1) Make a decision on the record without argument;~~
~~(2) Make a decision on the record with argument~~
~~(3) Conduct a hearing de novo; or~~
~~(4) Conduct a hearing limited to specific issues.~~

~~In the decision, the Board Shall affirm, modify, or reverse the lower decision, and accept any or all of the findings and conditions in the Hearings Body decision, or modify or adopt new findings and conditions on a permit.~~

~~4. If the Board allows argument only on the record, no new evidence shall be submitted.~~
~~5. Any legal issues not specifically raised are considered waived for purposes of further appeal.~~

6. ~~Where a hearing is limited to specific issues, any evidence or argument submitted must be related to the specific issue. Any evidence or argument submitted must be related to those specific issues.~~
7. ~~All items to be submitted to the County must actually be received by the County Planning Department no later than 5:00 p.m. on the deadline date. If the deadline date falls on a weekend or County holiday, then the item must actually be received by the County Planning Department no later than 12:00 p.m. on the next County business day following the deadline date. All items to be mailed to another party must be postmarked no later than the deadline date.~~
8. ~~The decision of the board shall not be final until reduced to writing and signed by the Board.~~

SECTION 5.8.230 Board of Commissioners Action

1. The Board of Commissioners shall affirm, modify, or reverse all or part of the action of the Hearings Body or shall remand the matter for additional review or information. [OR 04 12 013PL 2/09/05]
2. A final decision by the Board of Commissioners or Hearings Officer shall be appealed to the Land Use Board of Appeals (LUBA).

SECTION 5.8.250 Reconsideration of Administrative Decision

1. During the period set forth at Section 5.8.100, the Planning Director shall withdraw the decision for the purposes of reconsideration, any administrative decision.
2. If an administrative decision is withdrawn for the purposes of reconsideration, the Planning Director shall, within 30 days of the withdrawal, affirm, modify or reverse the administrative decision.
3. Notice of the reconsidered administrative decision shall be provided in the same manner as notice of the original administrative decision, and any appeal of said decision shall proceed pursuant to Article 5.8. [OR-92-07-012PL]

SECTION 5.8.300 Record Presented to Hearings Body or Board of Commissioners

After notice of intent to appeal has been filed pursuant to Section 5.8.200, then: [OR 96-06-007PL 9/4/96]

1. For appeals of administrative decisions, the Planning Director shall forward to the Hearings Body a copy of:
   a. the application for the subject administrative permit; and
   b. the written findings establishing the basis for his decision; and
   c. the notice of intent to appeal.

2. For appeals of Hearings Body decisions, the Planning Director shall forward to the Board of Commissioners a copy of:
   a. the application for the requested action; and
   b. the staff report on the request; and
   c. the public hearing record of the Hearings Body's decision; and,
   d. the notice of intent to appeal.

SECTION 5.8.400 Multiple Appeals

Multiple appeals of the same land use decision shall be consolidated into one hearing, at the discretion of the Planning Director, Planning Commission or Board of Commissioners, provided the appeals involve the same or substantially similar issues and/or a common question of law or fact. The consolidation process must not work to deprive any appellant of his or her right to a full and fair hearing on the merits of their case. Such consolidation of the appeals into one hearing will avoid unnecessary costs or delay and will assist in the proper resolution of the matter in question. ***If consolidation is granted by then a reduction of fee may be due to the parties when the final decision is rendered.***

~~**SECTION 5.8.500. (RESERVED) [OR-04-12-013PL-2/09/05]**~~

~~**SECTION 5.8.600. (RESERVED) [OR-04-12-013PL-2/09/05]**~~

SECTION 5.8.700 Reconsideration of Final Decision by Board of Commissioners

1. At any time subsequent to the filing of a notice of intent to appeal a decision made by the Board of Commissioners, and prior to the date set by the Land Use Board of Appeals for filing the record on said appeal, the Board of Commissioners Shall withdraw its decision for the purposes of reconsideration. If the Board withdraws its final decision order for purposes of reconsideration, it shall, within such time as the Land Use Board of Appeals Shall allow, affirm, modify or reverse its decision. [OR 92-07-012PL]

2. Hearings on reconsidered decisions will, at the County's sole discretion, be either:
   a. Based on the record. New findings shall be drafted for the Board's consideration and shall be presented to the Board at a regularly scheduled Board meeting. No new evidence or testimony shall be considered, or;
   b. De novo allowing additional evidence and testimony. Participation shall be strictly limited to those persons or organizations who are parties to the LUBA appeal.

3. The Board of Commissioners shall limit the scope of a hearing on reconsideration.

SECTION 5.8.800 Review of Remanded Decisions

When LUBA remands a decision and orders the County to pay the cost of the filing fee to the petitioner, the applicant must provide to the County proof of payment before the remanded application will be considered. If the applicant does not pay the fee within 45 days from the date of the LUBA remand, the application shall be deemed withdrawn by the applicant.

Any request for hearing on remand shall be subject to the appropriate fee.

1. Decisions remanded by the Land Use Board of Appeals will be scheduled for hearing only if the applicant files a written request that the governing body take up the remand within 45 days from the date of the final LUBA order[1], the request must be accompanied by the appropriate fee;
2. Within 30 days of receiving the request a hearing will be scheduled before the Board of Commissioners.

[1] Subsequent appeals could change the date of the final LUBA order.

3. If no written request is submitted to take up the remand, the application shall be deemed to be withdrawn and action will be taken to void the implementing Ordinance.
4. Hearings on remanded decisions Shall be, in the sole discretion of the Board, either:
    a. Based on the record without argument. The remand will be based solely on the existing evidentiary record. No new testimony, evidence or argument will be considered. The scope of the hearing will be limited to the remand issues LUBA identified in its final opinion.
    b. Based on the record with argument:
        i. In written form with no oral argument. Written argument shall be submitted to the Planning Department at least 10 days prior to the hearing in order to be considered. No further written argument will be accepted after the 10 day deadline or at the hearing.
        ii. In written form with oral argument. Written argument shall be submitted to the Planning department at least 10 days prior to the hearing in order to be considered. No further written argument will be accepted after the 10 day deadline or at the hearing.
        iii. Written and oral argument that will be accepted prior to and at the hearing.
    c. Limited to the issues identified by LUBA in its decision. New evidence and testimony shall be presented solely on the issues remanded by LUBA in its decision.
    d. De novo allowing new evidence and testimony.
5. The Board of Commissioners solely in its discretion shall further limit the scope of any hearing on remand.
6. At the direction of the Board the party prevailing at the remand hearing shall prepare the findings of fact necessary to support the decision.
7. The decision of the Board shall not be final for the purpose of appeal until reduced to writing and signed by the Board.

ARTICLE 5.9 ZONING COMPLIANCE LETTER

SECTION 5.9.100 Zoning Compliance Required:

Zoning Compliance Letters (ZCL) are required to be obtained prior to engaging in any type of development or initiation of use or activity listed in the Coos County Zoning and Land Development Ordinance. However, there may be other types of reviews required before a zoning compliance letter may be issued. A compliance determination form must be submitted to verify compliance with regulations prior to the issuance of a zoning compliance letter by the Coos County Planning Department unless the following applies:

1. ***If the compliance letter is needed for a sewage disposal system permit or evaluation;***
2. ***If a final land use decision covering the property or site has been issued and is still valid; or***
3. ***If the use or activity involves a Coos County sign-off for a land use compatibility statement (LUCS) as found on state and federal forms a zoning compliance letter will***

not be required in addition to that form unless the project involves permits from State Building Codes or sewage disposal system permits from Department of Environmental Quality (DEQ).

A ZCL must be obtain***ed*** from Coos County Planning prior to applying for ***state building permits and/or sewage disposal system permits from DEQ.*** ~~the applicant shall first obtain a zoning compliance letter (verification letter) from the Coos County Planning Department.~~ Thi~~s~~e **ZCL** ~~verification compliance letter~~ is valid for ~~one~~ **two** years from the date it is issued. **However, if the request for the ZCL has changed a new ZCL will be required prior to obtaining state permits.**

Prior to the expiration of a ZCL an applicant may request additional time to apply for building permits for the project. A new zoning compliance letter will be issued for a year subject to the fee set on the official fee schedule adopted by the Board of Commissioners.

If the request otherwise requires ***land use*** review (***compliance determination,*** conditional use, variance, partitioning, etc.), a compliance letter shall not be issued unless it is for a ***sewage disposal system*** evaluation or replacement of existing on-site system if a land use review has not been completed.

If the requested use or development is permitted in the zone or is authorized by a final land use approval of Coos County that has not expired, no further, ***land use*** review is required and the Planning Department will issue the compliance letter.

If the land use approval includes conditions of approval, the applicant will sign the ***ZCL*** ~~compliance letter~~ with the understanding that the conditions must be met or the authorization will be revoked.

A zoning compliance letter allows the state permitting (Sanitation and building) process to begin. A zoning compliance letter will not extend a land use authorization.

Fences, retaining walls, re-roofing and interior remodeling do not require zoning authorization but may require a permit from State Building Codes.

ARTICLE 5.10 COMPLIANCE DETERMINATIONS AND REVIEWS

SECTION 5.10.100 Compliance determinations:
An application for Compliance Determination (CD) are required to be submitted to the Planning Department with the elements described in § 5.10.200. Once the application is received the Planning Staff will review the CD against the applicable zoning district to determine if additional reviews or notifications are required.

If the application requires any type of discretionary analysis or interpretation, findings of compatibility or conditions of approval, then the application will be treated as an administrative conditional use and is subject to notice requirements of §5.10.400. If the application simply requires a check-off of clear and objective development standards, no administrative conditional use is required and a zoning compliance letter will be issued.

A compliance determination is not required in the following circumstances:

4. *If the compliance letter is needed for a sewage disposal system permits or evaluation; or*
5. *If a final land use decision covering the property or site has been issued and is still valid.*

There are two types of compliance determinations: one for Balance of County and the other for Estuary Plans.

SECTION 5.10.200 APPLICATION REQUIRMENTS:

The application form must be completed with a plot plan attached and include the following:

1. *If this is for an industrial or commercial use a parking plan is required (see Article 7.5).*
2. *If this is bare land and a driveway has not be completed a driveway confirmation form is required to be completed by the Roadmaster (see Article 7.6 for bonding options)*
3. *If this is bare land and the request is for a dwelling an address is required.*
4. *If this is for an estuary zoned property as defined in Chapter III then applicable zoning district standards and policies must be addressed.*

SECTION 5.10.300 REVIEW FOR BALANCE OF COUNTY ZONING DISTRICTS:

1. *Compliance determinations will be reviewed based on the zoning district requirements and any applicable special development considerations for permitted uses.*
2. *If it is determined that other land use reviews are required, staff will prepare a letter explaining what applications and criteria are required to be submitted. If other land use reviews are required, this application will automatically be upgraded to an administrative conditional use review and deemed incomplete until such time the application requirements for an administrative conditional use have been satisfied. Once a final land use decision is issued, then a zoning compliance letter will be issued.*
3. *If a compliance determination application is received for a use or activity that is not listed, a denial will be issued as a final land use decision (see § 5.10.400 for notification, unless the proposed use is subject to § 4.1.190 Uses Not Listed).*
4. *If no other reviews are required and discretion was used to make the determination of compliance then a final land use decision will be issued and notice under § 5.10.400.*

All new and replacement developments, with the exception of sewage disposal system permits, require a driveway confirmation and must be obtained as part of this review unless one has been completed. Industrial and Commercial development will require a parking plan and access plan in lieu of a driveway confirmation. Parking plans, driveways and accesses will be reviewed by the County Roadmaster in conjunction with the CD application.

SECTION 5.10.300 REVIEW FOR USES AND ACTIVES IN AN ESTUARY MANAGEMENT PLAN ZONE:

1. *Compliance determinations will be reviewed for any permitted uses subject to general conditions which require polices to be addressed. If the policies require a conditional use that process shall be followed.*
2. *If it is determined that other land use reviews are required the planning, staff will*

provide a letter explaining what applications and criteria are required to the applicant and the application will be deemed incomplete until all submittal requirements have been met. Once all conditional use applications have received a final land use decision a zoning compliance letter will be issued.

3. *If a compliance determination application is received for a use or activity that is not listed a denial will be issued unless § 4.1.190 Uses Not Listed applies.*
4. *If no other reviews are required the compliance determination and discretion was used to determine compliance the compliance determination decision will serve as the final land use decision. However, if the application simply requires a check-off of clear and objective development standards, no administrative conditional use is required and a zoning compliance letter will be issued and the compliance determination will not be characterized as a land use decision.*

All new and replacement developments, with the exception of sewage disposal system permits, require a driveway permit and/or parking permit prior as part of this review unless one has been completed. Industrial and Commercial development will require a parking plan to be submitted as part of the compliance determination review. Parking plans will be reviewed by the County Roadmaster.

SECTION 5.10.400 NOTIFICATION:

If the property is located within in an area that requires a notification to other agencies for comments that notification shall be mailed out for comments once the review of the Compliance Determination begins. Staff will review special development consideration maps and overlay maps to determine if a notice is required.

If the property is located in an area that requires one of the following notifications, the time line for a final land use decision will not be issued until the comment period has expired.

- *Oregon Department of Fish and Wildlife has 10 days to comment.*
- *Local Tribes have 30 days to comment.*
- *Department of State Lands (DSL) has 30 days to comment.*
- *Oregon Department of Aviation has 30 days to comment, unless notice has been submitted to FAA for comment.*
- *Review the files to see if a driveway confirmation has been completed by the Road Department.*
    - *Driveway confirmations are required for replacement and new dwellings. Driveways may be bonded to allow for all development to be completed.*
    - *If the development is commercial or industrial a parking plan will be required to be reviewed by the Roadmaster for compliance with parking standards.*

If the Compliance Determination is to serve as a final land use decision then there will be a notice of the decision mailed to the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:

1. *Within 100 feet of the exterior boundaries of the contiguous property ownership which*

is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;

2. *Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;*
3. *Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.*

If appealed the process in Article 5.8 will be followed. If a use is permitted outright the use may not be the subject of appeal unless discretion was used to determine if a standards or policies have been met then the decision may be appealed. Compliance determinations are only valid for a two year period. However, a two year extensions may be provided so long as the project has not changed which would requiring additional review.

AM-14-11

The findings document addresses the applicable comments that have been received for this text amendment. Several of the comments are repetitive covering the same issue. Therefore, staff has condensed those issues down by sections. This only addresses comments on the ordinance text changes for AM-14-11. There were other comments made that were beyond the proposed changes in which did not receive a response.

Chapter V

§ 5.0.175 Application Made by Transportation Agencies, Utilities or Entities:

1. A transportation agency, ***utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35*** may submit an application to the Planning Department for a permit or zoning authorization required for a ~~transportation~~ project without landowner consent otherwise required by this ordinance.
2. ***For any new applications submitted after the effective date of this section, such*** ~~A~~ transportation agency, ***utility, or entity*** must mail certified notice to the Planning Department and any owner of land upon which the ~~transportation~~ proposed project would be constructed at least ten (10) days before submitting an application to the Planning Department. Said notice shall state the transportation agency, ***utility, or entity's*** intent to file the application and must include a map, brief description of the proposed ~~transportation~~ project, and a name and telephone number of an official ***or representative of the project*** ~~with the transportation agency~~ available to discuss the proposed project.
3. ~~A~~ ***Such*** transportation agency, ***utility or entity*** (applicant) must comply with all ***other*** applicable requirements of this ordinance~~; however, a property divided by the sale or grant of property for state highway, county road, City Street or other right-of-way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned.~~ ***Including property owners that were provided with notice of any hearing on any hearing on the application pursuant to ORS 197.763***
4. Notwithstanding any other requirement of this ordinance, approvals granted to a ***such*** transportation agency ~~for a transportation improvement~~, ***utility or entity*** shall not become effective ***for construction on a property under the approval*** until ***the transportation agency, utility or entity obtains either the written consent of the property owner or the property rights necessary for construction on that property*** ~~the subject property is acquired for the project.~~
5. Any permit subject to this section will be ~~effective~~ ***valid*** for two (2) years unless a request for renewal for another two (2) years is received from the transportation, ***utility or entity*** agency within 2 years ***after the date of approval,*** ~~is received from the transportation agency within 2 year period~~, in which case renewal will be automatic to a maximum of 5 renewals. ***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.***[OR-92-07-012PL]

Comments submitted by: Joan Lynch
Jody McCaffree
Janet C. Stoffel
Jan Dilley
Kathy Dodds
Jenmarie Frangopoulos
Katy Eymann
Jonathan Hanson
Richard Knablin
Beverly Segner
JC Williams

Response:

This provision only allows for submittal of an application and does not allow for a use or property takeover. A use should be determined allowable prior to eminent domain being used to obtain a portion of the property. If eminent domain was use to obtain a strip of land and then a use denied, you would have a strip of land that was unusable for any other purpose. This would allow an application to go through the process and, if denied, the property would stay intact. Notification would still be given to all parties as required. This is the same process that the County used in siting its own pipeline. Once the land use approvals were given then negations for easements and properties could be done.

This provision does not give anyone the authority of eminent domain and the utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 would have to provide documentation that they have that right.

There has been no legal argument provided by the opponents for staff to review. There has been some testimony provided regarding the Natural Gas Act which is not relevant as explained above the company or agency relying on this provision to submit an application would be required to justify they have the ability to use the *private right of property acquisition pursuant to ORS Chapter 35.*

Ms. Eymann suggested using Tillamook County Code in place of subsection 5 but she only provides an excerpt and no background on this provision; therefore, it may not be consistent with the intent of Coos County's ordinance. If anything should be changed in this section, it should be deleting subsection 6 all together. It seems that subsection 6 may be a conflict with the extension criteria proposed in § 5.2.600 and § 5.3.360, which is specific to the type of application that is applied for.

There were a few arguments that stated this provision would not be consistent with Coastal Zone Management (CZM) program. Administrative procedures are not found to be enforceable policies under the CZM program. See attached March 13, 2014 memo concerning acknowledgement of Coos County Comprehensive Plan and Zoning Ordinance compliance with the program. Please note, Chapter V of the CCLDO is not listed as an enforceable policy under the CZM because application procedures are not relevant or enforceable criteria in determining compliance with CZM. Therefore, there is nothing

legally presented in this written argument. Therefore, the Board of Commissioners adopted the proposed language changes.

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§ 5.0.200(2) Land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision, including resolution of all appeals under ORS 215.422 (Review of decision of hearings officer or other authority) ***

Comments submitted by: Katy Eymann
Beverly Segner

Response:
To make this clear the word "For" was included before the word "Land". The sentence now reads "For land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision, including resolution of all appeals under ORS 215***" The language is based on ORS 215.427.

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§ 5.0.200(5) If the application is for industrial or traded sector development of a site identified under Section 12 below, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with Section 4 above.

Comments submitted by: Katy Eymann

Response:
Ms. Eymann is correct this should be subsection 11 and not 12. This change was made.

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§ 5.0.250(6) ~~Land use permits that have been approved by the county shall be held in abeyance until the decision is final and all fees are paid. That is, until the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.~~

Comments submitted by: Katy Eymann
Jody McCaffree
Beverly Segner

Response:
The section is a conflict for the calculation of time periods under Expiration and Extension of conditional uses and variances. This provision could be construed to mean the permit would not be valid until all appeals have been resolved, meaning you would not calculate the time period for an extension or expiration until those decisions were made. This is a conflict with how the time periods are calculated under OAR 660-033-0140 and ORS 215.417. To alleviate these procedural issues, the language was removed. A project will not receive

zoning compliance until all appeals have been resolved and the applicable conditions of approval have been met.

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§ 5.0.550 HEARINGS BODY REVIEW OF ADMINISTRATIVE DECISIONS: Notwithstanding Article 5.8 (Appeals), a contested quasi-judicial hearing shall be held to review a Planning Director's decision regarding an administrative conditional use, when, within ~~fifteen~~ **twelve (12)** days of notice of the decision, two or more members of the Planning Commission advise the Planning Director, orally or in writing, of their desire for a public hearing to review the application. Said hearing shall be held pursuant to Article 5.7.

Comments submitted by: Jody McCaffree
Jan Dilley
Kathy Dodds
Katy Eymann
Jonathan Hanson
Richard Knablin
Beverly Segner
Janet Stoffel
William York

Response:
Ms. Eymann's suggestion is inconsistent with the intent of the provision. Administrative decisions (Planning Director decisions) are appealable to the Planning Commission unless pre-empted by the Board of Commissioners. The Board reviewed this section and the suggestions by staff made the following modification:

Notwithstanding Article 5.8 (Appeals), a contested quasi-judicial hearing shall be held to review **all noticeable** Planning Director's decisions ~~regarding an administrative conditional use~~, when, within ~~fifteen (15) days of notice of the decision~~ **the appeal period**, two or more members of the Planning Commission advise the Planning Director, orally or in writing, of their desire for a public hearing to review the application. Said hearing shall be held pursuant to Article 5.7.

This section limits the Planning Commission to call up only conditional uses but did not include variances or other discretionary decisions made by the Planning Director. This is just for call up and does not extend to appeals of a Planning Director's decision. Normally an appeal of a Planning Director's decision is reviewed by the Planning Commission but the Board reserves the right to call the matter directly before them. This allows for flexibility for a hearings officer to meet a timeline.

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§ 5.0.600(4) The Board of Commissioners reserves the right to pre-empt any permit review process or appeal process and hear any permit application or appeal directly. The Board also reserves the right to appoint a Hearings Officer or Hearings Body to hear and consider any permit application or appeal. Notice of appeals of administrative actions shall be promptly forwarded to the Board of Commissioners, which may elect to hear the appeal instead of the Planning Commission.

Comments submitted by: Katy Eymann
Jonathan Hanson
Beverly Segner
JC Williams

Response:
The Board of Commissioner chose not to remove the ability to pre-empt a process. There are special circumstances that warrant the use of this provision especially if the application is approaching the 150 or 120 day time period and a final decision has not been made.

There have been request to have a hearing regarding hiring a hearings officer. When the contract is proposed it is reviewed in a regular board meeting which is a public meeting and contracting laws that are outside of the land use regulations. There is no legal basis for this suggestion. None of the opponents provide suggestions for criteria or how that process would function. There is also no consideration for the 120 or 150 timeline application requirements pursuant to ORS 215.416.

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§5.0.900 NOTICE REQUIREMENTS (ORS 197.763):
§ 5.0.900(1)(c)(x) The Planning Director shall cause notice of the hearing to be mailed to ~~all affected property owners pursuant to this section,~~ **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**

1) **Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;**
2) **Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;**
3) **Within 500 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone**

§ 5.0.900(2)(a)(ii) The owners of record of property as described in ORS 215.416(11)(c), **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**

a. **Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;**
b. **Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;**
c. **Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.**

Comments submitted by: Jody McCaffree
Jan Dilley
Beverly Segner
William York

Response :
The Board of Commissioners cannot base a notification area on one project. Several opponents of this section cite a case that is not within the jurisdiction of Coos County and failed to provide the facts for that case. It is understood that some of the opponents have suggested that all Commercial and Industrial projects (not zones) to have a 1,000 foot notification area from the project rather than be consistent with state law. So, if a pipeline were to be considered an industrial project and it is going through a very large property, such as 1000 acres, the neighbors may not receive notice because the 1000 feet of the project could be contained on the subject property. No notification would be given and that would be less restrictive than state law. The second issue raised was to have a use classified as a hazard before notice can be sent. That is also not consistent with state law and would require an interpretation of every project prior to notification. However, the interpretation would be a discretionary decision that would require notice and an opportunity for appeal. There are no criteria on how to determine if a project itself is industrial or commercial. The consequences of this type of proposal would be that the county would never be able to meet the 120 or 150 day deadline and would be required to refund the applicant half of their fee. The opponents are requesting to hold certain applicants to higher standards than others but they fail to provide any legal basis.

In ORS 197.763 provides for notices of hearings:

1. Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;
2. Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;
3. Within 500 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.

ORS 215.416 Notice of Administrative Decision (no public hearing)

ii. The owners of record of property as described in ORS 215.416(11)(c), **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**
a. Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;
b. Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;
c. Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.

The Board of Commissioner requested that staff review how other counties process notifications. Staff sent out a survey and did some research. Out of 19 of the counties only five have a different type of notification process. Out of the five counties the following changes were made: One county expanded the area for Goal 5 aggregate area, one expanded the notification area for mass gatherings and agri-tourism applications; One county has expanded the Farm/Forest from 750 to 1000; One county expanded the farm/forest to 1500; and One County expanded urban to 300 and rural to 500 but left farm/forest to minimum. Several counties responded that they objected to being more restrictive than state law due to the criticism from the citizens. As far as the recent pipeline case there were no properties that had the urban residential zoning so increasing the 100 boundary would not have gained any notification area in that specific case. The opposition is blending jurisdictions and the Board has to look at Coos County not the City of North Bend.

There have been comments received that imply that staff was mailing notice in a different manner than what the proposed language requires, but this is a false assumption. Staff has been following the notification rules of ORS 197.763 and ORS 215.416 to the current process. The changes in the ordinance list out the exact language from the ORS for clarification. The wording 'affected property owners' refers to adjacent property owners as described in the ORS. The Board of Commissioners chose to mirror state law and not be more restrictive.

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§ 5.0.900(b) The Planning Department shall mail a copy of the staff report to the city, special district, applicant and Hearings Body at least seven (7) days prior to the scheduled public hearing.

Response:
There is no proposed change to this section. This is based on ORS 197.763.

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§ 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

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

1. ~~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 the proposal from beginning or the development from continuing within the approval period; and~~
2. ~~The Planning director finds:~~
   a. ~~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~~
   b. ~~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)~~

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 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. ***Approval of an extension granted under this section 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. (possible delete)***
   d. ***Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.***

e. *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.*

f. *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.*

g. *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.*

Comments submitted by: Jody McCaffree
Susan P. Smith
Katy Eymann

Response:
This proposed change mirrors Oregon Revised Statute and Oregon Administrative Rule for extensions. The change in the language removes any confusion and now it will be based on statute and rule. There have been multiple requests to incorporate the following sentence *"[t]hat 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."* However, there has been no legal argument given that supports leaving this language in place. Staff suggested the Board adopt the proposed language as it is based on the statute and rule as described below:

The language from the ORS and OAR is as follows.

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). [2001 c.532 §2; 2009 c.850 §10; 2013 c.462 §6]

OAR 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).

However, there was some confusion about the following wording *"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."* The language states that administrative decision are not land use decisions, however, the term administrative is a

conflict with the way it is utilized throughout the CCZLDO and CCCP. The Board chose to remove this sentence. It is shown in blue and tagged as a possible deletion. This response applies to § 5.3.360 Extensions for Variances. This allows the County to be in compliance with state law and the CCCP.

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§ 5.3.350(5) Variance regulations in the CCZLDO Article 5.3 shall not apply to Sections 4.11.400 through 4.11460, Chapter VII and Chapter VIII.

Comments submitted by: Susan P. Smith
Jody McCaffree

Response:
This specific variance criteria would not apply to Article § 4.11.400 through 4.11.460, Chapter VII and Chapter VIII. Each identified section or chapter has their own variance criteria. This came up in a LUBA case Sperber v. Coos County LUBA No. 2008-072 which explained the way the county's variance provisions are written and structured there is no reason why both variance standards in Chapter V and in Chapter VII would not apply. The county's ordinance failed to include language specifically explaining why one variance provision would apply and the other would not. Therefore, if there is specific variance criterion that applies or no criterion that applies it must be clear in this section. This is necessary to ensure that it does not become an issue in future decisions.

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§ 5.6.115 SURFACE MINING:
Surface mining use continued under Section 5.6.100 shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

1. **The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and**
2. **The surface mining use was not inactive for a period of 12 consecutive years or more.**

Comments submitted by: Jody McCaffree

Response:
This language is based on 215.130 Application of ordinances and comprehensive plan; alteration of nonconforming use. 215.130 (A) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and (B) The surface mining use was not inactive for a period of 12 consecutive years or more.

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§ 5.7.300 Quasi-Judicial Land Use Hearings Procedures

4. Representatives
   b. Any person presenting ***written*** testimony on behalf of a group, company or any other organization, except an attorney, **consultant, owner, officer, or employee of that group, company, or organization** must enter written evidence into the

record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

i. ***Be written on the group, company, or organization's official letterhead;***
ii. ***Name the person authorized to appear on behalf of the group, company, or organization;***
iii. ***Specify the scope of the authorization; and***
iv. ***Contain the signature of a person with authority to grant the authorization.***

Failure of a person to submit such written authorization shall cause the group, company, or organization to not achieve party status for the purposes of the proceeding and shall preclude the group, company, or organization from having standing to file an appeal.

Comments submitted by: Jody McCaffree
Philip Johnson, Oregon Shores Conservation Coalition
Katy Eymann

Response:
The new language is a reformat and clarification of the current language. The language concerning written testimony came from a prior county counsel who was concerned about the legality of representation and achieving standing. The last paragraph of the proposed language is important to explain the consequences of not providing authorization to appear on behalf of a group, company or any other organization. Currently there is no remedy or consequences provided if someone fails to present the required authorization. This point was brought up by the hearings officer in a past case as a procedural flaw.

The case cited by Oregon Shores and provided the head notes from LUBA below:
24.2.1 Standing - Before LUBA - Generally. Persons who made an appearance during the local government proceedings that led to a city decision that was remanded by LUBA satisfy the ORS 197.830(7)(b) requirement that a person who moves to intervene in a subsequent LUBA appeal of the city's decision following LUBA's remand must have "appeared." The appearance during the initial local government proceedings is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, and it does not matter that the local government refused those persons' attempt to appear during the remand proceedings. South Gateway Partners v. City of Medford, 53 Or LUBA 593 (2006).

The change in the local language proposed does not limit who can appear just how they appear. Anyone can appear on their own behalf but, if you are going to represent someone else or some type of group, company or organization, it needs to be shown that the person appearing has legal authority to do so. Furthermore, the LUBA citation provided seems to deal with remands and the failure of a county to understand that if a party has appeared at any point they have achieved party status. This case is not relevant as it does not provide an explanation regarding representation as used in §5.7.300. The Land Use Board of Appeals explained standing pursuant to ORS 197.830(7)(b) for filing an appeal at the Land Use Board of Appeals but does not cover standing at the local level or an opinion on local standing

issues outside of a remand. There has been no direct link to a statutory provision or case law that prohibits Coos County's language.

There was an opposing comment made concerning having § 5.7.300(4)(b)(i) and not requiring letter head but including a copy of the groups filing with the State to show that the person submitting testimony is qualified to speak. The document may not explain how an individual can represent a group. This was considered but the additional language was not chosen.

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§ 5.7.300(5) Submission of Written Evidence

c. Required Number of Copies: Submission of written materials for consideration shall be provided ~~as follows for hearings before the:~~ ***in the form one original hard copy and one exact copy or one original hard copy and one electronic copy.***

i. ~~Planning Commission—15 copies~~

ii. ~~Board of Commissioners—7 copies~~

Comments submitted by: Philip Johnson, Oregon Shores Conservation Coalition
Susan P. Smith

Response:
The reason for the two copies is to ensure that one paper copy is available for the public to review. This section takes into account people that do not have the ability to submit material electronically. Two copies allows staff to have one document to copy from and one to place in the file for public records and viewing. Again there is no legal basis for changing the language as it is proposed.

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§ 5.8.100 Appeals General
Coos County has established an appeal period of ~~15~~ 12 days from the date written notice of administrative or Planning Commission decision is mailed.

The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article. [OR 04 12 013PL 2/09/05]

Comments submitted by: Jody McCaffree
Jan Dilley
Philip Johnson, Oregon Shores Conservation Coalition
Katy Eymann
Beverly Segner
William York

Response:
There have been multiple statements made regarding the change in the date. Staff explained in the presentation that there would not be an issue with leaving the date at 15 days with the exception of property line adjustments and lawfully created parcels. Property line adjustments

and lawfully created parcels are a simple process with very limited criteria. However, the suggested change conforms with state law as shown below.

ORS 215.416(11) (C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

There was some testimony received from a few people in opposition, who referenced ORS 197.375 which is an Appeal of a decision on an application for expedited land divisions. Coos County does not have a process for expedited land divisions. This is an incorrect reference. The other repeated statement was that the normal appeal period is 21 days. That is unsubstantiated by any law; in fact, in Staff's research had concluded Coos County has one of the highest appeal deadlines. Most counties are either 12 or 14 days; however, some counties allow for comments from adjacent land owners prior to the final planning director decisions.

The Board of Commissioners decided to leave the timeline the same for all applications except property line adjustments and discrete parcels.

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§ 5.8.170 Appeal procedures:

An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section or the reviewing body may dismiss the appeal. The petition must be filed with the appropriate fee as adopted by the Board of Commissioners.

The appeal form shall contain the following:

1. ***The name of the applicant and the County application file number;***
2. ***The name and signature of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single contact representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative;***
3. ***The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160;***
4. ***The date that the notice of the decision was mailed as written in the notice of decision;***
5. ***The nature of the decision and the specific grounds for appeal citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule.***

6. *The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application.*
7. *Appeals of Planning Director's decision will be de novo;*
8. *Appeals of Planning Commission's or appointed Hearings Officer(s) decision shall be reviewed by the Board of Commissioners or Hearings Officer if the Board of Commissioners so chooses. The Board of Commissioners shall, provided there has been an initial evidentiary hearing:*
    a. *Decline to hear the matter and enter an order affirming the lower decision; or*
    b. *Accept the appeal and:*
        i. *Make a decision on the record without argument;*
        ii. *Make a decision on the record with argument;*
        iii. *Conduct a hearing de novo; or*
        iv. *Conduct a hearing limited to specific issues.*
    c. *In the decision, the Board shall affirm, modify, or reverse the lower decision, and accept any or all of the findings and conditions in the Hearings Body decision, or modify or adopt new findings and conditions on a permit.*
    d. *If the Board allows argument only on the record, no new evidence shall be submitted.*
    e. *Any legal issues not specifically raised are considered waived for purposes of appeal to the Land Use Board of Appeals (LUBA).*
    f. *Where a hearing is limited to specific issues, any evidence or argument submitted must be relevant to the specific issue.*
    g. *All items to be submitted to the County must actually be received by the County Planning Department no later than 5:00 p.m. on the on the last day of the appeal period. If the last day of the appeal period falls on a weekend or County holiday, then the item must actually be received by the County Planning Department no later than 12:00 p.m. on the next County business day following the deadline date. All items to be mailed to another party must be postmarked no later than the end of the appeal period.*
    h. *The decision of the Board of Commissioners shall not be final for the purpose of appeal until reduced to writing and signed by the Board.*

Comments submitted by: Jody McCaffree
Philip Johnson, Oregon Shores Conservation Coalition
Katy Eymann
Beverly Segner

Response:
The Board of Commissioners chose to change the language to read *"An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section. If an appellant fails to correctly fill out the form, and there has already been a public hearing on the matter, the Board of Commissioners may deny the appeal based on failure to comply with this section. In*

the event the appeal is denied based on a failure to comply with this section, a refund of unexpended fees shall be returned to the appellant."

In the case of an appeal of a Planning Director's decision, the hearing is de novo and new issues can be brought forward. The details of the appeal should be included at the beginning so they may be addressed in the staff report. This will save staff time and allow for better understanding of the issues that are being appealed. There is no legal reason given by Oregon Shores other than an inconvenience on the part of the potential appellant. The language is corrected under Subsection 8; however, staff agrees that it could be clarified, if an issue is not raised at the local level it is considered waived. This is referred to as the "raise it or waive it" law.

There was some testimony received that miss cites procedures for court of appeals and LUBA appeals. These procedures do not apply to local land use appeals. In urban areas all local processes must be completed within 120 days and outside of the urban area 150 days. There has been no legitimate legal argument provided. Having clear and concise language is beneficial to all parties. ORS 215 regulates local land use processes including timelines. In a first appeal or public hearing, the matter is always reviewed as a de novo hearing meaning that any issue can be raised even if it was not identified in the initial appeal. However, any subsequent appeals may be restricted to an issue or the record based on the appeal that was filed.

Ms. Eymann stated other appeal bodies only require notice of appeal. However, she fails to identify what other appeal bodies she is referring to. The staff reviewed other counties such as Washington, Douglas and Deschutes counties, and they require specific reasons for appeals. Their appeal period is only 12 days. Other appeal bodies may be a comparison of local hearings appeal boards (County) with the State (LUBA) but again there is not enough information to allow a response from the reviewing body.

The instructions for filing an appeal have been laid out in a manner such that everyone understands they will not be able meet the requirements. This is in line with Goal 1 as it provides a clear process to help citizens build a record.

Additionally, there was a suggestion to extend the time lines of subsection (g) to 5:00 p.m. the next business day. However, the appellant would have already been provided additional time due to the holiday or the weekend. There is no legal reason provide for this request.

The argument about Goal 1 is not valid in this situation. Goal 1, titled Citizen Involvement, states the purpose is to develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process. The County did develop a program and a committee to address citizen participation.

Furthermore, citizens can provide testimony in any form on their own behalf, which this provision does encourage. Therefore, the Board adopted the change as discussed.

~~SECTION 5.8.200. Appeals of Administrative Decisions.~~

~~1. Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee. Upon receipt of an appeal, the Department shall schedule a public hearing before the Hearings Body and provide public notice as provided in Section 5.0.900(A). The hearing on appeal of an administrative decision shall be de novo (ORS 215.416).~~

~~2. The appeal hearing procedure shall be in accordance with Section 5.7.300. [OR-04-12-013PL, 2/09/05]~~

Comments submitted by: Philip Johnson, Oregon Shores Conservation Coalition

Response:
Oregon Shores stated that removal of § 5.8.200 was confusing because § 5.8.170 did not include a reference to § 5.7.300 for hearing procedures. Staff agrees that § 5.8.170 should be clarified to include the cross reference to § 5.7.300. Suggested change: "***Appeals of Planning Director's decision will be de novo and processed in accordance with § 5.7.300***"; . The Board accepted staff's suggestion.

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§ 5.10.100 Compliance determinations:
An application for Compliance Determination (CD) are required to be submitted to the Planning Department with the elements described in § 5.10.200. Once the application is received the Planning Staff will review the CD against the applicable zoning district to determine if additional reviews or notifications are required.*

Comments submitted by: Jody McCaffree

Response:
Currently, when someone requests a zoning compliance, staff looks at the property and the special considerations and makes a determination if the property is in compliance and, if so, a zoning compliance letter is then issued. Sometimes, however, discretion has to be applied in making this determination, which is an appealable action. This is not accounted for currently and a process needs to be formed. If discretion is used in making this type of decision it will be appealable. This is to ensure that the county is following the law for discretionary decisions.

Conclusion
Staff has made some suggested changes for clarity in this document. The opponents to the changes failed to make valid legal arguments for their testimony. In addition, there has been some case law provided by Ms. Eymann and Ms. McCaffree. Staff has printed out the final opinions on those cases for the Board of Commissioner to review as part of the record. The case law deals with comprehensive plan amendments and the Board of Commissioners has not proposed any comprehensive plan amendments. These are all ordinance text amendments. Any argument that has been raised has been addressed by explaining why the changes were necessary. The Board instructed staff to make the changes as discussed in the hearing as well as review the document one more time for typos. The final changes can be found at Attachment A to Ordinance 14-09-012PL.

Coos County Planning Department
Coos County Courthouse Annex, Coquille, Oregon97423
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
Jill Rolfe, Planning Director

PUBLIC HEARING ON APPEAL
Appeal File No. AP-15-01
Application File Nos. ACU-15-07
1:30 PM on June 26, 2015
Owen Building Large Conference Room
201 N. Adams, Coquille OR 97423

You have received this notice because you are either a party to one of the following application(s), an adjacent property owner, special district, or person with interest. Please read all the information contained in this notice as this matter may affect you. The location of the subject property is identified on the attached map(s). For copies of the appeal and other materials related to these appeals please visit the website at:
http://www.co.coos.or.us/Departments/Planning.aspx

Date of Notice: June 5, 2015
Applicant: Richard Allan, Marten Law, representing Pacific Connector Gas Pipeline, LP
Appellants: Kathleen Eymann, Attorney at Law, representing Jody McCaffree

The applicant requested approval for a two (2) year extension of the development approval period for County File No. HBCU-10-01 (REM-11-01). The 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 was appealed on April 30, 2015 by filing the appropriate form and fee.

APPLICABLE CRITERIA Coos County Zoning and Land Development Ordinance (CCZLDO)
Article 5.8 Appeal Requirements
Article 5.7 Public Hearings
§ 5.2.600 Expiration and Extension of Conditional Uses (1) Extensions on Farm and Forest (Resource Zoned property.
§ 5.2.600 Expiration and Extension of Conditional Uses (2) Extensions on non-resource zoned property.

Conduct of Hearing

1. Hearings Officer will commence hearing.
2. Hearings Officer will disclose any conflicts of interest, *ex parte* contacts, and biases, abstentions or challenges to impartiality.
3. Staff will provide the relevant criteria.
4. Testimony from applicant/proponents of the project.
5. Testimony from opponents.
6. Neutral Parties.
7. Questions from the Hearings Officer.
8. Hearings Officer will announce whether the record will be closed; record will be held open; or the public hearing will be continued.
9. Rebuttal by the proponent/applicant (if there is no continuance).

This is the initial evidentiary hearing in this matter. Prior to the conclusion of the hearing, any participant may request an opportunity to present additional evidence, arguments, or testimony regarding the application, and the Hearings Officer shall grant the request by either continuing the hearing or leaving the record open for additional written evidence, arguments or testimony for at least seven days.

"RAISE IT OR WAIVE IT": Failure to raise an issue in a hearing, in person, or by letter, or failure to provide statements or evidence sufficient to afford the decision-maker an opportunity to respond to the issue, precludes appeal to the Land Use Board of Appeals (LUBA) based upon that issue. This means that in order to appeal the County's decision to LUBA based upon a particular issue, you must raise that issue before the close of the record in this matter. The failure of the applicant to raise constitutional or other issues relating to proposed conditions of approval with sufficient specificity to allow the County to respond to the issue before the close of the record in this matter precludes any action for damages in Circuit Court.

Submission of Written of Testimony and Evidence
All written testimony and evidence should be provided to Planning Staff by **June 18, 2015 at 5:00 p.m.** to allow for transmittal to the hearings officer. However, written testimony and evidence may be submitted at the hearing. To provide testimony by mail please address to Planning Department, Coos County Courthouse, 250 N. Baxter, Coquille, Oregon 97423, or testimony may be deliver to the Planning Department at 225 N. Adams., Coquille, Oregon.

Submission of written materials for consideration shall be provided in the form of one original hard copy and one exact copy or one original hard copy and one electronic copy. The County may, at its sole discretion, reject any materials that do not contain the requisite number of copies. It may be requested that the County make the requisite number of copies subject to the submitter paying the applicable copy charges. E-mail testimony may be submitted; however, it is the responsibility of the person submitting the testimony to verify it has been received by Planning Staff by the applicable Deadline. All written testimony must contain the name of the person(s) submitting it and current mailing address for mailing of notice. All written evidence or testimony received prior to the close of the evidentiary record will be included in the evidentiary record. The decision shall be based on the application submittal and information on record.

A staff report discussing the application in relation to the identified approval criteria will be available seven days before the public meeting. 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.

For more information, the primary contact in this matter is Jill Rolfe, Planning Director. You may contact her or any other staff member at 541-396-7770 or by e-mail at planning@co.coos.or.us. Information will be posted on the website at http://www.co.coos.or.us/Departments/Planning/2015Applications.aspx

COOS COUNTY PLANNING DEPARTMENT

Jill Rolfe, Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner I
Alex Murphy, Planning Technician
Troy May, Planning Assistant

POSTED & MAILED ON: June 5, 2016 **POST THROUGH: June 26, 2015**

STAFF
Jill Rolfe, Planning Director
Amy Dibble, Planner I
Alex Murphy, Planning Technician
Troy May, Planning Assistant

FILE#: AP-15-01
REPORT DATE: June 19, 2015
HEARING DATE: June 26, 2015
HEARING TIME: 1:30 P.M.

STAFF REPORT FOR APPEAL

APPLICANT: Richard Allan, Marten Law, representing Pacific Connector Gas Pipeline, LP

APPELLANTS: Kathleen Eymann, Attorney at Law, representing Citizens Against LNG, Inc.

REQUEST: The applicant requested approval for a one (1) year extension of the development approval period for County File No. HBCU-10-01 (REM-11-01). The 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 was appealed on April 30, 2015 by filing the appropriate form and fee.

PROPERTY LOCATION: 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

STAFF CONTACT: Jill Rolfe, Planning Director

APPLICABLE CRITERIA
Coos County Zoning and Land Development Ordinance (CCZLDO)

Article 5.8 Appeal Requirements
Article 5.7 Public Hearings
§ 5.2.600 Expiration and Extension of Conditional Uses (1) Extensions on Farm and Forest (Resource Zoned property.
§ 5.2.600 Expiration and Extension of Conditional Uses (2) Extensions on non-resource zoned property.

I. BACKGROUND

The applicant requested approval for a one (1) year extension of the development approval period for County File No. HBCU-10-01 (REM-11-01). The 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.

On September 8, 2010, the Board of Commissioners (Board) adopted and signed Order No. 10-08-045PL (File No. HBCU-10-01) approving a conditional use permit for the development of a natural gas pipeline and associated facilities, subject to conditions. The decision was subsequently appealed to the Land Use Board of Appeals which resulted in a remand back to the County for additional review. On March 13, 2012, the Board addressed and resolved two grounds for the remand, and approved findings supporting approval of a valid conditional use permit by adopting

Order No. 12-03-018PL (File No. REM-11-01). The decision was finalized after the 21 day appeal period expired without any further appeals.

On March 7, 2014, Pacific Connector filed a request to extend its original ACU approval for two additional years from April 2, 2014 to April 2, 2016. Due to reasons for which the applicant was not responsible, Pacific Connector has been unable to obtain all federal approvals necessary to begin construction. The Planning Department approved the extension request on May 12, 2014 and it was subsequently appealed (AP-14-02). The final decision approving the extension for an additional year was adopted by the Board of Commissioners on October 21, 2014, Final Decision and Order No. 14-09-063PL for a one-year extension expiring April 2, 2015. On November 12, 2014, Jody McCaffree and John Clarke (Petitioners) filed a Notice of Intent to Appeal the Board's decision to LUBA. On January 28, 2015, the deadline for Petitioners to file their Petition for Review, Petitioners instead voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed the Petitioners' appeal, McCaffree v. Coos County, (LUBA No. 2014-102). Accordingly, the Board's decision to extend Pacific Connector's conditional use approval until April 2, 2015 was final and not subject to further appeal.

On March 16, 2015 Pacific Connector filed for another extension. Staff reviewed the matter and rendered a decision on that matter on April 14, 2015. The approval was appealed on April 30, 2015 by Kathleen Eymann, Attorney at Law, representing Citizens Against LNG, Inc. The appellant filed the appeal timely and correctly. The appellant has standing. The requirements of Article 5.8 have been followed.

A public hearing was scheduled and notice was properly sent pursuant to Article 5.7 of the CCZLDO.

The application was submitted on March 16, 2015 and deemed complete on April 8, 2015. The 150 day deadline to render a decision is on August 5, 2015. The applicant may grant an extension to the timeline pursuant to ORS 215.472.

II. FINDINGS MADE BY STAFF TO THE APPLICABLE REVIEW 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 for the entire ACU. 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 March 16, 2015, prior to the expiration date of April 2, 2015. The applicant has provided the reasons that prevented the applicant from beginning or continuing development within the approval period.

The applicant has explained that the reason that the project has not begun is because the Federal Energy Regulatory Commission's (FERC) final authorization has not been issued. The applicant provides a detailed explanation of the FERC process and the anticipated decision date for that permit. The project cannot begin construction without a final decision from FERC as well as other permitting agencies as listed in the applicant's Exhibit E. 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.

The last consideration for the extension of a conditional use approval in the resource zone is that the criteria for the decision have not changed. The application criteria pursuant to which the approval was originally granted have not changed. There has been some additional language added to the resource section of the ordinance as well as some renumbering but the language of the criteria has not been altered.

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 ACU.

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 March 16, 2015, prior to the expiration date of April 2, 2015.

The pipeline crosses both resource and non-resource zones, requiring the applicant to request an extension under both subsections 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 and the requested one-year extension shall be granted on all non-resource zoning districts the pipeline was approved to cross.

II. ARGUMENTS RAISED BY THE APPELLANT

A. Coos County Zoning and Land Development Ordinance (CCZLDO) only allows extensions "where applicable criteria for the decision have not changed." § 5.2.600.

The criteria governing development near the Southwest Oregon Regional Airport (Airport) was changed by Coos County on February 3. 2015. See Final Order AM-14-10

The pipeline is located within the overlay zone of the Airport. §4.11.400

The Applicant has failed to comply with:

§4.11.430 – Applicant has failed to establish that the current application for a land use decision was provided to the airport sponsor and the Department of Aviation.

§4.11.440 – Applicant has failed to provide a required map or drawing showing the pipeline in relation to the airport base map and elevation profiles and a plot plan showing the location of the pipeline and other information.

$4.11.445 – Applicant has failed in its application to demonstrate the pipeline will meet the requirements of this section regarding glare §4.11.445(3); and electrical interference, §4.11.445 (6).

RESPONSE: The appellants cites § 5.2.600 and states the extensions can only be allowed where applicable criteria for the decision have not changed. This is a factual criteria but the Southwest Oregon Regional Airport overlay does not extend into the resource zone in which the pipeline is located. Therefore, it is not applicable criteria. The criteria that is cited is specific to resource zoning which is listed in Chapter 4 as Forest, Forest Mixed Use or Exclusive Farm Use. See table below (page IV-1 of the CCZLDO) and map of airport overlay with the pipeline shown.

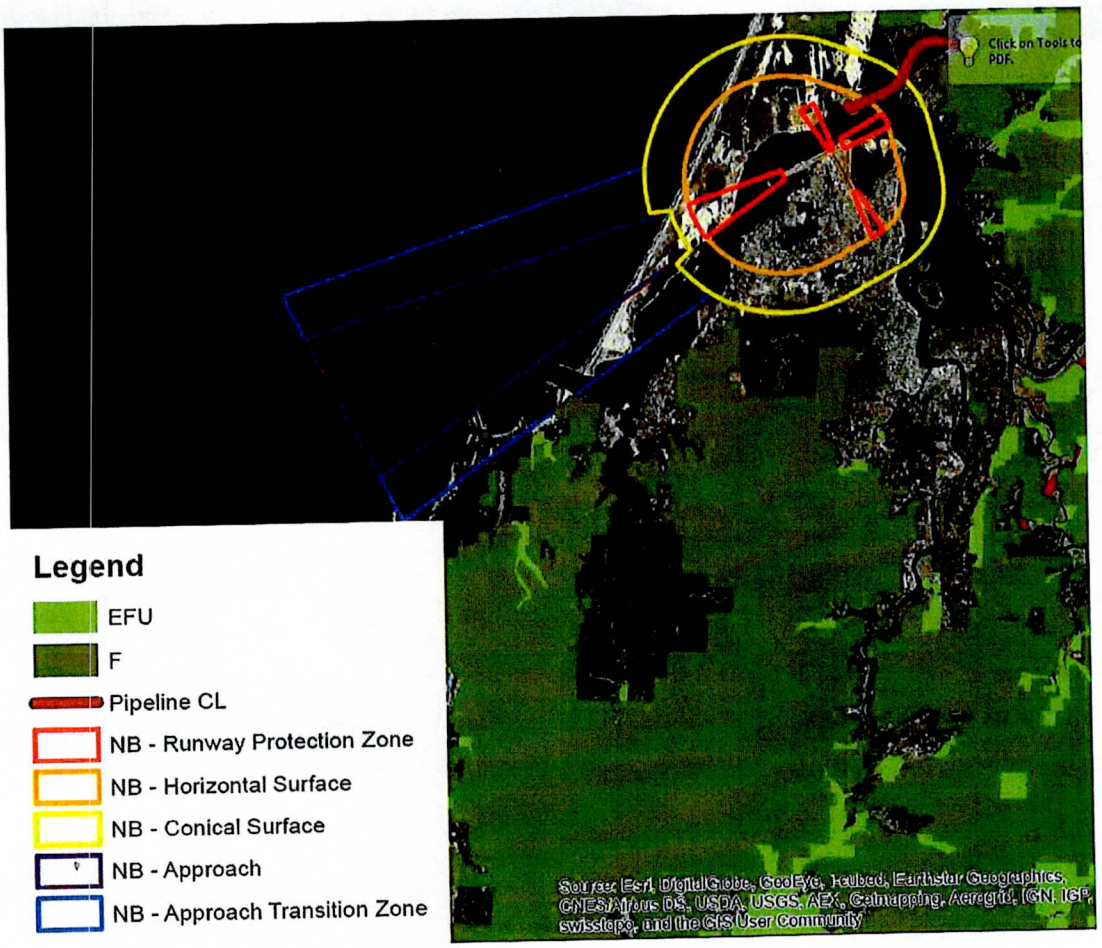
CHAPTER IV

BALANCE OF COUNTY ZONES, OVERLAYS & SPECIAL CONSIDERATION

This chapter applies to all non-estuary zoning districts. Article 2.1 has definitions listed that apply to this article. Chapter 5 contains all application process and procedures.

ZONING TABLE

Category	Type	Zoning District	Abbreviation	Page
Balance of County Zoning				
Residential				
	Urban	Urban Residential-1	UR-1	
		Urban Residential-2	UR-2	IV-7
		Urban Residential Multi-Family	UR-M	
	Rural	Rural Residential-2	RR-2	
		Rural Residential-5	RR-5	IV-19
Mixed Commercial-Residential				
	Urban	Controlled Development	CD	IV-33
	Rural	Rural Center	RC	IV-47
Commercial and Industrial				
	Urban/Rural	Commercial	C-1	IV-58
		Industrial	IND	IV-69
		Airport Operation	AO	IV-77
Recreation				
		Recreation	REC	IV-82
Resource				
		Forest	F	
		Forest Mixed Use	FMU	IV-90
		Exclusive Farm Use	EFU	IV-107
South Slough				
		South Slough	SS	IV-129
Minor Estuary and Shoreland				
		Minor Estuary and Shoreland	MES	IV-132
Bandon Dunes				



As shown above the Forest and Farm portions of the property are show in solid color. All other zones that are non-resource zones are not colored. This clearly shows that Staff did review the overlay to determine that the applicable criteria had not changed. The criterion for non-resource zoned property does not have the same requirement; therefore, staff did not include the airport overlay.

B. Additionally, the Applicant has made significant changes to the proposed Pipeline route and configuration in applications to other governmental agencies. These changes have not been approved by Coos County. Appellants are concerned that this Administrative Decision will be interpreted to permit Applicant's proposed changes to the pipeline route and configuration in the area west of Haynes Inlet, in violation of the following provisions of the CCZLDO and CBEMP.

§4.11.435 – The pipeline constitutes a physical hazard to air navigation

CBEMP and especially CBEMP Policy 5– Applicants have not demonstrated that the project complies with the CBEMP. It adversely affects the Coos Bay Estuary, does not satisfies a need and it unreasonably interferes with public trust rights since it no longer has a FERC certificate of Pubic Convenience and Necessity.

ORS 455.447 (4) – Applicant must demonstrate that consultation with the State Department of Geology and Mineral Industries has occurred before final approval of any plan to build a hazardous facility.

RESPONSE: Staff is only reviewing the extension of the approved pipeline and cannot review an extension for a portion of pipeline that has not been applied for. This argument is not valid to this review. The applicable

criteria are found under extension to conditional uses. Staff is not reviewing additional CBEMP policies only an extension to the approved application. Staff did take into consideration the changes to the airport overlay but again this is not applicable criteria. The applicant is not required to address new criteria through the extension process.

C. Finally, the Applicant has made significant changes to the purpose and need for the pipeline when the pipeline was changed to use for export of natural gas. The change of Condition #25 to allow export is subject to timely appeal before the Oregon Supreme Court.

RESPONSE: This was dismissed and is no longer pending; therefore, this is not a valid argument.

IV. NOTIFICATION

The Planning Department mailed individual written notice of the decision to the owners of record of all property located as required in Section 5.0.900.

COOS COUNTY PLANNING DEPARTMENT

Jill Rolfe, Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner I
Alex Murphy, Planning Technician
Troy May, Planning Assistant

Attachments: Application
Appeal
Exhibit 1 – Letter from Ron Foord
Authorization from Kathleen P. Eymann, Attorney at Law for Jody McCaffree to Appear

MARTEN LAW

March 16, 2015

Privileged and Confidential
Attorney Work Product/Client Communication

VIA EMAIL AND HAND DELIVERY

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

Re: Pacific Connector Gas Pipeline
Coos County Orders 10-08-045 PL; 12-03-018PL; 14-09-063PL
Conditional Use Permit Extension Request

Dear Ms. Rolfe:

This letter is written on behalf of Pacific Connector Gas Pipeline, LP (Pacific Connector) regarding its request to extend Pacific Connector's Conditional Use Permit (CUP) for the Pacific Connector Gas Pipeline (Pipeline). For the reasons set forth in the enclosed application and written narrative, the effective date of the original CUP was April 2, 2012. Under the relevant provisions of the Coos County Zoning and Land Development Ordinance (CCZLDO) and Coos County Final Decision and Order No. 14-09-063PL, which extended Pacific Connector's original two-year approval by one additional year, Pacific Connector's CUP, as previously extended, will expire on April 2, 2015.

County code provisions mirroring a state regulation provide the standard for evaluating extension requests in Farm and Forest (Resource) zoned areas. CCZLDO § 5.2.600(1)(b); OAR 660-033-0140(2). Specifically, the Director may grant an extension up to 12 months where:

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 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.

CCZLDO § 5.2.600(1)(b); OAR 660-033-0140(2). Additional one-year extensions "may be authorized where applicable criteria for the decision have not changed." CCZLDO § 5.2.600(1)(c); OAR 660-033-0140(4).

D - 503 . 241 . 2643 | E - rallen@martenlaw.com | 1001 SW Fifth Ave, Suite 1500, Portland, OR 97204

On non-resource lands, "The Director shall grant an extension of up to two (2) years so long as the use is still listed as a condition use under current zoning regulations." CCZLDO § 5.2.600(2)(a).

For the reasons described in this letter and the enclosed application and written narrative, Pacific Connector's extension request meets the requisite standards and should be granted.

Thank you for your attention to this request.

Sincerely,

Richard H. Allan

cc: Pacific Connector Gas Pipeline, LP

Coos County Planning Department
Land Use Application

Official Use Only

FEE: _____
Receipt No. _____
Check No./Cash _____
Date _____
Received By _____
File No. _____

Please place a check mark on the appropriate type of review that has been requested.

- [x] Administrative Review
- [ ] Final Development Plan (BDR)
- [ ] Hearings Body Review
- [ ] Variance

An **incomplete** application **will not** be processed. Applicant is responsible for completing the form and addressing all criteria. Attach additional sheets to answer questions if needed. Please indicated not applicable on any portion of the application that does not apply to your request.

A. Applicant:

Name: Pacific Connector Gas Pipeline, LP Telephone: (503)241-2643
Address: c/o Marten Law PLLC, Attn: Richard H. Allan, 1001 SW Fifth Ave., Ste. 1500
City: Portland State: OR Zip Code: 97204

B. Owner:

Name: Williams Pacific Connector Gas Operator, LLC Telephone: (801) 583-8800
Address: c/o Blaine Pritchett, PCGP Project Manager, 295 Chipeta Way
City: Salt Lake City State: UT Zip Code: 84108

C. As applicant, I am (check one): Please provide documentation.

- [ ] The owner of the property (shown on deed of record);
- [ ] The purchaser of the property under a duly executed written contract who has the written consent of the vendor to make such application (consent form attached).
- [ ] A lessee in possession of the property who has written consent of the owner to make such application (consent form attached).
- [ ] The agent of any of the foregoing who states on the application that he/she is the duly authorized agent and who submits evidence of being duly authorized in writing by his principal (consent form attached).
- [x] N/A See Condition of Approval 20 of Final Decision and Order No. 12-03-018 PL dated March 13, 2012

D. Description of Property: See original Application materials in File No. HBCU 10-01

Township _____ Range _____ Section _____ Tax Lot _____

Tax Account _____ Lot Size _____ Zoning District _____

E. Information (please check off as you complete)

- [x] 1. Existing Use See Final Decision and Order No. 12-03-01-018PL (Mar. 13, 2012)
- [x] 2. Site Address N/A
- [x] 3. Access Road N/A
- [x] 4. Is the Property on Farm/Forest Tax Deferral N/A
- [x] 5. Current Land Use (timber, farming, residential, etc.) See Final Order No. 12-03-01-018PL
- [x] 6. Major Topography Features (streams, ditches, slopes, etc.) See Final Order No. 10-08-045PL
- [x] 7. List all lots or parcels that the current owner owns, co-owns or is purchasing which have a common boundary with the subject property on an assessment map. N/A
- [x] 8. Identify any homes or development that exists on properties identified in #7. N/A
- [x] 9. A copy of the current deed of record. N/A
- [x] 10. Covenants or deed restrictions on the property, if unknown contact title company. N/A
- [x] 11. A detailed parcel map of the subject property illustrating the size and location of existing and proposed uses, structures and roads on an 8½" x 11" paper to scale. **Applicable distances must be noted on the parcel map along with slopes.** (See example plot map) See Copy of PCGP Overview Sheet (Figure 1).

F. Proposed use and Justification

Please attach an explanation of the requested proposed use and **findings (or reasons)** regarding how your application and proposed use comply with the following the Coos County Zoning and Land Development Ordinance (LDO). Pursuant to the LDO, this application may be approved only if it is found to comply with the applicable criteria for the proposed use. Staff will provide you with the criteria; however, staff cannot provide you with any legal information concerning the adequacy of the submitted findings, there is no guarantee of approval and the burden rests on the applicant. (You may request examples of a finding)

Applicable Criteria: The application requests County approval of a one (1) year extension for the Pacific Connector Gas Pipeline (PCGP) approval in the Board of Commissioners' Final Decision and Order No. 10-08-045PL (September 8, 2010), as ratified by the Final Decision and Order No. 12-03-018PL (March 13, 2012), as extended by Final Order No. 14-09-063PL (Oct. 23, 2014). The applicable criteria are set forth in the attached application narrative. Please see Condition 20 to Final Order No. 12-03-018PL regarding the procedural requirement of producing signatures of owners of affected properties.

G. **Authorization:**

All areas must be initialed by all applicant(s) prior to the Planning Department accepting any application unless the statement is not applicable. If one of the statements, below is not applicable to your request indicated by writing N/A.

RGHA

I hereby attest that I am authorized to make the application for a conditional use and the statements within this application are true and correct to the best of my knowledge and belief. I affirm that this is a legally created tract, lot or parcel of land. I understand that I have the right to an attorney for verification as to the creation of the subject property. I understand that any action authorized by Coos County may be revoked if it is determined that the action was issued based upon false statements or misrepresentation.

RGHA

ORS 215.416 Permit application; fees; consolidated procedures; hearings; notice; approval criteria; decision without hearing. (1) When required or authorized by the ordinances, rules and regulations of a county, an owner of land may apply in writing to such persons as the governing body designates, for a permit, in the manner prescribed by the governing body. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service. The Coos County Board of Commissioners adopt a schedule of fees which reflect the average review cost of processing and set-forth that the Planning Department shall charge the actual cost of processing an application. Therefore, upon completion of review of your submitted application/permit a cost evaluation will be done and any balance owed will be billed to the applicant(s) and is due at that time. By signing this form you acknowledge that you are response to pay any debt caused by the processing of this application. Furthermore, the Coos County Planning Department reserves the right to determine the appropriate amount of time required to thoroughly complete any type of request and, by signing this page as the applicant and/or owner of the subject property, you agree to pay the amount owed as a result of this review. If the amount is not paid within 30 days of the invoice, or other arrangements have not been made, the Planning Department may chose to revoke this permit or send this debt to a collection agency at your expense.

RGHA

I understand it is the function of the planning office to impartially review my application and to address all issues affecting it regardless of whether the issues promote or hinder the approval of my application. In the event a public hearing is required to consider my application, I agree I bear the burden of proof. I understand that approval is not guaranteed and the applicant(s) bear the burden of proof to demonstrate compliance with the applicable review criteria.

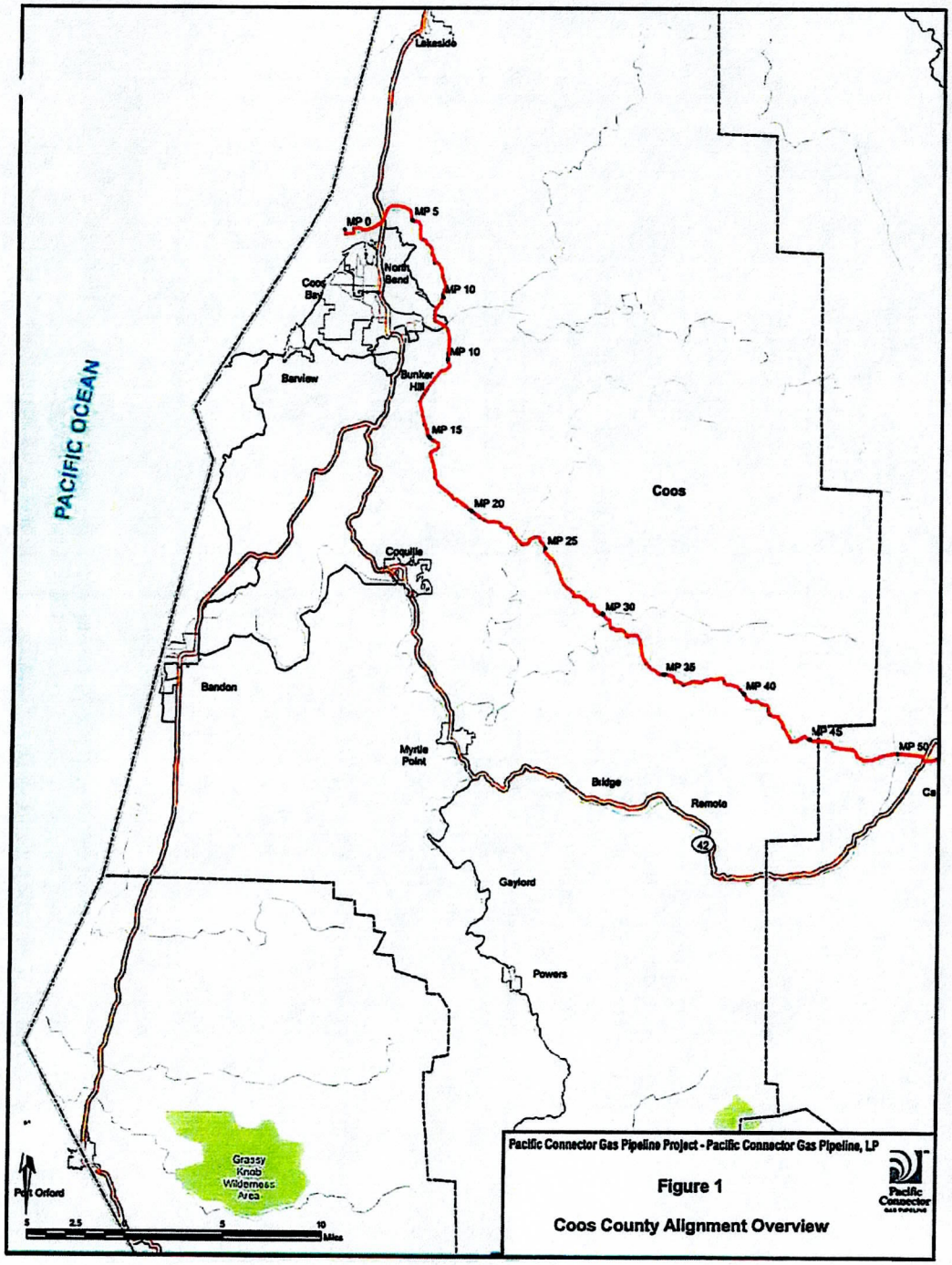
RGHA

As applicant(s) I/we acknowledge that is in my/our desire to submit this application and staff has not encouraged or discouraged the submittal of this application.

Richard A Hall

Applicant(s) Original Signature

Applicant(s) Original Signature


PACIFIC OCEAN
Lakeside
MP 0
MP 5
North Bend
Coos Bay
MP 10
MP 10
Barview
Bunker Hill
MP 15
MP 20
Coos
MP 25
Coquille
MP 30
MP 35
MP 40
Bandon
MP 45
MP 50
Myrtle Point
Bridge
Remote
42
Gayford
Powers
Grassy Knob Wilderness Area
Port Orford
5
2.5
0
5
10
Miles
Pacific Connector Gas Pipeline Project - Pacific Connector Gas Pipeline, LP
Figure 1
Coos County Alignment Overview
Pacific Connector

BEFORE THE PLANNING DIRECTOR
FOR COOS COUNTY, OREGON

In the Matter of a Request for a One-Year Extension of the Development Approval Period for County File No. REM-11-01	**NARRATIVE IN SUPPORT OF THE APPLICATION FILED BY PACIFIC CONNECTOR GAS PIPELINE, LP**

I. Introduction

Pacific Connector Gas Pipeline, LP, a Delaware limited partnership (Pacific Connector), submits this application to Coos County (County) requesting approval of a one-year extension of the development approval period for Pacific Connector's conditional use permit and utility facility necessary for public service authorization in County File No. HBCU-10-01, Final Order No. 10-08-045PL (attached as Exhibit A), as amended on remand, County File No. REM 11-01, Final Order 12-03-18PL (attached as Exhibit B). The 2010 and 2012 approvals are referred to collectively as the CUP. The CUP authorizes construction and operation of a natural gas pipeline and associated facilities on approximately 49.72 linear miles within Coos County, extending from Jordan Cove Energy Project's LNG Terminal to the alignment section in adjacent Douglas County.

On March 7, 2014, Pacific Connector filed a request to extend its original CUP approval for two additional years from April 2, 2014 to April 2, 2016. As described further below, the Board of Commissioners ultimately approved a one-year extension expiring April 2, 2015. File No. ACU 14-08/AP 14-02, Final Order No. 14-09-063PL (Oct. 21, 2014) (attached as Exhibit C). Due to reasons for which it is not responsible, Pacific Connector has been unable to obtain all federal approvals necessary to begin construction.

This narrative explains how this extension request satisfies the applicable requirements of the Coos County Zoning and Land Development Ordinance (CCZLDO). Accordingly, Pacific Connector requests the Director's approval of this request.

II. Background

As you are aware, Pacific Connector's CUP is for the purpose of constructing and operating a natural gas pipeline to provide gas to Jordan Cove Energy Project's liquefied natural gas (LNG) terminal and upland facilities. As established in Pacific Connector's original land use application and subsequent proceedings, the Pipeline is within the exclusive siting and authorizing jurisdiction of the Federal Energy Regulatory Commission (FERC), requiring a FERC-issued Certificate of Public Convenience and Necessity (Certificate) prior to construction. Under the federal Coastal Zone Management Act, however, a land use consistency determination

is also required within the state's Coastal Zone Management Area (CZMA), precipitating Pacific Connector's application for local land use approvals.

A. The 2010/2012 Coos County CUP

On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, approving Applicant's request for a CUP authorizing development of the Pipeline and associated facilities, subject to certain conditions. Exhibit A. The decision was subsequently appealed to, and remanded by the Oregon Land Use Board of Appeals (LUBA). On March 13, 2012, the Board addressed and resolved two grounds from remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL. Exhibit B. The March 13, 2012 decision became final when the 21 day appeal window expired and no appeals were filed on April 2, 2012. *See* Exhibit C at 1 ("[I]f Coos County grants a one-year extension of the CUP, PCGP would have until April 2, 2015 to begin construction on the pipeline").

B. The FERC Approval Process

Over the past several years, Pacific Connector has been pursuing the necessary approvals for the Pipeline. Pacific Connector received a FERC Certificate on December 17, 2009. *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 129 FERC ¶ 61, 234 (2009). However, due to changes in the natural gas market and Jordan Cove's reconfiguration of its facility from an LNG import facility to an LNG export facility, FERC issued an order on April 16, 2012 vacating Pacific Connector's Certificate despite objections of Pacific Connector. *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 139 FERC ¶ 61,040 (2012) (attached as Exhibit D).

Due to FERC's decision to revoke Pacific Connector's FERC Certificate, it has been necessary for Pacific Connector to seek new FERC approval for the Pipeline as reconfigured to serve Jordan Cove's proposed LNG export facility. In June 2012, Pacific Connector initiated the mandatory FERC "pre-filing" process to seek a new FERC Certificate. FERC Docket No. PF12-17-000. Following a public scoping process initiated by FERC that lasted until October 29, 2012, Pacific Connector filed a new application with FERC on June 6, 2013. FERC Docket No. CP-13-492-00.

FERC, however, has yet to complete the environmental review of the project needed for a full evaluation of Pacific Connector's application. On November 7, 2014, FERC issued a Draft Environmental Impact Statement (DEIS) for the Pipeline, with public comment held open until mid-February 2015. FERC's revised schedule for the project now indicates that completion of the Final EIS is scheduled for June 12, 2015, with a FERC decision on Pacific Connector's

application expected by September 10, 2015. *Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015) (attached as Exhibit E). A list of the major federal, state, and local approvals needed for the Pipeline and the Jordan Cove facility included by FERC in the DEIS is attached as Exhibit F.

C. The Amendment of Condition 25

Pacific Connector's CUP originally contained a condition which prohibited the use of the CUP "for the export of liquefied natural gas" (Condition 25). Exhibit A at 154. After the initial FERC authorization for the Pipeline was vacated due to the reconfiguration of the Jordan Cove facility, Pacific Connector applied to Coos County on May 30, 2013 for an amendment to the CUP requesting deletion or modification of Condition 25 as necessary for the use of the Pipeline to serve the Jordan Cove LNG export facility. After a revised application narrative was submitted, the application was deemed complete on August 23, 2013, and the County provided a public hearing before a hearings officer. On February 4, 2014, the County Board of Commissioners adopted the hearings officer's decision and approved Pacific Connector's requested modification of Condition 25. Final Order No. 14-01-006PL, HBCU-13-02 (Feb. 4, 2014).

Project opponents appealed the County's Condition 25 Decision to LUBA, which upheld the County decision on July 15, 2014. *McCaffree et al. v. Coos County et al.*, __ Or LUBA __ (LUBA No. 2014-022 July 25, 2014). After further appeal of the LUBA decision, the Oregon Court of Appeals affirmed LUBA's decision without opinion in December 2014. *McCaffree et al. v. Coos County et al.*, 267 Or App 424 (Dec. 3, 2014).

D. The First Extension of the Coos County CUP

Meanwhile, in light of the withdrawal of its FERC Certificate and the consequent impossibility of obtaining all federal approvals necessary to initiate construction within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original CUP approval for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

On local appeal, the Board of Commissioners invoked its authority under CCZLDO § 5.0.600 to appoint a hearings officer, Andrew H. Stamp, to conduct the initial public hearing for the appeal and make a recommendation to the Board. After a public hearing, an extended open record period for written evidence and testimony, and final written argument from the applicant,

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. In light of limitations contained in OAR 660-033-0140 applicable to extensions in farm- and forest-zoned lands, the Hearings Officer recommended approving the extension request for only one year, extending the CUP approval from April 2, 2014 to April 2, 2015.

The Board of Commissioners held a public meeting to deliberate on the matter on September 30, 2014. At the hearing, the Board voted to accept the Hearings Officer's recommended approval as it was presented. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for one year, until April 2, 2015. Exhibit C at 1, 37.

On November 12, 2014, Jody McCaffree and John Clarke (Petitioners) filed a Notice of Intent to Appeal the Board's decision to LUBA. On January 28, 2014, the deadline for Petitioners to file their Petition for Review, Petitioners instead voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed Petitioners' appeal. *McCaffree v. Coos County*, __ Or LUBA __, LUBA No. 2014-102 (Feb. 3, 2015) (attached as Exhibit G). Accordingly, the Board's decision to extend Pacific Connector's conditional use approval until April 2, 2015 is final and not subject to further appeal.

E. Consideration of Alternative Alignments

In response to requests from FERC, Pacific Connector has also evaluated and secured local Coos County approval for various alternative alignments to certain sections of the originally-proposed route – the Brunschmid/Stock Slough alternative alignment and the Blue Ridge alternative alignment. *See* File No. HBCU- HBCU-13-04, Final Order No. 14-01-007PL (Feb. 4, 2014) (approving application for Brunschmid/Stock Slough alternative alignment originally filed on August 19, 2013); File No. HBCU-13-06, Final Order No. 14-09-062PL (Oct. 21, 2014) (approving application for Blue Ridge alternative alignment originally filed on December 3, 2013). The ultimate Pipeline alignment to be constructed by Pacific Connector will be determined by FERC.

F. Douglas County CZMA Approvals

Pacific Connector has also undertaken efforts to secure all other needed local approvals for the Pipeline. For example, in Douglas County, Pacific Connector applied to remove a condition of its prior Douglas County land use approval within the Douglas County CZMA which limited the use of the pipeline to natural gas import purposes only. After several hearings, the Douglas County Planning Commission approved the removal of the import-only condition on March 20, 2014, and the County Board of Commissioners declined review and affirmed the

Planning Commission decision on April 30, 2014. Project opponents appealed that decision to LUBA, which – after resolution of record objections, briefing on the merits, and oral argument – affirmed the County's decision on November 12, 2014. *McLaughlin et al v. Douglas County*, __ Or LUBA __ (LUBA No. 2014-049, Nov. 12, 2014). LUBA's decision has been appealed, and is currently pending at the Oregon Court of Appeals. *McLaughlin et al. v. Douglas County*, A158313.

III. Procedure for Considering Whether Extensions Should be Granted

Under CCZLDO § 5.2.600, the Planning Director may approve extension requests as an Administrative Action under the local code. *See* Final Decision and Order 14-09-012PL, AM-14-11 (attached as Exhibit H). Extension decisions are subject to notice as described in CCZLDO § 5.0.900(2) and appeal requirements of CCZLDO § 5.8 for a Planning Director's decision.

IV. Substantive Criteria for Determining Whether Extension Should be Granted

The County recently brought the CCZLDO into conformity with a state Land Conservation and Development Commission rule regarding extensions of land use approvals on Farm and Forest (Resource) zoned lands. *See* Exhibit H. In Farm and Forest (Resource) zoned areas, the Director may grant an extension up to 12 months where:

v. An applicant makes a written request for an extension of the development approval period;
vi. The request is submitted to the county prior to expiration of the approval period;
vii. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
viii. 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.

CCZLDO § 5.2.600(1)(b); OAR 660-033-0140(2).

Further, additional one-year extensions "may be authorized where applicable criteria for the decision have not changed." CCZLDO § 5.2.600(1)(c); OAR 660-033-0140(4).

On non-resource zoned property, "The Director shall grant an extension of up to two (2) years so long as the use still listed as a conditional use under current zoning regulations." CCZLDO § 5.2.600(2)(a).[1]

[1] Pacific Connector notes that the then-current CCZLDO § 5.0.700 at issue in the prior extension proceedings has been deleted from the Coos County code and replaced with the above-

The CUP authorizes the Pipeline to be developed on both resource-zoned and non-resource zoned land. Therefore, the Applicant takes the conservative approach and requests a one-year extension for the entire CUP.

V. Pacific Connector's Compliance with the Applicable Standards for a CUP Extension Request on Farm and Forest Lands

Pacific Connector's application and attachments demonstrate compliance with the code requirements at CCZLDO 5.2.600(1) and OAR 660-033-0140(2) for granting extension requests for land use approvals on farm and forest lands.

a. Applicable criteria for the County's decision to approve the Conditional Use Permit have not changed.

The County previously granted a one-year extension of the CUP from April 3, 2014 until April 2, 2015. Exhibit C at 1, 37. The LUBA appeal challenging the County's extension decision was dismissed after Petitioners withdrew their appeal. Exhibit G. The County's prior extension decision is not subject to further appeal. Accordingly, this request is for an additional one-year extension until April 2, 2016.

Under the local code and by state regulation, "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." CCZLDO § 5.2.600(1)(c) (Exhibit H); OAR 660-033-0140(4). While the County standards for approving extensions have recently been modified, none of the applicable substantive approval criteria for the Pipeline have changed since the original County decision to approve the Pipeline in 2010.[2]

The Pipeline is permitted on EFU lands as a "utility facility necessary for public service" under CCZLDO 4.9.450(C) and ORS 215.283(1)(c). Exhibit A at 115–123. The applicable County criteria at CCZLDO § 4.9.450(C) have not changed since the County's original 2010 decision to approve the CUP. *Id.*

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referenced provisions at CCZLDO § 5.2.600. Exhibit H. Accordingly, whether there have 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" is not an approval criterion applicable to this extension request. *Compare* CCZLDO § 5.2.600 (Exhibit H at V-15 to V-16) *with* § 5.0.700 (Exhibit C at 6).

[2] While the County amended its criteria for evaluating extension applications in January 2015, these amendments did not affect the criteria on which the "decision" – the initial land use approval – was based. *See* Exhibit H.

The Pipeline is permitted as a "new distribution line" under CCZLDO § 4.8.300(F) and OAR 660-006-0025(4)(q). *See* Exhibit A at 80–86. The applicable County criteria at CCZLDO § 4.8.300(F) have not changed since 2010. *Id.* Accordingly, an additional one year extension may be authorized for the Pipeline pursuant to CCZLDO § 5.2.600(1)(c).

While the County may therefore grant the extension for the prior approvals on Farm and Forest resource lands based solely on the absence of any changes to relevant County approval criteria, this is the first extension that Pacific Connector has requested under the amended extension criteria at CCZLDO § 5.2.600. Exhibit H. Accordingly, in an abundance of caution, this narrative next addresses the applicable criteria for evaluating initial extension requests under CCZLDO § 5.2.600(1)(b).

b. Pacific Connector has made a written request for an extension of the development approval period.

This written narrative and application specifically request an extension of the development approval period. CCZLDO § 5.2.600(1)(b)(i).

c. Pacific Connector's request was submitted to the County prior to the expiration of the approval period.

As noted above, the CUP originally was scheduled to expire on April 2, 2014. Exhibit C at 1–2. On March 7, 2014, Pacific Connector applied for an extension of the approval period. As detailed above, a one-year extension (to April 2, 2015) was approved, and that approval is now final and not subject to further appeal. This written narrative and application have been submitted prior to the April 2, 2015 expiration of the extended CUP. CCZLDO § 5.2.600(1)(b)(ii).

d. The applicant has stated reasons that prevent the applicant from beginning development within the approval period.

In its approval of Pacific Connector's first extension request, the County found it "clear that the 'applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.'" Exhibit C at 9. Specifically, the County found that "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." *Id.*

The County's prior analysis continues to apply. While Applicant has filed a new application with FERC to authorize the Pipeline, FERC has not yet reached a decision on Pacific Connector's application and does not expect to reach a decision before the CUP's first extension period has expired. Exhibit E. As noted above, in November 2014, FERC issued its DEIS for the Pipeline, with the public comment period open until February 13, 2015. According to FERC's most recent schedule, the Final EIS for the project is scheduled for issuance on June 12, 2015. *Id.* FERC's final decision on Pacific Connector's request for a Certificate of Public Convenience and Necessity is now anticipated to be made by September 10, 2015. *Id.*

As the County previously recognized in its decision to grant Pacific Connector's initial extension request, Exhibit C, Pacific Connector needs federal approvals for the Pipeline and cannot commence project construction or operation until such federal approval is received. While Pacific Connector has made significant efforts and progress towards obtaining federal approval for the Pipeline, the federal process cannot be completed before the permit expiration date of April 2, 2015. Accordingly, Pacific Connector has stated valid reasons why it has been prevented from initiating development during the period of the initial extension. CCZLDO § 5.2.600(1)(b)(iii).

e. The County should determine that Pacific Connector was unable to begin or continue development during the approval period for reasons for which Pacific Connector was not responsible.

As noted above, the Pipeline is an interstate natural gas pipeline that requires FERC authorization. Accordingly, until Pacific Connector obtains a FERC Certificate for the Pipeline, it cannot begin construction or operation in Coos County or elsewhere along the Pipeline route. On April 16, 2012, however, FERC issued an order vacating Pacific Connector's Certificate despite objections of Pacific Connector. Exhibit D. FERC's order was not based on actions by Pacific Connector; rather FERC's order was based upon the decision by Jordan Cove Energy Project, LP to modify its plans "to make use of the Jordan Cove LNG terminal as an export facility for domestically produced natural gas." *Id.* at 7–9. Although Pacific Connector is a different company and did not make the decision to shift to export, FERC vacated its authorization of the Pipeline because the Commission viewed the Pipeline as integral to the LNG terminal project. *Id.* at 10–11. Due to this FERC action, many of the other state and federal agencies terminated work on permit applications. FERC's action was not within the control of Pacific Connector and it created delays for the entire permitting process.

The County previously determined that FERC's revocation of the original FERC Certificate was a valid reason, outside of Pacific Connector's control, which prevented Pacific Connector from beginning development during the initial approval period (prior to April 2, 2014). Exhibit C at 9. This prior determination is not at issue in this case. Instead, for the

purposes of the extension request now before the County, the County must determine whether there are reasons for which Pacific Connector was not responsible which prevented the company from beginning Pipeline development during the first extension period (April 3, 2014 to April 2, 2015).

After its initial federal authorization was revoked by FERC, Pacific Connector applied for a new FERC Certificate in June 2013. However, FERC's review is still ongoing, and until the environmental review is complete and a Final Environmental Impact Statement is issued, FERC cannot make a final decision on the merits of Pacific Connector's application or issue a Certificate for the Pipeline. As noted above, FERC has indicated that it expects to issue its Final EIS for the project in June 2015, with its final decision on Pacific Connector's application to follow by September 10, 2015. Exhibit E. Pacific Connector has provided all information requested by FERC, and the federal agency's lengthy review period is outside Pacific Connector's control.

As the attached Exhibit F indicates, there are dozens of major federal, state, and local permits, approvals, and consultations needed before the Jordan Cove and Pacific Connector projects can begin construction. While Pacific Connector has worked to move the Pipeline through the federal, state, and local processes as expeditiously as possible, this rigorous regulatory environment does not lend itself to fast-track approval. In addition to the ongoing federal FERC process, the Applicant has applied for local Coos County approvals for alternative alignments requested by FERC, as well as Douglas County land use approval within the CZMA. While these alternative alignments and other jurisdictions are not at issue in this proceeding, they further demonstrate Pacific Connector's diligence in pursuing all necessary federal, state, and local approvals necessary to initiate construction as expeditiously as possible.

Accordingly, for reasons for which it is not responsible, Pacific Connector has been unable to initiate construction and vest its conditional use during the initial CUP extension period from April 3, 2014 to April 2, 2015. The applicant has been diligently pursuing all necessary local, state, and federal approvals, but has not yet received its needed FERC Certificate. For the foregoing reasons, the County should find that Pacific Connector was unable to begin construction during the first extension period for reasons outside its control. CCZLDO § 5.2.600(1)(b)(iv).

VI. Pacific Connector's Compliance with the Applicable Standards for a CUP Extension Request on Non-Resource Lands

The recent amendments to the CCZLDO also provide the County standard for extensions of land use approvals on non-resource lands: "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." CCZLDO 5.2.600(2)(a) (Exhibit H). On all non-resource lands, the Pipeline use is still listed as a

conditional use under current zoning regulations, and the Director should grant Pacific Connector's request for an extension of the CUP for one year.

The County's land use approval criteria applicable to the Pipeline have not changed since the County's original decision to approve the Pipeline in 2010. Exhibit A at 87. In the F zone, the Pipeline was approved as a "new distribution line," permitted as a conditional use. In the EFU zone, the Pipeline was approved as a "utility facility necessary for public service," permitted outright under both the local code and state law. *Id.* at 115–23; CCZLDO 4.9.450(C); ORS 215.283(1)(c). The CCZLDO provisions providing the applicable approval criteria have not changed.

The approval standards for the Pipeline in non-resource zoned lands have also not changed. In the RR-2 and RR-5 zoning districts, the Pipeline was approved as a "utility facility not including power for public sale," a conditional use under the CCZLDO. Exhibit A at 36–45; CCZLDO § 4.2.400; Table 4.2c. In the IND zoning district, the Pipeline was permitted outright as a "utility facilituy not including power for public sale." Exhibit A at 45–47; CCZLDO § 4.2.600; Table 4.2e. None of the relevant approval standards for the Pipeline have changed.

VII. Conclusion

For the reasons set forth in this narrative and on the basis of the evidence included herewith, the Director should grant the request and extend the development approval period for the Pipeline by one (1) year to expire on April 2, 2016.

Attachments

- Exhibit A: Final Order No. 10-08-045PL, HBCU-10-01 (Sept. 8, 2010)
- Exhibit B: Final Order No. 12-03-018PL, REM 11-01 (Mar. 13, 2012)
- Exhibit C: Final Order No. 14-09-063PL , ACU 14-08/AP 14-02 (Oct. 21, 2014)
- Exhibit D: *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 139 FERC ¶ 61,040 (2012)
- Exhibit E: *Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015)
- Exhibit F: Major Permits, Approvals, and Consultations for the JCE & PCGP Project, Table 1.5.1-1, *Jordan Cove Energy and Pacific Connector Gas Pipeline Project Draft EIS* (Nov. 7, 2014)
- Exhibit G: *McCaffree v. Coos County*, __ Or LUBA __, LUBA NO. 2014-102 (Feb. 3, 2015)
- Exhibit H: Final Order No. 14-09-12PL, AM-14-11 (Jan. 20, 2015)

Exhibit A

Final Order No. 10-08-045PL, HBCU-10-01 (Sept. 8, 2010)

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

IN THE MATTER OF CONSOLIDATED CONDITIONAL USE APPLICATIONS HBCU-10-01 SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE	FINAL DECISION AND ORDER NO. 10-08-045PL

WHEREAS, on Pacific Connector Gas Pipeline filed consolidated permit applications to develop 49.72 miles of gas pipeline and associated facilities on property described in Exhibit "B" of this Order; and

WHEREAS, on March 2, 2010, pursuant to its authority under CCZLDO §5.0.600, the Board of Commissioners (Board) voted 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. On April 5, 2010, the Board appointed Andrew H. Stamp to serve as the Hearings Officer.

WHEREAS, on May 20, 2010, Hearings Officer Stamp conducted a public hearing on this matter and at the conclusion of the hearing the record was held open for 21 days to accept additional written evidence to rebut evidence presented at the hearing, followed by a 7-day period for accepting surrebuttal testimony, followed by a 7-day period for the applicant to submit final written argument.

WHEREAS, on July 16, 2010, Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board to approve the applications subject to the imposition of conditions.

WHEREAS, on August 3, 2010, at 1:30 p.m., the Board met to deliberate on the matter and made a tentative decision to accept the Hearings Officer's recommended approval subject to amended findings and conditions.

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 8th day of September 2010.

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
COOS COUNTY, OREGON

FILE NO. HBCU-10-01
SEPTEMBER 8, 2010

Exhibit "A"
Order. 10-08-045PL

TABLE OF CONTENTS

I. SUMMARY OF PROPOSAL AND PROCESS

A. Summary of Proposal.

This consolidated application is made by Pacific Connector Gas Pipeline Company, LP ("Pacific Connector" or "applicant") with respect to the Coos County segment of its proposed interstate natural gas pipeline known as the Pacific Connector Gas Pipeline ("PCGP" or "pipeline"). This is the fifth in a series of interrelated land use applications for the development of the Oregon International Port of Coos Bay's multi-berth Oregon Gateway Marine Terminal, a deep-draft moorage facility on the North Spit of Coos Bay, and Jordan Cove Energy Project's ("JCEP") associated Upland LNG Terminal. Both were previously approved by Coos County and have now received Federal Energy Regulatory Commission ("FERC") approval.[1]

The applicant seeks land use approval from Coos County ("County") for the 49.72-mile segment of the PCGP located within Coos County. The County alignment runs from JCEP's LNG Terminal upland from the Port's Marine Terminal to the alignment segment in adjacent Douglas County (mileposts [MPs] 0.00 to 45.70).

Pacific Connector has received authorization from FERC under Section 7c of the Natural Gas Act ("NGA") to construct, install, own, operate, and maintain an interstate natural gas pipeline, the PCGP, that will transport gasified natural gas from the Jordan Cove LNG terminal in Coos Bay to existing interstate natural gas transmission pipelines near Malin, Oregon and points in between. The 36-inch diameter pipeline will be a total of 234 miles and will provide natural gas to markets throughout the region.[2]

Within the applicable 49.72-mile segment of the PCGP that will be located within the County, the PCGP will cross through five Coos County zoning designations: Forest (F), Exclusive Farm Use (EFU), Rural Residential 2 (RR-2), Rural Residential 5 (RR-5), and Industrial (IND). Additionally, the PCGP will cross 14 Coos Bay Estuary Management Plan (CBEMP) zoning districts: Water Dependent Development Shorelands (6-WD), Development Shorelands (7-D, 19-D), Water Dependent Development Shorelands (8-WD), Conservation Aquatic (8CA, 20CA, 21CA), Natural Aquatic (13A-NA, 11-NA), Rural Shorelands (11-RS, 18-RS, 20-RS, 21-RS), and Development Aquatic (19B-DA) (see Tables 1 and 2).

Within the forest (F) zone, the pipeline use is characterized as a new gas distribution line with no greater than a 50 foot right of way. Within the agricultural (EFU) zone, the pipeline use

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[1] The County previously approved JCEP's LNG Terminal (Case File No. HBCU-07-03), the Port's Marine Terminal and Access Waterway (Case File No. HBCU-07-04) and the related Port applications for Sand Storage and Sorting Yard (Case File Nos. ACU-08-10 and CL-08-01) and Kentuck Mitigation Site (Case File Nos. AM-09-03/RZ-09-02/HBCU-09-01).

[2] The route mileposts no longer reflect the actual length of the PCGP because based on FERC's National Environmental Policy Act (NEPA) process, which resulted in a Final Environmental Impact Statement, Pacific Connector incorporated an alternative within Coos County into the original route. The environmental analysis was tied to the original mileposts, and the mileposts remain unchanged from the route filed with FERC in September 2007. Therefore, MP 11.36 R (revised) merges with the 2007-filed route at MP 7.67.

is characterized as a utility facility necessary for public service. Within the RR and IND zones, the pipeline use is characterized as a utility facility not including power for public sale. Finally, within the CBEMP, the pipeline use is characterized in the respective management units as a low-intensity utility.

The project consists of two distinct sets of components, the first permanent and the second temporary: (1) the pipeline itself, including its permanent 50-foot right-of-way, block valve assemblies, and two access roads; and (2) the temporary construction areas necessary to construct the pipeline. The pipeline consists of the 36 inch subsurface gas pipeline, four mainline block valves and associated facilities. The temporary construction areas (construction areas) include: the 95-foot temporary construction easement, temporary extra work areas, uncleared storage areas, two temporary access roads, and temporary construction storage yards. Environmental alignment sheets, which have been provided with the application as Exhibit 1, depict the pipeline alignment overlaid on a 2006 aerial photograph. The environmental alignment sheets provide land ownership and parcel information along the pipeline route. While the alignment sheets generally depict the FERC-authorized route, the applicant has stated that "there may be minor changes in the alignment within a given property boundary to accommodate a landowner request or to avoid specific construction obstacles." *See* Application Narrative, at p. 3.

As discussed above, Pacific Connector proposes the construction and operation of a 49.72-mile segment of the PCGP within the County. The pipeline would originate at milepost (MP) 0.0 at the Jordan Cove Receipt Meter Station located within the Jordan Cove LNG terminal site, on the North Spit of Coos Bay. The pipeline would extend east from the LNG terminal, passing through the Weyerhaeuser Linerboard site, and entering Haynes Inlet at about MP 1.7. The pipeline would be installed for about 2.4 miles in Coos Bay, exiting to the north of the Glasgow peninsula at about MP 4.1. It would then turn southeast to cross Kentuck Slough at about MP 6.3, and proceeding to Graveyard Point. The pipeline would cross under the Coos River at about MP 8.1 and then will cross Catching Slough at MP 11.11. Between about MPs 12.8 and 26.1, the pipeline would generally follow the existing Bonneville Power Administration (BPA) powerline. The pipeline would then proceed in a southeasterly direction and follow existing logging roads, where feasible. The pipeline would exit the County at MP 45.7. As noted, where feasible, the PCGP alignment is co-located with existing rights-of-ways and corridors to limit the areas of new disturbance.

As a result of the subsurface nature of the pipeline, the majority of the impacts from the pipeline will occur during the construction process. Generally throughout the project, Pacific Connector proposes to utilize a 95-foot wide temporary construction easement and associated temporary extra work areas and uncleared storage areas, with a 50-foot permanent right-of-way. The temporary construction easement configuration is required to accommodate the necessary clearing and grading activities to prepare for construction, temporarily store spoil materials for construction, and to provide a passing lane during construction for movement up and down the construction area. The temporary extra work areas and uncleared storage areas are needed because of site-specific characteristics of the construction easement. Pacific Connector has limited the width of the temporary construction easement and the size of the temporary extra work areas and uncleared storage areas to the greatest extent practicable.

There are two locations within the County where it will be necessary to create temporary access roads in order to construct a portion of the pipeline. These two temporary access roads will be located south of the Coos River in the 20RS zoning district, and will be restored to preconstruction conditions following completion of construction.

Pacific Connector will also need to create two permanent access roads providing access to the above-ground block valve facilities. These will be graveled private roads that are necessary for the operation and maintenance of the pipeline. Pacific Connector has located the final placement of the block valves adjacent to existing roads to minimize the need for creating new access roads and the length of the two new permanent access roads.

The pipeline is allowed as a hearings body conditional use within the EFU, RR-2, and RR-5 zones, an administrative conditional use within the F zone, and a use permitted outright in the IND zone. The pipeline is also allowed in the 15 zones that it crosses within the CBEMP as a permitted use, subject only to consistency with various general conditions.

B. Process

1. Summary

The review timeline for this application is as follows:

Feb. 12, 2010	Application submitted and accepted.
March 12, 2010	Application deemed incomplete.
April 19, 2010	Application deemed complete.
April 30, 2010	County mailed public notice.
May _13_, 2010	County Planning Department issued Staff Report.
May 20, 2010	Public Hearing before Hearings Officer
June 10, 2010	First Open Record Period Closed (rebuttal testimony only).
June 17, 2010	Second Open Record Period Closed (for surrebuttal testimony only
June 24, 2010	Applicant's Final Argument
July 8, 2010	County Planning Staff issued Supplemental Staff Report.
July 16, 2010	Hearings Officer's Recommendation.
Aug. 3, 2010	Deliberations and Decision by Board of Commissioners
September 8, 2010	Adoption of Final Decision by Board of Commissioners
September 25, 2010	150 Day Deadline.

2. Board Call-Up and Delegation to Hearings Officer

On March 2, 2010, pursuant to its authority under CCZLDO 5.0.600, the Board voted 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. On April 5, 2010, the Board appointed Andrew Stamp to serve as the Hearings Officer.

3. Public Hearing and Open Record Periods

On May 20, 2010, Andrew H. Stamp, Hearings Officer, held a public hearing on this matter. At the commencement of the hearing, he stated he did not have any bias, conflicts of interest, or *ex parte* contacts to disclose. He asked whether anyone wanted to challenge his impartiality. One member of the public inquired who was paying for his services. Mr. Stamp responded, he was being paid directly by the County pursuant to a contract. Further questions ensued regarding whether the applicant was paying Mr. Stamp. Planning Director Patty Evernden clarified the Hearings Officer was under contract with the County and the applicant was reimbursing the County for the administrative cost of reviewing the application, including the expense of retaining the Hearings Officer. Mr. Stamp advised this was a typical arrangement for local jurisdictions. Ultimately, no one formally challenged the Hearings Officer's impartiality to conduct the hearing and issue a recommendation on the application.

Mr. Stamp read the required notices of ORS 197.763 into the record and gave detailed instructions regarding presentation of testimony. He then called for the staff report. The Planning Director summarized the proposed development and staff report. After this presentation, the applicant and its representatives presented testimony, and members of the public (some in favor, some in opposition, and some who were neutral) presented testimony. At the conclusion of public testimony, the applicant presented rebuttal testimony to respond to various questions and issues raised by the public. At the conclusion of all oral testimony, the Hearings Officer left the record open for 21 days for the submission of additional written evidence to address testimony presented at the hearing, followed by a 7-day period for surrebuttal testimony, and a final 7-day period for the applicant to submit its final written argument.

Several parties submitted additional arguments and evidence into the record during the open record period. On July 16, 2010, the Hearings Officer delivered his opinions and recommendations to the County Board of Commissioners in a document entitled *Coos County Hearings Officer Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners*. Therein, the Hearings Officer recommended the Board approve the application, subject to proposed conditions.

4. Board of Commissioners' Deliberations

On August 3, 2010, at 1:30 p.m., the Board convened a public meeting to discuss the Hearings Officer's recommendation and deliberate on the application Commissioners Kevin Stufflebean, Bob Main, and Nikki Whitty were present. The Board opted to act, pursuant to its authority under CCZLDO 5.0.600.C, to review only the evidence, data, and testimony submitted prior to the close of the record by the Hearings Officer. The Board did not accept new evidence or allow additional public comment. At the commencement of the meeting, Assistant County Counsel Oubonh White inquired whether any members of the Board had any conflicts of interest or *ex parte* communications to disclose since the time the applications were filed. Commissioner Whitty disclosed she had a short conversation with Will Wright at the fair.When she realized he wanted to discuss the applications, she responded the issues were part of this proceeding and ended the conversation. All three Commissioners disclosed they attended the May 20, 2010

public hearing on this matter to observe. No other disclosures were made. No member of the public challenged the *ex parte* disclosures or the participation of any member of the Board in this matter.

Commissioner Stufflebean then called for the staff presentation. The Planning Director summarized the proposal and process to date. At the conclusion of this presentation, the Board discussed the application and the Hearings Officer's recommendation. These discussions included various questions to and responses from Planning staff. At the conclusion of these discussions, Commissioner Whitty made a motion, seconded by Commissioner Main, to tentatively approve the applications based upon the evidence in the record and to direct staff to work with the applicant to prepare findings of fact, conclusions of law, and conditions of approval consistent with the Board's discussion, for the Board's consideration at a later date. The Board approved the motion, 3-0.

C. Record and Scope of Review

1. Record Before the Board

The record before the Board consisted of the *Coos County Hearings Officer Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners* for HBCU-10-01 dated July 16, 2010; the written and oral testimony presented by the applicant, including the application materials; the written and oral testimony presented by other parties to the Hearings Officer, except where such testimony was specifically rejected by the Hearings Officer at the hearing as irrelevant; the various staff reports prepared by County Planning Department dated May 13, 2010, July 8, 2010, and July 28, 2010; and the entire Planning Department file, which was physically before and not rejected by the Board.

2. Scope of Review

When addressing the criteria and considering evidence in the record, the Board used the standard of review required for land use decisions. The applicant must provide substantial evidence in the whole record to demonstrate that all approval standards are met. When evidence conflicted, the Board reviewed the entire record to see if the undermining evidence outweighed the applicant's evidence. In addition, where the ordinance provisions were ambiguous, the Board applied the *PGE v. BOLI* methodology, discussed *infra* and as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), to arrive at what it finds to be the correct construction. In so doing, the Board attempted to rely, as much as possible, on past interpretations adopted by the Board, while still making sure that the interpretation is affirmable.

The Board believes that the conclusions made herein would be affirmed if appealed. The Board has fairly wide latitude under state law to draw its own conclusion about the evidence. In addition, with regard to issues of local code interpretation, state law establishes a very deferential standard of review, ORS 197.829(1). *Compare Clark v. Jackson County*, 313 Or 508 (1992); *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003); *Siporen v. Medford*, 231 Or App 585, 220 P3d 427 (2009), *rev allowed* 348 Or 19 (2010).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. The Opponents' "Alternative Route" Arguments Must Fail Because Only FERC has Jurisdiction to Regulate the Route of a Gas Pipeline or to Control Safety Standards Related to Gas Pipelines.

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

Nonetheless, the Board finds that any local land use process that would seek to determine the route of the pipeline or otherwise purport to take action inconsistent with FERC's determination in the "Certificate of Public Convenience and Necessity" would likely be preempted[3] by federal law. A discussion of this issue is included in Appendix A. For purposes of this application, however, the Board may only approve or deny the application that the applicant has submitted. The Board does not have the ability to propose major changes to the route, although minor detours (< 400 feet off centerline) are possible. In any event, the Board finds that there is no substantial evidence in the record to support any significant changes to the alignment that has been carefully analyzed and approved through the FERC process.

2. Landowner Consent.

There was considerable discussion concerning the applicant's ability to submit a land use application for a pipeline that will cross private property, when the landowner does not give consent to the application. The only applicable code section requiring landowner consent is

[3] The preemption doctrine is rooted in the Supremacy Clause of the Constitution, Article VI, clause 2, which states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Preemption doctrine consists of four different types: (1) "express preemption," resulting from an express Congressional directive ousting state law (*Morales v. Trans World Airlines, Inc.*, 504 U.S.374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)); (2) "implied preemption," resulting from an inference that Congress intended to oust state law in order to achieve its objective (*Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)); (3) "conflict preemption," resulting from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963)); and (4) "field preemption," resulting from a determination that Congress intended to remove an entire area from state regulatory authority (*Fidelity Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)). *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04, 103 S.Ct. 1713, 1721-22, 75 L.Ed.2d 752 (1983). The present case involves express and field preemption.

CCZLDO §5.0.150.[4] The requirement that a property owner or contract purchaser sign the application is a mandatory prerequisite to a properly filed application. However, as discussed below, it is procedural requirement that can be deferred to a later stage in the approval process.

At the onset, the Board notes that other local governments' codes have adopted specific exceptions to the general requirement that an owner must sign the land use application. For example, in *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004), LUBA addressed a code provision that contained a specific exception to the signature requirement aimed at "[a]pplications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the Application."[5] *See also Kurihashi Partners v. City of Beaverton*, 46 Or LUBA 791 (2004) (noting similar provision contained in the City of Beaverton Code). However, the CCZLDO contains no similar type of exception.

In a sense, the owner signature requirement may be viewed as a "completeness" issue, insomuch as an application may not be "complete" until the required signatures are present. In this case, staff had already deemed the application complete. Staff defends its decision to accept

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[4] SECTION 5.0.150 is entitled "APPLICATION REQUIREMENTS" and provides, in relevant part:

> "(Article 5.6 of this ordinance Site Plan Review Requirements and Chapter 6 Land Divisions have additional submittal requirements)
>
> Applications for development or land use action shall be filed on forms prescribed by the County and shall include sufficient information and evidence necessary to demonstrate compliance with the applicable criteria and standards of this Ordinance and be accompanied by the appropriate fee. An application shall not be considered to have been filed until all application fees have been paid. All applications shall include the following:
>
> Applications shall be submitted by the property owner or a purchaser under a recorded land sale contract. "Property owner" means the owner of record, including a contract purchaser. The application shall include the signature of all owners of the property. A legal representative may sign on behalf of an owner upon providing evidence of formal legal authority to sign. * * * *. (Emphasis Added).

[5] Deschutes County Code ("DCC") 22.08.010 provides, in relevant part:

> "A. For the purposes of DCC 22.08.010, the term 'property owners' shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.
> "B. Applications for development or land use actions shall:
> "1. Be submitted by the property owner or a person who has written authorization from the property owner as defined herein to make the application;
> "C. The following applications are not subject to the ownership requirement set forth in DCC 22.08.010(B)(1):
> "1. Applications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the Application[.]"

the applications, despite the lack of an owner's signature, based on precedent set in earlier cases. As stated in the Supplemental Staff Report dated June 10, 2010:

> The County treated the PCGP consolidated applications in the same manner as the County's prior pipeline applications (2002 and 2003) which were also submitted without owner signatures. The County determined the LDO's application signature provision was not intended to address applications for linear utility facilities involving numerous ownerships where the utility company has the right of condemnation and where obtaining all of the property owner signatures would be virtually impossible.
>
> At that time, the Board of Commissioners decided not to require the utility provider to initiate condemnation litigation against its citizens within the proposed pipeline alignment in order to submit a land use application.
>
> The prior approvals reflect the County's interpretation of its code to accept land use applications for pipelines in Coos County without the signatures of all landowners, as long as the applicant has condemnation authority and a condition is imposed that the land use approval would not take effect until the applicant acquires the necessary property. The precedent created in the prior County decisions was followed in this application.
>
> The County's interpretation is supported by the language in the code. LDO Section 5.0.150 addresses requirements for an application submittal. The first paragraph requires an application to be submitted on forms provided by the county and that the submitted application must be accompanied by the appropriate fee. This paragraph specifically states that "An application shall not be considered to have been filed until all application fees have been paid."
>
> It is the County's position that the signature requirement in the second paragraph is merely procedural rather than jurisdictional. The language in the first paragraph expressly creates a jurisdictional requirement: "An application shall not be considered to have been filed until all application fees have been paid." This same requirement is not applicable to the signature provisions of this Section. Therefore, the signature requirement is procedural, while the fee payment requirement is jurisdictional.
>
> Processing the consolidated applications without the property owners' signatures will not be prejudicial to the rights of any of the property owners if the applications are approved subject to a

condition that the approvals shall not become effective until PCGP acquires the interest in the subject properties necessary to precede with the project. This is essentially the same condition that the county used to approve its own pipeline application in 2002.

Supplemental Staff Report dated June 10, 2010, at p. 1-2.

For its part, the applicant does not argue that it is a "property owner" within the meaning of the Code. Rather, the applicant appears to be arguing, in part, that it does not need to obtain the consent of the property owner because it has a statutory power of condemnation.

The applicant cites ORS 772.510(3) and 15 USC § 717 in support of this argument. ORS 772.510 provides:

> 772.510. Pipeline companies, right of entry and condemnation
>
> (1) Any pipeline company[6] that is a common carrier[7] and that is regulated as to its rates or practices[8] by the United States or any agency thereof, may enter in the manner provided by ORS 35.220 upon lands within this state outside the boundaries of incorporated cities.[9]
>
> (2) This right may be exercised for the purpose of examining, surveying and locating a route for any pipeline, but it shall not be done so as to create unnecessary damage.

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[6] Under ORS 772.505(2), the term "pipeline company" includes "any corporation, partnership or limited partnership, transporting, selling or distributing fluids, including petroleum products, or natural gases and those organized for constructing, laying, maintaining or operating pipelines, which are engaged, or which propose to engage in, the transportation of such fluids or natural gases."

[7] Determining whether an interstate natural pipeline company has proven to be a more difficult question than anticipated. The Hearings Officer requested briefing on the issue, but no party directly responded. Since interstate gas companies derive eminent domain authority from the federal Natural Gas Act (specifically 15 U.S.C. 717f(h), it may not matter whether similar authority is granted under state law. In any event, it does appear that interstate natural gas pipelines are common carriers due to the passage of FERC Order No. 636. A concise history of the subject is set forth in *General Motors Corp. v. Tracy*, 519 U.S. 278, 283-4, 117 S. Ct. 811 (1997). *See also United Distribution Companies v. F.E.R.C.*, 170 P.U.R.4th 425, 88 F.3d 1105, 1123 (D.C. Cir. 1996) ("In Order No. 436, the Commission began the transition toward removing pipelines from the gas-sales business and confining them to a more limited role as gas transporters. * * * In effect, the Commission for the first time imposed the duties of common carriers upon interstate pipelines.").

[8] The term "practices" is very broad, and therefore there can be little doubt that the "practices" of Pacific Connector Gas Pipeline LP are regulated by a federal agency.

[9] In looking at the maps provided by the applicant, it appears that no part of the proposed gas pipeline traverses a city located in Coos County. Presumably, if the pipeline did traverse a City boundary, that City would be the land use approval authority for that portion of the pipeline.

> (3) These pipeline companies may appropriate and condemn such lands, or easements thereon or thereover, in such width as is reasonably necessary to accomplish their pipeline company purposes, by proceedings for condemnation as prescribed by ORS chapter 35. (Second Emphasis added).

It seems that federal law may provide additional statutory authority for the use of eminent domain in this case. 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).

Based on ORS 772.510(3) and 15 U.S.C. 717f, it appears that Pacific Connector does have the right of condemnation. The initial question is whether that right of condemnation itself provides an implicit exception to the Code's definition of "property owner." It does not.

The Board has reviewed the hearings officer's decision in the Pipeline Solutions Case (County File No. HBCU-02-04). In that case, the applicants argued that "[i]n cases such as this, where the application is for a public utility[,] an applicant, as a County with eminent domain powers, the applicant need not obtain signatures or consents from the property owners before obtaining land use permits."[10] The opponents cited CCZLDO §5.2.200 as an approval criterion requiring consent of property owners. The hearings officer found that CCZLDO §5.2.200 was a "procedural requirement" and not an approval criterion.

[10] The hearings officer in that case did not say whether the applicant provided authority to support that assertion.

The hearings officer in HBCU-02-04 went on to find the following:

> It would be reasonable for Coos County to have accepted the Application as complete without the consent of all affected property owners following the rationale of *Schrock Farms vs. Linn County.* The Application is for a public utility and the Applicant is Coos County, which has eminent domain powers. Therefore written consent would not be necessary from the affected property owners before filing this Application.

See Hearings Officer Decision, HBCU-02-04, at p. 4. The hearings officer in that prior case seemed to rely on *Schrock Farms Inc. v Linn County*, 31 Or LUBA 57 (1996) for his ruling.

In *Schrock Farms,* ODOT was the applicant for a PAPA. The Code allowed only property owners to file an application for a PAPA. The petitioner argued that ODOT was not a "property owner" within the meaning of the code. ODOT argued that it was a property owner *because it had initiated condemnation proceedings on the subject property* prior to the application being deemed complete on April 6, 1994. Petitioners countered that the condemnation proceedings had been dismissed by the Court on October 31, 1994, and therefore ODOT was no longer a property owner. LUBA disagreed with the petitioner regarding the legal import of the dismissal, noting that the "dismissal became effective after the application was deemed complete." Thus, LUBA apparently viewed the completeness date as having legal relevance to the issue.

Schrock Farms does not stand for the broader proposition that any entity with condemnation authority automatically has "property owner" status simply by virtue of a statutory grant of condemnation authority such as ORS 772.510(3). For this reason, *Schrock Farms* is not direct authority for this case, since no condemnation proceedings had been filed by the time the application was deemed complete back in April of 2010. However, as discussed in more detail below, *Schrock Farms* does suggest that one possible method for a common carrier pipeline company to gain "property owner" status is to do exactly what ODOT did in that case: initiate condemnation proceedings on the subject properties.

Staff and the applicant both state that most of the requirements set forth in CCZLDO §5.0.150 are not "jurisdictional" despite being worded in a mandatory fashion. Their argument is that some requirements may be merely "procedural" in nature, as opposed to being "jurisdictional." In this manner, a jurisdictional requirement is one that must be completed or met at the time the application is submitted. In that event, the County cannot process the application unless the requirement is completed. On the other hand, under their analysis, a procedural act – even one worded in mandatory terms – is one that may be met at some future point in time. For its part, Western Environmental Law Center ("WELC") states that the procedural versus jurisdiction issue is a "difference without distinction." *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1.

The applicant cites *Simonson v. Marion County*, 21 Or LUBA 313 (1991). In *Simonson*, LUBA addressed whether the county hearings officer correctly rejected an application because it had not been signed by the "legal owner" at the time it was filed. LUBA reversed the hearings officer, holding that:

> "A zoning ordinance requirement may be jurisdictional, in the sense that failure to comply with the requirement may not be waived by the local government or cured by later performance of the requirement. *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 690, 692-93 (1988); *Beaverton v. Washington County*, 7 Or LUBA 121, 127 (1983). However, the code language must clearly express that the requirement is jurisdictional. *See Rustrum v. Clackamas County*, 16 Or LUBA 369, 372 (1988); *Beaverton v. Washington County, supra.*"

In *Simonson*, the "agent" of the landowner filed the land use application in Marion County on May 2, 1990. The application was defective when submitted because it did not meet the requirement that the property owner submit in writing a document that confirms that the agent is "duly authorized" to submit the application on the owner's behalf. The applicant cured that defect on August 14, 1990 by submitting the required documentation. The County held its first hearing on the application on September 12, 1990, but ultimately denied the application on the basis that, on the day the application was submitted, the application did not contain the required documentation from the owner. LUBA held that this was in error, because the applicant had eventually submitted the required letter, and the requirement was not jurisdictional. Thus, *Simonson* makes clear that the application *could* be accepted and processed before compliance with the signature requirement is established. Had the issue been "jurisdictional," the application could not have accepted and processed.

The case of *Base Enterprises, Inc. v. Clackamas County*, 38 Or LUBA 614 (2000) also discusses the distinction between jurisdictional requirements and non-jurisdictional requirements, as follows:

> According to petitioner the requirement at ZDO 1301.03(A) that the application be submitted by "the owner, contract purchaser, option holder, or agent of the owner, of the property in question" is a jurisdictional requirement.
>
> * * * * *.
>
> Petitioner assumes, but does not establish, that the ZDO 1301.03(A) limitation on persons who may submit an application for an administrative action is a "jurisdictional" requirement. It may be that if ZDO 1301.03(A) expressly stated that its limitations are "jurisdictional" we would be required to treat it as a jurisdictional requirement: *See Breivogel v. Washington County*, 114 Or App 55, 58-59, 834 P2d 473 (1992) (county code made signature on local appeal

> document a jurisdictional requirement). However, unlike the code language at issue in *Bretvogel*, ZDO 1301.03(A) does not state that its limitations on who may submit an application are "jurisdictional." ZDO 1301.03(A) does not state that the county lacks authority to consider an application for an administrative action that is submitted by someone who does not prove he or she is among the persons listed in ZDO 1301.03(A).
>
> The first hearings officer presumably could have terminated his review, and determined that the first application should be dismissed, once he determined that Zamani was not among those authorized to submit the application under ZDO 1301.03(A). However, that does not mean the hearings officer was legally compelled to do so. We do not agree with petitioner that the county lacked jurisdiction to deny the first application or that it erred by denying the second application because it is substantially similar to the first application.

Similarly, in *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994), LUBA held that where a local code provision does not explicitly state that the elements of a complete development application are "jurisdictional" (specifically, a signature requirement), the local government's interpretation of the code provision as imposing a "procedural" requirements must be affirmed under ORS 197.829.

Thus, *Simonson, Base Enterprises, BCT Partnership* and similar cases[11] make clear that application signature requirements are not "jurisdictional" unless the code specifically makes them so. Simply because the signature requirement is worded in mandatory terms does not make the requirement "jurisdictional." Rather, to be jurisdictional, the Code must state something along the lines that "the county lacks authority to consider an application for an administrative action that is submitted by someone meeting the definition of owner." Under *BCT Partnership, Womble,* and *Bridges,* an application submittal requirement that is not jurisdictional is "procedural" in nature. Once it has been determined that an application submittal requirement is procedural, then an opponent challenging compliance with the requirement must demonstrate prejudice to his or her substantial rights. *See generally Burdhardt v. City of Molalla*, 25 Or LUBA 43, 51 (1993).

In the present case, the signature requirement under CCZLDO 5.0.150 is not presented as a jurisdictional element of an application. Although it does state a requirement that the application shall be signed by all property owners, it does not expressly make such signatures a jurisdictional requirement, and therefore it must be treated as procedural under the case law discussed above.

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[11] *See also Womble v. Wasco County*, 54 Or LUBA 68 (2007) (petitioner failed to provide basis for reversal or remand when, although land use application was not authorized by the property owners under local code, petitioner did not establish that the code requirements in question were "jurisdictional" in nature); *Bridges v. City of Salem*, 19 Or LUBA 373 (1990) (same).

This conclusion is directly support by the text and context of the CCZLDO itself. As staff notes, CCZLDO 5.0.150 also includes the following statement, which clearly creates the type of "jurisdictional" requirement contemplated in the LUBA cases cited above: "An application shall not be considered to have been filed until all application fees have been paid." Thus, the County has expressly created a jurisdictional requirement that an application cannot be considered without payment of the fee. However, there is no similar jurisdictional language associated with the property owner signature requirement.

However, just because something is not jurisdictional does not mean that it is not a mandatory requirement that can simply be ignored. WELC correctly asserts that the County cannot "waive" the requirement even if it is procedural. *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. In this regard, the case of *Baker v. Washington County*, 46 Or LUBA 591 (2004) is instructive. In *Baker*, the intervenors were applicants seeking to partition their property into two parcels. Intervenor took access to the parcels via a driveway easement that crosses the petitioner's land. Petitioners objected to the use of the easement for access for the two parcels, arguing that, as the underlying fee owners of the easement, Washington County Community Development Code (CDC) 203-1.1 required that the petitioners sign the application. In this regard, the code provision at issue stated:

> CDC 203.1.1. "Type I, II and III development actions may be initiated only by: Application by *all the owners* of the subject property, or any person authorized in writing to act as agent of the owners or contract purchasers. (Emphasis added).

The code did not make the signature a "jurisdictional" defect. Nonetheless, LUBA held that the County erred in concluding that the disputed application could be processed without petitioners' joining in the application, because the petitioners are "owners" of the property within the meaning of the code.

As if this were not complicated enough, *Caster v. City of Silverton*, 54 Or LUBA 441 (2007) throws another wrinkle into the mix. Pacific Connector argues, the County cannot deny the application for failure to obtain signatures of all owners, on account of the fact that staff issued a completeness letter. The applicant states:

> The signature requirement goes to completeness, not approvability or jurisdiction, and the county may not deem an application complete and then subsequently deny the application based upon noncompliance with a procedural factor that goes to the completeness of the applications. In *Caster v. City of Silverton*, 54 Or LUBA 441 (2007), the applicant failed to provide information requested by the city for completeness under ORS 227.178(2). LUBA held that the city could not deem an application complete but then subsequently deny the application based on noncompliance with a factor that goes to completeness of the applications:

> "Finally, even if petitioner in this case failed to provide the notice required by ORS 227.178(2)(b), the city elected to proceed with review of the permit application rather than treat the permit application as void under ORS 227.178(4). In that circumstance, the city may not thereafter simply cite an alleged failure on petitioner's part to provide requested information as a basis for denying a permit application. Having elected to proceed with the application notwithstanding petitioner's failure or refusal to provide the requested information, the city owes petitioner at least some explanation for why it believes petitioner's evidentiary submittal falls short of demonstrating the proposal complies with the relevant approval criteria." *Caster*, 54 Or LUBA at 451-52.

See Applicant's Final Argument dated June 24, 2010, at p. 2. However, the last sentence of the above-cited quote demonstrates that LUBA's point is rather nuanced. What LUBA is saying is that once a completeness letter is issued, the application cannot be denied due to a failure to provide the requested information. Rather, to the extent the local government wishes to deny the applicant, it may then only do so on the basis that the lack of the requested information causes there to be insufficient evidence to meet the requirements set forth in applicable approval standards. The Board finds that CCZLDO §5.0.150 is a mandatory approval standard because it could form the basis of denial of the application. *See Baker, supra.*

Notwithstanding the various cases in the field, the Board agrees with the applicant that "[i]t does not make practical sense for Pacific Connector to condemn the property required for construction of the pipeline until the necessary final approvals from the county and FERC have been obtained and any appeals are exhausted." *See* Applicant's Final Argument dated June 24, 2010, at p. 2.

Because the defect is not jurisdictional, it does not appear that the County is required to reject or deny the application, and the Board does not read *Baker* to establish an absolute rule to the contrary. *Compare Bridges .City of Salem*, 19 Or LUBA 373 (1990) (failure to provide proof of agency until after the application is filed does not warrant denial of application, where petitioners were not able to show prejudice). Rather, the County has some flexibility to allow the applicant to submit the required documentation at a later date. In this regard, *Simonson* is instructive:

> Where a local government imposes standards that must be met to obtain approval of permits, the local government must find that those standards are met before granting approval. If the permit applicant fails to demonstrate that applicable approval standards are met, the local government must deny the application. Of course, a local government also may, in an appropriate circumstance, impose conditions and rely on those conditions in determining that the application, as conditioned, meets the applicable approval

> standards. *Lousignont v. Union County, supra; Sigurdson v. Marion County*, 9 Or LUBA 163, 170 (1983); *Margulis v. City of Portland, supra.*

Continuing in a footnote, LUBA stated:

> In *Holland v. Lane County*, 16 Or LUBA 583, 596 (1988), we explained that a local government may be able to defer a determination of compliance with a discretionary approval standard to a later stage of the development process, where the code does not prohibit such deferral and the requisite notice and public hearing or notice and opportunity for an appeal is provided. *Compare Storey v. City of Stayton*, 15 Or LUBA 165, 184 (1986); *Spalding v. Josephine County*, 14 Or LUBA 143, 147 (1985).

Id. at 325, n 11. Before a condition can be imposed, the County has to make a determination of feasibility. The concept of "feasibility" findings is well established in Oregon. In *Meyer v. City of Portland*, 67 Or App 274, 280 n.3, 678 P2d 741 (1984), the Court of Appeals explained that the required finding of "feasibility" for the first stage approval requires "more than feasibility from a technical engineering perspective." *Id.* at 280, n3. The Court explained that "[i]t means that substantial evidence supports findings that solutions to certain problems * * * posed by a project are possible, likely and reasonably certain to succeed." *Id.* A feasibility finding that is equivocal or wavering is not sufficient. *Griffith v. City of Corvallis*, 16 Or LUBA 64 (1987); *Doughterty v. Tillamook County*, 12 Or LUBA 20, 31 (1984).[12]

The core goal of a typical two-stage approval process is to give the applicant certainty over the more discretionary, big picture issues, while allowing the resolution of more technical, *non-discretionary* issues to be deferred to a later stage in an approval process. Often, these non-discretionary issues are expensive and time consuming to resolve, and therefore it makes practical sense to get the "big-picture" discretionary issues out of the way first. The risk, of course, is that the decision-maker will improperly allow the applicant to defer discretionary decision-making to a later stage in the approval process where the public has no opportunity to participate. The local government can avoid this problem by agreeing to hold further public hearings on the deferred issue in the future. *Turner v. Washington County*, 8 Or LUBA 234 (1983); *Rhyne v. Multnomah County*, 23 Or LUBA 442 (2000); *Stockwell v. Benton County*, 38 Or LUBA 621, 629 (2000).

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[12] Provided this required "feasibility" determination is made when first stage approval is granted, precise solutions for problems posed by a land use decision and other detail technical matters may "be worked out between the applicant and city's experts during the second stage approval process for the final plan." *Id.* at 282 n.6. Resolution of precise solutions and technical matters and final approval of the subdivision need not include public hearings. *Id. See also Golf Holding Co. v. McEachron*, 39 Or App 675, 593 P2d 1202, *rev den*, 287 Or 477 (1979); *Meyer v. City of Portland*, 7 Or LUBA 184, 196 (1983), *aff'd*, 67 Or App 274, 687 P2d 741 (1984); *Rhyne v. Multnomah County*, 23 Or LUBA 42, 46-47 (1992).

LUBA recognized in *Schrock Farms* that initiation of a condemnation proceeding was sufficient to qualify an entity as an "owner" for purposes of a local code provision requiring a land use application be submitted by an owner of the property. In this case, the Board concludes the applicant has condemnation powers pursuant to ORS 772.510(3) and 15 USC § 717, at least to the extent that the FERC Certificate is not rescinded on appeal or via a reconsideration process. Therefore, the Board finds it is *feasible* for Pacific Connector to become a property owner for purposes of the signature requirement through the initiation of condemnation proceedings, and Pacific Connector may become an 'owner' for application purposes before actually obtaining the final judgment in the condemnation proceedings in the individual properties at issue. The Board also finds that it is feasible for Pacific Connector to obtain signatures of affected property owners indicating their consent to the application, either through negotiations with individual property owners or through the condemnation process.

WELC takes issue with this conclusion, and states that "there is no currently valid [FERC] authorization of condemnation power available to the applicant to exercise, let alone upon which to rely to evade the landowner consent requirements." *See* Letter from WELC Staff attorney Jan Wilson, dated June 8, 2010, at p. 2. The applicant responds to this argument as follows:

> Western Environmental Law Center (WELC) and other opponents argue that the FERC Order dated December 17, 2009 approving the project is not currently effective due to a subsequent Order Granting Rehearing for Further Reconsideration dated February 16, 2010. Therefore, opponents claim, Pacific Connector has no current authorization of condemnation authority and the FEIS is not currently valid. WELC goes to some length to quote from the Natural Gas Act, but chooses to ignore the provisions of the Act that require "stays" of FERC Orders, and require that "the filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section [appeal to U.S. Court of Appeals] shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." 15 USC § 717r(c).
>
> The FERC Order is still effective upon request for rehearing, and is still effective upon appeal to the Ninth Circuit Court of Appeals, unless a stay of that Order is obtained by opponents. In other words, a FERC Order is similar to a local land use decision in Oregon, which remains effective upon appeal unless and until a stay is obtained from LUBA.
>
> The issuance by FERC of the "Order Granting Rehearing for Further Consideration" dated February 16, 2010 does not stay the effectiveness of the Order. In fact, as explained in the attached excerpt from the American Bar Association's "FERC Basic

Practice Series" * * *, such orders are commonly issued by FERC as a "tolling" mechanism, which allows the Commission to avoid the otherwise strict deadline for ruling on rehearing requests. As explained by the ABA materials:

> "Because the Commission rarely has time to issue an order on rehearing within 30 days after receiving requests for rehearing, it usually issues 'tolling' orders, granting the request for rehearing solely for purposes of further consideration. The effect of these tolling orders is to avoid the automatic denial that results from Commission inaction. FERC them proceeds to issue the real order on rehearing at its own pace."

In the absence of a stay, the FERC Order dated December 17, 2009 is still valid and effective. Attached as Exhibit 2 to this letter is the relevant portion of an Order on Rehearing issued by FERC in January 2003, denying requests for rehearing of its original September 2002 order issuing a Certificate of Public Convenience and Necessity to Islander East (authorizing construction of the Islander East pipeline).

The discussion of the request for the stay begins at paragraph 20. The Connecticut Attorney General's request for stay was based partly on Islander East's announced intention to utilize eminent domain authority granted by the original order to access certain properties on its authorized right of way (¶ 21, see also ¶ 24). Islander East responded by asserting that "it needs the September 19 order to obtain access to the few remaining properties where access has been denied so that it can complete the surveys and reports." (¶ 27-28).

Paragraphs 31 et seq. set forth the standards the Commission applies when determining whether to grant a stay. In this case it found that the Connecticut AG had not shown irreparable injury, while granting a stay might harm Islander East:

> "easement agreements negotiations and condemnation proceedings are lengthy procedures. One of the reasons the Commission issued the September 19 order was to give Islander East sufficient time to conduct preconstruction activities, including acquiring the necessary easements. Staying Islander East's right to eminent domain while it resolves preconstruction environmental conditions would needlessly delay the project." (¶ 34).

> The attached FERC Order makes clear that (a) the original order conveys the right of eminent domain (b) which, absent a stay explicitly granted by the Commission, is not affected by the rehearing (or appeal) process.

See letter from Mark Whitlow, dated June 17, 2010. WELC disagrees with the applicant's legal conclusions, but does little to press its case. *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. The Board concludes the original FERC order conveys the right of eminent domain when no stay of such order was obtained or explicitly granted by FERC.

WELC raises another issue in its letter dated June 8, 2010. It notes that CCZLDO §5.0.150 requires "*all* owners of the property" to sign the application. *See* Letter from WELC Staff attorney Jan Wilson, dated June 8, 2010, at p. 2, n2. In this regard, the code is worded in a manner similar to the provision at issue in *Baker v. Washington County,* 46 Or LUBA 591 (2004). WELC argues that even if Pacific Connector condemns an easement, that it will still have to obtain the signature of the owner of the fee interest due to the use of the phrase "all of the owners of property." The Board finds that it is feasible for Pacific Connector to obtain signatures of affected property owners indicating their consent to the application, either through negotiations with individual property owners or through the condemnation process and resulting court order condemning the necessary property.[13] As discussed elsewhere in these findings, the Board also finds that the property owner signature requirement is an element of local procedure that was not intended to apply to this type of application, and could be preempted by federal law, which does not contemplate that a property owner whose property interests are subject to condemnation pursuant to FERC order would still need to sign a consent form.

The County can ensure there will be no prejudice to the rights of any affected property owner through the imposition of a condition of approval requiring the applicant to acquire an ownership interest in the property and/or to obtain signed consents from property owners prior to the actual construction of the pipeline. The Board further finds the act of verifying the signatures will be ministerial in nature, because ownership can be verified without exercising discretionary decision-making.[14] County staff can simply verify the signatures received for a certain property against the County's ownership records for that property. The records will either match or not; there will not be a need or opportunity to exercise judgment in this process. As a result, the County will not need to conduct an additional quasi-judicial land use hearing to verify ownership.

In summary, the Board adopts the interpretation and legislative history of CCZLDO §5.0.150 contained in the Supplemental Staff Report dated June 10, 2010. Because the property

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[13] These alternative findings are effectuated by the Board through the adoption of two alternative versions of Condition 20 regarding landowner consent. The first condition 20(a) allows that a court order condemning property for the pipeline could also convey the corresponding consent of the property owners or otherwise obviate the need for their signatures. In the alternative, if that condition is deemed invalid or insufficient on appeal, the Board finds that alternative condition 20(b) ensures compliance with CCZLDO 4.0.150.

[14] A determination is discretionary if it "requires the application of judgment or some form of evaluation." *Buckman Community Ass'n v. City of Portland,* 168 Or App 243, 245 n1 (2000). A standard that is subjective, discretionary, or requires factual, legal, or policy judgment is also not clear and objective. *Hiebenthal v. Polk County,* 41 Or LUBA 316 (2002).

owner signature requirement is procedural rather than jurisdictional and it is feasible for the applicant to initiate condemnation proceedings in the future; the County may approve this application subject to a condition requiring that the land use approval will not take effect until the applicant acquires an ownership interest in the necessary property and/or acquires the signed consent of the property owners.

One final note is worth mentioning. WELC states that "even if the condition of approval requiring landowner consent somewhere down the road" is added to the decision, the landowners will still be prejudiced because "it puts an immediate cloud over the property, such that selling it becomes difficult and burdensome." *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. Regardless of whether a condition of approval is added or the land use application is denied, this land use process will not cause *further* damage beyond what is going to occur as a result of the FERC process. In other words, the real battle is at FERC and this application is a mere sideshow. If the opponents somehow convince FERC to rescind the Certificate, or if they successfully overturn the FERC Certificate at the Ninth Circuit, then this land use approval is worthless to the applicant. On the other hand, if the FERC Certificate is ultimately affirmed, then whatever ill-effects stem from the "cloud" created by a condition of approval mandated here will be indistinguishable from the "cloud" created by the FERC Certificate itself.[15]

3. Potential for Mega Disasters (Tsunamis, Earthquakes, etc).

One common theme throughout much of the testimony stems from the concern that a gas pipeline would create secondary problems such as explosions and fire if the County is hit by a tsunami or earthquake. 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.

As an initial matter, the Board finds that tsunamis are not much of an issue considering the pipe will be a thicker grade of steel and it will buried in 5-8 feet of sediment and encased in four inches of concrete. Although it is not clear whether a natural gas pipeline is one of the types of facilities regulated in a tsunami zone under ORS 445.447,[16] the FEIS makes clear that the risk

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[15] WELC further states that the condition of approval would "in effect, * * * authorize a taking of the landowner's rights to freely transfer their property." *See* Letter from WELC staff attorney Jan Wilson dated June 16, 2010, at p. 1. As an initial matter, the irony of having an environmental group raising a pro-property rights "takings" argument is duly noted. But regardless of that hypocrisy, there is no "taking" caused by a pipeline because there will still be economically viable uses of the landowner's property. As Measure 37 claimants know all too well, a taking only occurs is there is a virtual wipeout of all economically viable uses of the land. Moreover, planning a future condemnation alone is not enough to constitute a taking for condemnation blight. *Clarke v. Port of Portland*, 23 Or App 730, 543 P2d 1099 (1975). Regardless, protection of property value is not an approval standard for this case. Therefore, the opponent's comments on this issue provide no basis for denial. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994); *Sunburst II Homeowners Assn v. City of West Linn*, 17 Or LUBA 401 (1989).

[16] **ORS 455.447 Regulation of certain structures vulnerable to earthquakes and tsunamis; rules.** (1) As used in this section, unless the context requires otherwise:
(a) "Essential facility" means:
(A) Hospitals and other medical facilities having surgery and emergency treatment areas;

of a tsunami has been studied and planned for. *See* FEIS 5.1.1, at p. 5-2. The applicant's geo-technical engineers studied the potential effect of a "design tsunami event," which is apparently a 565 year return period. *See* Geologic Hazard's Report dated October 30, 2009, by Geo-Engineers at p. 26-27. The modeled event predicted three feet of temporary scouring. Since the pipe will be buried at a depth of five feet, no harm is anticipated to occur to the pipe as a result of a design tsunami event. The opponents have not presented credible evidence that suggests that

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(B) Fire and police stations;

(C) Tanks or other structures containing, housing or supporting water or fire-suppression materials or equipment required for the protection of essential or hazardous facilities or special occupancy structures;

(D) Emergency vehicle shelters and garages;

(E) Structures and equipment in emergency-preparedness centers;

(F) Standby power generating equipment for essential facilities; and

(G) Structures and equipment in government communication centers and other facilities required for emergency response.

(b) "Hazardous facility" means structures housing, supporting or containing sufficient quantities of toxic or explosive substances to be of danger to the safety of the public if released.

(c) "Major structure" means a building over six stories in height with an aggregate floor area of 60,000 square feet or more, every building over 10 stories in height and parking structures as determined by Department of Consumer and Business Services rule.

(d) "Seismic hazard" means a geologic condition that is a potential danger to life and property that includes but is not limited to earthquake, landslide, liquefaction, tsunami inundation, fault displacement, and subsidence.

(e) "Special occupancy structure" means:

(A) Covered structures whose primary occupancy is public assembly with a capacity greater than 300 persons;

(B) Buildings with a capacity greater than 250 individuals for every public, private or parochial school through secondary level or child care centers;

(C) Buildings for colleges or adult education schools with a capacity greater than 500 persons;

(D) Medical facilities with 50 or more resident, incapacitated patients not included in subparagraphs (A) to (C) of this paragraph;

(E) Jails and detention facilities; and

(F) All structures and occupancies with a capacity greater than 5,000 persons.

(2) The Department of Consumer and Business Services shall consult with the Seismic Safety Policy Advisory Commission and the State Department of Geology and Mineral Industries prior to adopting rules. Thereafter, the Department of Consumer and Business Services may adopt rules as set forth in ORS 183.325 to 183.410 to amend the state building code to:

(a) Require new building sites for essential facilities, hazardous facilities, major structures and special occupancy structures to be evaluated on a site specific basis for vulnerability to seismic geologic hazards.

(b) Require a program for the installation of strong motions accelerographs in or near selected major buildings.

(c) Provide for the review of geologic and engineering reports for seismic design of new buildings of large size, high occupancy or critical use.

(d) Provide for filing of noninterpretive seismic data from site evaluation in a manner accessible to the public.

(3) For the purpose of defraying the cost of applying the regulations in subsection (2) of this section, there is hereby imposed a surcharge in the amount of one percent of the total fees collected under the structural and mechanical specialty codes for essential facilities, hazardous facilities, major structures and special occupancy structures, which fees shall be retained by the jurisdiction enforcing the particular specialty code as provided in ORS 455.150 or enforcing a building inspection program under ORS 455.148.

(4) Developers of new essential facilities, hazardous facilities and major structures described in subsection (1)(a)(E), (b) and (c) of this section and new special occupancy structures described in subsection (1)(e)(A), (D) and (F) of this section that are located in an identified tsunami inundation zone shall consult with the State Department of Geology and Mineral Industries for assistance in determining the impact of possible tsunamis on the proposed development and for assistance in preparing methods to mitigate risk at the site of a potential tsunami. Consultation shall take place prior to submittal of design plans to the building official for final approval. [1991 c.956 §12; 1995 c.79 §229; 1995 c.617 §1; 2001 c.573 §12] (Emphasis added).

the measures proposed in the FEIS would be insufficient to prevent the pipe from getting scoured out by a tsunami. In any event, the Board has already granted land use approval for the LNG terminal, which presumably would be at much greater risk in a tsunami event.

Moreover, if a tsunami that has the power to uproot a steel pipe buried in five to eight feet of sediment[17] and encased in four inches of concrete hits Coos Bay, then Keith Comstock is correct when he states that the "LNG facility will be the least of your worries."

FLOW claims that Pacific Connector "*failed to provide adequate information regarding the geologic hazards for the pipeline*" and cites the State of Oregon's comments to the FERC FEIS. Attached to the State of Oregon's comment letter are the DOGAMI comments and recommendations made to the project's Draft EIS (Attachment 1, page 3) recommending additional work to be completed and included in the Final EIS. Pacific Connector responded to questions and comments raised by DOGAMI in the updates noted in the FEIS.

Also, FLOW incorrectly attributes comments made by DOGAMI in Section 4.1.2.3 to Pacific Connector. In fact, Section 4.1.2 of both the FERC DEIS and FERC FEIS are specific to the geo-hazard analysis of the Jordan Cove LNG Terminal. Geo-hazard evaluations and recommendations for the Pacific Connector Gas Pipeline are found in Section 4.1.3 in both documents.

Pacific Connector evaluates, analyzes and mitigates the effects of earth movement potential in all phases of the project: pipeline routing, detailed engineering design, facility construction, and ongoing operations and monitoring of the in-service pipeline facilities. As part of the Coos County public record, Pacific Connector submitted the *Coos County Geologic Hazards Report* prepared by GeoEngineers for Pacific Connector. This report is an excerpt from the 2007 FERC Certificate application and provides the geotechnical and geohazard information along the pipeline route within Coos County. The report constitutes substantial evidence, and there is no scientifically-based evidence to the contrary.

The issue of earthquakes has also been considered. Earthquakes have the ability to impact the pipeline by causing earth movement and thus displacing the pipeline from its original location. This displacement can be caused from crossing an earthquake fault or secondary impacts from an earthquake such as liquefaction, lateral spreading, or landslides. In addition to earth movement, river and stream scour potential was analyzed at each river crossing within the report.

Regarding earthquakes, Section 3.3 Seismic Settings (of the GeoEngineers report), 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).*

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[17] The top of the pipe will be covered by 5 feet of sediment. *See* FEIS at p. 2-98.

Regarding the other forms of earth movement that may cause displacement to the pipeline, Pacific Connector chose avoidance as the mitigation priority when routing the pipeline. Appendix A and Appendix B in the *Coos County Geologic Hazards Report* identify the locations along the pipeline alignment where a geohazard exists, what risk level the hazard presents to the pipeline, and if mitigation measures will be required at those locations (where avoidance was not possible). 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. In addition, FERC Environmental Condition #14 requires Jordan Cove and Pacific Connector to hire a board of third-party consultants to review and approve both projects' final design as it relates specifically to their geotechnical evaluation and mitigation measures.

Next, the issue of landslide risks in riparian reserves is considered. FLOW asserts that the pipeline will increase the risk of landslides due to the removal of vegetation on steep slopes. Pacific Connector has included in its FERC application, and federal and state water quality permit applications, an Erosion Control and Revegetation Plan (ECRP) 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. The ECRP is attached under the tab labeled "Erosion Plan" as an exhibit to the Applicant's May 12, 2010 Pre-Hearing Evidentiary Submittal. The ECRP has been reviewed by various federal and state agencies (including the Forest Service and BLM) during the FERC pre-filing process, the FERC Certificate application process, and the Plan of Development process, and their review comments have been incorporated into the plan. The noted temporary and permanent BMPs have been approved by these agencies for use on private and federal lands. Mitigation measures specific to steep slope construction are discussed in Section 11.0 and the related appendices in the Pacific Connector ECRP. In summary these measures include:

- 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 to Welling letter dated June 17, 2010);
- 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.

The Board finds that these BMPs are adequate to address the risk of landslides.

4. Riparian vegetation removal and the "public utility" exemption.

Generally, the CCZLDO requires that riparian vegetation must be maintained within 50 feet of certain waterbodies. However, applicable code provisions in the EFU, Forest, Rural Residential and CBEMP zoning districts include the following exemption: "Riparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-way."

WELC and other opponents assert that the PCGP is not a "public utility" to which this exemption can be applied. However, the pipeline falls within the CCZLDO definition of a "low-intensity utility facility," which is described as including gas lines for "public service." CCZLDO §2.1.200. The pipeline also falls within the ORS 757.005(1)(a)(A) definition of a "public utility," which includes "[a]ny corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power...."

Contrary to the unsupported assertions of several opponents, the term "public utility" referenced in the analogous provision of ORS 215.213(1)(d) is not concerned with whether the utility is owned by a public or private entity but whether the facility is so impressed with a public interest that it comes within the field of public regulation. 42 Or Att'y Gen 77 (1981) (cited in *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 773 P2d 779 (1989)).

Notwithstanding the applicability of this exemption, in circumstances where riparian vegetation must be removed for construction of the pipeline, Pacific Connector is proposing to restore riparian vegetation within 25 feet of the impacted waterbody. Pacific Connector has stated that it will comply with all FERC requirements regarding waterbody crossings, and has provided a detailed Erosion Control and Revegetation Plan (ECRP) that was developed using FERC's Upland Erosion Control, Revegetation, and Maintenance Plan and FERC's Wetland and Waterbody Construction and Mitigation Procedures. The applicant's ECRP and the two referenced FERC documents were submitted into the record as part of the applicant's submittal dated May 12, 2010.

Section 10.12 of the ECRP includes detailed information regarding planting of native shrubs and trees in wetland and riparian areas to mitigate impacts from construction, and provides that "in riparian areas, shrubs and trees will be planted across the right-of-way for a width of 25 feet from the waterbody banks." ECRP pages 38-39.

WELC also contends the applicant has not established that any necessary removal of riparian vegetation will be "the minimum necessary," as required within riparian areas in the Rural Residential and CBEMP zones. In response to these concerns, during the second open record period the applicant provided correspondence from Randy Miller of Pacific Connector dated June 17, 2010, which identifies measures that have been taken by the applicant in designing the project in order to minimize impacts to riparian vegetation, including the following:

- Construction impacts to riparian areas have been minimized to the extent possible through routing efforts to ensure a safe, stable alignment for long-term pipeline integrity. Through these efforts, the alignment follows ridgelines and watershed boundaries in many areas, significantly minimizing waterbody and riparian crossings.
- Construction work area limits have been minimized and work area setbacks from waterbodies and wetlands provided where feasible based on topographic and engineering constraints.
- Construction schedules across waterbodies have been planned to coincide with ODFW recommended in-stream work windows and the low-flow periods, unless an unknown occurrence of northern spotted owls or marbled murrelets arise which create a conflict in seasonal restrictions between species. Should such a conflict arise, Pacific Connector would work with federal and state wildlife agencies to determine the appropriate construction schedule.
- Streambeds will be restored to their preconstruction contours, elevations and grade and streambanks will be restored to their approximate original contour or to a stable configuration to ensure stability and to restore floodplains. These measures will ensure that streamflow characteristics and floodplain functions are restored.
- Streambeds will be reclaimed with replacement of existing spawning substrate.
- After construction is complete, large woody debris will be placed in streams or banks depending upon the size of the stream, its pre-construction condition relative to the presence or absence of trees and other site specific factors.

- All riparian areas will be restored and revegetated including trees and shrubs where appropriate and in accordance with the federal and state permit conditions.
- Coniferous and shrub vegetation will be re-established within affected riparian areas for a distance of 25 feet on each side of intermittent and perennial waterbodies, or to the limit of the existing riparian vegetation.
- The pipeline maintenance corridor has been narrowed to the minimum necessary and to comply with DOT maintenance requirements.
- Erosion control will be implemented as described in the project's Erosion Control and Revegetation Plan (ECRP) through implementation of extensive BMPs as required by federal, state, and local permits. The ECRP includes BMPs for construction and post-construction; it provides environmental controls for waterbody and wetland crossings, spill management, hydrostatic testing, and trench dewatering. Restoration procedures include recontouring, soil compaction and scarification, seedbed preparation, seed mixes, fertilization, noxious weed control, and maintenance.

As explained in the June 17, 2010 correspondence from Randy Miller, and in the above-cited provisions of the ECRP, the applicant has exceeded any applicable County standards regarding protection of riparian vegetation. The applicant has demonstrated that the amount of riparian vegetation that will be removed will be the minimum necessary, and that vegetation will be replanted in any event. WELC does not explain what additional measures could be taken, or otherwise provide evidence that refutes Mr. Miller's testimony. For this reason, the Board rejects WELC's arguments regarding this issue. Nevertheless, to ensure compliance with the applicant's representations, the Board imposes Condition of Approval A.18 to read as follows:

> "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."

The Board finds that the applicant's proposed condition (Condition of Approval B.3) is redundant with Condition of Approval A.18 and should be deleted and identified as "Intentionally deleted."

5. Coordination with Native American Tribes (CCZLDO §3.2.700)

The applicable county requirements governing archaeological resources are CBEMP Policy #18 and CCZLDO §3.2.700, which directly implements Policy #18. Representatives from the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians testified that the following Code provision was applicable to this case:

SECTION 3.2.700. Process for Tribe(s) Review and Response of Proposed Development within Acknowledged Archaeological Sites. Properties which have been determined to have an "archaeological site" location must comply with the following steps prior to issuance of a "Zoning Compliance Letter" for building and/or septic permits.
1. The County Planning Department shall make initial contact with the Tribe(s) for determination of an archaeological site(s). The following information shall be provided by the property owner/agent:
a. plot plan showing exact location of excavation, clearing, and development, and where the access to the property is located; and
b. township, range, section and tax lot(s) numbers; and
c. specific directions to the property.
2. The Planning Department will forward the above information including a request for response to the appropriate tribe(s).
3. The Tribe(s) will review the proposal and respond in writing within 30 days to the Planning Department with a copy to the property owner/agent.
4. It is the responsibility of the property owner/agent to contact the Planning Department in order to proceed in obtaining a "Zoning Compliance Letter" (ZCL) or to obtain further instruction on other issues pertaining to their request.[OR-00-05-014PL]

By its express terms, CCZLDO §3.2.700 only applies if the proposed land use will occur on lands determined to be an "archaeological site" location. The County has generally mapped "cultural areas" consistent with Statewide Planning Goal 5, but the specific location of Native American cultural sites is not provided in the Goal 5 maps for security reasons. Nonetheless, the reference in Section 3.2.700 to acknowledged "archaeological site" locations is a reference to these Goal 5 maps. The generalized Goal 5 Element map makes clear that portions of the proposed pipeline will travel through lands that are identified as "Areas of Archaeological Concern" in the Coos County Comprehensive Plan. Therefore, the route chosen by the applicant triggers CCZLDO §3.2.700 review, although, as discussed below, the timing of that review is an issue.

The correct application of CCZLDO §3.2.700 and CEBMP Policy #18[18] was one of the issues addressed by LUBA in the appeal of the Jordan Cove LNG terminal, *Southern Oregon*

[18] Policy #18: Protection of Historical, Cultural and Archaeological Sites

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 Site Plan Application, 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

Pipeline Information Project v. Coos County, 57 Or LUBA 44, 2008. In that case, LUBA held that Policy #18 is only triggered upon the applicant's submittal of a "site plan application" that identifies "all areas proposed for excavation, clearing or construction." The County's requirements for coordination and consultation with the tribes do not begin under Policy #18 until such an application has been submitted. At that point, the tribes have 30 days to submit a written statement regarding any objections to the specific development proposal, and if the tribes and the applicant cannot agree on appropriate protective measures, the county must hold a public hearing to resolve the dispute.

In its review of the LNG terminal on remand from LUBA, the Board of Commissioners adopted the following interpretation of Policy #18 and CCZLDO §3.2.700:

Umpqua Tribe(s) in writing, together with a copy of the Site Plan Application. 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.
"Appropriate measures" may include, but shall not be limited to the following:
a. Retaining the prehistoric and/or historic structure in situ or moving it intact to another site; or
b. Paving over the site without disturbance of any human remains or cultural objects upon the written consent of the Tribe(s); or
c. Clustering development so as to avoid disturbing the site; or
d. Setting the site aside for non-impacting activities, such as storage; or
e. If permitted pursuant to the substantive and procedural requirements of ORS 97.750, contracting with a qualified archaeologist to excavate the site and remove any cultural objects and human remains, reinterring the human remains at the developer's expense; or
f. Using civil means to ensure adequate protection of the resources, such as acquisition of easements, public dedications, or transfer of title. If a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply. Land development activities, which violate the intent of this strategy, shall be subject to penalties prescribed in ORS 97.990.
III. Upon receipt of the statement by the Tribe(s), or upon expiration of the Tribe(s) thirty day response period, the local government shall conduct an administrative review of the Site Plan Application and shall:
a. Approve the development proposal if no adverse impacts have been identified, as long as consistent with other portions of this plan, or
b. Approve the development proposal subject to appropriate measures agreed upon by the landowner and the Tribe(s), as well as any additional measures deemed necessary by the local government to protect the cultural, historical and archaeological values of the site. If the property owner and the Tribe(s) cannot agree on the appropriate measures, then the governing body 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 archaeological values of the site.
IV. Through the "overlay concept" of this policy and the Special Considerations Map, unless an exception has been taken, no uses other than propagation and selective harvesting of forest products consistent with the Oregon Forest Practices Act, grazing, harvesting wild crops, and low intensity water-dependent recreation shall be allowed unless such uses are consistent with the protection of the cultural, historical and archaeological values, or unless appropriate measures have been taken to protect the historic and archaeological values of the site. This strategy recognizes that protection of cultural, historical and archaeological sites is not only a community's social responsibility, it is also legally required by ORS 97.745. It also recognizes that cultural, historical and archaeological sites are non-renewable cultural resources.

"LUBA's remand regarding archaeological resources issues under Policy #18 is based upon a lack of clarity regarding whether LDO 3.2.700 implements Policy #18. As explained in more detail below, the Board finds that the 'Site Plan Application' requirement contemplated by Policy #18 is intended by the county to be implemented through the submittal of a 'plot plan' under LDO 3.2.700 at the time the applicant requests a zoning compliance (verification) letter under LDO 3.1.200 for the issuance of building permits by the State of Oregon Building Codes Division. In its final opinion LUBA stated:

> 'We leave open the possibility that the county might interpret LDO 3.2.700 to fully implement CBEMP Policy #18 because all development subject to CBEMP Policy #18 will require a zoning compliance letter and the decision making required by Paragraph III of CBEMP Policy #18, including any required 'administrative review' and 'quasi-judicial hearing' will occur under LDO 3.2.700(4). But any attempt to defer the quasi-judicial hearing and necessary decision making that may be required to resolve disputes between the tribes and the applicant to a point in time after the conditional use approval is granted, must ensure that the required decision making and quasi-judicial hearing will be provided later before the proposed development can commence.'

"Consistent with the above-quoted portion of LUBA's decision, the Board of Commissioners finds that LDO 3.2.700 provides the county's intended process for the tribe(s) review of proposed development in order to fully implement Policy #18. Although the plan policy and code provision do not expressly cross-reference each other, the stated purpose of LDO 3.2.700 is to provide a 'Process for Tribe(s) Review and Response of Proposed Development within Acknowledged Archaeological Sites,' and Policy #18 is also designed to protect such sites. Like Policy #18, LDO 3.2.700 provides the Tribes a 30-day review period within which to review a development proposal and respond in writing.

"Significantly, LDO 3.2.700 makes clear that the time for compliance with applicable requirements regarding protection of archaeological resources is at any time before a 'zoning compliance letter' is requested for purposes of obtaining building permits, not at the time of conditional use permit approval. Under LDO 3.2.700, this is accomplished through the applicant's submittal of a 'plot plan showing exact location of excavation, clearing, and development.' The time for application of the Policy #18 and LDO 3.2.700 requirements is prior to obtaining a zoning compliance

> letter and building permit under LDO 3.1.200 (LDO 3.2.700 refers to a 'zoning compliance letter,' which the Board finds is the equivalent of a 'zoning verification letter' as described under LDO 3.1.200).
>
> "Therefore, the Board finds that the 'Site Plan Application' contemplated by Policy #18 is the 'plot plan' contemplated under LDO 3.2.700, which expressly implements the policy. JCEP must comply with the specific coordination and administrative hearing requirements of Policy #18 prior to obtaining a zoning compliance (verification) letter as required for issuance of building permits under LDO 3.1.200, rather than as part of its conditional use permit approval. The administrative review and hearing required under Policy #18 will occur at the time a 'plot plan' and related information are submitted for obtaining the necessary zoning compliance letter.

In this case, the Supplemental Staff Report provides:

> The consultations, surveys, and reports undertaken by the applicant regarding compliance with state and federal law governing cultural and archaeological resources are explained in Section 4.10 of the FEIS. As described in Sections 4.10.1.3 and 4.10.2.3 of that document, Pacific Connector has surveyed the pipeline route, and has prepared a Cultural Resources Survey Report identifying locations of archaeological sites along the route, and filed that report with both FERC and the State Historic Preservation Officer (SHPO), as required under state and federal law. However, according to staff, the report is not included in the record because under state and federal law, the contents of the report cannot be made available for public review in order to protect specific cultural sites that may be of interest to artifact hunters. This confidentiality requirement is also recognized in CBEMP Policy #18, which provides that the county "shall refrain from widespread dissemination of site-specific information about identified archaeological sites."

See Supplemental Staff Report dated July 8, 2010, at p. 1.

CCZLDO §3.2.700 sets forth a process that is, by its express terms, applicable only "prior to issuance of a 'Zoning Compliance Letter' for building and/or septic permits." In this case, a zoning compliance letter will be required prior to obtaining a building permit from State Building Codes in order to construct and connect the pipeline to the meter station at the LNG terminal. At that point, the notice required under Policy #18 must be provided to the tribes, who will be entitled to submit comments and concerns regarding resource sites along the entire pipeline route. Other state agencies may also require county sign-off on a land use compatibility

statement. The planning department will ask for comment from the appropriate tribe (Coquille or Confederated) consistent with CCZLDO §3.2.700 prior to issuance of a zoning compliance letter or sign-off on a land use compatibility statement.

Given this backdrop, the concerns of the Tribes can be addressed. The Cultural Resources Protection Coordinator for the Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, Ms. Arrow Coyote, wrote a letter dated June 10, 2010 in which she states the following:

> Section 3.2.700 would fail to protect the County's cultural resources if it were limited only to cases where a permit was being issued under the Oregon Building Codes Agency regulations. Too many ground disturbing activities would not be covered including roads, underground cables and pipelines. The placement of Section 3.2.700 in provisions involving use and the context of the section itself strongly suggest that the intent of the County was to protect its cultural resources, and those of the tribes, when any ground disturbing activity occurs that requires County approval.

The CCZLDO language is unambiguous and only applies to "building and/or septic permits." While it may be true that certain other ground-disturbing activities do not trigger CCZLDO §3.2.700, it is not within the Board's authority to rewrite the CCZLDO as part of this application process. However, the concern may be overstated, because, as quoted above, staff advises that building permits will be required for the pipeline's connection to the meter station itself. The Board agrees that this is the case. In any event, the Tribes are afforded what are perhaps even stronger protections under the FERC condition of approval No. 17, discussed below.

With regard to CBEMP Policy #18, the Board's Remand Order sets forth a workable solution for implementation of that policy. In a June 6, 2010 letter, the Hearings Officer stated that "[a]t this point, I am inclined to agree with the applicant that compliance [with CBEMP Policy #18 and CCZLDO §3.2.700] can be met with a condition of approval." The Hearings Officer further stated that "I would be interested in hearing from the Tribes whether they have any reason to believe that a condition of approval would not be sufficient to address their concerns." The Tribes responded to the Hearings Officer's request in a letter dated June 10, 2010. In that letter, Ms. Coyote expresses a generalized concern that CEBMP Policy 18 may not have any force once a CUP is issued. However, given the condition of approval proposed by the applicant, see *infra*, the Board finds that CBEMP Policy 18 and CCZLDO §3.2.700 will continue to have full force.

In her June 10, 2010 letter, Ms. Coyote explains that in the FEIS, FERC staff recommended certain conditions of approval related to cultural resources. *See* FEIS 4.10-21 and 5-32. These conditions were adopted, in somewhat modified form, in the Dec. 17, 2009 FERC Order. *See* FERC Order at p. 72-73. FERC's Condition 17 provides as follows:

Jordan Cove and Pacific Connector shall not begin construction and/or use any of their respective proposed facilities, including related ancillary areas for staging, storage, temporary work areas, and new or to-be-improved access roads until:

a. Jordan Cove and Pacific Connector each file with the Secretary remaining cultural resource survey reports and requested revisions, necessary site evaluation reports, and required avoidance/treatment plans;
b. Jordan Cove and Pacific Connector each file with the Secretary comments on the reports and plans from [SHPO], appropriate land management agencies, and interested Indian tribes;
c. The [ACHP] has been afforded an opportunity to comment, and a Memorandum of Agreement has been executed; and
d. The Commission staff reviews and the Director of Office of Energy Projects (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".

Thus, this condition requires certain action to be taken prior to construction of the proposed pipeline. Ms. Coyote faults Pacific Connector for not completing the tasks set forth in the condition, as follows:

These deficiencies are specifically as follows:

1. Re-routing of the pipeline in the Fairview Area to avoid two known sites 35CS225 and 35CS226 that will be impacted by the pipeline (FEIS 4.10-9).

2. Failure of draft unanticipated discovery plan to correctly identify state law process, address monitoring of ground disturbing activities adequately, or identify the role of the Confederated Tribes, and no requirement that the Project make use of the State-Tribal Inadvertent Discovery Plan.

3. Although the cultural resource surveys in the Haynes Inlet have been conducted, Pacific Connector has not provided with [sic] the Confederated Tribes with a rerouting plan to avoid the newly discovered archaeological sites.

4. Lack of cultural resources surveys and testing at the crossings at Kentuck and Willanch Sloughs.

5. Further archaeological investigation including trenching below the dredge fill at Graveyard Point.

6. Lack of a report of the archaeological investigation of the new upland route above Coos Bay.

7. The lack of an MOA outlining future consultation responsibilities or any other aspect of cultural resource protection.

While it is understandable that the tribes may be concerned that their issues could get lost in the shuffle, so to speak, it seems premature to criticize the applicant at this point in time for any failures to comply with FERC Condition 17. The applicant is a long way away from starting construction, and it seems that most, if not all, of the issues germane to CBEMP Policy #18 will get worked out as a part of the process of satisfying FERC Condition 17. By making FERC's condition a requirement for this approval, the County can assume a supervisory role as well.

In her letter dated June 10, 2010, Jody McCaffree states the following:

> Since dredging by Pacific Connector Gas Pipeline could impact unknown burial sites among other Archeological impacts that may yet be discovered in the area of the proposed pipeline route, it is the duty of the Hearings Officer and Commissioners to deny this permit application until the issues and concerns of the Tribe have all been resolved.

Id. at p. 29. However, given the Board's prior interpretation, Ms. McCaffree's suggested resolution makes no sense. As interpreted by the Board, CBEMP Policy #18 and CCZLDO §3.2.700 set forth processes that are to be undertaken *after* CUP approval is obtained. The Board finds that it is feasible for the applicant to fulfill the FERC conditions and to undertake the analysis required by CBEMP Policy #18 and CCZLDO §3.2.700. While it may be that this analysis will lead to further revisions and modifications to the route and/or other aspects of the proposal, that is a factual matter that will develop with time.

In any event, the applicant proposed a condition of approval on this issue which is essentially the same as the condition on this issue added to the LNG terminal approval. Staff proposed a condition of approval on this issue as well. The Hearings Officer recommended approving the applications, subject to both the applicant-proposed and staff-proposed conditions. The Board reviewed the Hearings Officer's recommendation and discovered minor variations between the language of the applicant-proposed and staff-proposed conditions. Prior to the deliberations in this matter, County staff submitted a staff report recommending that the Board accept the applicant's condition and delete the staff condition. At the deliberations in this matter, the Planning Director further advised the Board that the staff-proposed condition should be tweaked to reflect that the applicant would not be required to obtain approval of septic permits or a plot plan for the pipeline. Accordingly, the Board strikes the staff-proposed condition on this subject and instead adopts the applicant's proposed condition of approval as Condition of Approval B.24 to read as follows:

Historical, Cultural and Archaeological.

At least 90 days prior to issuance of a zoning compliance letter under CCZLDO Section 3.1.200, the County Planning Department shall make initial contact with the affected Tribe(s) regarding the determination of whether any archaeological sites exist within the CBEMP areas proposed for development, consistent with the provisions of CCZLDO Section 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of CCZLDO Section 3.2.700, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources have been identified, the County may approve and issue the requested zoning compliance letter and 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 CBEMP Policy #18 resources on the site and the applicant and the 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 archaeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of Section 5.8.200 of the CCZLDO with the Board of Commissioners serving as the Hearings Body.

The Board finds that imposing this condition of approval addresses the opponents' concerns.

B. Multiple Approval Standards Related to Specific Zones

1. Rural Residential RR-2 and RR-5 Zones.

The staff report notes that the proposed pipeline crosses a total of approximately 0.37 of a mile of private property zoned Rural Residential - 5 (RR-5), and approximately 0.10 of a mile of private property zoned Residential Rural - 2 (RR-2). According to the applicant, the pipeline crosses five RR-5 zoned areas from MPs 10.15 to 10.25, 11.94 to12.04, 12.47 to 12.49, 14.22 to14.28, and 22.59 to 22.71. From MPs 4.17 to 4.22 and 10.12 to 10.15, the pipeline crosses property zoned RR-2. All of the RR-5 and RR-2 zoned lands crossed are private.

The applicable code provision is CCZLDO §4.2.900 (7), which provides as follows:

SECTION 4.2.900.7 – The use must be found compatible with surrounding uses or may be made compatible through the imposition of conditions.

The County has interpreted this standard to mean that the proposed use "is capable of existing together with surrounding uses without discord or disharmony." That formulation was upheld as falling within the permissible range of interpretations under ORS 197.829(1). *Clark v. Coos County*, 53 Or LUBA 325 (2007). In *Clark*, LUBA also upheld the County's conclusion that the "compatibility" requirement of CCZLDO 4.2.900(7) only applies to *existing* uses, and not to future or potential uses or additions to residential property. *Id.* at 330.

Compatibility standards of this sort are extremely subjective in nature. *Corbett/ Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601, 617 (1993); *Knight v. City of Eugene*, 41 Or LUBA 279 (2002). As LUBA has noted, "[i]ndividual perceptions may widely diverge about whether a proposed development will be compatible with the existing setting or the type and scale of development envisioned in planning documents. The term is flexible and, therefore, an imperfect standard for judging the acceptability of proposed development" *See Marineau v. City of Bandon*, 15 Or LUBA 375 (1987).

Given the deferential scope of review LUBA and the Courts apply to a governing body's code interpretations under ORS 197.829(1); *Church v. Grant County*, 187 Or App 518, 525, 69 P3d 759 (2003) and *Siporen v. Medford*, 231 Or App 585, 220 P3d 427 (2009), *rev allowed* 348 Or 19 (2010), the Board has a fairly wide degree of latitude on this issue. However, LUBA has cautioned, in a pre-*Clark* case, that it is not proper to, in effect, balance the need for the land use against the potential harm to surrounding uses. *See Vincent v. Benton County*, 5 Or LUBA 266 (1982). Whether that holding survives *Clark* and ORS 197.829(1) is unclear, but in all likelihood, it does not.

Nonetheless, by defining the proposed use as a "conditional use" in the zone, there has already been a legislative determination that gas pipelines are not *per se* incompatible with rural residential uses. Were that not the case, then gas pipeline uses would be considered to be a prohibited use in the zone. Thus, the issue becomes whether the proposed pipeline creates specific incompatibility issues with the uses that currently exist in the surrounding areas.

The term "surrounding uses" is not defined in the CCZLDO. No party attempts to assert that analysis of any particular geographical area is required. The applicant seems to have attempted to define the "surrounding area" via its maps and aerial photographs. The applicant's analysis focuses on all structures within 100 feet of edge of the corridor, the temporary work areas and uncleared storage areas. The Board finds that the applicant's maps and aerial photos included with the June 17, 2010 letter from Mr. Gregory are adequate to define the "surrounding area," and accepts the 100 foot limit as acceptably defining the limit of possible impacts.

WELC and other opponents argue that the pipeline should not be allowed in the Rural Residential zones because the applicant has failed to identify nearby uses with sufficient specificity, and therefore the county cannot make the "compatibility" determination required

under CCZLDO 4.2.900(7). *See* Letter from WELC staff attorney Jan Wilson, dated June 8, 2010 at p. 7.[19] Also, WELC contends that the applicant has not provided sufficient detail regarding mitigation measures that would be employed to ensure compatibility with rural residential uses. *See* Letter from WELC staff attorney Jan Wilson, dated June 8, 2010, at p. 7.

As the applicant notes, WELC does not present any evidence of its own suggesting that a particular segment of pipe is not compatible with an existing use in the rural residential zones. Rather, WELC's focus seems to be on the argument that the applicant's evidence is *per se* insufficient to meet its threshold burden of proof, even in the absence of any evidence to the contrary. In this regard, WELC is correct that the applicant has the burden of proof to

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[19] The June 10, 2010 letter from WELC states:

> "The application narrative says that the surrounding uses include "residential uses, pasture land, and forest operations." This list is too vague as to which uses are where and how close to the pipeline and what, exactly, is being done on the property. For example, a "residential use" could include a backyard children's play area or garden beds or a residential septic field – all things that may be impacted in a variety of ways. Without knowing what uses – specifically – are on each of the specific properties, it is impossible for the hearings body to make the required finding of "compatibility."
>
> Further, the applicant makes general assertions of minimization and mitigation, without detailing what would be done where, so that those things can be incorporated into the conditions of approval, as required by CCZLDO 4.2.900(7). What does the applicant mean when it says that it would engage in "appropriate" measures to protect homes and structures during pipeline construction and that it would restore disturbed areas "as closely as possible" to preconstruction condition? For example, where the pipeline crosses pasture land, would gates be installed in existing pasture fence, or would fences be moved, or would livestock (or pets) be merely excluded from the pipeline right-of-way (presumably with appropriate monetary compensation for the loss of pasture land)? By quoting Condition 43 of the FERC order, does the applicant mean to request that the same condition of approval be incorporated into the county's decision and also to assert that the condition is adequate to make the pipeline compatible with surrounding uses? By including the Groundwater Supply Monitoring and Mitigation Plan, which itself is vague about exactly what wells, springs, and seeps are near the proposed pipeline route, does the applicant mean to have those determinations made part of the conditions of approval?
>
> Under recent and current Oregon law, as interpreted by LUBA and the Court of Appeals, where an approval criteria specifically requires a finding – such as the requirement of a finding of compatibility with surrounding uses, in this case – the decision can not merely defer and delay determination of the relevant finding until the applicant gets around to providing the factual data necessary to make the finding. Instead, in order to defer a finding such as the "compatibility" finding required here, the county must find (a) that it is feasible for the applicant to satisfy the criteria and (b) that the later process, where the finding is actually made, offers the same level of public review and participation as the original proceeding. In this case, the applicant has not provided the data necessary to make a "compatibility" finding, has not even provided enough data to make it possible to determine that satisfying the compatibility requirement is even feasible, and has made no suggestion about any future process that would allow that determination to be made with the same level of public participation as this current process.
>
> Thus, lacking adequate information to make the required finding, the county should deny the application."

demonstrate compliance with an approval criterion, but as discussed, below, the applicant has met its burden.

WELC states that a "residential use could include a backyard children's play area or garden beds or a residential septic field – all things that may be impacted in a variety of ways," but then does not describe any of those alleged ways. It is not intuitive to the Board how an underground pipe in normal operation 50 to a 100 feet away from a "backyard children's play area" or a "septic drainfield" could impact those uses. The only obvious potential impact would be those resulting from a leak or an explosion, which is discussed below. Nonetheless, with regard to septic drain fields, the FERC conditions require the applicant to file a plan with the Secretary "outlining measures that should be implemented to mitigate pipeline construction impacts on domestic water supply systems and septic systems." *See* FERC Condition No. 43. The Hearings Officer found that it is feasible for the applicant to demonstrate compliance and recommended that the FERC condition be applied here. The Board agrees and adopts Condition of Approval A.8 to read as follows:

> "To protect residences and structures, evidence of compliance with FERC's Certificate Order, Condition #43 must be provided prior to issuance of zoning clearance."

The April 14, 2010 application narrative, at pages 22-23, provides a description of why the pipeline is compatible with surrounding rural residential uses. Notably, as a sub-surface facility, the pipeline creates no real "compatibility" issues other than (1) temporary disturbances during construction, and (2) restricting the landowner from building new structures on top of the pipeline right-of-way.

The applicant has provided detailed information regarding compatibility and mitigation measures with existing residential uses in correspondence from Rodney Gregory and Derrick Welling on Williams Pipeline letterhead, dated May 11, 2010. The May 11, 2010 correspondence also provided two pages of detailed information regarding location of the pipeline in relation to existing residential structures, and also identified measures that will be taken to minimize and mitigate impacts on residential uses. *See* Williams Pipeline May 11, 2010 letter at p. 18-9.

Therein the applicant stated:

> Within RR-5 zoned lands near MP 14.25, there are two residences within 100 feet of the construction area. There are also several structures within RR-5 zoned lands within 100 feet of the construction area. Within RR-2 zoned lands, there are no residences within 100 feet of the construction area; however, there are several structures located within 100 feet of the construction area. The structures are shown on the Environmental Alignment Sheets provided in Exhibit 1 to the application narrative.
>
> Pacific Connector will undertake specific measures to ensure safety and mitigate impacts on residential uses and structures,

including the following: (1) installation of orange safety fence between the construction right-of-way and the residence; (2) avoiding removal of trees and landscaping wherever possible; (3) restoring all lawn areas and landscaping within the construction right-of-way consistent with the requirements of FERC's upland plan; (4) maintaining access to residences at all times during construction; (5) providing alternative sewer facilities if septic systems are disturbed during construction, including repairing and restoring such systems if necessary.

Consistent with the above, the principal method for mitigating impacts to existing residential areas will be to ensure that the construction proceeds quickly through such areas (thus minimizing exposure to nuisance effects, such as noise and dust) and limiting the hours of operations that high-decibel noise levels can be conducted. Landowners will be notified prior to construction and access and traffic flows will be maintained during construction activities, particularly for emergency vehicles. Pacific Connector has developed and will implement Landowner Complaint Resolution Procedures.

Dust minimization techniques such as watering will be used on-site and all litter and debris will be removed daily from the construction site. Pacific Connector will comply with all local noise ordinances. Pacific Connector does not currently plan to work on Sundays. However, certain activities, such as waterbody crossing construction and hydrotesting, may require a 24-hour work schedule. Pacific Connector will attempt to schedule activities during normal working hours.

After project construction, landowners affected by the project will have use of the right-of-way, provided it does not interfere with the easement rights granted to Pacific Connector for construction and operation of the pipeline system.

Mature trees, vegetation screens and landscaping will be preserved to the extent possible while ensuring the safe operation of construction equipment. Landowners will be compensated for removal of trees. Immediately after backfilling the trench and weather permitting, all lawn areas and landscaping within the construction work area will be restored. Permanent structures will not be permitted on the permanent right-of-way, including houses, tool sheds, garages, poles, guy wires, catch basins, swimming pools, trailers, leaching fields, septic tanks, or any other objects not easily removed; nor in general is grading or removal of cover allowed without Pacific Connector's involvement. Pacific

> Connector will compensate landowners for damage to homes if the damage is caused by pipeline construction. Depending on the specific circumstances, Pacific Connector may choose to relocate residents during construction activities. Arrangements will be determined through negotiations between the landowner and Pacific Connector's Land Representative prior to construction.
>
> Within 50 feet of a residence, the edge of the construction work area will be fenced for a distance of 100 feet on either side to ensure that construction equipment and materials, including the spoil pile, remain within the construction work area. Fencing will be maintained, at a minimum, throughout the open trench phases of pipeline installation. Where feasible, Pacific Connector has reduced the construction right-of-way near residences and placed temporary work areas as far as practicable from the residences. Pacific Connector will also limit the period of time the trench remains open prior to backfilling.

WELC does not specifically take issue with these findings.

Regarding WELC's argument concerning lack of sufficient information about nearby uses, it is not clear what additional information WELC believes is necessary to make the necessary determination about compatibility. The applicant has identified the specific locations of all residential structures on the alignment sheets attached to the April 14, 2010 application narrative as Exhibit 1. The applicant also provided correspondence dated June 17, 2010 from Rodney Gregory of Pacific Connector (attached as Exhibit 8 to the applicant's June 17, 2010 record submittal), providing further information regarding the compatibility issue and enclosing the following additional materials:

1. A table that identifies all structures located within 100 feet of the proposed pipeline corridor, or any TEWA or UCSA. Properties are identified by milepost, ownership, zoning, land use type, and the distance of each structure on the property from the corridor, TEWA or UCSA.

2. Close-up version of the aerial photo alignment sheets for the properties identified in the above-referenced table, showing all structures within 100 feet of any portion of the project and identifying their precise distance from the project.

The Board reviewed the information in the application, as set forth above, and concludes that this information constitutes substantial evidence that an underground natural gas pipeline is capable of existing together with surrounding rural residential zone uses without discord or disharmony. Once built, the pipeline itself will be underground and will not create noise, dust, vibration, or other impacts. The use will only generate traffic during inspections and periodic maintenance. The pipeline will not impair views or obstruct access to solar energy. The pipeline will not be a visual blight. The 30 foot corridor will remain clear of trees, shrubs, and similar vegetation, but that is not far removed from what happens when roads are built, and there is no suggestion that road are incompatible with rural residential uses. As discussed elsewhere, there is some potential

that the corridor will be used by off-road vehicles, but that possibility will be minimized with the appropriate condition of approval.

The only potential impacts are construction related, and *all* construction creates some temporary impacts – regardless of the proposed use under consideration. A review of LUBA case law reveals that compatibility analysis typically does not focus on temporary construction-related impacts of that sort. However, even to the extent that the criterion is focused on those types of temporary construction impacts, the code allows uses that might be incompatible to be "made compatible through the imposition of conditions." CCZDO 4.2.900(7) As the testimony of the applicant makes clear, it is feasible for a pipeline to be constructed in a manner that is compatible with neighboring residences, and the FERC conditions will ensure compatibility during construction.

The biggest potential compatibility concern stems from the property shown on Drawing No,. 3430.33-X-9007. (MP 13.8 to MP 14.4). On the drawing (aerial photograph), that property is listed as the "Ketchum residence," but the table accompanying Mr. Gregory's June 17, 2010 letter shows the property as being owned by "Robert G. Scoville." In any event, that property has two residential structures[20] that are 2.5 feet and 5.7 feet from the edge of the construction easement, and even that is somewhat misleading since it appears that the easement was reduced in width at that location to avoid those structures. The FERC condition of approval appears to provide a remedy for this particular landowner, as it requires "evidence of landowner concurrence if the construction work area and fencing would be located within 10 feet of a residence." Presumably, this consent requirement gives the landowner a high degree of negotiation leverage in the event the applicant does go this route. The applicant has testified that it has latitude under FERC's Order to make minor adjustments to the route of the pipeline. The Hearings Officer recommended a condition of approval requiring the pipeline to be rerouted to avoid the residence shown on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4).

The Board finds that the Hearings Officer's recommended condition may have misstated the name of the landowner as well as the direction the pipeline would need to be relocated in order to minimize impacts to the residence in question. Moreover, the Board finds the recommended condition may actually reduce the applicant's flexibility to respond to the landowner's concerns. Finally, the Board finds that the proposed condition is too narrow in scope and should apply to all landowners along the pipeline alignment. Accordingly, the Board modifies and adopts the condition as Condition of Approval A.4 to read as follows:

> "The pipeline will be rerouted, where feasible, in order to avoid impacts to the property identified on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4). If requested, the applicant shall work with affected property owners within the pipeline's alignment to make 'minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands' pursuant to FERC Order Condition #6 in order to avoid or minimize impacts to structures or the owner's use of the property."

[20] From the aerial photographs, the structures appear to a dwelling and a detached garage.

In looking at the remainder of the aerial photographs and maps, it appears that there is sufficient distance between the actual location of the pipeline and nearby residences to ensure co-existence without "discord or disharmony."

There is quite a bit of evidence in the record suggesting that gas pipelines occasionally explode, causing destruction to property and occasionally even injury and death to humans. *See* Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. For example, a natural gas pipe explosion in Carlsbad, New Mexico killed eleven people on August 19, 2000. *Id.* The argument advanced by the opponents seems to be that any utilityhas the potential to cause death and injury is *per se* incompatible with rural residential uses. However, the Board has already determined that the proposed use is a conditional use in the zone, and therefore this type of "*per se*" incompatibility argument is a collateral attack on the legislative enactment of the code.

Moreover, it is difficult to rely on anecdotal evidence as a basis to conclude incompatibility. For example, most of the incidents cited by opponents involve older pipes with deferred maintenance issues. *See* Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. The applicant has testified that the newer designed pipes have more built-in safety features and use better materials, and are less likely to have the same type of maintenance issues as experienced with older pipes. As a decision-maker in a land use hearing, one 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.").

Moreover, even if one assumes that a future accident will happen, it does not follow that occasional loss of life and property damage from accidents necessarily means that the gas pipeline utility use is not compatible with residential use. Obviously, if an explosion occurred, it would cause "discord or disharmony." However, the evidence in the record shows that the potential for an explosion at any one particular location is statistically very low, perhaps akin to the odds of a person getting hit by lightning. For example, the publication entitled "Out of Sight Out of Mind No More" was published in 2000, and documents less than 200 oil and gas pipeline deaths over the period from 1984-1999. *See* Exhibit N to the June 17, 2010 letter from Jody McCaffree, Executive Director of Citizens Against LNG. The Board finds that the small potential for an accidental explosion does not form a basis to conclude that the pipeline is not "compatible" with any particular surrounding use.

Finally, the Board finds that the risk of an accident caused by the pipeline is no greater than the risk of any other life-threatening accident, such as an electrical house fire, electrocution,

a tree fall, etc. We live in a modern society that demands certain conveniences, such as running water, electricity, natural gas, and automobiles. It is simply not possible to completely avoid the risk of death or injury to humans resulting from the provision of such systems. The allowance of automobile use, for example, is virtually guaranteed to kill tens of thousands of Americans every year, despite laws that demand reasonable and safe operation of these automobiles, and vigorous enforcement of such laws. And yet, despite the carnage caused by cars, is there any question that cars are "compatible" with residential areas, rural or otherwise? Is there any movement to bar cars on the grounds that human life will be saved? No, of course not. Similarly, all Americans take on a certain degree of risk of harm or death by having gas and electricity in their homes, and yet electrical and gas appliances and furnaces are still considered to be "compatible" with residential uses. Indeed, they are necessary for modern residential use. The bottom line is the risk of harm to life and property here is miniscule, and is far outweighed by the benefits to society. Therefore, public utility uses such as gas pipelines are compatible with residential uses despite the incidental risks associated therewith.

In closing on this issue, the application narrative also notes the following condition of approval being required by FERC that will ensure future compatibility with residential property:

> "43. Prior to pipeline construction, Pacific Connector shall file with the Secretary, for the review and written approval of the Director of OEP:
>
> a. The results of a civil survey of the entire pipeline route that identifies all residences and commercial structures within 50 feet of the construction right-of-way;
> b. A plan outlining measures that should be implemented to mitigate pipeline construction impacts on domestic water supply systems and septic systems; and
> c. For any residence closer than 25 feet to the construction work area, a site-specific plan that includes:
> (1) A description of construction techniques to be used (such as reduced pipeline separation, centerline adjustment, use of stove-pipe or drag-section techniques, working over existing pipelines, pipeline crossover, bore, etc.), and a dimensioned site plan that shows:
> (i) the location of the residence in relation to the pipeline;
> (ii) the edge of the construction work area;
> (iii) the edge of the new permanent right-of-way; and
> (iv) other nearby residences, structures, roads, or waterbodies.
> (2) A description of how Pacific Connector would ensure the trench is not excavated until the pipe is ready for installation and the trench is backfilled immediately after pipe installation; and
> (3) Evidence of landowner concurrence if the construction work area and fencing would be located within 10 feet of a residence."

The Hearings Officer recommended that the County impose a substantively identical condition. The Board agrees and adopts Condition of Approval A.8 for this purpose.

Testimony presented at the hearing, expressed concern about the possibility that the gas

pipeline will affect shallow rural wells and water supplies. It is not readily apparent or intuitive that a natural gas pipeline will have any effect on water supplies. Without more focused testimony and supporting evidence, the Hearings Officer did not give speculative testimony such as this any credence.[21] The Board sees no reason to do so either. As discussed above, FERC Condition 43 addresses this issue.

2. Industrial Zone (IND)

The proposed pipeline will cross approximately 0.07 mile of IND zoned property adjacent to Jordan Cove. According to staff, the site was previously impacted by industrial use (Weyerhaeuser yard).

The applicant has requested a consistency determination of the permitted nature of the use in the IND zone.

CCZLDO §4.1.100 sets forth the purposes of the Industrial (IND) zone:

> The purpose of the "IND" district is to provide an adequate land base necessary to meet industrial growth needs and to encourage diversification of the area's economy accordingly. The "IND" district may be located without respect to Urban Growth Boundaries, as consistent with the Comprehensive Plan. The "IND" designation is appropriate for industrial parcels that are needed for development prior to the year 2000, as consistent with the Comprehensive Plan.

CCZLDO §4.6.610 states that a "site plan review" is required for *all* uses in the IND zone. The term "use" is defined in a manner that includes "facilities." The term "utility" is defined in a manner that encompasses "facilities." Therefore, a utility is a "use." However, a "utility facility not including power for public sale" is a permitted use pursuant to Section 4.2.600 and Table 4.2-e. The Board finds that the proposed gas pipeline is a "utility facility- not including power for public sale" within the meaning of CCZLDO §2.1.200, and that it is an outright permitted use in the IND zone.

Staff states that "the pipeline will be located beneath the surface of the site and is a necessary component of the previously approved LNG facility." Therefore, staff asserts that further site plan review is not necessary.

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[21] The hearings officer is mindful of the fact that lay-person testimony can, under the right set of facts, undermine contradictory expert testimony. *See Johns v. City of Lincoln City*, 35 Or LUBA 421, 428 (1999); *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999). However, under this set of facts, no reasonable decision-maker would accept the vague and unsubstantiated opinions of lay persons that the pipeline will harm wells, particularly when the applicant's experts concluded that no such harm will result. To constitute substantial evidence sufficient to overcome such expert testimony, the opponents would need to support their conclusions and opinions with *some sort of* actual collaborating evidence or facts, and not just rely on an unsubstantiated, self-serving opinions.

WELC and Jody McCaffree take issue with the staff report's conclusions. In a letter dated June 8, 2010, WELC's staff attorney states:

> CCZLDO §4.4.610 requires site plan review for "all" uses in the Industrial (IND) zoning district. Development proposed for the IND zones includes not only the pipeline itself but also temporary construction areas. The applicant has not applied for site plan review for these development activities, and thus the pipeline cannot be approved in the IND zones until the site plan review is completed. A condition of approval may be an appropriate way to ensure compliance with the code requirement for site plan review.

The applicant responds to these assertions in its letter dated June 24, 2010, as follows:

> [R]equiring a site plan review for a subsurface pipeline crossing of a portion of the Industrial zone would be inappropriate for several reasons. First, Section 5.6.400 indicates that the related development standards are intended to address a traditional "development of a site and building plans," which is obviously not implicated by the installation of a subsurface gas pipeline. Further, the standards of the section largely apply to structures and other types of above-surface improvements, which also cannot be applied to a subsurface pipeline. As discussed above in Section 5 of this letter, the pipeline is not a "structure" under the county code definition. Finally, the applicant submits that the only relevant standard in Article 5.6 is the Threshold Standard in Section 5.6.5003 [sic] which provides, in pertinent part, that "The Planning Director, at his discretion, may waive part or all of the site plan requirements including fees, if, in the Director's judgment, the proposed development is *de minimis* in extent to the existing development." This section allows the county discretion to find that the provisions of Article 5.6 are inapplicable because they were not intended to address a subsurface gas pipeline.

WELC is correct that the CCZLDO would typically require a site plan review for this site prior to development. Specifically, CCZLDO §5.6.300 states that "[w]ithin any zone designation requiring a site plan review, *no building permit or verification letter shall be issued for the* erection or *construction of a permitted* or conditional *use until* the plans, drawings, sketches and other documents required under Section 5.6.500 have been approved by the Planning Director in conformity with the criteria specified in Section 5.6.400."(emphasis added). Notwithstanding this general requirement, CCZLDO §5.6.500(3) authorizes the Planning Director to waive the site plan requirement. This provision states: "The Planning Director, at [her] discretion, may waive part or all of the site plan requirements including fees, if, in the Director's judgement [*sic*], the proposed development is diminimous [*sic*] in extent to the existing development."

The Hearings Officer found that nothing would be accomplished by requiring a "site plan

review" of an underground gas pipeline across an old Weyerhaeuser yard. Further, the Board finds that the development standards of CCZLDO §5.6.400 are intended to apply to structures and other types of above-surface improvements, and are not applicable to subsurface pipelines and their ancillary facilities, including temporary construction areas. Further, as conditioned, any adverse effects caused by the construction and operation of the pipeline on existing development will be fully mitigated. Accordingly, the pipeline will necessarily be *de minimis* in nature to existing development in this zoning district. The Board finds that the authority delegated by the Board to the Director under CCZLDO §5.6.500(3) also necessarily applies to the Board. The Board finds that the site plan requirements of this section are not applicable to the pipeline and its ancillary facilities, including temporary construction areas.

3. Coos Bay Estuary Management Plan (CBEMP)

The PCGP will cross through 15 CBEMP zoning districts. Compliance with the standards and policies applicable in those districts is addressed in the following documents submitted by the applicant in this proceeding:

- The application narrative dated April 14, 2010, at pages 26-50;
- Correspondence dated May 17, 2010 from Randy Miller of Pacific Connector, specifically addressing compliance with standards in CBEMP aquatic districts;
- Correspondence dated June 9, 2010 from Robert Ellis, Ph.D., of Ellis Ecological Services (the "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.

CCZLDO Section 4.5.100.

Some opponents raised CCZLDO 4.5.100 as a potentially applicable approval standard. It is a purpose statement stating general objectives, not an approval criterion. *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. Section 4.5.150 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 Section 4.5.150.

Section 4.5.150(5)(a) states that the Management Objective provides general policy guidance regarding the uses that are, or may be allowed in the district. Section 4.5.150(5)(b)

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

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

a. 6-Water-Dependent Development Shorelands (6-WD):

The 6-WD zoning district is a former industrial log yard, which will be the site of the Jordan Cove LNG terminal. The upland LNG terminal and all of its associated facilities and accessory uses, including the first segment of the pipeline, were approved in the 6-WD district as part of the Coos County Board of Commissioners decision dated December 5, 2007, and subsequent decision on remand from LUBA on August 21, 2009.[22]

> *Section 4.5.275 Management Objective: This district shall be managed so as to protect the shoreline for water-dependent uses in support of the water-related and non-dependent, nonrelated industrial use of the area further inland. To assure that the district shoreline is protected for water-dependent uses while still allowing non-water-dependent uses of the inland portion of the property (outside of the Coastal Shoreland Boundary), any new proposed use of the property must be found by the Board of County Commissioners (or their designee) to be located in such a manner that it does not inhibit or preclude water-dependent uses of the shoreline. Further, use of wetlands in the district must be consistent with state and federal wetland permit requirements.*

Section 4.5.276(A)(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 30, 49, 50, and 51.

Citizens Against LNG makes the following comments regarding this site:

> The proposed Pacific Connector pipeline route will cut through prime Industrial waterfront shoreline property making the property limited for future development. No structures can be built over the pipeline or in the easement areas. The Port has expressed concerns about this,[23] which was noted in the recent Pacific Connector

[22] On December 5, 2007, the Coos County Board of Commissioners adopted Order No. 07-11-289PL approving County File No. HBCU-07-04 regarding JCEP's proposed LNG import terminal as a water-dependent industrial and port facility, with the import terminal described in the decision to consist of upland facilities for LNG importation, processing, energy generation and transshipment into the interstate gas pipeline.

[23] Pacific Connector Clean Water Joint Permit - Appendix I - Wetland Mitigation PCGP - page 4:

> 401/404-permit application to Army Corps, DEQ and DSL. (See Exhibit P) The pipeline will also impact the shoreline area of Jordan Cove itself; impacting resource and development areas there as well. Impacts to protected Wetlands and Archeological sites noted on Coos Counties *Shoreland Values Requiring Mandatory Protection* Map will also occur in Jordan Cove, clearly violating the zoning requirements in this district. (See Exhibit B) Alternative Pipeline Routes that would have gone towards the North first instead of going directly East along the shoreline of the Coos Bay Estuary were never considered or analyzed by the Pacific Connector as indicated by their map of alternative routes. (See Exhibit A-1) This would have not only avoided impacts to future water dependant industrial development in this area, but also would not have been so impacting to the estuary. By using this more northerly route, most of the Pacific Connector right of way west of I-5 would cross property owned by Weyerhaeuser Corporation – which has supported the LNG development and would benefit from the sale of its North Spit property. The more northerly route would also avoid impacts to Rural Residential and EFU lands in Coos County. (See Exhibit A-1 & A-2)

See letter from Jody McCaffree, dated June 190, 2010, at p. 6. These type of "alternative route" are within the province of FERC, not the County. Nonetheless, the applicant responds as follows:

> [I]nstallation of the pipeline as a component of the approved LNG terminal will cause only temporary disturbance within the 6-WD zoning district. Pacific Connector has coordinated with Weyerhaeuser and Roseburg Forest Products to ensure that the pipeline location would not impede their existing or planned, future water-dependent uses or non-water-dependent uses or non-dependent, nonrelated industrial uses of the area further inland. Pacific Connector will obtain a 50-foot permanent right-of-way for the pipeline from landowners, and permanently engineered structures will not be allowed within the permanent right-of-way. However, once the pipeline is constructed and in operation, most water-dependent uses may proceed as they did prior to the pipeline

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"....The WC-1A-2A alignment modification on the north spit between approximately MPs 0.9 and 2.4 basically follows the original land route. Pacific Connector consulted with Clausen Oysters as well as the Port of Coos Bay about the modification to the WC-1A route variation. Although the WC-1A-2A is superior compared to WC-1A in avoiding direct effects to the oyster beds, Clausen Oysters have expressed concerns with the potential construction/ turbidity impacts of this route variation including WC-1A when compared to Pacific Connector's Proposed Route in the Bay that was filed in the FERC Certificate application. The Port of Coos Bay also indicated that WC-1A-2A would cross more areas that are within the Port's future development plans than the original WC-1A route.

installation. Furthermore, the beginning location of the pipeline is determined by the location of the LNG Terminal, which was approved by Coos County as an accessory component to the primary water-dependent port and industrial use. Pacific Connector has applied for state and federal wetland permits and will comply with all state and federal requirements.

Given both the coordination that has occurred between the applicant and Weyerhaeuser, and the distinct lack of objection from Weyerhaeuser in this proceeding, the Board finds that the proposed pipeline is not inconsistent with the management objective of the 6-WD zone.

The management objective is met.

b. 7-Development Shorelands (7-D)

The pipeline crosses the 7-D zoning district from MPs 0.97 R to 1.15 R and from MPs 1.22 R to 1.65 R. This section is privately owned by Weyerhaeuser Company. Section 4.5.286(A)(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 49, 50, and 5.

Pacific Connector would utilize the Roseburg Dock and the Weyerhaeuser Cove pipe storage and contractor yards during construction, which are partially zoned 7D. As described above, Roseburg Dock is a former industrial log yard, and the Weyerhaeuser Cove area is an old industrial site, half of which is paved.

Section 4.5.285 Management Objective: This shoreland district, which borders a natural aquatic area, shall be managed for industrial use. Continuation of and expansion of existing nonwater-dependent/non-water-related industrial uses shall be allowed provided that this use does not adversely impact Natural Aquatic District #7. In addition, development shall not conflict with state and federal requirements for the wetlands located in the northwest portion of this district.

Installation of the pipeline is consistent with the objective to manage the area for industrial use. The pipeline will be constructed using a stove pipe technique along the existing dirt service road on the Weyerhaeuser property that runs east-west just north of the Jordan Cove. This technique is being proposed to install the pipeline within the existing footprint of the road in order to avoid a known Point Reyes bird's-beak plant community, designated as a State Endangered Species, that borders the Jordan Cove shoreline as well as surveyed archeological sites located along the north and west shores of the Jordan Cove. The service road and all temporary extra work areas (TEWAs) would be reclaimed following installation of the pipeline within this district. Neither construction of the pipeline nor the permanent right-of-way will cross the 7-D district; therefore, there will be no direct impacts to 7-NA. To avoid indirect impacts, Pacific Connector will implement the ECRP throughout construction and restoration, which details the best management practices that will be installed to contain all project disturbance within the FERC-certificated boundaries (i.e., the construction right-of-way and TEWAs). Where the southern boundary of TEWA 1.19-N is adjacent to 7-NA, Pacific

Connector will install silt fencing to ensure that there is no off-site sedimentation or impact to 7-NA. Pacific Connector has applied for the necessary state and federal wetland permits and will comply with all state and federal requirements (see response to Policy #17 for consistency with significant wildlife habitat requirements).

In addition to the foregoing, the above-referenced Ellis Report provides the following testimony regarding compliance with the 7-D management objectives:

> "As outlined above, zone 7-D will be used as a temporary construction yard. Construction in the 7-D zone would be required to comply with a DEQ 1200-C Construction Stormwater Permit, which includes requirements for erosion control plans. The erosion control plans will be completed and submitted prior to initiation of construction and will include specifics on erosion control measures and BMPs to be implemented during construction. These protective measures could include the installation of silt fences, mulch blankets, slope breakers, straw wattles or other erosion controls. BMPs and other protective measures will preclude adverse impacts to the adjacent zone 7-NA aquatic unit, as required under the management objectives." Ellis Report, page 17.

The applicant asserts that, as a result of this information. "the first [*sic* third] condition of approval proposed by staff in the May 13, 2010 staff report is no longer necessary." That condition states "The applicant's plan to protect the 7-NA district from adverse impacts due to the temporary construction phase of the pipeline shall be provided to the Planning Department. The Board agrees.

Citizens Against LNG makes the following comments regarding a neighboring site which is zoned 7-NA:

> Applicant hasn't shown there will be no adverse effect on management unit 7-NA, where the Management Objective is, "*to protect natural resources.*" PCGP states they are submitting a plan to the Planning Dept in the future (SR Cond. 3), but this is not sufficient. In order to analyze this project properly we need to be able to see how they plan to protect this management unit. Stormwater and watershed runoff along with impacts from the pipeline easement and dredging being so near the shoreline in this area are highly likely to cause degradation to the waterway in management unit 7-NA. In addition, cumulative impacts from pipeline dredging of other estuarine water areas will filter down to this management unit. Habitat species and marine life degradation will occur and this clearly violates the management object of unit 7–D and 7-NA. This Zoning District has a noted Wetland on the West end of Jordan Cove that will also be impacted by the

pipeline-dredging proposal, making the project clearly not in zoning compliance. (See Exhibit B).

See letter from Jodi McCaffree, dated June 190, 2010, at p. 7. However, the applicant does not propose to build within the 7-NA zoned property, and therefore criteria in the 7-NA zone are not applicable here. Protection to neighboring area will be accomplished via the various federal CWA permits that the applicant will be required to obtain.

c. 8-Water-Dependent Development Shorelands (8-WD)

The pipeline crosses the 8-WD zoning district from MPs 1.65 R to 1.70 R. This section is privately owned by Weyerhaeuser Company. Section 4.5.371(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 23, 27, 49, 50 and 51. Pacific Connector proposes to utilize Weyerhaeuser Cove for pipe storage and as a contractor yard during construction (also designated as TEWAs 1.19-W/1.24-W), which is partially zoned 8-WD. The Weyerhaeuser Cove area is an old industrial site, half of which is paved.

Section 4.5.370 Management Objective: This shoreland district shall be managed to allow the continuation of and expansion of aquaculture, along with the development of a boat ramp and limited tie-up facilities, to permit public access to the Estuary.

Upon completion of construction, the Weyerhaeuser Cove yard will be reclaimed to pre-construction conditions, allowing pre-construction activities to continue unhindered. Pacific Connector will obtain a 50-foot permanent right-of-way for the pipeline. The development of the boat ramp and limited tie-up facilities would not be impeded as long as the boat ramp is not proposed within the 50-foot right-of-way. The pipeline will be buried and will not interfere with public access to the Estuary.

As the applicant notes, aquaculture is defined in the county code as "[r]aising, feeding, planting, and harvesting fish and shellfish, and associated facilities necessary for such use." The use of this upland district for the continuation and expansion of aquaculture should not be impacted during construction (*i.e.*, utilization of the Weyerhaeuser Cove yard) and will not be impacted once the pipeline is installed. Aquaculture can continue post-construction as it did pre-construction. Additional responses regarding potential construction-related impacts on aquaculture and other natural resources in the CBEMP aquatic districts are addressed elsewhere in this decision.

d. 8-Conservation Aquatic (8-CA)

The pipeline crosses a small portion of the 8-CA zoning district between mileposts 1.70 R and 1.78 R (see environmental alignment sheets attached as Exhibit 1 to April 14, 2010 application narrative). The 8-CA district includes upland and tideland areas east of the Southern Pacific Railroad right-of-way and the adjacent Weyerhaeuser industrial site. Section 4.5.376(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

Pacific Connector will utilize portions of the Weyerhaeuser Cove yard as a temporary construction and storage area, but not the submerged and submersible tideland areas located within the 8-CA zoning district. The only impact on tideland areas will be the installation of the pipeline itself.

> *Section 4.5.375 Management Objective: This district, because of its sheltered condition and location near productive aquatic resource areas, shall be managed for development of low intensity recreational facilities. The uses shall be limited by the small size of the area and the natural depths of the channel. The low-intensity recreational facilities must be located in such a manner that conflicts will not arise with the existing aquaculture use, which is also a permitted use.*

The management objective for the 8-CA zone is to manage the land "*for development of low intensity recreational facilities.*" However, low-intensity utility facilities are a permitted use in the zone, subject to the aforementioned CBEMP policies. Thus, there is clear legislative intent indicating that low-intensity utility facilities will not undermine the management objectives of the zone, at least to the extent that CBEMP policies are satisfied. The Board rejects the general tenor of arguments made by opponents suggesting that (1) only recreational use are allowed, and (2) a pipeline is *per se* incompatible with the management objective.

The applicant states that upon completion of construction, the Weyerhaeuser Cove yard will be reclaimed to pre-construction conditions, allowing pre-construction activities to continue unhindered. Following installation, the pipeline will be buried and will not affect any boating or other low intensity recreational facilities or aquaculture uses. Impacts during construction will be temporary. As defined by Section 2.1.200, aquaculture is, "[r]aising, feeding, planting, and harvesting fish and shellfish, and associated facilities necessary for such use."

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the discussion below regarding the 11-NA zoning district and the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010, submittal.

In their letter dated June 8, 2010, WELC asserts the following:

> The proposed project impacts the 8-CA site where the pipeline crosses the tideland area and where the Weyerhaeuser Cove yard will be used for construction staging and storage. The specific management objective there includes protection of the "existing aquaculture use." Neither the original application nor the supplemental materials are clear on the nature of the "existing aquaculture" or how it would be protected. The applicant says merely, "After the pipeline is installed, aquaculture can continue as it did pre-construction." Given the sensitivity of fish and shellfish to the turbidity and dredging likely to accompany the construction and installation of the pipeline, it seems more details are necessary

> in order for the county to make the determination that the pipeline will, indeed, be consistent with the resource capabilities and management unit purposes and objectives.

In response, the applicant submitted the Ellis Report. This extensive analysis contained therein provides the following expert testimony regarding compliance with the 8-CA management objectives:

> "the impacts of the project to the zoning district will be short-term, primarily limited to the period of construction, with some lasting impacts to small patches of eelgrass. The eelgrass is expected to recover within three years or less and will be replanted at densities higher than are present currently. Following construction, the zone will be recontoured to preconstruction conditions, and there will be no lasting impacts to boating, clamming or other low-intensity recreational uses. Furthermore, effects to aquaculture (specifically oyster growing) should likewise be short-term, as discussed above." Ellis Report, pages 17-18.

The Board finds that a proposed pipeline is not considered to be a "recreational facility" for which conflicts with aquaculture must be limited under this management objective. Had the drafters envisioned a different reading of the Code, it seems unlikely that it would have made low-intensity utility facilities a permitted use in the zone. Nonetheless, the applicant notes that the long-term continuation and expansion of aquaculture should not be impacted during construction and the pipeline will have no impacts once it is installed. After the pipeline is installed, aquaculture can continue as it did pre-construction. Additional responses regarding potential construction-related impacts on aquaculture and other natural resources in the CBEMP aquatic districts are addressed elsewhere in this decision.

e. 11-Natural Aquatic (11-NA)

The pipeline crosses the 11-NA zoning district from mileposts 2.70 R to 4.12. This is a tideland area located at the north end of Haynes Inlet. Section 4.5.406(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

> *Section 4.5.405 Management Objective: This extensive intertidal/marsh district, which provides habitat for a wide variety of fish and wildlife species shall be managed to protect[24] its resource productivity. The opening in the Highway 101 Causeway is a designated mitigation site ("low" priority).*

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[24] LUBA provided extensive analysis of what the term "protect" means in the context of Goal 16 in *Columbia Riverkeeper v. Clatsop County*, __ Or LUBA __ (LUBA No. 2009-100, April 12, 2010):

> The definition of "protect" contains stringent language: "save or shield from loss, destruction, or injury." "Save" has many definitions, including "1:f: to preserve or guard from injury, destruction or loss." *Webster's Third New International Dictionary* 2019 (1981). "Shield" is defined as "to protect with or

Citizens Against LNG makes the following comments regarding this zone:

> However, to install the pipeline in either district, PCGP would need to engage in the ACTIVITY of wet open cut method, which would fall under the definition of dredging. In both zoning districts 11-NA and 13A-NA, any new dredging is a prohibited activity. So, although a "low-intensity utility" may be a permitted USE in zoning districts 11-NA and 13A-NA, any kind of new dredging is an impermissible ACTIVITY in zoning districts 11-NA and 13A-NA. PCGP must not only explain in what sense its pipeline is a low-intensity utility; it must also find some means other than the wet open cut dredging method for laying its pipeline in order to be permissible within zoning districts 11-NA and 13A-NA.

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as if with a shield." *Id.* at 2094.

Context for interpreting the goal definition of "protect" is provided by considering its use within the text of Goal 16. The goal itself provides that its purpose is:

> "To recognize *and protect* the unique environmental, economic, and social values of each estuary and associated wetlands; and
> "To *protect*, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries." (Emphases added.)

* * * * *.

Although we agree with the county that the Goal definition of "protect" does not require that estuarine resources identified for protection be completely or absolutely protected from any "loss, destruction, or injury" whatsoever, the county has made a planning decision under the CCCP policies at issue that implement Goal 16 and the scheme set forth in the second paragraph of Goal 16, quoted above, to "protect" as opposed to a decision to "maintain," "develop," or "restore" traditional fishing areas and endangered or threatened species habitat. Having made that "protect" planning decision, the local program to protect those estuarine resources must not allow "loss, destruction, or injury" beyond a *de minimis* level. Thus, the development that is to be allowed by the disputed rezone is not consistent with the Goal definition of "protect" unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a degree that there is at most a *de minimis* or insignificant impact on the resources that those policies require to be protected. (Emphasis added).

In this case, the management objective of the 11-NA zone is to "*protect its resource productivity.*" Thus, the County has also made the "protect" determination in its Comprehensive Plan and Zoning Code for the 11-NA zone.

See letter from Jody McCaffree, dated June 10, 2010, at p. 8. As discussed elsewhere, the applicant does not have to "explain in what sense its pipeline is a low-intensity utility" because the Code makes it such as a matter of law. With regard to the contention that dredging is not an allowed activity in the 11NA and 13A-NA zones, the following definition from CCZLDO 2.1.200 applies:

> 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.

The applicant is not proposing "new dredging" because it is not proposing to deepen the channel. 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."*[25] (Underlined emphasis added.

Before addressing that test, however, the Board addresses two contentions related to the above analysis. In her letter dated June 10, 2010, Jody McCaffree contends that portions of the PCGP project will constitute "temporary alterations" subject to CBEMP Policy #5a. This contention is not persuasive for the reasons set forth below.

First, 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. Ms. McCaffree is correct that the list of uses for the Natural management unit in Section B of Policy #2 includes "temporary alterations." However, that list also includes "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation," which more closely describes the PCGP project. The fact that the applicable use category already contemplates incidental dredging activities associated with the installation of "pipelines" indicates that any temporary impacts associated with the use are already contemplated as part of the allowed "pipeline" use designation. Under such circumstances, it would be redundant for the county to separately consider "temporary alterations" associated with the PCGP. Therefore, the Board finds that the PCGP does not include any "temporary alterations."

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

> **TEMPORARY ALTERATION.** Dredging, filling, or another estuarine alteration occurring over a specified short period of time

[25] 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.

which is needed to facilitate a use allowed by an acknowledged plan. Temporary alterations may not be for more than three years and the affected area must be restored to its previous condition. Temporary alterations include: (1) alterations necessary for federally authorized navigation projects (e.g., access to dredged material disposal sites by barge or pipeline and staging areas or dredging for jetting maintenance), (2) alterations to establish mitigation sites, alterations for bridge construction or repair and for drilling or other exploratory operations, and (3) minor structures (such as blinds) necessary for research and educational observation.

The PCGP project does not fall within any of the listed categories.

Third, the pipeline use, including incidental dredging necessary for its installation, is also allowed in both the Conservation and Development management units "without special assessment of the resource capabilities of the area." However, as explained above, because 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 finds that CBEMP Policy #5a is inapplicable.

However, in the alternative, the Board finds that Policy #5a is satisfied in this case based upon the analysis and reference to record submittals discussed below, in conjunction with the following review criteria set out in Section II of Policy #5a, as follows:

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

This criterion is satisfied by the Ellis Report submitted by the applicant, as mentioned elsewhere in this decision.

> *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.*

This criterion has been satisfied by the applicant's record submittals consisting of the letters from Randy Miller of Pacific Connector dated May 17, 2010 (describing how the application is consistent with all applicable aquatic management unit purpose statements) and of June 9, 2010 (identifying the state and federal environmental permits required for the aquatic portions of the project and the relationship with applicable CBEMP standards, and providing his professional opinion that it is feasible for Pacific Connector to obtain the necessary state and federal permits). Specifically, Randy Miller's June 9, 2010 letter describes the need for the PCGP project to obtain permits from the Oregon Department of State Lands (DSL) acting under the Oregon Removal-Fill Law (ORS 196. 800 et seq.) and the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (CWA). By cross reference, CBEMP Policy #5 (Estuarine Fill and Removal), at Section I.d contains the

relevant criterion that: "adverse impacts are minimized". Mr. Miller's letter, at pages 3-4, specifically states that: "The Corps will also evaluate the proposal under the 404(b)(1) Guidelines (Guidelines) which require, among other things, a stringent evaluation of alternative, impact avoidance and *mitigation*"(emphasis added). Further, the Corps cannot issue a permit under Section 404 without issuance of a water quality certificate by the Oregon Department of Environmental Quality (DEQ) under Section 401 of the CWA. Mr. Miller's letter also points out that the project will require a permit from the DEQ for a certification under Section 401 of the CWA and for a 1200-C (NPDES) permit under Section 402 of the CWA.

In summary, compliance with CBEMP Policy #5.I.d will be satisfied by the issuance of Pacific Connector's required permits from the Corps, DSL and DEQ, the review criteria of which are coincidental with the approval criteria of Policy #5 as outlined above, thereby being consistent with the review criterion of Policy #5a.II.b.

> *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 dredge areas, if this is shown to be effective).*

This criterion is satisfied through the evidence provided in the applicant's record. submittals contained in the Ellis Report (see page 3 describing the incidental trenching and backfilling construction techniques proposed for pipeline installation which constitute the "removal of the fill" or the "filling of dredged areas") and the letter of June 4, 2010 from Randy Miller, Staff Environmental Scientist for Pacific Connector Gas Pipeline (see pages 3-4 describing the wet open cut crossing method to be used within Haynes Inlet). This criterion is satisfied.

> *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.*

This criterion is also satisfied by the evidence submitted in the letters from Robert Ellis and Randy Miller above described, which describe the related construction activities that will take less than 3 years. *See also* April 30, 2010 letter from Mark Whitlow to Patty Evernden (describing the tentative construction schedule and indicating that the pipe installation would occur in year two and the project restoration would occur in year three).

A second contention is raised by WELC in its letter dated June 8, 2010. WELC's argument is a bit difficult to follow, due to the nature of the subject matter, so it is set forth verbatim:

> In its application and again in its May 17, 2010 supplemental submittal letter, Pacific Connector references the Coos Bay Estuary Management Plan (CBEMP) Policy 2, which explains that there are, in fact, three estuarine management units within the CBEMP area: Natural, Conservation, and Development. Within

> Policy 2, certain uses for each management unit are allowed "without special assessment of the resource capabilities," subject to specific conditions for each particular zoning designation. (The zoning designation indicates the type of management unit – for example, the C in zone 8-CA (Conservation Aquatic) indicates that it's a Conservation management unit, whereas the N in 13-NA (Natural Aquatic) indicates that it's a Natural management unit.)
>
> The applicant asserts that Policy 2 says that pipelines "may be allowed in all three types of management units," and that does not, in fact, seem to be the case. Section B.9 under the Natural management unit listing in Policy 2 does list pipelines, and Section B.4 under the Development management unit listing includes "all activities allowed in Natural and Conservation units." But pipelines are not within the list for the Conservation management unit in Policy 2. Thus, in those zones within the Conservation management unit, the analysis of the resource capabilities and the purpose of the management unit – which ensures compliance with not merely the local plan (CBEMP) but also statewide Goal 16 and the federal Coastal Zone Management Act - cannot be so cursory.

WELC does appear to be correct that the "pipeline" category found at "Natural Management Unit" ("NMU") B9 and in Development Management Unit ("DMU") B4 is not specifically mentioned under the list of allowed uses under the Conservation Management Unit ("CMU"). However, WELC misreads the import of that omission.

CBEMP Policy #2 is intended to implement Statewide Planning Goal 16. Goal 16 makes clear that "[p]ermissible uses in conservation zones shall be all uses listed in (1) above except temporary alterations." *See* Statewide Planning Goal 16, at p. 3 (under "Management Units" Section (2): Conservation). According to DLCD staff, pipelines are an "allowed use or activity" in the CMU. See "A Citizen's Guide to the Oregon Coastal Management Program," DLCD, March 1997, at p. 19 (Table entitled "Permitted Uses in Estuary Management Uses"). Conversely, pipelines are subject to resource capability review in the NMU and DMU. Id.

There is no indication that Coos County intended to apply CBEMP Policy #2 in a more strict manner than Goal 16. Admittedly, CBEMP Policy #2 CMU (A(1) creates an ambiguity because of the use of the phrase "all uses permitted *outright.*" WELC reads that phrase "permitted outright" as being a reference to only the nine uses set forth at NMU A (1)-(9). That is perhaps understandable, since the NMU A(1)-(9) uses are those that do not require a "special assessment of the resource capabilities in the area." One might be tempted to say that the NAU A(1)-(9) uses are permitted "outright" and the NMU B(1)-(10) uses are permitted "conditionally" (*i.e.* requiring a special assessment). However, the same sentence in CMU A(1) goes on to say "(except for 'temporary alterations.')." There would be no need to list that specific exception if the intent had been to only include the nine NMU (A)(1)-(9) uses in the first place. One first level maxim to be considered under *PGE v. BOLI* is that that courts will give effect to all sections of a statute, in order to produce a harmonious whole. ORS 174.010; *Lane County v.*

LCDC, 325 Or 569, 578, 942 P2d 278 (1997). *See also Davis v. Wasco IED*, 286 Or 261, 267, 593 P2d 1152 (1979); *Tatum v. Clackamas County*, 19 Or App 770, 775, 529 P2d 393 (1974); *Plotkin v. Washington County*, 36 Or LUBA 378 (1996); *Walz v. Polk County*, 31 Or LUBA 363 (1996); *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996) (Ordinance). Courts will try to avoid a construction that makes a word or phrase a redundancy. *Phelps and Nelson*, 122 Or. App. 410, 415, 857 P.2d 900 (1993) (courts generally avoid giving statutes construction that render some portions redundant). *Cornier v. Paul Tulacz, DVM PC*, 176 Or. App. 245, 249, 30 P.3d 1210 (2001) ("[W]e 'presume that the legislature did not intend to enact a meaningless statute' " (*EQC v. City of Coos Bay*, 171 Or. App. 106, 110, 14 P.3d 649 (2000) ("We are required, if possible, to avoid construing statutes in a way that renders any provision meaningless.").

Moreover, there would be no apparent policy reason for allowing pipelines in NMU's but not allow them in the more permissive CMU. Therefore, given that Goal 16 allows pipelines in conservation areas, the Board interprets CBEMP Policy #2 CMU A(1) to be consistent with, and not more strict than, Goal 16, by interpreting the phrase "all uses permitted outright in Natural Management Unit (except for 'temporary alterations.')" to include the NMU B (1)-(10) uses such as "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation."

Turning back to the two-part test, the applicant submitted the Ellis Report, which provided a determination of consistency with resource capability and the purposes of the management units utilizing the three-part analysis articulated above in Policy #4. Page 17 of that Ellis Report includes the determination of consistency which finds, in pertinent part, that "[a]ll resources will be able to assimilate the pipeline and its effects, and will continue to function in a manner protective of significant wildlife habitats, natural biological productivity and values for scientific research and education."

In *Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc.*, LUBA affirmed a county's analysis under locally adopted "Resource Capacity test" criteria.[26] Analysis of those criteria led to the following conclusion: "Habitat disturbance will ultimately be temporary as the site will be restored following mining operations in a manner that must satisfy both ODFW and DOGAMI requirements. *Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc.*, __ Or LUBA __ (LUBA No. 2009-128, March

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[26] Curry County's code, at CCZO 7.040(14)(a), contains test for evaluating a proposed uses consistency with the resource capabilities of the area which was similar to the test set forth at CBEMP 4:

> (a). Resource Capability Test. Certain uses in estuarine areas require findings of consistency with the resource capabilities of the area.
>
> "(1) A determination of consistency with resource capability shall be based on:
>
> "(a) Identification of all resources existing at the site and factors relating to the resource capabilities of the area.
>
> "(b) Evaluation of impacts on those resources by the proposed use.
>
> "(c) Determination of whether any or all of the identified resources can continue to achieve the purpose of the management unit if the use is approved.
>
> "(2) In determining the consistency of a proposed use or activity with the resource capabilities of the area, the county shall utilize information from federal or state resource agencies regarding any regulated activities in estuarine areas."

12, 2010). Once reclaimed, the property should provide the types of vegetative cover and promote the same animal species it supports now." *Id.* Stated in the words of the *Columbia Riverkeeper case,* the question presented in whether the incidental dredging associated with pipeline installation has "at most a *de minimis* or insignificant impact on the resources." *Columbia Riverkeeper v. Clatsop County,* __ Or LUBA __ (LUBA No. 2009-100, April 12, 2010). Those appear to be different formulations of essentially the same test.

In its final argument letter dated June 24, 2010, the applicant concludes that the installation of the pipeline will have no permanent impacts but admits that construction activities will result in some temporary impacts:

> The applicant states that following construction, the buried pipeline will not impact the intertidal/marsh district. Potential impacts during construction have been analyzed as part of the FERC NEPA process and are provided in the Section 4.5.2.3 of the Final Environmental Impact Statement (FEIS). Impacts to threatened and endangered species have also been analyzed and provided to FERC in a draft Biological Assessment (BA) that was provided to the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) for consultation. USFWS and NMFS transmitted comments to FERC that have led to a revised BA that is pending transmittal to those agencies.
>
> Following construction of the pipeline, Pacific Connector is proposing on-site wetland restoration for estuarine habitats impacted by construction of the pipeline through the Haynes Inlet of Coos Bay which also includes the intertidal/marsh district. Although the construction area across Haynes Inlet does not intercept high density eelgrass beds, all low and medium density eelgrass beds will be replanted at high density levels. The incremental gain to high density levels will provide sufficient compensation for the short-term loss of eelgrass caused by the PCGP construction.
>
> The pipeline route would temporarily impact mitigation site M-8(b) (Highway 101 Causeway) during construction. Construction of the natural gas pipeline within Haynes Inlet would involve burying approximately 2.5 miles of 36-inch diameter steel pipe. The steel pipe would be covered with a 4-inch layer of concrete and installed a minimum of five feet (measured from the top of the pipe) below the substrate surface. The burial depth was established based on the predicted maximum scour depth and to comply with 49 CFR 192.327. Construction would involve excavating an in-water trench, storing excavated material for backfill to the side of the trench, installing the pipe, backfilling the trench and re-grading. Trenching would be conducted with a barge-mounted bucket dredge where water depth allows. In shallow areas along the alignment, marsh excavators, which

are capable of trenching in shallow water, would be used. During the ebb tide, marsh excavators utilize tracks around pontoons to allow excavation in both "wet" and "dry" terrain. The pipeline would be laid using a "pipe push" method. During the portions of the alignment installed using the "pipe push" method, the lay barge would remain stationary and the pipe sections would be pushed and floated out from the barge into the pre-dredged ditch as they are completed, using pre-designed floats.

Following is a summary of preliminary work procedures, BMPs, and protective measures that will be implemented during construction to minimize short-term and long-term impacts to water resources, biological resources and the surrounding environment:

1. Work will be conducted in compliance with the comprehensive plan, zoning requirements and other local, state and federal regulations pertaining to the project.
2. The contractor shall develop a turbidity monitoring and management plan (TMMP) that describes measures to reduce turbidity impacts resulting from dredging and backfill operations to ensure compliance with federal and state water quality standards.
3. Where water depths allow, the dredge bucket will be kept below the water surface while placing excavated soil along the trench in order to minimize turbidity.
4. The pipeline trench will be backfilled as quickly as possible after the pipeline is installed to minimize the distribution of excavated spoil from tidal influence.
5. Turbidity will be monitored in accordance with the 401 Water Quality Certification (WQC) requirements during dredging and backfilling operations by the environmental inspector. If turbidity levels exceed established tolerances, then the procedures outlined in the 401 WQC will be followed.
6. Turbidity curtains may be deployed, as practicable, in certain areas to protect sensitive resources such as oyster and eelgrass beds. Implementation of turbidity curtains is limited by local site conditions including flow velocities. Use and location of turbidity curtains will be determined during final design or as approved by the environmental inspector.
7. Construction will be scheduled to reduce impacts to sensitive resources and will be in accordance with the recommended in-water work window established by ODFW.
8. Work below mean higher high water (MHHW) will be conducted during the recommended in-water work window established by ODFW and approved by USFWS and NMFS.

The recommended in-water period for Coos Bay is October 1 through February 15.

9. Construction impacts will be confined to the minimum area necessary to complete the project.
10. When practicable, fueling and maintenance of equipment will occur more than 150 feet from the nearest wetland, ditch or flowing or standing water. (Fueling large compressors, cranes and generators 150 feet away may not be practicable.)
11. The contractor shall prepare a Spill Prevention Control and Countermeasure (SPCC) Plan prior to commencing work (available upon request).
12. All equipment used for construction activities will be cleaned and inspected prior to arriving at the project site to ensure no potentially hazardous materials are exposed, no leaks are present and the equipment is functioning properly.
13. The contractor shall perform daily inspection of construction equipment to ensure there are no leaks of hydraulic fluids, fuel, lubricants or other petroleum products.
14. Biological monitoring will be conducted as required by state and federal permit conditions.
15. A work plan will be prepared and submitted to the appropriate agencies prior to construction.
16. A site restoration plan will be prepared and submitted to the appropriate local, state and federal agencies prior to construction.

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010 submittal as Exhibit 1.

In addition to the foregoing, the June 9, 2010 letter report submitted by Robert Ellis, Ph.D., of Ellis Ecological Services provides the following testimony regarding compliance with the 11-NA management objectives:

"As discussed throughout this Impact Assessment, the installation of the pipeline will impact fish and wildlife habitat within this zoning district. However, as discussed, the impacts will be short-term and primarily limited to the period of construction. Following a brief recovery period (months in the case of benthic invertebrate recolonization to a few years for eelgrass restoration), the pipeline will not interfere with this zoning district's resource productivity." Ellis Report, page 18.

The applicant's expert witness, Robert Ellis, Ph.D., of Ellis Ecological Services conducted extensive analysis of the potential environmental impacts of the pipeline construction. The result of that effort is discussed in the Ellis Report, which sets forth the Resources Capacity Analysis envisioned by CBEMP Policy #4, including a description of all resources existing at the site, an impact assessment, and a determination of consistency relating to the resource capabilities of the area. The Board has read the Ellis Report in detail and has determined the report constitutes substantial evidence confirming that impacts will be temporary and insignificant. There is no expert evidence in the record to the contrary. The Board adopts the Ellis Report as additional findings in support of the application as if it was fully set forth herein.

f. 11-Rural Shorelands (11-RS)

The pipeline crosses the 11-RS zoning district from MPs 4.12 R to 4.17 R. In this segment, the pipeline exits Haynes Inlet and crosses a rural area that is dominated by trees. Section 4.5.401(15)(a) lists the use as permitted subject to CBEMP Policies 17, 18, 23, 38, 34, 14, 49, 50 and 51. Other than the pipeline and the construction easement itself, there are no other accessory project components within zoning district 11-RS.

> *SECTION 4.5.400 Management Objective: This district shall be managed so as to continue its rural low-intensity character and uses that have limited (if any) association with the aquatic district. This district includes three designated mitigation sites (M-12, M-13 and M-22). However, only Site M-22 shall be protected from pre-emptive uses. Other sites are "low" priority, and need not be protected. (See Policy #22).*

Following installation, the buried pipeline will not affect the rural low-intensity character of the district nor the uses that have limited (if any) association with the aquatic district. All disturbed areas will be recontoured and revegetated in a manner consistent with the ECRP, and those areas that were forested prior to construction will be reforested except for the 30-foot maintained corridor centered over the pipe. The PCGP does not impact mitigation sites M-12, M-13, or M-22.

g. 13A-Natural Aquatic (13A-NA)

The pipeline crosses the 13A-NA zoning district from mileposts 1.78 R to 2.70 R. The pipeline crosses the Haynes Inlet in this zone. Section 4.5.426(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

> *Section 4.5.425 Management Objective: This district shall be managed to allow the continuance of shallow-draft navigation while protecting the productivity and natural character of the aquatic area. The openings in the two road dikes are designated mitigation sites [M-5(a) and (b), "low" priority]. Maintenance, and repair of bridge crossing support structures shall be allowed. However, future replacement of the railroad bridge will require Exception findings.*

Construction of the 2.80-mile route across Haynes Inlet that includes district 13A-NA will occur within the ODFW-recommended in-water work timing window from October 1 of Year One construction through February 15 of Year Two. ODFW has recommended the in-water work timing window in Coos Bay be delayed to October 15 to minimize impacts to a fall Chinook fishery. The applicant proposed a condition of approval requiring fill and removal activities in Coos Bay be conducted between October 1 and February 15 unless otherwise modified by ODFW. The Board finds that this condition properly recognizes ODFW's jurisdiction in this field and modifies and adopts the condition as Condition of Approval B.6 to read as follows:

> "Fill and removal activities in Coos Bay shall be conducted between October 1 and February 15, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife."

Following construction of the pipeline, Pacific Connector is proposing on-site wetland restoration for estuarine habitats impacted by construction of the pipeline through the Haynes Inlet of Coos Bay which also includes district 13A-NA. Although the construction area across Haynes Inlet does not intercept high density eelgrass beds, all low and medium density eelgrass beds will be replanted at high density levels. The incremental gain to high density levels will provide sufficient compensation for the short-term loss of eelgrass caused by the PCGP construction. Additionally, the pipeline will be buried five feet below the bottom of the Inlet and will not affect shallow-draft navigation or the natural character of the aquatic area. The project does not impact mitigation sites M-5(a) or (b) and will not affect the bridges.

For additional descriptions of the project work within the estuary and measures that will be taken to minimize and mitigate impacts on estuarine habitat, see the response above regarding the 11-NA zoning district and the "Estuarine Wetland Mitigation Plan, PCGP Project, Coos Bay Estuary," report prepared by Ellis Ecological Services dated March 2009, which is attached to the applicant's May 17, 2010 submittal as Exhibit 1.

In addition to the foregoing, the Ellis Report provides the following testimony regarding compliance with the 13A-NA management objectives:

> "Although there may be some temporary disruption of navigation during pipeline construction as discussed above, the pipeline will be buried five feet below current grade and will have no lasting effect on shallow-draft navigation. Affected low and medium density eelgrass beds in the zone will be replanted at high densities and are expected to recover quickly." Ellis Report, page 18.

The management objective is met, for the reasons stated both in the Ellis Report and the findings propose for the 11-NA zone, *supra*.

h. 18-Rural Shorelands (18-RS)

The pipeline crosses the 18-RS zoning district from MPs 10.74 R to 11.10 R. In this segment, the PCGP alignment is located within a vacant pasture area and crosses East Bay Drive. Other than the pipeline and the construction easement itself, there are no other accessory project components within zoning district 18-RS. Section 4.5.481(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 20, 22, 23, 27, 28, 34, 49, 50 and 51.

> ***SECTION Management Objective** 4.5.480: This district shall be managed to allow continued use as pasture-grazing but shall also be managed to allow dredged material disposal or mitigation. This district contains two designated mitigation sites, U-12 and U-16(a) ("high" priority). It also contains designated dredged material disposal site 30(b). 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).*

Construction of the pipeline would temporarily impact this area. Following construction, the district could be used as pasture-grazing unimpeded by the pipeline. In agricultural areas, the pipeline will be installed with 5 feet of cover, to allow farming activities to continue safely over the pipeline. The area will be revegetated to preconstruction conditions; therefore, grazing could continue unhindered. Furthermore, the pipeline would not preclude use of the site for dredged material disposal; nor would the pipeline preclude mitigation development of the site (see discussion of CBEMP Policies #20 and #22 for more detail).

The management objective is met.

i. 19-Development Shorelands (19-D)

The pipeline crosses the 19-D zoning district from MP 11.10 R to MP 8.10. In this segment, the pipeline crosses a large, undeveloped privately owned parcel. In addition to the pipeline and construction easement itself, accessory uses within this segment of the alignment include a permanent access road at MP 7.70 and block valve #2 at MP 7.70. Section 4.5.536(15)(a) lists the use as permitted subject to CBEMP Policies14, 17, 18, 27, 49, 50 and 51.

> ***SECTION 4.5.535** Management Objective: This district is a large parcel (152 acres) of filled, undeveloped property in a single ownership bordering on a maintained shallow-draft channel. While the site is presently suitable for pastureland, the Plan anticipates that these characteristics will make it an important water-dependent/water-related industrial site in the future. To protect the site for futures industrial development, the Plan designates it "D" (Development). According to staff, the parcel's large site and the limitation on water access from only the Coos River shoreland makes it unlikely that the entire site can be utilized for only water-dependent/water-related uses.*
>
> *Therefore, to assure that non-water-dependent/non-water-related uses that which to locate on the site do not limit or preclude water-dependent uses of the shoreland, development must be consistent with a site plan that accomplishes this goal and is approved by the Coos County Board of Commissioners or their designee.*

At page 20 of her June 10, 2010 letter, Ms. McCaffree states that the management objective for zoning district 19-D requires consistency with a site plan for the future development of the zoning district.[27]

The applicant notes that during construction, pipeline installation will temporarily impact this large parcel, which is owned by Weyerhaeuser. A site plan has not yet been developed by the landowner for future development of the site. However, following construction, the buried pipeline will be compatible with future industrial development. The only restriction will be the development of permanently engineered aboveground structures within the 50-foot permanent right-of-way. Pacific Connector states that they have consulted with Weyerhaeuser regarding the pipeline alignment, and there was no indication from Weyerhaeuser that the PCGP will impact future development plans. The accessory access road follows an existing pasture two-track road and would provide access to block valve assembly #2 for maintenance and operation purposes. The access road would be 25 feet wide and 154 feet long, and would be graveled. Block valve assembly #2 would be located within the 50-foot permanent right-of-way and would occupy a 50x50-foot area enclosed by a 7-foot high safety fence.

The Board finds that following construction, the buried pipeline will be compatible with future industrial development. The proposed access road follows an existing pasture two-track road. A review of Alignment Sheet 008 (Exhibit 1 to the application narrative of April 14, 2010), reveals that the alignment of the pipeline within the 19-D zoning district avoids the river frontage portions of the district except for the area of crossing, thus assuring that the pipeline will not interfere with future water-dependent or water-related uses or developments. The last sentence in paragraph 1 of the management objective set out in Section 4.535 indicates that the parcel's large size and the limitation of water access from only the Coos River shoreland makes it unlikely that the entire site can be utilized for only water-dependent/water-related uses. Otherwise stated, the management objective recognizes that the portions of the district most available for future water-dependent/water-related uses are the portions of the district along the water frontage, which will not be areas of the 19-D zoning district used for the proposed pipeline crossing. Accordingly, the Board finds that the pipeline crossing will not limit or preclude water-dependent uses of the 19-D shoreland.

The management objective is met.

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[27] Ms. McCaffree testifies as follows:

> Where is the required site plan? Proposal includes permanent road. Applicant must demonstrate road won't limit or preclude future water-dependent uses or impact important archeological sites that may be found in this zoning district. This zoning district, also known as Graveyard Point, is subject to policy's 14, 17, and 18, among others. Coos County's, *"Shoreline Values Requiring Mandatory Protection"* map shows the pipeline will be in violation of policy 18 due to it impacting an important and vital Archeological Site on Graveyard Point. (See Exhibit D) PCGP's application should be denied due to this issue and in any event would not be in line with Coos County's zoning management objectives and policies for this area that require both, *"Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands, and Protection of Historical, Cultural and Archaeological Sites."*

j. 19B-Development Aquatic (19B-DA)

A portion of the pipeline and related construction areas will be located in the 19B-DA zoning district. This area is on the north bank of the Coos River. Section 4.5.541(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

> *CCZLDO Section 4.5.540 Management Objective: This development aquatic district shall be managed primarily to maintain use of the channel for access to future upland development adjacent to Christianson Ranch.*

The pipeline will be installed beneath the bottom of Coos River and will allow use of the channel for access to future upland development of any adjacent properties.

CCZLDO Section 4.5.541 Uses Activities and Special Conditions

The pipeline is permitted, subject to general conditions, as a low intensity utility in the 19B-DA district. The 19B-DA General Condition states that inventoried resources requiring mandatory protection in the district are subject to Policies #17 and #18. As addressed under the CBEMP Policy section below, the PCGP is consistent with each of those policies.

The management objective is met.

k. 20-Rural Shorelands (20-RS)

The pipeline crosses the 20-RS zoning district from MPs 8.22 to 8.39. This segment of the pipeline is located on the south bank of the Coos River. Section 4.5.546(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

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

The project will not impact mitigation sites, U-17(a) and (b). Once installed, the pipeline will not prohibit rural uses or recreational access. Additionally as discussed above, the temporary access road areas within the 20-RS district will be returned to their previous condition following construction. In this area on the south side of the Coos River, the area is pastureland and may continue be used as pastureland following construction. A 1,750-foot HDD is the crossing method for the Coos River. This crossing method 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 frac-out from the HDD bore. This issue is discussed in the section addressing the 20-CA zone. For the reasons set forth therein, the Board

finds that it is feasible to conduct HDD boring operations in an environmentally safe manner if the applicant follows the BMPs it has proposed to FERC, including those set forth in the HDD Contingency Plan.

The management objective is met.

l. 20-Conservation Aquatic (20-CA)

The pipeline crosses the 20-CA zoning district from mileposts 8.12 to 8.22. The 20-CA district is aligned with the Coos River. Section 4.5.551(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

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

Pacific Connector states that it will use a horizontal directional drilling (HDD) method to install the pipeline below the Coos River. Using this crossing method, the PCGP will be installed approximately 57 feet beneath the bottom of the Coos River and will not impact log transport and will not impact fish habitat.

The HDD method involves boring under a feature and pulling the pipeline into place through the borehole that has been reamed to accommodate the diameter of the pipeline. This procedure involves three main phases: pilot hole drilling, subsequent reaming passes, and pipe pullback. These phases are explained in detail in correspondence from Randy Miller of Pacific Connector dated May 17, 2010. Upon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided. Additional details on the HDD process are included in Section 2.4.2 of the FEIS.

In addition to the foregoing, the Ellis Report provides the following additional testimony regarding compliance with the 20-CA management objectives:

> "As discussed above, this zoning district will be traversed using HDD methodology, which should have no affect on either fish habitat or log storage." Ellis Report, page 18.

WELC states the following in a letter dated June 8, 2010:

> The proposed project impacts the 20-CA site where the pipeline crosses the Coos River. The management objective for this site is to "allow log transport while protecting fish habitat." For this crossing, the applicant would use "horizontal directional drilling" (HDD), as described in the supplemental letter and the FERC environmental impact statement. The applicant gives the

> assurance that, "[u]pon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided." However, as was abundantly documented in the FERC process, *un*successful HDD, including "frac-outs," can be devastating to aquatic species, sensitive resources and water quality. [*See* FEIS p 2-97, 4.3-50-51, 4.5-101-102]. We all know that the risks of environmental disasters – even when extremely low in probability – can result in unacceptable consequences. Given the very real risk of unsuccessful HDD occurring in at least one point among the many waterbody crossings proposed for the pipeline route, the applicant should be required to minimize the waterbody crossings where possible and document that the crossing point chosen is one that would have a relatively lower magnitude of harm to protected resources should the crossing go awry. The applicant should also be required to detail exactly how frac-outs and other drilling mishaps would be handled to minimize the potential environmental damage.

This last point is well taken, and, according to FERC, the HDD Contingency Plan addresses these issues. Both the Ellis Report and the discussion of the HDD Contingency Plan contained in the FEIS constitute substantial evidence.

In her June 10, 2010 letter, Jody McCaffree states:

> Application says "construction will use appropriate measures to minimize impacts; all impacts will be mitigated." Applicant must describe potential impacts on fish habitat; construction and mitigation measures. Pacific Connector is proposing to use the Horizontal Directional Drilling (HDD) method for the crossing of the Coos River (MP 8.18). The HDD method involves boring under the Coos River and pulling the pipeline into place through the borehole that has been reamed to accommodate the diameter of the pipeline. This procedure involves three main phases, pilot hole drilling, subsequent reaming passes, and pipe pullback. HDD typically is used for the crossing of major waterbodies (greater than 100 feet wide). Williams who will be responsible for constructing the PCGP has a HDD failure rate since 2000 of 2 of 6 involving 36' pipelines. Failure rates result in what is known as frac-outs where drilling muds are released into the waterbody. Frac-outs occurred with the 12-inch pipeline and the impacts to vital marine life and habitat were significant. Photos of the stream damage caused by the 12-inch line can be seen in Exhibit U. Potential releases of drilling fluid bentonite clay can wear down fish gills and impair fish vision making difficulty and predation easy (ODFW quote). As shown in the testimony above, the

impacts on fish habitat should this occur would be difficult or impossible to mitigate.

As discussed by FERC, FEIS p 2-97, 4.5-101-102, the risk of frac-outs from a properly-supervised HDD method bore are low, particularly if PCGP "locate[s] the HDD entry and exist points a good distance away from the backs of the waterbody." *Id.* at p. 4.5-102.

The management objective is met.

m. 21-Rural Shorelands (21-RS)

The pipeline crosses the 21-RS zoning district from MPs 10.97 to 11.11 and MPs 11.14 to 11.32. The segments of the PCGP Project within the 21-RS district are located on the east and west banks of Catching Slough. Section 4.5.596(15)(a) lists the use as permitted subject CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

SECTION 4.5.595 Management Objective: This shoreland district of generally diked farm land shall be managed to maintain the present low-intensity, rural character and uses in a manner compatible with protection of the aquatic resources. An existing heron rookery located in the district shall be preserved by protecting those trees in the rookery which are used by the birds. This district contains a number of designated mitigation sites. The following are "high" or "medium" priority, and must be protected as required by Policy #22: U-28, U-29(b), U-30(b), U-32(a)and (b), U-33, U-34(c) and (d). The following are "low" priority sites, and received no special protections: U-21(b), U-22, U-23, U-24, U-26, U-27, U-29(a), U-32(c) and U-34(a) and (b).

Upon completion of installation, the pipeline will not affect the present low-intensity, rural character and uses in the area because the pre-construction uses will be allowed to continue following construction both across and adjacent to the right-of-way. As detailed in the 21-CA narrative section below Catching Slough will be crossed using a conventional bore, protecting the diked waterbody. Pursuant to the County Shoreland Values map, the heron rookery is located where Catching Slough enters Coos Bay, which is several miles north of where the pipeline crosses Catching Slough. Nonetheless, between MPs 10.97 and 11.32, the pipeline will be installed in pasture lands, and there will be no tree removal required for that segment of pipeline construction. Therefore any trees used as bird habitat near that segment of the route will be protected. The pipeline will cross the northeastern edge of designated mitigation site U-22 and will cross the middle of designated mitigation site U-24. Both designated mitigation sites are "low" priority sites and, as stated above, receive no special protections. Furthermore, as discussed below this segment of the pipeline satisfies the requirements of Policy #22.

The management objective is met.

n. 21-Conservation Aquatic (21-CA)

The proposed pipeline crosses the 21-CA zoning district from MPs 11.11 to 11.14. This segment of the pipeline will cross Catching Slough. Section 4.5.601(9)(a) lists the use as permitted subject to CBEMP Policies 17 and 18.

> *Section 4.5.600. Management Objective: This aquatic district shall be managed to allow rural upland uses while protecting aquatic resources. Dredging for routine repair/maintenance of dikes shall only be permitted if no alternative upland source of suitable fill material is reasonably available and/or land access is not possible.*

According to the applicant, the upland areas will be returned to their previous condition in compliance with the ECRP. Therefore, the rural upland uses on the surrounding pasture lands will be able to continue once construction is complete.

Pacific Connector proposes to use a conventional bore method to install the pipeline below Catching Slough. The bore method is intended to provide additional protection to aquatic resources within the Slough. The specific type of bore that will be utilized for crossing Catching Slough will be determined during the design phase of the project and depends primarily on construction characteristics and the type of soils present.

According to the applicant, a conventional bore requires bore pits (launching and receiving) on either side of the feature being bored (*i.e.*, waterbody, road, railroad, etc.). The depth of the bore pits is dependent on the required pipeline depth and the construction equipment placed in the bore pits, and the bore pits are sized to allow for the necessary equipment and workers. The equipment, depending on the type of conventional bore, is lowered into the pit. Because conventional boring does not limit water migrating into the bore, an important factor in the design of launching and receiving pits is groundwater control. According to the applicant, dewatering systems using deep wells or well points are frequently used, and trench boxes or sheet piling are often used to support the pit walls and to temporarily cut off groundwater inflows.

In addition to the foregoing, the Ellis Report provides the following additional testimony regarding compliance with the 21-CA management objectives:

> "As stated above, adjacent rural uses will be temporarily impacted by pipeline construction. However these areas will be returned to pre-construction conditions following installation of the pipeline. Because Catching Slough will be bored under for pipeline installation, BMPs and other avoidance measures should protect all aquatic resources." Ellis Report, page 19.

WELC discusses this issue in their June 8, 2010 letter from attorney Jan Wilson:

> The proposed project impacts the 21-CA site where the pipeline is bored under Catching Slough. The management objective for that area is to allow rural upland uses while protecting aquatic resources. The applicant proposes to use "conventional" boring methods, including dewatering, to install the pipeline under the

slough. The supplemental letter indicates that many of the details for this crossing are yet to be worked out, and thus the county may not yet be able to make the feasibility determination required to satisfy this approval criterion. It is not clear, for example, how the dewatering might affect the aquatic resources, both in the short and long term.

WELC's testimony is again focused on the argument that the applicant has not put forth enough evidence to meet it prima facie burden of proof. This is simply not a very effective tactic, given that the applicant's experts have listed the BMPs that they will use to avoid harm to aquatic resources, and have opined that those resources will be adequately protected. *See* ECRP. WELC opines that 'it is not clear * * * how the dewatering might affect the aquatic resources, both in the short and long term." However, this criticism seems rather vague and uninformed, particularly given the fact that the ECRP addresses the BMPs that will be employed to prevent sediment laden water from being reintroduced directly into water-bodies during de-watering operations. *See* ECRP at p. 23. In any event, the "technical details" of how the crossing will occur are engineering and scientific matters that can worked out at a later date.

The management objective is met.

o. 36-Urban Water-Dependent (36-UW)

This site is known as the Georgia Pacific-Coos Bay site. The property contains an active sawmill and lumber yard and it is located within zoning district 36-UW. Section 4.5.691(15)(a) lists the use as permitted subject to CBEMP Policies 16, 17, 18, 23, 27, 49, 50 and 51. Pacific Connector would utilize the Georgia Pacific-Coos Bay site as an accessory pipe storage and contractor yard temporarily during construction.

SECTION 4.5.690 Management Objective: This shoreland district, which includes a mix of water-dependent and non-water-dependent industrial uses and an area bordering the 35-foot channel which is "suitable for water-dependent use", shall allow only water-dependent uses along the deep-draft channel, except as allowed by Policy #16. In the remainder of the district, existing uses shall be permitted to continue and expand.

The temporary storage of pipe and equipment and temporary addition of mobile office trailers during construction will be similar to the existing operations associated with the active sawmill and lumber yard, and as stated in the objective, "existing uses shall be permitted to continue and expand."

The management objective is met.

p. Other Estuary and Bay Related Concerns

i. Impact to Oyster Beds from Turbidity resulting from Wet Crossing Construction or "Open Cutting" Techniques.

Ms. Lilli Clausen entered a letter into the record dated May 13, 2010 and testified verbally, expressing concern that the pipeline construction activity in Haynes Inlet will silt up and kill her oyster beds. The Board's task in evaluating this letter is made more difficult because the letter does not state exactly where their oyster beds are in relation to the proposed pipe. Nonetheless, the map Ms. Clausen submitted seems to suggest that her oyster beds are very close to the proposed pipe location. Ms. Clausen does not submit any scientific expert testimony to support her contentions, which is highly problematic.

The Board has read the materials provided by the applicant which address this issue, including:

- letter from Mr. Randy Miller dated May 17, 2010
- the Ellis Report.[28]
- Excerpts from the FEIS entitled "Wildlife and Aquatic Resources", at p. 4.5-93.
- Environmental Condition No. 24 in the FEIS.

The applicant states that the contractor will develop a turbidity monitoring and management plan ("TMMP") "to ensure compliance with federal and state water quality standards." *See* Miller letter dated May 17, 2010, at p. 5. In the June 6, 2010, letter, the Hearings Officer requested more information regarding the specific numeric water quality standards that are at issue and more information to demonstrate that the specific BMPs proposed in the TMMP will make it feasible to comply with the applicable regulations and protect the oyster beds. In addition, requested additional information verifying that the specific standards set forth in state and federal law are sufficient to ensure that oyster beds are protected under conditions similar to what the applicant will be facing in Haynes Inlet.

The applicant also stated that "turbidity will be monitored in accordance with the 401

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[28] In its June 16, 2010 letter, WELC purports to "object" to the applicant's submittal of the Ellis Report, complaining that that the opponents were not provided enough time to review and comment on the report. As the applicant notes, however, "the Ellis Report was prepared and submitted in direct response to concerns and questions raised at the public hearing; the Ellis Report contains precisely the type of surrebuttal evidence that is intended to be provided during the second open record period established by the hearings officer."

The applicant is also correct that "the opponents have had plenty of time to gather and provide their *own* evidence regarding alleged impacts on aquatic species and habitat, but have apparently chosen not to do so." As the applicant points out, there is no rule that says opponents may only comment on evidence submitted by an applicant; rather, they are obviously free to create their own evidentiary record and force the decision-maker to make a determination regarding whose evidence is more "substantial." Had WELC elected to submit its own evidence at the close of the open record period, the applicant would have been similarly limited to a seven-day response period.

Finally, the Board notes that any party had a right to file a written request to submit new evidence to respond to that surrebuttal evidence submitted during the second period (and raise "new issues" related to that evidence). ORS 197.763(6)(c) & (7). The type of evidence accepted under this provision is limited: it has to be evidence and argument that "respond[s] to new evidence submitted during the period the record was left open." *See* ORS 197.763(6)(c). Thus, the requested open-record period is an evidentially round, but limited to additional surrebuttal evidence: the parties can only raise "new issues" that relate to the rebuttal evidence, etc, raised during the first open-record period. No party availed themselves of that opportunity.

Water Quality Certification (WQC) requirements during dredging and backfilling operations by the environmental inspector." The applicant goes on to state that "[i]f turbidity levels exceed established tolerances, then procedures outlined in the 401 WQC will be followed." Although that statement may be reasonable and true, it really does not communicate much information to a lay person, and does not provide enough information to make a feasibility finding. The Hearings Officer requested more detailed information concerning the specific WQC requirements, as well as information regarding the "environmental inspector."

In response to these issues, the applicant submitted the Ellis Report, which provides a detailed analysis of the following:

(a) the type and extent of alterations in the aquatic zoning districts that will result from trenching, pipeline construction, installation and backfill (pages 4-6);

(b) types of resources that would be affected within those zoning districts, including vegetation, invertebrates, fish and wildlife (pages 6-10);

(c) expected extent of impacts of construction activities on those resources (pages 11-16); and

(d) methods that could be employed to avoid or minimize adverse impacts (page 16).

The relevant conclusions of the Ellis Report regarding potential impacts on aquatic resources are quoted and/or summarized as follows:

- Plants (eelgrass) – "Therefore, light limitation and direct sedimentation on eelgrass beds is expected to be localized and only result in minor short-term effects on local patches of eelgrass beds proximate to the construction area. Outside of the immediate area, turbidity should not represent an additional indirect source of impact to eelgrass habitats or dependent aquatic species. Thus, the pipeline installation should not affect the ability of the eelgrass beds to function in a manner to protect significant wildlife habitats, natural biological productivity and values for scientific research and education." Ellis Report, page 11.

- Invertebrates – "Following construction, recovery of the benthic community is expected to be rapid, particularly the epibenthic community that provides the majority of the food resources for fish. In a previous study, benthic communities on mud substrates in Coos Bay that were disturbed by dredging activities recovered to pre-dredging levels in four weeks (Newell et al. 1998). It is anticipated that some of the longer lived organisms such as clams and large polychaetes will require up to a year or more to fully recover pre-construction densities." Ellis Report, page 12.

- Fish – The October to February inwater work period will not coincide with the presence of protected sturgeon or salmonids, with the exception of migrating coho salmon adults in the fall. Primary impacts would be due to turbidity, but fish would likely avoid active work areas and would be expected to move to less turbid waters. "The elevated suspended sediment conditions would be short-term during pipeline installation and

would not be continuous at any one location. This would reduce the chances of continuous elevated exposure for any fish that may remain in a localized area." Ellis Report, page 13.

- Oyster Beds – "Four companies lease lands within the bay that they seed with juvenile oysters (spat) and later harvest. Some beds are present in Haynes Inlet near the pipeline corridor. However, all oyster growing areas have been avoided by re-routing the proposed pipeline. Hazardous spills or burial of spat by increased sedimentation have the potential to impact survival and production of these oysters. * * * Adverse effects would be restricted to the short-term period of active construction as sedimentation and erosion control plans would attempt to limit elevated turbidity and suspended sediment near known rearing areas. Any inwater work would comply with turbidity standards as administered under the DEQ Section 401 Clean Water Act certification program.

  " * * * Because oyster beds often occur near the mouths of sediment-laden rivers, oysters are quite tolerant of high suspended sediment loads (Wilbur et al. 2005). Although deep burial can cause mortality, Dunnington (1968) reported that oysters buried 1.25 cm or less could 'usually clear their bills of sediment if the water was warm enough for active pumping.' It is highly unlikely that dredging near the oyster beds will cause sediment deposition significant enough to cause mortality. PCGP is currently in consultation with oyster growers (discussed below) on potential remedies should oyster production be negatively affected." Ellis Report, page 15.

The Ellis Report goes on to describe turbidity monitoring requirements and potential impact minimization practices that could be required in the event that field-testing confirms turbidity standards are being exceeded. In addition, additional safeguards will be provided by virtue of the fact that the applicant will need to obtain permits under the Clean Water Act. Finally, the consultation requirement will provide additional safeguards.

The evidence provided by the applicant constitutes substantial evidence. This is particularly true given that the scientific analysis provided by the applicant has not been rebutted by the opponents. The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995); *Younger v. City of Portland*, 305 Or 346, 357, 752 P2d 262 (1988). "A finding lacks substantial evidence when the record contains credible evidence weighing overwhelmingly in favor of one finding and the agency finds another without giving a persuasive explanation." *Canvasser Services, Inc v. Employment Dept.*, 163 Or App 270, 274, 987 P2d 652 (1999). In this case, the applicant has met its burden of proof. Given the record, to rule against the applicant on this issue would be reversible error. In this regard, there was a complete failure by the opponents to submit credible scientific expert testimony of their own.

ii. Sediment Quality in Coos Bay

More than one opponent testified that the bay is full of hazardous waste that is currently buried in layers of sediment, and that dredging in these areas will cause these substances to be re-introduced into the aquatic environment. The FEIS confirms this may be true. *See* Page 4.5-93 ("Wildlife and Aquatic Resources"). With regard to impacts to fish, the FEIS addresses the

effects of these chemicals on salmon and other fish and concludes that there will be long-term impacts. In the absence of the scientific evidence to the contrary discussed below, the Board would accept the FERC findings in the FEIS as constituting substantial evidence.

The FEIS also states that "suspended sediment may adversely affect filter feeding commercially and recreationally important clams and oysters near the pipeline route in the bay where most of the sediment would be suspended." FERC FEIS at p. 4.5-94. In the Hearings Officer's June 6, 2010 letter to the parties, he opined that "[t]he FEIS goes on to conclude, rather unconvincingly, that '[a]dverse effects would be restricted to the short-term period of active construction as sedimentation and erosion control plans would attempt to limit elevated turbidity and suspended sediment near known rearing areas.'" *Id.* In that same letter, the Hearings Officer stated that "[w]hat concerns me is that there is no *evidence* to conclude that short term exposure to construction-related turbidity is not significant in filter feeding organisms. Common sense suggests that filter-feeding organisms will ingest the toxic compounds, making them inedible or, at the very least, undesirable. The applicant needs to do more to address this issue."

The applicant addresses this issue in its June 24, 2010 final argument, as follows:

> First, as noted in the FEIS, there are no known hazardous waste sites in the area of Coos Bay that would be crossed by the pipeline. FEIS page 4.5-93. In the absence of any contrary evidence provided by opponents regarding the actual presence of contaminated sediments along the route of the pipeline through the bay, the applicant submits that the hearings officer could adopt approval findings based on this evidence alone. However, the FEIS does go on to state that historically there has been boat painting in the general area of Coos Bay that could have resulted in deposits of toxic compounds, and that there is evidence regarding the presence of tributylin in Catching Slough. FEIS page 4.5-93.
>
> In response to these concerns, the applicant submitted a letter from Staff Environmental Scientist Randy Miller dated June 4, 2010. That letter notes that "[t]he proposed pipeline work in Haynes Inlet requires confirmation that the sediment that will be excavated is of sufficient quality that water quality impacts will not occur as a result of chemical constituent concentrations in the sediment." The letter goes on to explain in detail the steps that have been taken by Pacific Connector, and what will be required in the future regarding evaluation of sediment quality.
>
> Pacific Connector has prepared a Level 1 Sediment Quality Assessment that was submitted to the Corps and to the Project Review Group (PRG) for review. The PRG responded in a letter dated December 3, 2009 recommending that Pacific Connector undertake the following steps: (1) preparation of a Sediment Analysis Protocol (SAP) in accordance with the established

Sediment Evaluation Framework (SEF) used for waters of the Pacific Northwest; (2) division of the project area into three dredged material management units; (3) collection of nine sediment cores along the proposed alignment within Haynes Inlet; and (4) physical/chemical analysis of the sediment samples.

Following the recommendations of the PRG, Pacific Connector prepared a January 2010 SAP (copy attached to the letter from Randy Miller), which has been approved by the Corps and the PRG. The purpose of the SAP is to assess whether chemicals of concern are present in sediment in the Haynes Inlet portion of the project area (mileposts 1.7 to 4.1). Chemicals of concern and screening levels established by the SEF are listed on Table 1 of the SAP.

The June 4, 2010 letter from Randy Miller notes that prior sediment testing near the project area indicates that contaminants of concern are not present in the project area at concentrations of concern: "The Coos Bay area studies indicate that there is no reason to believe that chemical contaminants are present in the project area at concentrations greater than SEF screening levels." Miller letter, page 2. Should the sampling to be undertaken by Pacific Connector observe any chemical constituents at concentrations higher than the SEF standards, Pacific Connector will work with the Corps, DEQ, NMFS and the USFWS to apply appropriate mitigation measures or revised construction methods to ensure that no adverse water quality impacts will result from pipeline construction.

The applicant has also submitted a letter dated June 17, 2010 from Robert Ellis, Ph.D., of Ellis Ecological Services (Exhibit 9 to applicant's June 17, 2010 submittal), which responds to concerns stated during the first open record period regarding what steps the applicant will take to evaluate risk posed by contaminated sediments, and the framework that will be applied in order to assess potential risks, including bioaccumulation concerns.

The SAP establishes the methods for sampling and analysis of sediment within the planned pipeline route in order to satisfy the recommendations of the PRG and to ensure that water quality impacts will not occur as a result of sediment contamination. It would be appropriate for the county to impose a condition of approval requiring the applicant to undertake the sampling and analysis set forth in the SAP in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet.

The Board finds that information contained in the June 4, 2010 letter from Mr. Miller, the June 17, 2010 letter from Mr. Ellis, and the SAP constitutes substantial evidence regarding the specific pipeline impacts sufficient to rebut the general conclusions of the FEIS and to respond to concerns expressed by opponents. As quoted above, the applicant proposed the Board impose a condition of approval requiring the applicant to undertake the Sediment Analysis Protocol ("SAP") during dredging operations. The Board finds it is important for the applicant to complete the sampling and analysis of the SAP. However based upon staff recommendation, the timing of these steps should be accelerated in order to identify and address issues as soon as possible. Accordingly, the Board adopts Condition of Approval B.19 to read as follows:

> "Prior to construction, the applicant shall be required to undertake the sampling and analysis set forth in the Sediment Analysis Protocol (SAP) in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet."

Given these extensive avoidance, minimization and mitigation measures proposed by the applicant, and subject to this condition, the Board concludes that any impacts to resources will be temporary and *de minimis*. *Oregon Shores Conservation Coalition v. Curry County and Tidewater Contractors, Inc.*, __ Or LUBA __ (LUBA No. 2009-100, March 10, 2010).

q. Forest Zone (F) (CCZLDO Article 4.8)

CCZLDO §4.8.300(F)

The proposed pipeline will cross approximately 39.47 miles of Forest-zoned lands within the County (*see* Tables 1 and 2 in the application narrative). Of the 39.47 miles, 10.76 miles are on BLM-managed lands, while the remaining segments are located on privately owned lands. The Environmental Alignment Sheets in Exhibit 1 to the application narrative provide the landowner and zoning information with the parcel data overlaying aerial photography.

The majority of the pipeline route through the County is located on Forest-zoned lands. As shown on Table 1 in the application narrative, the pipeline would cross Forest-zoned lands between the following mileposts: 4.22 to 6.25, 6.44 to 8.28, 8.54 to 10.42, 8.95 to 9.06, 9.10 to 10.12, 10.52 to 10.97, 11.32 to 11.94, 12.04 to 12.47, 12.49 to 14.22, 14.28 to 15.69, 15.73 to 15.89, 15.95 to 19.24, 20.05 to 21.81, 21.87 to 22.59, 23.06 to 29.52, 30.15 to 45.70.

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).[29]

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). *See* Letter from Jan Wilson dated June 8, 2010, at p. 5. They argue that only gas "distribution" lines are allowed, and a distribution line is one that distributes gas to homes in the County. The opponents seek to differentiate the proposed Pacific Connector pipeline on the grounds that it does not "distribute" gas to residents or businesses within the County, but is instead one that "transmits" gas to California and other locales.[30]

The applicant responds to this argument as follows:

> Several opponents have argued that the PCGP is a "transmission" gas pipeline rather than a "distribution" line, and that the pipeline is therefore not allowed under the applicable Goal 4 rule,
>
> The language in [OAR 660-006-0025(4)(q)] expressly and unambiguously defines all new utility lines as "distribution" lines, with the exception of new electric lines, which are identified as "transmission" lines. For purposes of this state rule, and the corresponding county code provision, there is no such thing as a natural gas "transmission" line. While the opponents may disagree with the appropriateness of this characterization, the text of the rule is not ambiguous and cannot be changed by the hearings officer.
>
> The opponents' argument is based on the fact that the PCGP is described in other materials and in FERC documents as an interstate natural gas "transmission" facility. The opponents' argument

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

[30] In their letter dated June 8, 2010, WELC states as follows:

> Because the provision mentions "electrical transmission lines" separately from "distribution lines," which, by the given list of examples, include more than just electrical lines, it is not clear that ***non***-electrical ***transmission*** lines are allowed under the provision. The definitions section of the county code makes no distinction between transmission lines and distribution lines, though it does define utility "service lines" to include "distribution lines" for both electrical and non-electrical utility services. In any event, the applicant has the burden of showing how the proposed natural gas pipeline, which seems to be merely transmitting natural gas through the county (from the proposed LNG import facility to the main north-south interstate pipeline that transmits natural gas though multiple western states between the Canadian and Mexican borders), rather than distributing it to any Coos County users, falls within the defined administrative conditional use.

assumes that the PCGP's classification by FERC must also be consistent with its classification under OAR 660-006-0025(4)(q) and CCZLDO § 4.3.800(F). Following this assumption, opponents argue that interstate natural gas pipelines are prohibited in forest zones because the rules only allow "transmission" lines for electricity. Opponents argue that the PCGP is not a distribution line under their interpretation and therefore is not allowed in forest zones as a conditional use.

It is important to clarify the interpretive issue before the county and the proper scope of analysis. The interpretive issue is limited to the classification of the PCGP under the county's forest zone. The county's forest zone provisions allowing new distribution lines were adopted to implement OAR 660-006-0025(4)(q) and, therefore, must be interpreted consistently with the Goal 4 rules. *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999). Accordingly, the focus of the analysis is on the Goal 4 rule rather than the local code language. *Id.*

Because the issue before the county is the classification of the PCGP under *Goal 4*, the county should not consider FERC's classification of the PCGP under *federal law*. Stated simply, the county's land use review and FERC's review of the PCGP are two separate processes, each applying a different set of definitions and standards. In its review process, FERC does not consider or determine the classification of the PCGP under Goal 4 or the county forest zone. Similarly, the county's land use review process does not involve any definitions or review criteria established by FERC or federal law. FERC's classification of the PCGP, which forms the bulk of the opponents' analysis, has no bearing on the on the classification of the PCGP under Goal 4.

Under the Goal 4 rule, the classification of the PCGP is a question of statutory construction, which must be reviewed under the analysis established in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). The first level analyzes the text and context of the provision. The second level considers legislative history that is offered by the parties, even if the text and context of the provision do not present an ambiguity. *State v. Gaines*, 340 Or 160, 171-72 (2009). "However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* The third level of analysis, maxims of statutory construction, is only considered if the text, context, and legislative history do not answer the interpretive question. *Id.* Under the Goal 4 rule, the classification of the PCGP is a question of statutory construction, which must be reviewed under the

analysis established in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). The first level analyzes the text and context of the provision. The second level considers legislative history that is offered by the parties, even if the text and context of the provision do not present an ambiguity. *State v. Gaines*, 340 Or 160, 171-72 (2009). "However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* The third level of analysis, maxims of statutory construction, is only considered if the text, context, and legislative history do not answer the interpretive question. *Id.*

a. The text and context of the Goal 4 rule establish that the PCGP is a "new distribution line" under OAR 660-0006-0025(4)(q).

OAR 660-006-0025 includes a long list of uses and activities that are either allowed outright or as conditional uses in rural forest zones. Two of those uses are relevant to the classification of the PCGP. OAR 660-006-0025(3)(c) allows "Local distribution lines (*e.g.*, electric, telephone, natural gas) and accessory equipment" as outright permitted uses.[31] OAR 660-006-0025(4)(q) allows, as conditional uses: "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."

The text of OAR 660-006-0025 reflects that separate classification schemes are used for electrical and non-electrical lines. For purposes of Goal 4, electrical lines are classified as either local distribution lines (allowed outright) or transmission lines (allowed as a conditional use with up to 100 feet of right-of-way). Non-electrical lines are classified as either local distribution lines (allowed outright) or new distribution lines (allowed as a conditional use with up to 50 feet of right-of-way). Nothing in the text of Goal 4 identifies either non-local electrical distribution lines or non-electrical transmission lines as a separate classification.[32] Instead, all non-local non-electrical lines are classified as new distribution lines. Such lines are allowed as conditional uses with up to 50 feet of right-of-way.

[31] Identical language is included in CCZLDO § 4.8.200(H) regarding uses permitted outright in the county Forest zone.

[32] When LCDC amended the Goal 4 rules in 1992, "electrical" was deleted from the listed types of distribution lines in OAR 660-006.0025(4)(q) because non-local electrical lines became separately classified as transmission lines.

The opponents interpret Goal 4 to require the same classification schemes for both electrical and non-electrical lines – *i.e.* transmission and distribution lines. The distinction, opponents argue, is that a gas distribution line must be designed to provide local utility customers with supplies of gas. However, this interpretation ignores the fact that OAR 660-006-0025(3)(c) and CCZLDO § 4.8.200(H) specifically allow local distribution lines as a use permitted outright. Consequently, OAR 660-006-0025(4)(q) must be interpreted to allow distribution lines that serve more than just local customers. *See* ORS 174.010 (statutes must be construed to give effect to all provisions). Further, Goal 4 does not identify any non-electrical lines (e.g. telephone, oil, and fiber optic cable) as transmission lines. Under the opponents' interpretation, all non-electrical lines, even telephone phone lines, that are not restricted to local service would be prohibited in the Forest zone. The text of Goal 4 does not support this interpretation.

The statutory context of the Goal 4 rule confirms that the PCGP is properly classified as a new distribution line. The Goal 4 utility line classification scheme is derived from ORS Chapter 772, which establishes the amount of right-of-way that can be condemned for various types of utility lines. ORS Chapter 772 makes clear that "transmission" is a classification used only for electrical lines and electrical utilities.[33] No other type of utility line (*e.g.* gas, oil, geothermal, telephone, fiber optic cable) is classified as a "transmission" line under ORS Chapter 772, including utility lines that might be classified as a transmission line under federal law. Consequently, all non-electrical utility lines, including the PCGP, are properly classified as distribution lines for purposes of the Goal 4 rule.

The opponents' classification scheme erroneously ignores ORS Chapter 772 and, instead, focuses on the classification of the PCGP under other laws and FERC documents. As explained above, this interpretation loses sight of the fact that the proper analysis is whether the PCGP is a distribution line under Goal 4, not FERC's rules or some other source of law. Neither Goal 4 nor ORS Chapter 772 implements either federal law or Williams' classification scheme. Therefore, federal law does not provide context for interpreting Goal 4. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

[33] In fact, when the Goal 4 rule was adopted, nothing in Oregon law classified gas lines as "transmission lines."

The purpose statements in Goal 4 and the Goal 4 rule also provide context for interpreting the term "new distribution lines."[34] The purpose of Goal 4 and the Goal 4 rule is to conserve and protect lands for timber production. Goal 4 and the Goal 4 rule recognize that five general types of uses may be allowed in forest zones, subject to the standards in Goal 4 and the Goal 4 rule. OAR 660-006-0025(1). New distribution lines are part of the general category of locationally dependent uses allowed by Goal 4. However, the "distribution" label is not what is important for ensuring that these lines are consistent with the purpose of Goal 4. Instead, these lines are made consistent with the purpose of Goal 4 through the 50 foot permanent right-of-way standard in OAR 660-006-0025(4)(q) and the conditional use criteria in OAR 660-006-0025(5). The opponents' labeling distinction between "distribution" and "transmission" lines does not further the purpose of Goal 4 and the Goal 4 rule. In fact, if opponents' arguments were correct, it would be impossible to site an interstate gas pipeline across Forest-zoned land in Oregon.

In short, the Goal 4 rule classifies all gas lines as either local distribution lines or distribution lines. Goal 4 does not recognize a separate classification for gas transmission lines because there is no similar classification under ORS Chapter 772 or any Oregon statute that could serve as relevant context. Therefore, under Goal 4 and CCZLDO 4.8.300(F), the PCGP is a distribution line and is allowed as a conditional use with up to 50 feet of right-of-way width.

b. <u>The legislative history of the Goal 4 rule confirms that the PCGP is properly classified as a distribution line.</u>

The legislative history of the Goal 4 rule confirms that the classification scheme for utility lines was developed based on the classification scheme in ORS Chapter 772, which does not identify gas transmission lines as a separate classification. OAR 660-006-0025 was first adopted by LCDC in 1990 and classified all types of utility lines, including electrical lines, as either local distribution lines or distribution lines. All distribution lines were allowed as conditional uses with up to 50 feet of right-of-way. In 1992, LCDC amended the rule to allow "new electric transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210" and deleted the reference to "electrical" under distribution lines. The apparent reason for this revision was to make the Goal 4 rules consistent with ORS Chapter 772, which

[34] General purpose statements are not approval criteria for a land use decisions. However, purpose statements can provide context for a statutory or regulatory interpretations.

> recognized electric transmission lines as a separate classification and provided for additional right-of-way condemnation authority for such lines. No amendment was necessary for other types of utility lines because ORS Chapter 772 did not classify any other types of lines as transmission lines. Consequently, LCDC's decision to amend the Goal 4 rules to recognize electrical transmission lines does not reflect an intent to classify, and thereby prohibit, any other type of utility line as a transmission line.

See Final Argument, Letter from Mark Whitlow dated June 24, 2010, at p. 5-9.

The opponents appear to be correct that the gas pipeline industry distinguishes between gas transmission lines and gas distribution lines. *See generally*, William A. Mogel and John P. Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, ENERGY LAW JOURNAL, Vol. 4.2, page 155; 157 (1983).[35] In the industry, it is apparently understood that interstate gas pipelines are generally used for the "transmission" of natural gas. *Id.* FERC seems to adopt this distinction as well, as the discussion in the FEIS makes clear.

However, the applicant is correct that there is no indication in Statewide Planning Goal 4 or OAR 660-006-0025(4)(q) that LCDC purposefully intended to use the federal vernacular, and there is no indication that LCDC sought to purposefully exclude interstate gas "transmission" pipelines from Forest zones. As the applicant notes, neither the FERC classification or other federal law is necessarily "context" for interpreting DLCD's administrative rule, because there is simply no evidence to suggest that OAR 660-006-0025(4)(q) implements federal law or was enacted with federal law in mind.

OAR 660-006-0025(4)(q) specifically lists "gas" amongst a list of examples of "distribution lines." Because the rule creates a separate category for "local" gas distribution lines, the only logical inference is that all other gas lines (*i.e.* "non-local gas lines) are a conditional use. By using the term "transmission" lines for electrical lines, the rule is intending to recognize the vernacular used in the state statute. *See* ORS Chapter 772.

The legislative history is also telling because there is really no discussion regarding gas "transmission" lines. If DLCD were making a purposeful decision to exclude interstate gas transmission lines from Forest zones, one would think that such a monumental decision would have generated more debate and attention. Such debate and discussion would be reflected in the legislative history. However, the tenor of the legislative history is much more in line with "housekeeping" changes, and not major shifts in policy.

Moreover, as the Hearings Officer's discussion on preemption makes clear, it is doubtful that DLCD would have the authority to exclude interstate gas transmission lines from the Forest

[35] "There are three major segments of the natural gas industry: production, transmission, and distribution. Essentially, interstate natural gas pipeline companies act as middlemen, buying natural gas from producers at the wellhead, transporting it, and reselling it directly to large end-users or to local distribution companies, which in turn resell it for a variety of end users."

zone in any event. This is particularly true for parts of the state not subject to the CZMA. Along those same lines, the opponents' argument also seems to conflict with the apparent purpose behind ORS 215.275(6), which, as stated elsewhere herein, appears to be a legislative recognition of federal preemption on the issue of interstate gas pipelines in Farm zones.

The Board concludes that the interstate gas pipeline proposed here is a "distribution line" within the meaning of OAR 660-006-0025(4)(q). In any event, the Board further concludes that even if the application is proposing an interstate gas "transmission" line, and even if CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) could be read to bar such gas transmission lines in a Forest zone, those laws would be preempted by federal statute. The Board adopts herein the applicant's argument, as set forth above, as additional findings.

50 Foot Right of Way Corridor and Temporary Right of Way.

Another issue stemming from CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) concerns the fact that the applicant is proposing a temporary construction corridor that exceeds 50 feet. As quoted above, CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) allow "new distribution lines (*e.g.*, gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width." The applicant has testified that the permanent right-of-way for the PCGP will not exceed 50 feet at any point along the pipeline route. As reflected in the FEIS, Pacific Connector originally proposed a right-of-way with varying widths depending upon the underlying land ownership. However, as explained in the applicant's letter dated June 17, 2010, Pacific Connector has adjusted the project right-of-way width to a consistent 50 foot width in response to public comments from FERC and other agencies.

Several opponents argue that the proposed pipeline exceeds the "50-foot right-of-way" requirement because an additional 45-foot temporary construction easement is required during construction of the pipeline. WELC makes the opponent's argument in their letter dated June 8, 2010:

> [I]t is clear that [OAR 660-006-0025(4)(q)] allows for the wider 100-foot right-of-ways only for electrical lines. The non-electrical lines – even if properly characterized as "distribution" lines – are limited to those that can be fit into a 50-foot right-of-way. The provision makes no distinction between "temporary" and "permanent" rights-of-way, and the applicant's attempt to squeeze an unallowed 95-foot right-of-way into the 50-foot right-of-way limit is a blatant attempt to establish an unpermitted use. It is not clear why it would take more than 50 feet of right-of-way to install a three-foot diameter pipe, but, in any event, the county code has clearly determined that, in Forest zones, the maximum linear clearing width that would not significantly interfere with primary forest operations and forest habitat values is 50 feet. The applicant's proposal for a pipeline that ostensibly requires a 95-foot right-of-way – during construction or anytime – is not allowed in the Forest zones.

> The state statutes are to the same effect. ORS 772.210(3)[36] gives gas public utilities condemnation rights "not exceeding 50 feet in width," and specifically note that the 50-foot limit is intended to accommodate all the right-of-way necessary for "constructing, laying, maintaining and operating" the pipeline and "including necessary equipment." There is absolutely no provision in the law for a "temporary" construction easement wider than the 50-foot right-of-way limit.

The applicant responds as follows:

> However, [the opponents'] interpretation is not supported by the text and is inconsistent with a recent decision by the Oregon Energy Facility Siting Council (EFSC). As noted above, the language used in the county code to describe the use category comes directly from the Goal 4 implementing regulation. OAR 660-006-0025(4)(q) provides that gas distribution lines are permitted on forest lands within a 50-foot right-of-way. The

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[36] ORS 772.210. Construction of service facilities, right of entry and condemnation of lands:

(1) Any public utility, electrical cooperative association or transmission company may:

(a) Enter upon lands within this state in the manner provided by ORS 35.220 for the purpose of examining, locating and surveying the line thereof and also other lands necessary and convenient for the purpose of construction of service facilities, doing no unnecessary damage thereby.

(b) Condemn such lands not exceeding 100 feet in width for its lines (including poles, towers, wires, supports and necessary equipment therefore) and in addition thereto, other lands necessary and convenient for the purpose of construction of service facilities. If the lands are covered by trees that are liable to fall and constitute a hazard to its wire or line, any public utility or transmission company organized for the purpose of building, maintaining and operating a line of poles and wires for the transmission of electricity for lighting or power purposes may condemn such trees for a width not exceeding 300 feet, as may be necessary or convenient for such purpose.

(2) Notwithstanding subsection (1) of this section, any public utility, electrical cooperative association or transmission company may, when necessary or convenient for transmission lines (including poles, towers, wires, supports and necessary equipment therefore) designed for voltages in excess of 330,000 volts, condemn land not to exceed 300 feet in width. In addition, if the lands are covered by trees that are liable to fall and constitute a hazard to its wire or line, such public utility or transmission company may condemn such trees for a width not exceeding 100 feet on either side of the condemned land, as may be necessary or convenient for such purpose.

(3) Notwithstanding subsection (1) of this section, a water or ***gas public utility*** may condemn such lands, not exceeding 50 feet in width, as may be necessary or convenient for purposes of ***constructing***, laying, maintaining and operating its lines, including necessary equipment therefore. (Emphasis Added).

(4) 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 and diminution in value to remaining timber caused by increased harvesting costs. (Emphasis Added).

> language does not suggest intent by DLCD to limit anything other than the permanent right-of-way corridor.
>
> As noted in my June 17, 2010 correspondence, the EFSC Final Order approving the COB Energy Facility supports the interpretation that the 50-foot width limitation included in OAR 660-006-0025(4)(q) is intended to include only the permanent, operational right-of-way, and not temporary construction areas. In that case, the pipeline crossed through a Klamath County forest zone that applied the OAR 660-006-0025(4)(q) use category. The findings in that decision indicate that construction would require a 120-foot wide corridor along a segment of the pipeline located within a forest zone.[37] Despite a 120-foot construction corridor through the forest zone, EFSC approved the natural gas pipeline as a new distribution line with a right-of-way of 50 feet or less in width, and applied the following condition, "[t]he certificate holder shall limit the width of the *permanent/operations* easement for the natural gas pipeline to no more than fifty feet on lands zoned FR" (emphasis added).
>
> Pacific Connector has proposed conditions of approval designed to ensure (a) that the permanent right-of-way is no wider than 50 feet, and (b) that all temporary construction areas will be restored to their preconstruction condition.

See Applicant's final Argument, at 9-10.

The Klamath County case provides some authority that the standard practice with regard to this issue is to consider temporary construction easements to be separate and distinct from "right of way" as that term is used in the above-cited administrative rule. The case of *Friends of Parrett Mountain v. Northwest Natural Gas Co.*, 336 Or. 93, 79 P.3d 869 (2003) provides similar insight as to the standard practice. In *Friends of Parrett Mountain.* the Oregon Supreme Court noted the following facts pertaining to an intrastate natural gas pipeline authorized by the Oregon Energy Facility Siting Council:

> The certificate authorizes Northwest Natural to construct its pipeline within an approximately 62-mile long, 200-foot wide corridor designed around 10 significant "constraint points." Inside that corridor, Northwest Natural will build the pipeline within an 80-foot wide, temporary construction easement. Upon completion of the project, the width of the easement will be reduced to 40 feet and become permanent. (Emphasis added).

[37] The findings addressing the forest zone review criteria state that "[d]ue to local topography (side slopes), construction of this segment of the pipeline would require 120-foot-wide corridor." Final Order, COB Energy Facility, at 334.

The parties to the *Parrett Mountain* case did not raise the "temporary construction easement" issue to the Supreme Court, so the case cannot be viewed as formal precedent on that issue. Nonetheless, it provides further indication that EFSC does not consider the temporary easement to be "right-of-way" within the meaning of the statute.

WELC's argument assumes that the 45-foot wide "temporary" portion of the easement area is "right-of-way." Indeed, the FEIS refers to this area as the "95 foot wide construction right-of-way." On the other hand, Figure 2.3-1 of the FEIS, page 2-64, makes it fairly obvious that it is not physically possible to build a pipeline within 50 feet of ROW. As the Board has previously noted, state law is generally preempted to the extent it is inconsistent with FERC authorizations. Therefore, the Board rejects the contention that the application must be denied because it proposed a greater right-of-way than may be contemplated by OAR 660-006-0025(4)(q).

WELC also cites ORS 772.210(3), which states that "a water or gas public utility may condemn such lands, not exceeding 50 feet in width, as may be necessary or convenient for purposes of *constructing*, laying, maintaining and operating its lines, including necessary equipment therefore." It does not appear that the applicant is relying on ORS 772.210(3) as the source of its condemnation authority. Rather, the applicant relies on ORS 772.510(3), which provides that "[t]hese pipeline companies may appropriate and condemn such lands, or easements thereon or thereover, *in such width as is reasonably necessary to accomplish their pipeline company purposes,* by proceedings for condemnation as prescribed by ORS chapter 35." This statute appears to allow the pipeline company to condemn pretty much whatever it reasonably needs in terms of right-of-way.

Applying the *PGE v. BOLI* methodology, the text of OAR 660-006-0025(4)(q) could be read to support WELC's position. But a legal standard such as this cannot be read in a vacuum. *State v. Stoneman*, 323 Or 536, 546, 920 P2d 535 (1996).[38] The context of a statute or statutory scheme can sometimes reveal an ambiguity in a particular phrase that, standing alone, appears to have a clear meaning. *Southwood Homeowners Ass'n v. City Council of Philomath*, 106 Or.App. 21, 806 P.2d 162 (1991) (citing *Dennehy v. City of Portland*, 87 Or.App. 33, 40, 740 P.2d 806 (1987).

For the reasons explained elsewhere in this decision, the statutory context, including ORS 215.275 and ORS 772.210(3), supports PCGP, and tilts the balance in favor of the applicant's

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[38] In *Stoneman*, the Oregon Supreme Court stated:

> It is true that, when viewed in isolation, ORS 163.680 (1987) appears to have contained a content-based proscription on expressive material. It forbade commerce in certain forms of expression--films, videotapes, and the like in terms of their content--"sexually explicit conduct by a child under 18 years of age." But a statute cannot be read in a vacuum. An examination of the *context* of a statute, as well as of its wording, is necessary to an understanding of the policy that the legislative choice embodies. *See PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-11, 859 P.2d 1143 (1993) (first level of interpretation of statute involves examining both text and context). A closer look at the provision under examination here, within its statutory context, reveals a different focus. (Emphasis added).

interpretation. Thus, the Board finds that the 45-foot temporary easement area is not "right-of-way" within the meaning of OAR 660-006-0025(4)(q), or in the alternative, that OAR 660-006-0025(4)(q) is inconsistent with both ORS 772.510(3) and federal law and therefore is preempted and without legal force on that issue.

SECTION 4.8.400.

CCZLDO §4.8.400 is entitled "Review Criteria for Conditional Uses in Section 4.8.300," and provides 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*

As the applicant correctly notes, there are several important limitations on this standard. First, it is important to note that this criterion relates to *significant* impacts on farming and forest practices and *significant* cost increases. The applicant is not required to demonstrate that there will be no impacts on farming or forest practices, or even that all impacts that may force a change or increase costs have been eliminated through mitigation or conditions of approval. *See 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 does not require the extensive analysis applied under the similarly-worded provisions of ORS 215.296(1). *Comden v. Coos County*, 56 Or LUBA 214 (2008). 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.*

i. Accepted Forest Practices.

Mr. Jake Robinson of Yankee Creek Forestry testified at the May 20, 2010 hearing and submitted a letter dated June 7, 2010. Mr. Fred Messerle of Messerle and Sons also testified and submitted letters dated May 2, 2010 and June 10, 2010. Since the issues raised in these letters overlap, they are considered together.

Mr. Robinson and Mr. Messerle state that the pipeline will force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands. In support of that conclusion, they raise the following issues:

- The limited number of hard crossings across the pipeline easement will increase costs, because it changes the way an entire stand of trees is harvested.
- 95 foot wide easement will fragment timber stands, making them more difficult o log efficiently,
- The "hard edge" will cause tree blow downs, because trees that were previously sheltered from wind will now be fully exposed,
- Corridor will promote trespass, both in terms of vehicles and pedestrians. Additional human traffic will cause an increased risk of damage to trees via disease (including Port Orchard Cedar root rot and Douglas Fir root rot), fire, and vandalism,
- Increased vector for noxious weeds,
- Increased vector for fire,
- Trees on the edge of the easement will be of poor quality because they have more exposure to sunlight and, as a result, grow more limbs, and they will be on a different growth cycle as compared to neighboring trees,
- Pipeline reduces the ability to fight fire because it impedes access to forest via bulldozers and making it more difficult to create "cat lines."
- Reduced ability to use land for conservation easements, etc.
- Increased costs associated with monitoring the construction of the pipeline,

The Board finds Mr. Robinson and Mr. Messerle to be credible expert witnesses and is sympathetic to the concerns they raise. The applicant's expert, Mr. Dallas Hemphill, has 45 years of experience in the forest industry and also is a credible expert witness. In effect, this case presents a "battle of experts," and the Board has the difficult task of choosing to agree with one side over the other. In this case, the Board agrees with the evidence provided by the applicant. The following factors influence this conclusion:

First, it seems that many of the concerns raised are of a type that would be true no matter what kind of pipeline was proposed. For example, in every case where a pipeline traverses forest lands in Oregon, the resulting corridor will result in a new forest edge, and that edge will experience some degree of blow downs due to previously-sheltered trees receiving increased exposure to wind. Despite these types of foreseeable impacts, there has already been a legislative determination, both at the state and county level, that pipelines are an allowed use in the Forest zone. Therefore, it cannot be assumed that standard practices associated with pipeline construction and operation will automatically, in every case, force a significant change in, or significantly increase the cost of, accepted forest practices on forest lands. Otherwise, pipeline uses would have simply been prohibited in Forest zones. Here, the opponents have not asserted that there is something particular about their land or County forest land in general that causes the

pipeline to have anything beyond the typical expected impacts. Their testimony is simply too generalized to be persuasive.

Second, and perhaps more importantly, all of the increased costs can form the basis of an increased just compensation award. In the Hearings Officer's letter dated June 6, 2010, he requested that the parties discuss the applicability or inapplicability of ORS 772.210(4), which addresses the issue of what costs factor into the just compensation analysis:

> ORS 772.210(4) 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 and diminution in value to remaining timber caused by increased harvesting costs. (Emphasis Added).

Although the Hearings Officer questioned the applicability of this statutory section, the applicant appeared to accept the compensation rules set forth in ORS 772.210(4). *See* Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" at p. 3 ("This policy with respect to damages may be interpreted in the specific context of forestry to mean that whatever incremental costs and value losses 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.")

The Hearings Officer found it significant that the landowner would be compensated for both the value of the land taken and the value of the timber removed. The Hearings Officer further understood Mr. Hemphill's testimony to mean that the landowner would be compensated for the timber as if it was already of a mature size ready for harvest. The Hearings Officer deemed this requirement important, since he determined that a stand of 20 year trees probably has little to no *current* value. On the basis of this reasoning, the Hearings Officer determined that the applicant presented substantial evidence that the pipeline would not significantly increase the cost of forestry operations. To ensure compliance with this standard, the Hearings Officer proposed a condition of approval.

Although the Board disagrees with the Hearings Officer's conclusion that a stand of 20-year trees has no current value, the Board otherwise concurs with the Hearings Officer's conclusion on this issue. The Board further finds the condition should be modified to provide compensation for loss of product value due to blow-downs and to apply to all timberlands not only those that are commercial in nature. Accordingly, the Board adopts the modified condition as Condition A.5 to read as follows:

> "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. [*See ORS 772.210(4) and Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.*]"

Subject to the unrelated modification discussed in more detail below, the Board adopts this condition as Condition of Approval A.5.

In its final argument, Pacific Connector acknowledges that the PCGP will have limited effects on accepted forest practices[39] on the forest lands in the vicinity of the pipeline right-of-way. *See* Applicant's final Argument. However, the Board finds that those limited impacts will not force a *significant* change in the accepted forest practices in the vicinity of the pipeline. Nor will those limited impacts significantly increase the cost of accepted forest practices. As explained in the application narrative, accepted forest practices in the vicinity of the pipeline corridor include timber production and harvesting, hauling harvested timber, logging road construction and maintenance, application of chemicals, and disposal of slash.

The pipeline project will have effects on the timbered areas located in the Forest zone both during and after construction in the form of the cleared corridor. As discussed in the application narrative, the pipeline must maintain a 30 foot cleared corridor directly over the pipeline for safety purposes. However, the remaining 20 feet of permanent right-of-way, as well as the temporary construction areas will be replanted in a manner consistent with Pacific Connector's Erosion Control and Revegetation Plan (ECRP). The permanent removal of a 30-foot strip of trees within the Forest zone will not force a significant change to the surrounding forest practices.

Several opponents argue that the cleared 30 foot strip itself is a significant change. However, as discussed above, if any tree removal required for the footprint of the conditional use itself could be interpreted as forcing a significant change, no use with a permanent tree removal footprint could ever be approved as a conditional use in a Forest zone. The Board finds that is clearly not the intent of this review criterion. Instead the relevant analysis is whether the use contained within that footprint or impact area will force a significant change on forest practices adjacent to the impact area for the use itself.

The PCGP will also have temporary effects on adjacent forest lands and forest practices during construction. The landowner will be unable to conduct accepted forest practices within

[39] The term "forest practices" is defined by the Oregon Forest Practices Act as "any operation conducted on or pertaining to forestland, including but not limited to (a) reforestation of forest land; (b) road construction and maintenance; (c) harvesting of forest tree species; (d) application of chemicals; and (e) disposal of slash." ORS 527.620(5).

the temporary construction easement and work areas during pipeline construction. However, all temporary construction areas and all but 30 feet of the 50-foot right-of-way will be replanted and restored in manner consistent with the final ECRP. Once the restoration occurs, the landowner will be able to continue accepted forest practices in those areas. The Hearings Officer proposed a condition of approval to this effect. The Board agrees that the applicant should replant timberlands; however, the Board finds that the landowner is not required to continue engaging in forest practices in those areas. Accordingly, the Board modifies and adopts the condition as Condition of Approval A.20 to read as follows:

> "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."

Further, the Board finds that the applicant-proposed Condition of Approval B.3 is redundant with Conditions of Approval A.20 regarding forestlands and A.21 regarding farmlands. Accordingly, the Board deletes Condition of Approval B.3 and identifies it as "Intentionally deleted."

Finally, the pipeline will have limited effects on accepted forest practices once construction is complete. Public comments raised concerns related to the following potential effects on forest practices adjacent to the pipeline: future pipeline crossings, location of heavy forestry equipment, fragmentation of parcels owned by smaller private timber operators, spread of invasive species, and off-highway vehicle use. These issues are addressed in detail in the following documents, which are adopted herein as findings:

- The application narrative dated April 14, 2010, at pages 15-17;
- Correspondence dated May 11, 2010 from Rodney Gregory of Pacific Connector, at pages 10-13;
- Correspondence dated June 8, 2010 from Rodney Gregory of Pacific Connector, at pages 1-4 (Exhibit 10 to the applicant's submittal dated June 9, 2010);
- Correspondence dated June 17, 2010 from Mark Whitlow of Perkins Coie LLP, at pages 3-6;
- Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" (attached as Exhibit 3 to the applicant's submittal dated June 17, 2010).

In his report dated June 17, 2010, Mr. Hemphill analyzed the specific size and location of each individual tract that would be impacted by the pipeline, and the potential impacts to forestry operations that could be caused by access restrictions, pipeline crossing restrictions, reduction in the amount of harvestable timber, and fragmentation of specific tracts.

Mr. Robinson's comments are based on the premise that "most of" the impacted forest lands within the County are private, non-industrial timber lands, whose owners do not have the land-base to absorb the increased costs of timber operations. Robinson letter, page 3. However, in his response Mr. Hemphill reviewed the specific list of forestry tracts that will be traversed by the pipeline and determined that, out of 39 miles of forest-zoned land, only approximately 9.4 miles of the pipeline would cross property owned and operated by small "non-industrial" private forest operators.

Mr. Messerle states that the pipeline will encourage trespassing, which will potentially increase the possibility of introducing diseases to trees, including two different types of root fungi. Mr. Hemphill responds with the following testimony:

> Port Orford Cedar root rot is already widespread throughout the second-growth areas of southwest Oregon. Laminated root rot is also naturally widely distributed throughout western Oregon. It is not transmitted by soil on traffic, but "...is only known to spread by root contact between infected trees or infected stumps and susceptible trees." (Thies, W. and R. Sturrock, 1995: *Laminated Root Rot in Western North America*, USDA Forest Service Res. Bull. PNW-GTR-349, Portland.) Therefore the pipeline cannot be expected to accelerate the infestation of either pathogen.

Unfortunately, the Thies / Sturrock report was not included in the record, so the truth of the assertion cannot be verified. Nonetheless, the mere citation to authority indicates confidence in the assertion and itself provides a micron of weight which tips the scales in favor of the applicant regarding a substantial evidence finding.

With regard to the allegation that the pipeline will encourage trespassing, Mr. Hemphill rebuts those assertions as well:

> Trespass is an issue throughout western Oregon timberlands. The additional opportunity provided by the pipeline and its access routes would however be only slightly incremental to the problem. The pipeline operator will install robust traffic controls (gates, etc.) that private landowners are often unwilling or unable to afford, thus likely mitigating the problem. Consequently, there should be a negligible increase in human-caused fires, which in any case are often a result of logging and forestry activities. Similarly, there should not be a significant rise in vandalism and other unauthorized activities.

Mr. Hemphill also adequately rebuts, the "hard edge" problem, as follows:

> This can be an issue on all forest edges, including those cutting lines and road rights-of way created by the landowner itself. The proposed vegetation

management strategy on the easement will serve to limit windfall potential. Vegetation will be controlled only on the central 30 feet of the easement, over the pipeline. Outside this area, on the remainder of the easement natural regeneration can be expected to occur, or the landowner may choose to plant. The 30- foot cleared area is narrow enough—about the same as a road right-of-way—that the trees crowns will soon close in (as Mr. Messerle points out in his submission) sufficiently that windfall should not be a significant issue.

Mr. Robinson and Mr. Messerle both assert that the 30 foot strips that will be re-grown will nonetheless produce trees of poor quality due to excessive limbs. Mr. Hemphill fully rebuts this concern with the following testimony:

> As the landowner will be compensated for the loss of land and original timber on the easement, any timber that he may subsequently be able to produce in the two strips is therefore a bonus, at no cost to the landowner. It can be retained until the landowner's adjacent timber is mature and then logged concurrently; in this sense, the strips on the construction easement do not constitute unmanageable fragments. Limby trees are produced on forest edges, but in this case the edge trees will have grown on land for which the landowner has already been compensated for the land and original timber. As a result, the landowner's trees on the edge of the 95-foot construction easement will not have this edge effect. None of the more valuable 1-3P grade logs are ever produced in a second growth stand.

In response to the argument that the pipeline will hamper firefighting efforts, Mr. Hemphill states:

> Any outbreak of fire would be reported to the pipeline operator concurrently with the landowner. The pipeline operator would be an integral part of the response team. The only time this process would delay fire response would be where the fire was caused by logging or forestry activity...Areas too steep to be accessible by excavator will be hand-slashed on a similar schedule.

Mr. Hemphill further testified that the applicant will conduct routine vegetation maintenance clearing on the 30-foot strip every three to five years and that in the interim, the vegetation will attain only "small dimensions." Staff originally proposed a condition of approval requiring that the pipeline operator mow this vegetation every three to five years; however, the Board finds that it is important to provide the applicant flexibility to identify and implement the most beneficial and cost-effective technique to maintain this vegetation. Accordingly, the Board modifies and adopts this condition as Condition of Approval A.23, which reads as follows:

> "The pipeline operator will conduct routine vegetation maintenance clearing on the 30-foot strip every 3-5 years. [*See Report entitled Forest Practices and Economic Issues related to*

Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE, dated June 17, 2010, at p. 5]"

To summarize on the issue of impact to forest practices, Mr. Hemphill concludes that the incremental increased costs to these timber operators generally amounts to a range of 1-2% of total production costs, which is certainly not an amount that could be described as a "significant" increase in the cost of forestry operations. Second, perhaps more importantly, and as required by Condition of Approval A.5, all of these costs will be included as part of the compensation paid to landowners by the pipeline operator, and therefore such costs will not be borne by the landowners. Therefore, there will be no *actual* increase in costs to the landowners of forestry operations.

Thus, to the extent there are *any* increased costs due to operational changes in the forest practices occurring around the pipeline right-of-way, those costs will be considered in the monetary compensation package paid by Pacific Connector to the landowner. Thus, the Board finds that there will be no significant increase in costs of forest practices to the landowners along the pipeline route.

ii. Accepted Farming Practices.

As explained in the application narrative, and in more detail in correspondence dated May 11, 2010 from Rodney Gregory of Pacific Connector (at pages 6-10), the proposed pipeline will not force a significant change in or significantly increase the costs of accepted farm practices, even on those lands that the pipeline directly crosses.

As described in Pacific Connector's prior submittals, the PCGP will have short-term impacts on farming practices within the temporary construction areas and permanent right-of-way during construction activities. Specifically, farming practices within the right-of-way and the temporary construction areas will be interrupted during construction. However, those short-term construction impacts will not cause a significant change in farming practices because of their temporary nature and because farming practices will be able to continue on lands directly adjacent to the temporary construction areas. Furthermore, Pacific Connector must compensate the landowner not only for the permanent right-of-way, but also for any demonstrated loss in crop production within the temporary construction areas. Consequently, the pipeline will not result in any increased cost in farming practices for the landowner, much less a significant increase in cost.

Following construction, adjacent farming practices, including crop lands and grazing pastures may resume within the temporary construction areas as well as over the permanent right-of-way itself. As explained in Rodney Gregory's correspondence dated May 11, 2010, in EFU areas Pacific Connector will install the pipeline five feet below the surface in agricultural areas to make certain that farming equipment may cross through the right-of-way without impacting the structural integrity of the pipeline. Pacific Connector will undertake many other steps as described in Mr. Gregory's May 11, 2010 letter and in the ECRP that are specifically designed to ensure that impacts on agricultural uses will be minimized.

Except as discussed below, the opponents did not rebut the applicant's evidence or otherwise present substantial evidence of their own explaining how the applicant's proposed efforts to minimize the impacts of the pipeline would be inadequate or ineffective. Therefore, the Board finds that the application satisfies this standard as to accepted farming practices.

The opponents raised two issues – application of herbicides along the pipeline route and potential impacts to groundwater supplies – that, while not specifically directed at this criterion, could be considered impacts on surrounding lands devoted to farm use. Therefore, the Board addresses these issues under this approval criterion below.

(1) Use of herbicides in pipeline corridor

Ms. Jody McCaffree of Citizens Against LNG questioned the applicant's herbicide application policy. Although Ms. McCaffree did not connect her concerns to any applicable approval standards, the applicant presented rebuttal on the record to clarify the applicable herbicide application policy.

As stated on the record, as a general practice during pipeline operations, herbicides will not be used to control vegetation as a means to maintain the permanent 30-foot cleared corridor centered over the pipeline. As set forth in Section 12.6 of the ECRP, where weed control is necessary, the applicant will employ hand and mechanical methods (pulling, mowing, disking, etc.) to prevent the spread of potential weed infestations. However, spot treatments with appropriate herbicides will be conducted where applicable depending on the specific weed and site-specific conditions using integrated weed management principles. The applicant will not use aerial herbicide applications. Spot herbicide treatment would only be utilized when it could be effective (*i.e.*, where plant phenology and effective herbicide treatment windows coincide) prior to and post construction. Any herbicide treatment would be conducted by a licensed applicator using herbicides labeled for the targeted species and registered for the use. The applicant will not utilize herbicides on any right-of-way without landowner consent/approval and will obtain all required permits from the local jurisdictions/authorities.

As detailed in Section 12.6 of the ECRP, in order to prevent impacts to sensitive areas and habitats, herbicides would not be applied during precipitation events or when precipitation is expected within 24 hours or as specified on the label. Herbicides will not be used within 100 feet of a wetland or waterbody, unless allowed by the appropriate agency. To ensure sensitive species/habitats are not adversely impacted, the biological surveys will map any sensitive species proposed and/or listed under the Endangered Species Act, survey and manage species, and federally (BLM and Forest Service) sensitive species. If noxious weed infestations occur in the vicinity of sensitive sites, the proper treatment buffers will be applied to avoid potential adverse impacts to non-targeted species. In these areas site-specific control will be designed (*e.g.* application rate and method, timing, wind speed and direction, nozzle type and size, buffers, etc.) to mitigate the potential for adverse disturbance and/or contaminant exposure.

Thus, the applicant will not apply herbicides to the entire right-of-way to control noxious weeds, but rather spot treatments of herbicides may be used in select areas as summarized above. Ms. McCaffree seems to recommend County oversight of the applicant's herbicide application, if any, within the pipeline corridor. In response to these specific concerns about

herbicide application, the applicant proposed, the Hearings Officer recommended, and the Board adopts a condition of approval requiring the applicant to use weed control and monitoring methods consistent with the Weed Control and Monitoring sections of the final ECRP. The Board further finds that consequences to landowners may potentially be significant if the applicant engages in aerial application of pesticides. Thus, the Board finds that it is appropriate to memorialize the applicant's representation that there will be no such application of pesticides, in Condition of Approval B.5.

(2) Groundwater impacts

Various opponents expressed concern that the pipeline would adversely impact groundwater supplies. Substantial evidence in the record refutes this contention. First, the risk of impacts to the water supply is limited, as there are no public groundwater supply wells or springs within 400 feet of the proposed construction disturbance according to the State Department of Environmental Quality public water supply database. Second, Condition 43.b of the FERC Order attached to the applicant's correspondence dated May 12, 2010 requires the applicant to prepare a Groundwater Supply Monitoring and Mitigation Plan ("Groundwater Plan") to identify, assess, and monitor groundwater supplies; to prevent impacts to groundwater resources; and to mitigate unavoidable impacts. The applicant has prepared the Groundwater Plan pursuant to this condition, which is included as Exhibit 3 to the April 14, 2010 application narrative. The components of the Groundwater Plan are further summarized in the June 3, 2010 letter from Jared Ellsworth, P.E. of Pacific Connector Gas Pipeline, which is attached as Exhibit 7 to the applicant's submittal dated June 9, 2010.

During the deliberations in this matter, the Board expressed concerns whether the Groundwater Plan would adequately protect area groundwater supplies. Specifically, the Board expressed concern that installation and operation of the pipeline could adversely affect water supply to private wells and/or the supply of water from private wells to homes. The Board finds that compliance with the Groundwater Plan will prevent these occurrences for the following reasons. For example, the applicant will contact landowners within 200 feet of the right-of-way prior to construction requesting their cooperation in identifying groundwater wells, springs, or seeps that could potentially be impacted by the project. The applicant will request permission to take field measurements for baseline water quality and yield as well as for the following parameters: temperature, pH, turbidity, and specific conductance. Samples will be analyzed in a laboratory for TPH, fecal coliform, and nitrate. The applicant will also conduct post-construction sampling if requested by the landowner or in disputed situations to determine the effects of construction, if any, on both the yield and quality of the groundwater supply. Moreover, the applicant will engage in various measures to prevent impacts to groundwater resources, including compliance with: (1) a Spill Prevention, Containment, and Countermeasures Plan to prevent the inadvertent release of fuels, solvents, or lubricants used during construction; and (2) blasting plans to minimize impacts to groundwater resources from blasting activities. Finally, the applicant will implement required mitigation measures on a site-specific basis to remedy any adverse impacts on the yield or quality of water supplies. Such mitigation measures may include ensuring a temporary supply of water and, if necessary, replacing permanent water supply.

The Board also finds there is not substantial evidence in the record as to why or how the Groundwater Plan is inadequate, incomplete, or otherwise ineffective. The Board finds that the Groundwater Plan will be sufficient to ensure the pipeline will not adversely impact groundwater supplies or any farm practices that rely thereon.

In sum and for the reasons stated above, the proposed pipeline will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices.

Finally, the Board addresses the proposed conditions of approval requiring compliance with the Groundwater Plan. First, the Board finds that the staff and applicant have proposed nearly identical conditions on this issue. Accordingly, the Board intentionally deletes the applicant's proposed condition (Condition of Approval B.22). Further, in order to ensure compliance with all aspects of the Groundwater Plan, the Board adopts the staff-proposed condition (Condition of Approval A.2) as modified to read as follows:

> "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."

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

The opponents further contended that the proposed pipeline will significantly increase fire hazard, fire suppression costs, and risks to fire suppression personnel. The Board denies these contentions, because the applicant has offered substantial evidence in support of the conclusion that these increases will not occur. Pursuant to CCZLDO 4.8.400, the second standard for conditional use review in the forest zone is:

> *"The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel."*[40]

(i) Fire hazard

The proposed pipeline will not significantly increase fire hazard. The pipeline will be subject to exacting safety requirements that will significantly minimize the risk of a fire caused by the pipeline itself. Specifically, the pipeline and all associated facilities will be designed and maintained to conform with or exceed US Department of Transportation (DOT) requirements found in Title 49 Code of Federal Regulations (CFR), Part 192 *Transportation of Natural and*

[40] The wording for this criterion is taken directly from the Goal 4 rule at OAR 660-006-025(5).

Other Gas by Pipeline: Minimum Safety Standards; 18 CFR § 380.15, *Site and Maintenance Requirements*; and other applicable federal and state regulations.

Comments to the Hearings Officer suggested that FERC had not adequately addressed pipeline safety and fire issues. While not directly relevant to the County's approval criteria, it is important to clarify that the Federal Department of Transportation rather than FERC is responsible for ensuring pipeline safety, while the Pipeline Hazardous Materials Safety Administration Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation of natural gas by pipeline. While FERC is not the agency responsible for pipeline safety, the Reliability and Safety Section of the FEIS does include a pipeline facilities discussion at Section 4.12.10. That section describes the DOT safety responsibilities, as well as the specific safety standards the pipeline must comply with in greater detail.

(1) Fire fuel in pipeline corridor

Several comments raised concerns about fire fuel within the 30-foot cleared corridor created by slash or vegetation that would grow along the right-of-way between maintenance clearings. First, based upon its vegetation maintenance and distribution practices, the applicant does not anticipate increased risk from potentially hazardous fuels, which is assumed to imply woody debris or biomasses distributed on the right-of-way after clean-up and reclamation. As explained in more detail in correspondence from Rodney Gregory dated June 9, 2010, as part of the FERC review process, the applicant worked in conjunction with the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) to develop a standardized set of fuel loading specifications for BLM and private lands, and separate specifications for USFS lands. These fuel loading specifications are set forth in Section 10.2 of the ECRP and are developed specifically for the PCGP project based on the amount of woody material expected to be encountered during construction. 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.

On National Forest Lands the maximum amount of slash that would be scattered across the right-of-way will be 12 tons per acre, which would be distributed over the following fuel loading size classes:

Fuel Loading by Size Class	
Size Class (Diameter)	Tons/Acre
0-1/4"	<1
1/4– 3"	4-8
3-8"	7-12
Maximum	12

On BLM lands the fuel load specifications are:

Fuel Loading by Size Class	
Size Class (Diameter)	Tons/Acre
0-1/4"	< 1 [1]
1/4 -8"	5-8 [1]
>8"	10-15
[1] Adapted from USFS Fuel Loading Standards	

These measures will significantly reduce the risk of fires associated with vegetation remaining in the cleared corridors. In order to ensure that fuel loading measures are consistent across the entire corridor, the applicant would accept a condition of approval requiring the BLM loading standards on private lands. On federal lands, at the discretion of the BLM and USFS, the applicant will remove larger slash pieces (more than eight inches in diameter) from the project area and deck them in designated storage sites, or at road crossings. This material will be made available to the public through the various agencies' firewood programs.

Second, the cleared corridor will have less heavy timber that burns with higher intensities once ignited, and will have a greater percentage of lighter fuels according to the fuel loading specifications designed specifically for the proposed pipeline. While the lighter fuels spread within the project corridor may burn somewhat faster than timbered fuels, the lighter fuels are much easier to suppress, burn at a lower intensity, and react more quickly to changes in humidity and moisture. Additionally, the clear-cut corridor will provide fire suppression personnel with an opportunity to utilize the lighter fuels as a control and access point should a fire start in a forest that includes the pipeline corridor.

Finally, revegetation and maintenance of the corridor, as described in the ECRP, will reduce the risk of fires rather than increase the risk. The applicant has consulted with the Natural Resources Conservation Service ("NRCS") and land management agencies to develop seed mixtures appropriate for the corridor, including seed mixtures (described in Table 10.9-1 of the ECRP) for revegetation of private lands. The seed mixtures emphasize native plants adapted to the site conditions. During right-of-way negotiations, private landowners may request other seed mixtures, and the mixtures specified through those negotiations will be documented in landowner right-of-way agreements. The ECRP describes how the applicant will control noxious weeds, reseed the corridor, and monitor to promote successful revegetation.

In upland areas, vegetation within the permanent easement will be periodically 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. Routine vegetation maintenance clearing shall not be done more frequently than every three years. However, to facilitate periodic corrosion and leak surveys, a corridor not exceeding 10 feet in width centered on the pipeline may be maintained annually in an herbaceous state. In no

Fuel Loading by Size Class	
Size Class (Diameter)	Tons/Acre
0-1/4"	< 1 [1]
1/4 -8"	5-8 [1]
>8"	10-15
[1] Adapted from USFS Fuel Loading Standards	

These measures will significantly reduce the risk of fires associated with vegetation remaining in the cleared corridors. In order to ensure that fuel loading measures are consistent across the entire corridor, the applicant would accept a condition of approval requiring the BLM loading standards on private lands. On federal lands, at the discretion of the BLM and USFS, the applicant will remove larger slash pieces (more than eight inches in diameter) from the project area and deck them in designated storage sites, or at road crossings. This material will be made available to the public through the various agencies' firewood programs.

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In upland areas, vegetation within the permanent easement will be periodically 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. Routine vegetation maintenance clearing shall not be done more frequently than every three years. However, to facilitate periodic corrosion and leak surveys, a corridor not exceeding 10 feet in width centered on the pipeline may be maintained annually in an herbaceous state. In no

case will routine vegetation maintenance clearing occur between April 15 and August 1 of any year.

Outside of this 30-foot corridor, mature trees will be allowed to re-establish. Allowing mature trees to re-establish will promote cooling and shading of the 30-foot corridor, which also reduces fire potential.

(2) ATV / OHV Use in Pipeline Corridor

Based on *Utsey v. Coos County*, 38 Or LUBA 516 (2000), it is clear that ATVs / OHVs can be the type of activity that causes a significant impact on forestry, due to the increased risk of fire from sparks generated in the engines of these vehicles. The Board understands that the applicant proposes to work with landowners on a case-by-case basis to reduce ATV / OHV impacts via the use of dirt and rock berms, log barriers, signs, and locked gates, etc. *See also* Report dated June 17, 2010 from Consultant Forester Dallas Hemphill, ACF, CF, PE, titled "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline" at p. 4. The Board agrees with the testimony of the opponents that fences placed in key locations (*i.e.* where access to the pipeline would otherwise be easy) would be an effective means to discourage ATV / OHV use. The Board has proposed a condition of approval requiring the applicant to work with landowners in an effort to provide impediments to access to ATVs and OHVs.

(2) Pipeline Corridor as a Conduit for Fire

Multiple opponents argued that the corridor itself would act as a conduit for fire. No scientific evidence or other clear foundation was presented to support the theory. Substantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based." *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988).

The applicant admits that the cleared corridor will have less heavy timber that burns with higher intensities once ignited, and will have a greater percentage of lighter fuels according to the fuel loading specifications designed specifically for the proposed pipeline. However, no evidence of that leading to a conduit effect is in the record. Mr. Hemphill downplays the concern in his report dated June 17, 2010 due to the fact that the corridor will be mowed every three to five years, as needed. *See* "Forest Practices and Economic Issues Related to Proposed Pacific Connector Gas Pipeline," at p.5.

The Board notes that this issue was briefed extensively in the Douglas County case, and the County agreed with the applicant's position on that issue. *See* Douglas County Planning Commission Findings of Fact and Decision, at p. 63-5.

(ii) Fire suppression costs and personnel

At the hearing, there was considerable discussion regarding the potential for a forest fire caused by a ruptured gas pipeline. The Hearings Officer agreed with the applicant that such a risk is remote. However, if it did occur it has the potential to be a huge problem, and this type of

event is probably the most likely emergency response scenario in the rural area. The Hearings Officer previously expressed concerns about the capability of small rural fire departments, which are often manned by volunteers, to combat fires in remote areas of the County. *See* letter dated June 6, 2010.

The applicant discussed these issues in its May 11, 2010 submittal. *See* Letter from Rodney Gregory and Derrick Welling dated May 11, 2010, at p. 14-17. The applicant also discussed the fact that there will be personal on call 24 hours a day that can coordinate an immediate response to situations as they develop. *See also* Reliability and Safety Report dated March 2010, at p. 8. The applicant's "Reliability and Safety Report" dated March 2010 stated that various actions will be taken in the future, such as training and meetings with emergency responders. *Id.* The report also stated that "Williams Pacific Operator will use adequate local or contract resources to support the pipeline and facilities if an emergency occurs."

The applicant also addressed the issue in its final argument dated June 24, 2010, as follows:

> For the reasons set forth above and in the applicant's prior submittals, the fire risk associated with the pipeline is low. Therefore, the pipeline will not significantly increase risks to fire suppression personnel, nor will it significantly increase fire suppression costs. The presence of the pipeline will require coordination between the applicant and local fire personnel. In order to comply with federal safety regulations, the applicant must coordinate with local emergency response groups prior to commencing pipeline operations. As detailed in Section 4.12.10 of the FEIS, the applicant will meet with local responders, including fire departments, to review plans and communicate specifics about the pipeline. If requested, the applicant will also participate in any emergency simulation exercises and provide feedback to the emergency responders.
>
> While there will be some additional cost to local fire suppression organizations in order to participate in the coordination efforts, the majority of the education and coordination costs will be borne by the applicant and the costs to local department will not be significant. Furthermore, those efforts will in turn reduce the risk to fire suppression personnel that respond to a fire in the vicinity of the pipeline. As detailed in the Reliability and Safety Report, which is attached as Exhibit 7 to the applicant's May 11, 2010 submittal:
>
> "1.6.1 Emergency Response Capabilities
>
> "Williams Pacific Operator will maintain 24-hour emergency response capabilities, including an emergency-only phone number,

which accepts collect charges. The number will be included in informational mail-outs, posted on all pipeline markers, and provided to local emergency agencies in the vicinity of the pipeline and compressor station.

"In addition, Williams Pacific Operator 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. Williams Pacific Operator will meet with local emergency responder groups (fire departments, police departments, and other public officials) to review plans and will work with these groups to communicate the specifics about the pipeline facilities in the area and the need for emergency response. Williams Pacific Operator will also meet periodically with the groups to review the plans and revise them when necessary. If requested by local public emergency response personnel, Williams Pacific Operator will participate in any operator-simulated emergency exercises and post-exercise critiques. Williams Pacific Operator will use adequate local or contract resources to support the pipeline and facilities if an emergency occurs."

Friends of Living Oregon Waters (FLOW) contends that the application should be denied because the applicant has not yet obtained authorization for use of water that might be needed during construction of the pipeline for fire suppression purposes. First, FLOW does not identify any applicable approval criteria that it believes would authorize the hearings officer to deny the application due to a failure to prove that it can obtain water for fire-fighting purposes a year or more in advance.

Second, this issue is addressed in the letter from Derrick Welling of Pacific Connector (attached as Exhibit 5 to the applicant's June 17, 2010 submittal), which explains that necessary water for fire suppression and other activities will be obtained in accordance with the required federal and state permitting requirements, and that all water withdrawals will meet or exceed all permitting requirements. The applicant 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.

The opponents contend that FERC has not adequately addressed pipeline safety and fire issues, and they have questioned the lack of an emergency response plan in the FEIS. As explained above, the federal DOT rather than FERC is responsible for ensuring pipeline safety, and there is no formal federal requirement to include an emergency response plan at this stage of

the proposal or as part of the FEIS. However, in order to respond to the comments on this issue, the applicant has provided an example of the type of Public Safety Response Manual that will be provided, which was attached as Exhibit 8 to the applicant's submittal dated May 11, 2010. Further, the applicant has provided some information regarding Emergency Response Capabilities in the Reliability and Safety Report, which was attached as Exhibit 7 to the applicant's May 11, 2010 submittal.

It appears that fire protection personnel in the County should already be receiving some training in incident response to natural gas pipeline fires, due to the approval of the 2002 12" pipeline. In that application, the applicant promised to train fire personnel on specific methods for responding to natural gas pipeline fires. The applicant here has also proposed to conduct additional training at the applicant's expense.

The Board finds that it is reasonable to conclude that the pipeline will not significantly increase risks to fire suppression personnel or significantly increase fire suppression costs. After all, a pipeline is expected - on a statistical basis - to have an expected incident rate of one per every 280 years, and one injury can be expected every 1001 years. *See* Hearings Officer Decision, File No. HBCU-02-04, at p. 43. It stands to reason that if no incidents occur, then the cost of responding will necessarily not increase.

Moreover, there was significant expert testimony introduced in the Pipeline Solutions, Inc. case, File No. HBCU-02-04, from first responders that have pipelines located in their district. *See* Hearings Officer Decision, File No. HBCU-02-04, at p. 43. Those first responders were unanimously of the opinion that the cost to their department was little or nothing. The hearings officer in that case found such evidence to be "particularly persuasive." Although this case involved a 36" pipeline instead of a 12" pipeline, the Board does not find that to be a significant difference. While the applicant in *this* case did not provide much in the way of similar testimony, the hearings officer's findings in HBCU-02-04 are themselves substantial evidence that can be relied on to form a conclusion in this case as well. Such evidence might not be afforded as much weight, and could have been overcome by current testimony from first responders expressing negative implications associated with the proposed pipeline, but no testimony of this type was received into evidence. Therefore, the Board finds that substantial evidence exists in the record to support a conclusion in the applicant's favor on this issue.

Specifically, the Board finds that the applicant's evidence is sufficient to support a finding that the standard is either satisfied or that feasible solutions to identified problems exist, and that a condition of approval can be imposed to ensure compliance. *Rhyne v. Multnomah County*, 23 Or LUBA 442,447-48 (1992). As noted in the Reliability and Safety Report, an emergency response plan has not yet been developed for the pipeline. The *sample* report demonstrates the feasibility of creating a similar report for this facility, however. The applicant has proposed a condition of approval requiring submittal of a County pipeline-specific Public Safety Response Manual ("PSRM") to the County prior to construction, and the Hearings Officer recommended imposing this condition. Staff proposed that the condition be modified to require the applicant provide the PSRM prior to commencing operations. The Board agrees that the applicant should provide a PSRM; however, the Board finds that staff's proposal may not provide sufficient time for the applicant to distribute the PSRM and coordinate with area emergency

response personnel. Accordingly, the Board modifies and adopts the condition as Condition of Approval B.19 to read as follows:

> "At least six (6) months' prior to delivery of any gas to the Jordan Cove Energy Project LNG import 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. As detailed in Section 4.12.10 of the FEIS, 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."

For these reasons, the Board finds that the proposed pipeline will not significantly increase fire hazard, fire suppression costs, or risks to fire suppression personnel.

Section 4.8.600, Section 4.8.700 and Section 4.8.750

At the hearing, the parties presented different views regarding the applicability of CCZLDO Sections 4.8.600, 4.8.700 and 4.8.750. Section 4.8.400 provides as follows:

> SECTION 4.8.400. Review Criteria for Conditional Uses in Section 4.8.300 and Section 4.8.350.
>
> A use authorized by Section 4.8.300 and Section 4.8.350 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
>
> B. The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and
>
> C. All *uses*[41] must comply with Section 4.8.600, Section 4.8.700 and Section 4.8.750. (Emphasis added).

By their own terms, however, Section 4.8.600, Section 4.8.700 and Section 4.8.750 only

[41] The term "use" is defined as follows: "USE: The end to which a land or water area is ultimately employed. A use often involves the placement of structures or facilities for industry, commerce, habitation, or recreation."

appear to apply to "dwellings" and "structures." There is a significant ambiguity in the CCZLDO regarding whether a utility is a "structure" as that term is defined in the CCZLDO. The Board resolves this ambiguity and, for the reasons stated below, interprets the CCZLDO to find that a "utility" is not a "structure" for purposes of these applications.

Mark Sheldon and others argue that the proposed pipeline is a "structure" within the meaning of the CCZLDO. His comments cite a CCZLDO definition of "structure" as follows: "Anything constructed or installed or portable, the use of which is required [*sic*?] a location on a parcel of land." He cites "Section 2.1.200" as the source of this quote. However, that is an outdated definition. The current definition in the CCZLDO is as follows:

> "STRUCTURE: Walled and roofed building including a gas or liquid storage tank that is principally above ground."

As stated by staff on the record, the County amended the definition of "structure" on September 8, 2009, through adoption of Ordinance 09-07-003PL. This was one of several legislative CCZLDO amendments initiated in response to Federal Emergency Management Agency ("FEMA") updates. The amendments were necessary in order for the County to continue in the National Flood Insurance Program. As further stated by staff on the record, the current definition of "structure" was taken from the model ordinance provided by DLCD.

The Board must construe the various provisions of the CCZLDO. When construing a statute, the court will first look directly at the text of the statute itself. *See Whipple v. Howser*, 291 Or 475, 635 P2d 782 (1981) (citing *Greyhound Corp. v. Mount Hood Stages, Inc.*, 437 US 322, 330, 98 S Ct 2370, 2375 (1978)). Emphasizing the need to look first to the language of the statute, the *Whipple* court stated:

> "The cardinal rule for the construction of a statute is to ascertain from the language thereof the intent of the law makers as to what the purpose was to be served, or what the objective was designed to be attained."

Whipple, 291 Or at 479 (citing *Swift & Co. and Armour & Cove, Co. v. Peterson*, 192 Or 97, 233 P2d 216 (1951). *See also State of Oregon v. Buck*, 200 Or 87, 92, 262 P2d 495 (1953). The *Whipple* court also cited to *State ex rel. Cox v. Wilson*, 277 Or 747, 562 P2d 172 (1977), in which the court stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute then the words by which the legislature undertook to give impression to its wishes."

There the text of CCZLDO §2.1.200 seems to be clear and unambiguous. The plain text of this definition excludes a subsurface pipeline from being considered a "structure" under the CCZLDO.

However, one factor that complicates the analysis is, as Mr. Sheldon notes, the CCZLDO defines the term "utility" as "public service *structures* * * *." CCZLDO 2.1.200. The meaning of a seemingly unambiguous code provision can be clouded by contextual provisions in the same legislative scheme: "It is true that the context of a statute or statutory scheme can sometimes reveal an ambiguity in a particular phrase that, standing alone, appears to have a clear meaning. *Southwood Homeowners Ass'n v. City Council of Philomath*, 106 Or.App. 21, 806 P.2d 162 (1991) (citing *Dennehy v. City of Portland,* 87 Or.App. 33, 40, 740 P.2d 806 (1987).

One commonly employed first–level maxim of statutory construction is that in the absence of some indication of contrary intent, it is likely that a term is intended to have the same meaning throughout a legislative enactment. *Knapp v. City of North Bend*, 304 Or 34, 41, 741 P2d 505 (1987); *State v. Holloway*, 138 Or App 260, 267-68, 908 P2d 324 (1995)(The fact that a regulatory document uses a term consistently throughout the document strongly suggests that the drafters intended the same meaning in the provision in dispute); *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 141, 20 P3d 837, *rev. den.* 332 Or 518, 32 P3d 898 (2001). Thus, when determining the meaning of a term within a legislative enactment, it is sometimes possible to look to other examples of the use of that term in the same legislative enactment, in order to gather insight as to the overall intended meaning of the term. However, this interpretative maxim often applies with less force where, as here, the legislative enactment is a patchwork of amendments made over time, because the likelihood that the subsequent amendments have made changes using terms and phrases that are not in keeping with the original terms increases.

In addition, when a word used in a zoning ordinance is defined, the definition as set forth in the definition section usually controls over a generalized dictionary definition. However, that is not always the case. In fact, CCZLDO §2.1.100 recognizes that a word used in the ordinance will usually have the meaning as defined in CCZLDO §2.1.200 but provides an exception when "it is plainly evident that a different meaning is intended."

In this case, the Board finds that it is plainly evident that the definition of the term "utility" should not be interpreted in connection with the definition of "structure." Indeed, the use of the defined term "structure" in the definition of "utility" is not very intuitive, given that "structures" are defined as being something that is a "walled or roofed building." Otherwise, the suggestion would be that, in addition to being public service" related a "utility" must be either a building or a gas or liquid storage tank. The question is whether the CCZLDO, as written, evinces a purposeful intent to use the term "structure" in a consistent manner throughout the CCZLDO. It does not.

In this case, the context provided within the definition of "utility" suggests that the term "structure" is being used there in a more broad sense (and consistent with the *earlier* CCZLDO definition). For example, among the list of "utilities" are water, sewer, and gas lines, which are typically routed underground and do not constitute "structures" within the meaning of the new definition. If the Board interprets the CCZLDO such that the term "utility" only includes "structures" that meet the new definition of that term, (*i.e.* a "walled and roofed building including a gas or liquid storage tank that is principally above ground"), then the interpretation would effectively bar all underground utilities. Furthermore, it would effectively require that

each utility had to be a "building." The Board finds that this construction of the CCZLDO is not consistent with legislative intent.

Thus, it is apparent that this inconsistency results from the recent code update process, as there was a failure to cross-check the code to see how the new definition of "structure" affects provisions such as the definition of "utility." Take, as an example of this failure, the language of CCZLDO 4.8.750(B): "all buildings or structures except for fences shall be set back...." This code provision assumes that a fence is a structure; otherwise, there would be no reason to express the "exception." But a fence is clearly not a "walled and roofed building including a gas or liquid storage tank that is principally above ground."

The Board concludes that the CCZLDO contains internal inconsistencies between the formal definition of the term "structure" and the usage of that term throughout the CCZLDO. The applicant discusses the inconsistency as follows:

> Nonetheless, this inconsistency does not override the obvious intent of the drafters to exclude subsurface pipelines from the definition of a "structure" when that definition was recently adopted in 2009. As explained by staff in the supplemental staff report, the Coos County Board of Commissioners adopted the new definition of "structure" on September 8, 2009 as part of a series of code amendments related to flood damage prevention under FEMA requirements. The county adopted the language provided in the "Oregon Model Flood Damage Prevention Ordinance," which was provided by DLCD to local governments to ensure compliance for purposes of participation in the National Flood Insurance Program. The hearings officer appears to be correct that the county's adoption of the model ordinance did not include a cross-check of other uses of the term "structure" in the county code for consistency. However, the ambiguity created by inconsistent use of the defined term in a separate definition does not override the clear intent of the drafters to only apply the term "structure" to walled and roofed buildings.

See letter from Mark Whitlow to Patty Evernden dated June 24, 2010, at p. 11. The Board agrees, and finds that the Code uses the term "structure" differently and inconsistently throughout the CCZLDO. This does not appear to be purposeful, but rather, as discussed above, results from the 2009 amendments to the definition of the term "structure." Therefore, although the CCZLDO definition of "utility" expressly *presumes* that utilities are "structures," the term "structure" in that context means something along the lines of "anything constructed or installed, the use of which requires a location on a parcel of land."

Therefore, based upon this legislative history the Board construes these provisions of the CCZLDO together and interprets the CCZLDO such that the term "structure" as used in Section 4.8.600, Section 4.8.700 and Section 4.8.750 is defined as set forth in the definition section of the CCZLDO, whereas the term "structure" as set forth in the definition of "Utility" means

"[a]nything constructed or installed or portable, the use of which requires a location on a parcel of land."

In addition, the Board finds that the reference to the term "use" at Section 4.8.400(C) does not broaden the applicability of Section 4.8.600, Section 4.8.700 and Section 4.8.750 to include "uses" that are not "structures." Depending upon whether one relies on the definition of "structure" or the definition of "utility," different conclusions arise. The Hearings Officer noted that Section 4.8.600 appears to be a direct codification of OAR 660-006-0029 and 4.8.700 is a direct codification of OAR 660-006-0035. As such, the Hearings Officer found that these provisions of the CCZLDO cannot be interpreted in a manner that is less restrictive than state law. The state administrative rules use the terms "dwellings" and "structures" but do not appear to define the terms. The Hearings Officer did not find any obvious applicable references in state law defining the term "structure." Therefore, the Hearings Officer concluded that state law leaves the task of defining the term to the local governments tasked with implementing OAR Chapter 660, division 6. The Board adopts by reference the Hearings Officer's findings regarding the relationship between state law and these provisions of the CCZLDO.

Regardless of the issue created by the term "use" in Section 4.8.400(C), the question remains whether an underground utility is a "structure." As stated above, the Board finds that Section 4.8.600, Section 4.8.700 and Section 4.8.750 only apply to structures as that term is used in CCZLDO 2.1.200, notwithstanding the definition of the term "utility." In the alternative, the Board has prepared findings set forth below that assume, *arguendo,* that utilities are "structures," and, as a result, CCZLDO 4.8.600, 4.8.700 and 4.8.750 are applicable. As demonstrated below, the analysis under those sections is somewhat awkward when applied to a gas pipeline, but ultimately the applications can satisfy those standards.

CCZLDO §4.8.600

The application narrative dated April 14, 2010 explains how the proposed pipeline will meet the siting standards at CCZLDO §4.8.600, .700, and .750. The Board adopts that portion of the April 14, 2010 application as findings as if fully set forth herein. CCZLDO §4.8.600 is a direct codification of OAR 660-006-0029(1). The administrative rule provides as follows:

> (1) Dwellings and structures shall be sited on the parcel so that:
>
> (a) They have the least impact on nearby or adjoining forest or agricultural lands;
>
> (b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;
>
> (c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and
>
> (d) The risks associated with wildfire are minimized.

The intended purpose of OAR 660-006-0029(1) is clarified by OAR 660-006-0029(2):

> (2) Siting criteria satisfying section (1) of this rule may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.

As an initial matter, OAR 660-006-0029(2) makes clear that OAR 660-006-0029(1) and CCZLDO §4.8.600(A) were not intended to apply to linear features such as gas pipelines. Setbacks and clustering are not consistent with linear features such as gas pipelines. While it is possible to site pipelines "close to existing roads," the applicant has already taken that step.[42] In addition, CCZLDO §4.8.600(A) starts with the premise that one can "site" a structure on a particular property in a location that minimizes the impacts and harms that such a structure will cause on neighboring forest and farm lands, forest operations, etc, as compared to other locations on the site. That type of analysis is really not well-suited towards determining the best location for a linear pipeline feature. With a linear feature such as a pipeline, it is safe to say that, as a general rule, the route that causes the least impact is generally going to be the shortest, most direct route. The applicant certainly has proposed the shortest ***feasible*** route, and therefore has likely met the intent of this provision. In addition, the applicant testified that it has some latitude under the FERC Order to make site-specific locational adjustments to the general alignment approved by FERC in order to accommodate landowner's preferences. The Board finds that site-specific concerns of that nature are best addressed as part of that process and adopts Condition of Approval A.4 to ensure compliance.

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[42] In its May 11, 2010 submittal, the applicant states:

> Finally, where practicable, the alignment of the PCGP Project utilized existing rights-of-way and pipeline and powerline corridors while providing a safe distance between these existing utilities. A table identifying specific areas where the PCGP is co-located with existing right-of-way and corridors is attached as Exhibit 2 to this letter. While the alignment of the pipeline parallels existing roads and railroads in a number of areas, routing the pipeline entirely within existing right-of-way was not feasible. For example, many existing transportation easements were avoided because of the negative impact to traffic flow during construction. Additionally, many roads are located in valleys or drainage bottoms adjacent to streams where it is not feasible to install a large-diameter, steel pipeline due to large construction area requirements, confining topographic conditions, and waterbodies running parallel to the alignment. Many forest roads are located on steep side slopes where it is impractical to route the pipeline because of constructability/stability requirements and concern with the long-term safety and integrity of the pipeline. To ensure the pipeline is installed properly within consolidated (non-filled) materials and to provide the necessary equipment space, construction on steep side slopes requires significantly more construction areas to accommodate the necessary cuts or excavations. Long-term safety and the potential for third-party damage to the pipeline must be considered. Finally, future road expansions or improvement projects may require the pipeline to be relocated where it has been constructed within road easements, which may create unforeseen environmental, landowner, and system impacts.

Subsections (B) of CCZLDO §4.8.600 requires the applicant to provide evidence that "the domestic water supply" is from a source authorized by law. The Board finds that this section is context supporting the conclusion that an underground utility is not a "structure" within the meaning of the definition of structure in CCZLDO §2.1.200. But even if that is not the case, CCZLDO §4.8.600(B) only applies to uses that require or propose domestic water usage. Obviously, a gas pipeline has no use for a domestic water supply.

Subsection (C) and (D) of CCZLDO §4.8.600 only apply if the use includes a "dwelling," and therefore are not implicated here.

CCZLDO §4.8.700 (Fire Siting Safety Standards).

CCZLDO §4.8.700 contains certain requirements that apply only to dwellings or structures that have a roof. Moreover, the CCZLDO also gives the Planning Director the ability to "authorize alternative forms of fire protection when it is determined that these standards are impracticable." In this case, the applicant proposes a 30 foot cleared corridor, centered on the pipe. *See* Application Narrative, at p. 13. The Board determines that demanding additional primary and secondary firebreaks under CCZLDO §4.8.700 (A)(1) & (3) are not practicable because they are not needed and they conflict with the objectives sought to be achieved by other CCZLDO criteria. Similarly, the garden hose requirement in CCZLDO §4.8.700 (A)(2) is also impracticable. CCZLDO §4.8.700 (B), (C), (D), (E), (F) and (H) are clearly inapplicable. CCZLDO §4.8.700 (G) would be applicable assuming utilities are structures, but should be easily met via a condition of approval. The Board amends Condition of Approval B.17 to ensure compliance with this standard.

CCZLDO §4.8.750 (Development Standards).

CCZLDO §4.8.750 contains development standards for "development" and "structures." The minimum lot size provisions and setback provisions do not apply to linear utility features that must, by their very nature, traverse property lines of all sizes. That is because there is no set of facts under which those criteria could be met. If the County had intended to prohibit linear utility features entirely, it would not have made them administrative conditional uses in the Forest zone. Indeed, these CCZLDO standards are further evidence that utilities are not meant to be considered "structures" within the meaning of CCZLDO 2.1.200. Further, CCZLDO §4.8.750 (C) through (I) do not appear to contain any substantive requirements applicable here.

Jody McCaffree contends that the proposed permanent access road to block valve #4 is not allowed in the Forest zone under Goal 4. OAR 660-006-0025(3) identifies uses that are consistent with Goal 4 and allowed outright on forest lands. Private access roads are not specifically enumerated as an allowed use under this rule. Nevertheless, the Board finds that the access road is a use permitted outright in conjunction with the pipeline.

First, the County's definition of "road" in CCZLDO 2.1.200 indicates that roads are not to be construed as a "use" *per se*, but as a "public or private way created or intended to provide ingress or egress for persons to one or more lots, parcels, areas, or tracts of land." Further, the definition of road "does not include a private way that is created or intended to provide ingress or

egress to such land in conjunction with the use of such land exclusively for forestry, mining, or agricultural purposes."

When the principal use is allowed in the zone, that right carries with it all associated uses which are normally essential, auxiliary and incidental thereto, (as opposed to those uses which are mere non-essential accessory uses). For example, an applicant for a McDonald's restaurant does not have to seek separate approval of an "office" in order to have a room in the structure dedicated to administrative functions. It is understood that all restaurants have an office where administrative matters are attended to, and land use approval for a "restaurant" inherently and automatically includes an incidental administrative office to support that restaurant use (but not for other unrelated commercial functions).

As relevant here, LUBA has held that unenumerated uses that are necessary and accessory to an enumerated forest use are permitted "because they are, in effect, part of uses expressly authorized by Goal 4." *Lamb v. Lane County*, 7 Or LUBA 137, 143 (1983). OAR 660-006-0025(3)(c) allows a pipeline use outright as a "[l]ocal distribution lines (*e.g.*, electric, telephone, natural gas) and accessory equipment." Similarly, OAR 660-006-0025(4)(q) allows new gas distribution lines as a conditional use. As the applicant explains on page four of the application narrative dated April 14, 2010, the proposed road is "necessary for the operation and maintenance of the pipeline." Without this road, the applicant will be unable to access the block valve, which is a necessary component of the pipeline, and ensures that the applicant can operate the pipeline in a safe manner. In this way, the access road is "necessary and accessory" to, and thus effectively a part of, the pipeline use. Therefore, under *Lamb*, the access road is permitted under Goal 4.

Finally, accepting Ms. McCaffree's interpretation of OAR 660, Division 6 runs counter to legislative intent, as it at least curtails, and in many cases effectively nullifies, the use rights granted under the rule. If the Board were to agree that access roads in conjunction with one of the enumerated uses are not allowed, it would effectively preclude development of many of the allowed uses on forest lands that cannot otherwise exist in the absence of developing an access road. For example, many farm uses, private hunting and fishing operations, and caretaker residences — all permitted outright on forest lands under OAR 660-006-0025(3) — could be inaccessible and therefore effectively undevelopable under Ms. McCaffree's interpretation of the rule. Similarly, conditional uses such as cemeteries and firearms training facilities could not exist without road access; neither could any of the dwellings allowed under OAR 660-006-0027. These listed uses all contemplate being able to provide at least a private road for access. There is no evidence that LCDC intended for such a harsh construction of the rule. The Board rejects Ms. McCaffree's contention.

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

CCZLDO §4.9.450 Additional Hearings Body Conditional Uses and Review Criteria.

The applicant notes that the proposed pipeline will cross approximately 3.72 miles of property in Coos County zoned Exclusive Farm Use (EFU), all of which is privately owned. The

3.72 miles of EFU-zoned parcels are interspersed throughout the length of the pipeline within Coos County. The Board concludes that the pipeline is consistent with the requirements of ORS Chapter 215, OAR 660, Division 33, and the applicable approval criteria of the CCZLDO.

CCZLZO §4.9.450 is more or less a direct codification of ORS 215.283(1)(c).[43] CCZLZO §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[44] and 4.9.700.[45]
>
> * * * * * *.
>
> 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.[46] ORS 215.275 provides:

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[43] 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.

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

[45] 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.

[46] 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

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;

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

(c) Lack of available urban and nonresource lands;
(d) Availability of existing rights of way;
(e) Public health and safety; and
(f) Other requirements of state or federal agencies.

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

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

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

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

The exception 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 supposed to be subject to ORS 215.275(1). This subsection contains the requirement that the applicant to 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 660-033000139(16).[47] 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.

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[47] OAR 660-033-0130 (16) provides:

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

(A) Technical and engineering feasibility;

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

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

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

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

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

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

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

WELC addresses this criterion by arguing that "[r]eams of testimony submitted to [FERC] explained how the * * * pipeline is not at all necessary in order for natural gas to be provided to US residents." *See* Letter from WELC staff attorney Jan Wilson dated June 8, 2010, at p. 5. Ms. Wilson goes on to state that California and other states will not need natural gas, and that "the threat of this pipeline being used to bring domestic natural gas * * * to a coastal terminal is very real." *Id.* 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." To the contrary, it seems that if the United States is to be faulted, it is because it fails to export enough goods to other countries. Nonetheless, if "reams of testimony" were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning code 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, 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 CCZLZO §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).

The applicant addresses the issue as follows:

> The PCGP is an interstate natural gas pipeline that has been authorized by and is subject to regulation by FERC under Section 7c of the NGA under which a Certificate of Public Convenience and Necessity has been issued to Pacific Connector to construct, install, own, operate, and maintain the PCGP. The PCGP is a utility facility under CCZLDO Section 4.9.450.C.
>
> Due to its linear nature and the points of connection it must make from the JCEP LNG Terminal site on the North Spit over the 49.72 miles to the interstate pipeline connection near Malin, Oregon, it is necessary for some segments of the pipeline to be situated in agricultural land in satisfaction of this review criterion and the companion criterion of ORS 215.275(1). ORS 215.275(6) exempts interstate natural gas pipelines from the provisions of ORS 215.275(2)-(5) and OAR 660-33-0130 has a similar exemption.
>
> The PCGP is a locationally dependent linear facility that must cross exclusive farm use land in order to provide natural gas service between the Jordan Cove terminal and the existing pipeline system. In order to achieve the project purpose, the pipeline must start at the Jordan Cove terminal and exit Coos County on the county's eastern boundary to eventually connect to the existing pipeline near Malin, Oregon. Given the large expanses of EFU-zoned lands scattered throughout the rural portions of Coos County, even if avoidance of EFU lands were the only

> consideration in the pipeline alignment, it would not possible for the pipeline to avoid all EFU zoned lands and maintain a reasonably direct route through Coos County. Therefore, the PCGP must be sited in the Coos County EFU zone in order to provide the planned natural gas service. Under the existing alignment, the impacts to EFU-zoned land is limited, amounting to only 3.72 miles of the total of 49.72 miles crossed within Coos County. Therefore, while not eliminated, impacts to EFU lands were minimized during the alignment selection process. The alignment selection process is discussed in detail in Section 3.4 of the FEIS.

Staff commented on the need issue as follows:

> The pipeline will travel from the North Spit to the Douglas county line for a distance of approximately 50 miles. The pipeline route will travel through 3.72 miles of EFU land. The applicant states that it would not be possible to avoid all EFU zoned lands and maintain a reasonably direct route, and has provided a detailed description of the alternative route analysis that was undertaken as part of the FERC review and approval process in its correspondence dated May 11, 2010, as well as the pipeline location alternatives analysis in Section 3.4 of the FEIS, which is included in the applicant's May 12, 2010 submittal. Given the need to cross most of the county to achieve the project purpose, and the large expanses of EFU land throughout rural portions of the county, there appears to be a need to site the pipeline on agricultural land in order to provide the utility facility service.

In its May 11, 2010 submittal, the applicant states:

> Third, as discussed above, the pipeline is a locationally dependent linear facility that must cross EFU land in order to achieve a reasonably direct route. In order to achieve the project purpose, the pipeline must start at the Jordan Cove LNG terminal and exit Coos County on the county's eastern boundary in order to eventually connect to the existing pipelines near Roseburg, Medford and Malin, Oregon.[48] Given the number and configuration of EFU-zoned lands in the rural portions of Coos County, it is not possible for the pipeline to avoid all EFU zoned lands and maintain a reasonably direct route through Coos County.

The Board agrees with the applicant and staff for the reasons stated above, and frankly finds

[48] The location of the Jordan Cove LNG terminal itself was selected as the result of a separate alternatives analysis approved by FERC.

assertions to the contrary to be frivolous. It seems rather obvious that it would not be possible to build a pipeline from one end of Coos County to the other without traversing any EFU land. To the extent that it could be accomplished, the route would be highly circuitous, and the need to traverse difficult forested terrain would far outweigh any benefit to EFU lands. In any event, the County has no ability to determine that an interstate gas pipeline is not needed or that alternative routes are feasible. As discussed earlier, those issues are within the sole province of FERC to decide.

Various opponents raised the issue that the proposed pipeline is not an "interstate pipe line" for purposes of ORS 215.275(6) because the segment of pipeline being proposed under consideration does not cross state lines. *See e.g.,* Letter from WELC staff Attorney Jan Wilson dated June 8, 2010, at p. 6.

The applicant responds as follows:

> WELC and other opponents continue to argue that the PCGP is not an "interstate" gas pipeline under ORS 215.276(6) because it is only located within the State of Oregon. Although the pipeline itself is only physically located within Oregon, it will transport liquefied natural gas from the FERC-approved LNG import terminal on the North Spit of Coos Bay *into* the interstate pipeline system, and that gas will then be sold in interstate commerce. The PCGP is therefore an interstate natural gas pipeline subject to federal jurisdiction and regulation by FERC. There would be no FERC jurisdiction over this project if it were not an interstate gas pipeline. During the first open record period, Pacific Connector submitted relevant portions of the Natural Gas Act, which explains that the basis for FERC jurisdiction over this project is the fact that it is an interstate pipeline because the pipeline will allow for the "transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." 15 USC § 717(b).[49] Further, that section excludes from

[49] 15 U.S.C. 717(a)-(c) provides as follows:

> (a) Necessity of regulation in public interest
>
> As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) Transactions to which provisions of chapter applicable

> FERC jurisdiction only those truly "intrastate" projects where the natural gas is received "within or at the boundary of a State if all the natural gas so received is ultimately consumed within such state." 15 USC § 717(c). Because the PCGP will transport natural gas into interstate commerce through the interstate pipeline system, it is an "interstate natural gas pipeline" within the meaning of FERC statutes and rules and ORS 215.275(6).

See Final Argument letter from Mark Whitlow dated June 24, 2010, at p. 23. The applicant is correct for the reasons stated above. The term "interstate" in ORS 215.275(6) refers to any segment of a gas pipeline that is interconnected with other segments in a manner that allows gas to flow in interstate commerce. Therefore, the fact that this particular segment of pipeline is located entirely within Oregon does not mean that it is not an "interstate" gas pipeline. *See* NGA, 15 USC § 717(b), and Section 1671(8) of the Natural Gas Pipeline Safety Act of 1968. As the applicants pointed out, the fact that FERC believes that it has jurisdiction over the project is perhaps the most telling evidence that the opponent's argument is plainly wrong.

4. **CBEMP Policies – Appendix 3 Volume II**

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

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

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> (c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence
>
> The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

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.

Staff states that this plan policy applies to 6-WD, [50] 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS and 21-RS. The pipeline is a permitted use in each of these CBEMP zoning districts. Staff asserts that the "pipeline is a necessary component of the approved marine terminal and LNG facility which are water-dependent uses and must be located in these CBEMP shoreland zones." Therefore, the proposal is consistent with this plan policy.

Jody McCaffree's letter of June 10, 2010, disagrees with staff, and asserts that the applications are deficient with respect to CBEMP Policy #14. As the applicant notes, Ms. McCaffree is incorrect for several reasons:

Policy #14 was previously interpreted and applied by the Board of County Commissioners in both the application of Jordan Cove Energy Project, L.P. (Coos County Department File No. #HBCU-07-04, Coos County Order No. 07-11-289PL) and in the application of the Oregon International Port of Coos Bay (Coos County Planning Department File No. #HBCU-07-03, Coos County Order No. 07-12-309PL). Copies of both decisions are included in the documents submitted into the record by the applicant at the public hearing on May 20, 2010. Those decisions provide written findings showing compliance with Policy #14, partially through Board findings from the Board's findings from the adoption of the Coos County Comprehensive Plan (see findings from HBCU-07-03 below). Regarding the Board's decision approving JCEP's LNG terminal application, the Policy #14 finding appears at page 13 and states:

> "The proposed LNG terminal is an industrial and port facility that is water-dependent and consistent with the uses allowed in the 6-WD zoning district. The proposed use satisfies a need that cannot be accommodated on uplands or shorelands in urban and

[50] PCGP and its associated facilities were approved under JCEP's prior LNG Terminal application.

> urbanizable areas or in other rural areas built upon or irrevocably committed to non-resource use. The Board relies upon and adopts the conclusions of the hearings officer regarding consistency with Policy #14. The applicant has provided evidence sufficient to establish that [the] proposed site on the North Spit is the only site available below the railroad bridge with sufficient size and the necessary water-dependent characteristics for the proposed facility, including access to one of the only three deep-draft navigation channels in the State of Oregon."

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

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

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

Under Policy #14, the PCGP would 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" (also see utilization of that term in ORS 215.275(6)). The pipeline would otherwise be described as an "other use" in Policy #14 I.e. As an "other use", the PCGP would be reviewed in each CBEMP zoning district as a low-intensity utility. In either event, Policy #14 I.e requires "a finding by the Board of Commissioners or its designee that such uses satisfy a need which cannot be accommodated on uplands or shorelands in urban or urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use," a finding that was already made by the Board in the prior decisions approving JCEP's LNG terminal and, again, approving the Port's Oregon Gateway Marine Terminal. It is appropriate for the Board to make similar findings in this case for the reasons set out below.

As stated in the application narrative, the pipeline must originate at the Jordan Cove LNG terminal which has been permitted by the County as above described. As also provided in several sections of the applicant's narrative, the pipeline route has undergone extensive analysis. The proposed route has been determined by FERC through the NEPA process, as described in the FEIS. The alternative analysis appears at Section 3.0 of the FEIS, and the pipeline alternative analysis is contained in Section 3.4. Based on the alternative analyses and the FERC-determined route, the pipeline must cross these zoning districts. However, following construction, the subsurface pipeline will not be an impediment to the uses associated with the County's rural shoreland areas. Protection for specific resources in those areas are provided in the applicant's responses to Policies #17, #18 and #22 in the applicant's narrative.

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

This plan policy is met.

b. Plan Policy #16 Protection of Site Suitable for Water-Dependent Uses and Special Allowance for new Non-Water-Dependent Uses in "Urban Water-Dependent (UW) units."

Local government shall protect shorelands in the following areas that are suitable for water-dependent uses, for water-dependent commercial, recreational and industrial uses.

a. Urban or urbanizable areas;
b. Rural areas built upon or irrevocably committed to non-resource use; and

c. Any unincorporated community subject to OAR Chapter 660, Division 022 (Unincorporated Communities).

This strategy is implemented through the Estuary Plan, which provides for water-dependent uses within areas that are designated as Urban Water-Dependent (UW) management units.

I. Minimum acreage. The minimum amount of shorelands to be protected shall be equivalent to the following combination of factors:

a. Acreage of estuarine shorelands that are currently being used for water-dependent uses; and

b. Acreage of estuarine shorelands that at any time were used for water-dependent uses and still possess structures or facilities that provide or provided water-dependent uses with access to the adjacent coastal water body. Examples of such structures or facilities include wharves, piers, docks, mooring piling, boat ramps, water intake or discharge structures and navigational aids.

The only UW zoning applicable to this project is located near Coos Bay which is the site of the Georgia Pacific sawmill and lumber yard. The location is an active sawmill and lumber yard and it is located within zoning district 36-UW. The applicant proposes to establish a contractor yard and location to store pipe on the property. The temporary use will not impact the existing operation or permanently remove any acreage from water-dependent use. Therefore, the proposal is consistent with this plan policy.

II. Suitability. The shoreland area within the estuary designated to provide the minimum amount of protected shorelands shall be suitable for water-dependent uses. At a minimum such water-dependent shoreland areas shall possess, or be capable of possessing, structures or facilities that provide water-dependent uses with physical access to the adjacent coastal water body. The designation of such areas shall comply with applicable Statewide Planning Goals.

As noted above, Pacific Connector would temporarily utilize a portion of the commercial area as a pipe storage yard. The temporary use will have no impact on future water-dependent uses at the site or the designation of water-dependent shoreland areas or the suitability of the shoreland areas to accommodate water-dependent uses.

III. Permissible Non-Water-Dependent Uses. Unless otherwise allowed through an Exception, new non-water-dependent uses which may be permitted in "Urban Water-dependent (UW)" management units are a temporary use which involves minimal capital investment and no permanent structures, or a use in conjunction with and incidental and subordinate to a water-dependent use. Such new non-water-dependent uses may be allowed only if the following findings are made, prior to permitting such uses:

1. Temporary use involving minimal capital investment and no permanent structures:

a. The proposed use or activity is temporary in nature (such as storage, etc.); and

b. The proposed use would not pre-empt the ultimate use of the property for water-dependent uses; and

c. The site is committed to long-term water-dependent use or development by the landowner.

Pacific Connector would temporarily utilize the Georgia Pacific-Coos Bay site as a pipe storage and contractor yard during construction. The location is an active sawmill and lumber yard, owned by Georgia Pacific, and it is located within zoning district 36-UW. Use of a portion of the industrial site as a pipe storage and contractor yard will be temporary in nature (i.e., only during construction) and will not require the development of permanent structures. Further, the temporary use of the existing lumber yard will not pre-empt the ultimate use of the property for water-dependent uses because Pacific Connector will not use the site following construction.

This plan policy is met.

c. Plan Policy #17 Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands.

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

I. Local government shall protect:

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

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

c. "Coastal headlands"; and

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

As discussed in detail below, the PCGP crosses near two wetlands identified as significant wildlife habitats. Based on Coos County's maps, the PCGP does not cross 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.

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 8-CA, 13A-NA, 11A-NA, 11-RS, 18-RS, 19-D, 19B-DA, 20-CA, 20-RS, 21-RS, 21-CA, and 36-UW.

Policy #17 applies to inventoried resources requiring mandatory protection within each of the CBEMP zoning districts. As noted above, the PCGP alignment is near two wetlands identified as significant wildlife habitats on the CBEMP Shoreland Values Map. The first wetland is located at MP 1. According to Pacific Connector's wetland delineation, there is not currently a wetland located within the mapped area. The current wetland location is east and north of the mapped location. The second wetland is located at approximately MP 4.1.

LUBA discussed CBEMP Plan Policy 17 in its decision in *Southern Oregon Pipeline Information Project, Inc. v. Coos County*, 57 Or LUBA 44 (2008):

> "CBEMP 17 requires that '[l]ocal governments protect from development major marshes and significant wildlife habitat.' If CBEMP Policy 17 stopped there, SOPIP's argument might have merit. But CBEMP Policy 17(II) goes further and expressly explains *how* this mandate to protect certain coastal resources is implemented. CBEMP Policy 17(II)(a) explains that the CBEMP 'limit[s] uses *in these special areas* to those that are consistent with protection of natural values.' (Emphasis added.) CBEMP Policy 17(II)(b) provides that CBEMP Policy 17 is implemented by 'the Special Considerations Map, that identified special areas and restricts uses and activities *therein* to uses that are consistent with the protection of natural values.' (Emphasis added.). CBEMP Policy 17(II)(b) goes on to list some uses that are consistent with those values. With regard to bird sites, CBEMP Policy 17(II)(c) provides that CBEMP Policy 17 is implemented by contacting the Oregon Department of Fish and Wildlife so that it may 'comment on the proposed development *within the area of the 5b or 5c bird sites*.' There is simply nothing in the text of CBEMP Policy 17 that suggests it is to be implemented by limiting uses on properties that adjoin or are located near inventoried major marshes or significant

wildlife habitat to avoid possible impacts on such marshes and habitat." *SOPIP I*, slip op at 8-9 (emphases in original).

As mentioned above, the County's Shoreland Values inventory map notes that there are two inventoried freshwater wetlands along the pipeline route. The applicant is proposing to bore to avoid the first wetland, which is located at MP 1 in the 6-WD zone. The pipeline will cross to the south of the second wetland, which is located near MP 4.1. There are no other inventoried sites requiring protection.

The opponents do not provide any substantial evidence to suggest that these avoidance techniques are insufficient to protect these sites and the resources contained therein.

This plan policy is met.

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

This Plan Policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 8-CA, 13A-NA, 11-NA, 11-RS, 18-RS, 19-D, 19B-DA, 20-CA, 20-RS, 21-RS, 21-CA, and 36-UW.

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 Section 3.1.200 in order to obtain development permits, Policy #18 requires the applicant to submit a "plot plan" under Section 3.2.700, which then triggers the requirement to coordinate with the Tribe to allow for comments when the development is in an inventoried area of cultural concern. The Tribe has 30 days to comment and suggest protection measures. Policy #18 allows for a hearing process should the Tribe and the developer not agree on the appropriate protection measures. In the prior land use approvals related to the LNG project, the Board of Commissioners imposed a condition to ensure compliance with this Plan Policy. The applicant suggests the same condition be imposed for this application. The Board finds that imposition of the condition is consistent with prior approvals and will ensure compliance with this Plan Policy.

This plan policy is met.

e. Plan Policy #20 Dredged Material Disposal Sites

Local government shall support the stockpiling and disposal of dredged materials on sites specifically designated in Plan Provisions, Volume II, Part 1, Section 6, Table 6.1, and also shown on the "Special Considerations Map". Ocean disposal is currently the primary disposal method chosen by those who need disposal sites. The dredge material disposal designated sites on the list provided on Table 6.1, has decreased because the ocean has become the primary disposal method, the in-land DMD sites have diminished and those which have remained on the DMD list are sites which may be utilized in the future and not be cost-prohibitive. Consistent with the "Use/Activity" matrices, designated disposal sites shall be managed so as to prevent new uses and activities which could prevent the sites' ultimate use for dredge material disposal. A designated site may otherwise only be released for some other use upon a finding that a suitable substitute upland site or ocean dumping is available to provide for that need. Sites may

only be released through a Plan Amendment. Upland dredged material disposal shall be permitted elsewhere (consistent with the "Use/Activity" matrices) as needed for new dredging (when permitted), maintenance dredging of existing functional facilities, minor navigational improvements or drainage improvements, provided riparian vegetation and fresh-water wetlands are not affected. For any in-water (including intertidal or subtidal estuarine areas) disposal permit requests, this strategy shall be implemented by the preparation of findings by local government consistent with Policy #5 (Estuarine Fill and Removal) and Policy #20c (Intertidal Dredged Material Disposal). Where a site is not designated for dredged material disposal, but is used for the disposal of dredged material, the amount of material disposed shall be considered as a capacity credit toward the total identified dredged material disposal capacity requirement.

I. This policy shall be implemented by:

a. Designating "Selected Dredge Material Disposal Sites" on the "Special Considerations Map"; and

Within CBEMP zoning district 18-RS, the PCGP will cross DMD 30(b).

b. Implementing an administrative review process (to preclude preemptory uses) that allows uses otherwise permitted by this Plan but proposed within an area designated as a "Selected DMD" site only upon satisfying all of the following criteria:

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

The PCGP will be buried under the 30(b) dredge disposal site and will not entail substantial structural or capital improvements such as roads, permanent buildings and non-temporary water and sewer connections. As discussed above, the PCGP is not a "structure" as that term is defined in CCZLDO Section 2.1.200, and there are no above-ground components within the 30(d) dredge disposal site. Nor is the PCGP a capital improvement to the property which would preclude future use of the site for dredge disposal. The only impacts on future development will be the prohibition of structural improvements within the right-of-way, which is entirely consistent with the stated purpose of Policy #20, preclusion of preemptory uses.

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

Following installation of the PCGP, the site will be restored as closely as possible to its pre-construction contours, reestablishing existing drainage patterns. Following construction, dredge material could still be stored over the PCGP in consultation with Pacific Connector, thereby preserving the usable volume of the site.

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

The PCGP would not require site changes that would prevent the expeditious conversion of the site to estuarine habitat.

c. *Local government's review of and comment on applicable state and federal waterway permit applications for dike/tidegate and drainage ditch actions.*

The PCGP will not include dike/tidegate or drainage ditch actions. Therefore, this provision is not applicable.

II. This strategy recognizes that sites designated in the Comprehensive Plan reflect the following key environmental considerations required by LCDC Goal #16:

a. Disposal of dredged material in upland or ocean waters was given general preference in the overall site selection process;

b. Disposal of dredged material in estuary waters is permitted in this Plan only when such disposal is consistent with state and federal law;

c. Selected DMD sites must be protected from preemptory uses.

As discussed above, the PCGP does not involve disposal of dredged material but will allow for dredged material disposal on site 30(b) and will, therefore, not be a preemptory use.

This plan policy is met.

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

I. This policy shall be implemented by:

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

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

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

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

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

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

The PCGP will be buried within the 30(b) dredge disposal site and will not entail substantial structural or capital improvements such as roads, permanent buildings and non-temporary water and sewer connections. As discussed above, the PCGP is not a "structure" as that term is defined in CCZLDO Section 2.1.200. The PCGP will simply cross the property beneath the surface. The only impacts on future development will be the prohibition of structural improvements within the right-of-way, which is entirely consistent with the stated purpose of Policy #20, preclusion of preemptory uses.

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

Following installation of the PCGP, the site will be restored as closely as possible to its pre-construction contours, reestablishing existing drainage patterns. Following construction, mitigation could still occur over the PCGP in consultation with Pacific Connector, thereby preserving the usable volume of the site for mitigation purposes.

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

The PCGP would not require site changes that would prevent the expeditious conversion of the site to estuarine habitat.

CBEMP 18-RS contains two "high" priority mitigation sites (U-12 and U-16). U-12 is also the site of Dredge Material Disposal Site 30b. The 18-RS Management Objective states that the higher priority is the DMD site.

The presence of the pipeline would not impact the potential for conversion of the site for estuarine habitat.

This plan policy is met.

g. Plan Policy #23 Riparian Vegetation and Streambank Protection

Plan Policy 23 states

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

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

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

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

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

The zoning districts through which the PCGP crosses requiring compliance with Policy #23 are 6-WD,[51] 7-D, 8-WD, 11-RS, 18-RS, 20-RS, 21-RS, and 36-UW (Georgia Pacific Yard).

Various opponents raised CBEMP Plan Policy 23 as a basis for denial. The Board has reviewed Plan Policy 23 and finds that this policy does not create a mandatory approval standard applicable to a quasi-judicial land use process. Rather, the policy is framed in aspirational, hortatory, and non-mandatory language. *Compare Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990) (comprehensive plan policies that "encourage" certain development objectives are not mandatory approval standards); *Bennett v. City of Dallas*, 96 Or App 645, 773 P2d 1340 (1989).

However, Plan Policy 23 states that "appropriate provisions for riparian vegetation are set forth in the CCZLDO Section 4.5.180." Although it is far from clear that the phrase "appropriate provisions for riparian vegetation" is intended to make CCZLDO §4.5.180 an approval standard, the parties all seem to treat it as such.[52]

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[51] As explained above, the PCGP and its associated facilities were approved under JCEP's prior LNG Terminal application.

[52] For example, the applicant states in its application narrative:

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...*

Staff notes 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."

Staff also notes that the applicant must comply with all FERC requirements for wetland and waterbody protection and mitigation both during and after construction, and will restore riparian vegetation 25 feet from the streambanks on either side of waterbodies on private lands where riparian vegetation existed prior to construction, consistent with the ECRP.

The Board has already discussed the public utility exception elsewhere in this decision. As discussed herein, the Board finds that opponents are incorrect when they argue that the public utility exception does not apply.

In addition, subsection II does not apply to this case. While Pacific Connector will restore areas disturbed during construction to their pre-construction condition, the PCGP does not include independent permanent streambank stabilization projects. Staff recommended a condition of approval requiring the applicant to contact the Planning Department to determine the appropriate review for any part of the project involving riprap. In light of the fact that the applicant is not specifically proposing any permanent riprap or stream stabilization as part of the PCGP project and that jurisdiction over such activities may lie with a state or federal agency, the Board modifies and adopts the condition as Condition of Approval A.13 to read as follows:

As indicated under subsection I, this policy is implemented through the requirements of CCZLDO Section 4.5.180, Riparian Protection Standards in the Coos Bay Estuary Management Plan. Section 4.5.180 generally requires that riparian vegetation within 50 feet of a wetland, stream, lake or river, as identified on the Coastal Shoreland Fish and Wildlife habitat inventory maps, shall be maintained. However, the standard provides the following exception, "[r]iparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose." The PCGP qualifies as a public utility, and is therefore exempt from the 50-foot riparian vegetation maintenance requirements of CCZLDO Section 4.5.180 provided the vegetation removal is the minimum necessary for the PCGP installation. However, Pacific Connector has designed the project to minimize impacts to riparian vegetation as much as possible.

"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."

This plan policy is not an applicable approval criterion.

h. Plan Policy #27 Floodplain Protection within Coastal Shorelands

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

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

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

The applicant addresses this policy by showing compliance with the provisions of Article 4.6. The County has indicated that the Flood Insurance Rate Map (FIRM) is consistent with the Federal Emergency Management Agency's (FEMA) flood hazard map for the County. As in the applicant's narrative, the PCGP is consistent with the applicable floodplain approval criteria for all areas identified on the FEMA flood hazard map/FIRM as a designated flood area. The FEMA maps identify the 100-year floodplain, which is typically a larger area than the floodplain[53] and floodway[54] 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.

As a further means to ensure compliance with this policy, staff recommended a condition of approval requiring floodplain certification for "other development" occurring in a FEMA flood hazard area. The Board adopts the staff recommendation in Condition of Approval A.15, subject to an amendment to cross-reference the applicable section of the CCZLDO. As amended, Condition of Approval A.15 reads as follows: "Floodplain certification is required for 'other

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

[54] "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.

development' as provided in CCZLDO 4.6.230 occurring in a FEMA flood hazard area. The applicant must coordinate with the County Planning Department."

CCZLDO SECTION 4.6.210. Permitted Uses.

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

CCZLDO SECTION 4.6.215. Conditional Uses.

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

As detailed above, the PCGP is permitted either outright or conditionally in each of the base zones that it crosses. As described in this section of the narrative, it also satisfies each of the applicable Floodplain Overlay standards. Therefore, it is also a permitted use in the Floodplain Overlay zone.

CCZLDO 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 natural gas pipeline is not 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 following demonstrates that the PCGP is consistent with the "other development" standards.

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.

The PCGP will be installed below existing grades and no permanent structures will be placed above existing grades within the FEMA 100-year floodplain. In addition, at the completion of the PCGP installation, all construction areas will be restored to their pre-construction grade and condition. Flood plain compliance will be verified prior to construction and the issuance of a zoning compliance letter.

CCZLDO 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:

All new construction associated with the PCGP satisfies the following special flood hazard area criteria.

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 PCGP will be constructed with corrosion-protected steel pipe. Where deemed necessary, the PCGP 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 PCGP 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 PCGP does not include electrical, heating, ventilation, plumbing, or air conditioning components. Therefore, this criterion is not applicable.

This plan policy is met.

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

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

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

The "EFU" zoned land within the Coastal Shorelands Boundary shall be designated as "Other Aggregate Sites" inventories by this Plan pursuant to ORS 215.298(2). These sites shall be inventoried as "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).

This policy applies to CBEMP zones 18-RS, 20-RS and 21-RS. These CBEMP zones list the pipeline as a permitted use.

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 narrative, the PCGP is allowed as a utility facility necessary for public service under the agricultural provisions of ORS 215.283(d) and ORS 215.275(6). Therefore, the PCGP is consistent with the Policy #28 requirements for mapped Agricultural Lands.

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

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

A utility facility necessary for public service may be established as provided in ORS 215.275."[55] As discussed in the EFU zone section of this narrative, the PCGP is a utility facility necessary for public service pursuant to ORS 215.275. Therefore, the PCGP is also an allowed use in those areas identified as Agricultural Lands on the CBEMP Special Considerations Map.

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

This plan policy is met.

j. Plan Policy #30 Restricting Actions in Beach and Dune Areas with "Limited Development Suitability" and Special Consideration for Sensitive Beach and Dune Resources (moved from Policy #31)

This plan policy is applicable to CBEMP zone 7-D. However, according to staff, there are no beach or dune areas within zoning district 7-D, and therefore the policy does not apply.

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

This policy applies to CBEMP zones 11-RS, 18-RS, 20-RS, and 21-RS and addresses forest operations in areas of coastal shorelands. There are no identified forest lands in these CBEMP zones, therefore, the policy does not apply.

l. Plan Policy #49 Rural Residential Public Services

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS, and 36-UW and addresses acceptable services for rural residential development. This policy does not apply to the proposal.

m. Plan Policy #50 Rural Public Services

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

[55] The County is not a marginal lands county, 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).

recognizes that LCDC Goal #11 requires the County to limit rural facilities and services

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS and 36-UW and addresses acceptable rural serves. Staff states that "[t]his policy does not apply to the proposal."

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

Mark Sheldon wrote comments suggesting that a gas pipeline should be considered a "high-intensity" utility facility. CCZDO 2.1.200 defines the term "utility" as follows:

> UTILITIES: Public service structures which fall into two categories:
> 1. low-intensity facilities consist 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).
>
> Note: in shoreland units this category also includes sewage treatment plants, electrical substations and similar public service structures. However, these structures are defined as "fill for non-water-dependent/related uses" in aquatic areas. (Emphasis Added).

The code resolves the issue in a manner that is unambiguous and conclusive against Mr. Sheldon's argument. Given the recognition that gas lines are a "low-intensity" facility, Plan Policy 50 does not assist the opponents in any way.

This plan policy is met.

n. Plan Policy #51Public 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:

This policy applies to CBEMP zones 6-WD, 7-D, 8-WD, 11-RS, 18-RS, 19-D, 20-RS, 21-RS and 36-UW and addresses extension of water and sewer outside of UGBs when necessary for certain development including industrial and exception land development. This policy does not apply to the proposal.

PCGP has received authorization from FERC to construct, install, own, operate and maintain the proposed interstate natural gas pipeline, consistent with applicable state and federal laws and permitting requirements. The county has previously reviewed and approved a series of related applications including a marine terminal and upland LNG facility prior to this matter.

The subsurface pipeline will not impact access to the Estuary. Most impacts from the pipeline will be temporary, and will occur during construction and maintenance of the pipeline. The applicant will work with state and federal agencies on an appropriate plan to mitigate such impacts.

Protection measures will be required as well as mitigation. The applicant will work with state and federal regulators to obtain all necessary permits, which is coordinated with the county through consistency requirements.

C. Miscellaneous Concerns.

1. Evidence of Past Misdeeds by Various Unrelated Pipeline Companies.

The opponents have submitted voluminous testimony discussing past environmental damage done by pipeline companies. For example, Ms. McCaffree also brought to the Hearings Officer's attention the Shell Oil Sakhalin Island LNG project in Russia. As her testimony and accompanying evidence seem to indicate, a large amount of environmental damage occurred with that project. The opponents also bought up the Mas Tec issue as well. As the Board is well aware, Mas Tec Inc. did a horrible job of complying with its permit requirements, and caused extensive environmental damage. Judge Hogan found that there was plenty of fault to go around in that case, and stated that "lack of government oversight" was a factor. Undoubtedly the County has learned valuable lessons from that experience.

The apparent goal of the opponent's testimony is to create doubt whether PCGP can conduct its construction activities as promised. As discussed above, however, this type of testimony can seldom form a basis for a denial, since it necessarily requires the decision-maker to speculate about future events. The decision-maker cannot simply assume that the applicant will fail to live up to its promises. To do so would be mere speculation. *Gann v. City of Portland,* 12 Or LUBA 1, 6 (1984).

In a land use process such as this, the primary goal is to determine if it is feasible for the applicant to meet applicable approval standards. Often, the applicant accomplishes this by demonstrating that he or she has a plan, and that the plan is reasonable and likely to succeed. The issuance of a land use permit cannot, in and of itself, guarantee full compliance with applicable laws. Rather, ensuring full compliance with applicable laws requires leadership from the applicant's management team and vigorous oversight from the various government agencies as well as watchdog groups.

2. Difficulty of Getting Homeowner's Insurance within 900 feet of Pipeline.

Mr. David Gonzales and Ms. Jody McCaffree testified that it would be difficult or impossible for a landowner to obtain homeowner's insurance within 900 feet of a pipeline. Although this could be a potentially important factor, the opponents surprisingly submitted no evidence to substantiate the claim. An assertion of this sort without supporting evidence or documentation is not very useful because it does not constitute substantial evidence. Substantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based." *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988).

3. Hearing is Premature Due to Unresolved Issues related to BLM, the FEIS and Requests pending Before FERC.

Many opponents stated that they believed that this process should be put on hold until other regulatory processes are fully completed. The County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. In addition, the Board is not aware of any approval standard that requires this process to be held up pending favorable results in related but separate process. As was discussed at the hearing, however, this 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.

4. Bentonite as a Carcinogen.

Anita Coppock testified that various construction techniques used by the applicant involve the use of bentonite, which the person identified as a carcinogen. Bentonite is a clay that originates from weathered volcanic ash. *See* FEIS. It is a widely used substance for drilling due to its unique properties. It is sometimes used in the wine industry as a clarifying agent. It is also used for various medical and health-related purposes. It may be dangerous for the user to breath bentonite dust in a pure, out-of-the-bag form, but that is not an issue once it is mixed with water and released into the environment. In short, it is simply not believable that bentonite is a carcinogen, and the Board has not been made aware of any evidence in the record to support the notion that it is dangerous to human health in anything other than as mentioned above.

Unsupported statements are mere conclusions, and do not constitute evidence. For example, in *Palmer v. Lane County*, 29 Or LUBA 436 (1995), LUBA held that on 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. *Id.* at 441. Similarly, in *DLCD v. Curry County*, 31 Or LUBA (1996) LUBA disapproved a finding stating that "[t]here can be no conflict with nearby permitted users on nearby lands." LUBA described the finding as "simply a conclusion" that fails to explain why such conflicts will not occur. Here, there is no evidence, scientific or otherwise, to back up the concern that bentonite is a carcinogen.

5. School Kids Won't Go to School Due to Construction Impacts on Traffic.

One person testified that children will not go to school because of the fact that construction will alter traffic patterns and close roads, etc. The Board is skeptical of this argument for a number of reasons. First, it does not seem to relate to any approval criterion. Secondly, this appears to be a traffic *management* issue that should be addressed by the public works department prior to and during construction. If properly managed, the Board finds that construction activities associated with the pipeline will not cause significant and widespread disruptions to the transportation infrastructure. Even if problems occurred in the past, the solution is better management, not denying development that otherwise satisfies applicable approval criteria.

6. Use of Eminent Domain for "Public Use" Requires a Public Need or a Public Benefit.

Many opponents asserted the belief that eminent domain should not be used unless there is a local "need" for the project or a "benefit" to the community. For example, Ms. McCaffree dedicates eight pages of what appears to be well-researched argument pertaining to the lack of "need" for the pipeline in her final submittal. *See e.g.,* McCaffree Letter dated June 10, 2010, at p. 39-46. However, whatever the merits to these types of arguments, "need" 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).

Even to the extent that "need" could be considered to be a legal requirement, Section 1.3 of the FEIS provides a detailed explanation of the overall need for the PCGP project, and that analysis is hereby incorporated by reference herein. Furthermore, the applicant has obtained a "Certificate of Public Convenience and Necessity," which establishes the particular need for the facility. In addition, 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. Moreover, the precise need for taking individual properties for the public purpose of siting a natural gas pipeline must be successfully demonstrated in each case or the proposed condemnation would not be allowed.

7. State and federal permitting.

Several public comments suggested that the county should require compliance with the Endangered Species Act, the Coastal Zone Management Act[56], the Clean Water Act, and the Clean Air Act. Generally speaking, those issues are outside of Coos County's jurisdiction for purposes of this land use application.

A detailed discussion of the complex and comprehensive state and federal permitting regime for this project is included in the correspondence from Staff Environmental Scientist Randy Miller of Pacific Connector dated June 9, 2010. A list of all state and federal permits, approvals and consultations is attached as Exhibit 5 to the letter on Williams Pipeline letterhead dated May 11, 2010. Also, Section 1.5 of the FEIS details the myriad permits and approvals required for the PCGP and the associated permitting governmental authorities.

For example, it is FERC's responsibility to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act. It is the responsibility of these agencies to protect threatened and endangered species (*i.e.*, northern spotted owl, marbled murrelet, coho salmon, etc.). Additionally, Pacific Connector must submit a certification application to the Oregon Department of Land Conservation and Development and receive certification that the PCGP complies with Oregon's Coastal Management Program. DLCD must in turn consult with other state and local agencies to confirm consistency. Pacific Connector must also apply for and obtain permits under the Clean Water Act (Sections 404, 401, and 402) from the U.S. Army Corps of Engineers and the Oregon Department of Environmental Quality. These permits will regulate activities within and near all waterbodies and wetlands potentially impacted by the PCGP. These permits will include the appropriate TMDL restrictions.

Section 1.5 of the FEIS also details the public process and agency coordination that has occurred to-date in the development of the FEIS. Unless Pacific Connector receives all of the applicable federal permits and approvals FERC will not issue a "Notice to Proceed." Pacific Connector has stated that it would accept a condition that requires the applicant to provide proof of the Notice to Proceed prior to beginning construction, and the Hearings Officer recommended that such a condition be imposed. The Board hereby imposes the recommended condition as Condition of Approval A.14.

8. Federal Forestry Standards

Cascadia Wildlands and other opponents argue that the pipeline will violate requirements of the Northwest Forest Plan on BLM lands, and that the FEIS improperly bases its conclusions

[56] Ms. McCaffree argues that the federal Coastal Zone Management Act of 1972 needs to be "considered and evaluated in with this Permit Application." *See* McCaffree Letter dated June 10, 2010, at p. 2. However, Ms. McCaffree never makes any effort to explain how she believes the Act applies to this application, or how the application violates the Act. She does not even cite any particular section of the Act which she believes applies. Under these circumstances, her arguments are not developed well enough to provide a decision-maker with fair notice as to what issues she intended to raise. Any issue related to the Coastal Zone Management Act of 1972 is waived.

regarding environmental impacts on a BLM management plan called the Western Oregon Plan Revision (WOPR), which was been withdrawn by the Department of the Interior in 2009.

Cascadia Wildlands and other opponents correctly point out that the FEIS incorporates the WOPR, and further that the WOPR was withdrawn after issuance of the FEIS and is no longer being used by the Bureau of Land Management (BLM). It is also true that the PCGP alignment crosses federal lands managed by BLM within Coos County.[57] However, the opponents fail to explain how the provisions of the Northwest Forest Plan or the WOPR withdrawal relate to the land use approval criteria applicable to the application currently pending before the county. In fact, these issues are completely irrelevant to the county's applicable criteria under the CCZLDO. The substantive portions of the FEIS affected by the WOPR withdrawal are limited to Sections 4.6.1.2 (Threatened and Endangered Species/Birds) and 4.7.4.2 (Federal Land Use Plans and Land Allocations). Pacific Connector has not referenced either of these sections of the FEIS in support of the current land use application. Furthermore, the FEIS correctly evaluated the project within the regulatory framework that was in force at the time the FEIS was issued. Therefore, the WOPR withdrawal has no impact on this land use application, nor does it invalidate the evidence Pacific Connector has relied upon to demonstrate compliance with the applicable approval criteria.

9. TEWAs, UCSAs and Hydrostatic Testing

Cascadia Wildlands submitted comments arguing that the applicant has failed to sufficiently identify the size and location of Temporary Extra Work Areas (TEWAs) and Uncleared Storage Areas (UCSAs), which are areas that will be used temporarily for construction of the pipeline. Cascadia Wildlands also asserts that the applicant has failed to fully describe and analyze the hydrostatic testing procedures for the pipeline.

Cascadia Wildlands has not attempted to tie these arguments to any applicable County approval criteria, and has alleged no basis on which their arguments (if true) would necessitate denial by the Board. Nonetheless, detailed information regarding these issues was provided in correspondence from the applicant dated June 17, 2010, at pages 10-14.

D. Additional Issues Discussed During Board Deliberations

1. Condition of Approval A.1

The Hearings Officer recommended that the Board adopt the following condition as Condition of Approval A.1:

> "All promises and recommendations made by the applicant and its consultants during the course of this proceeding for the purpose of demonstrating compliance with approval standards and performance measures shall be binding on the applicant and shall

[57] However, as noted in Pacific Connector's original application narrative, local governments in Oregon do not have direct land use permitting authority over projects located on lands owned and controlled by the federal government. Furthermore, federal lands are excluded from the CZMA boundary definition under both state and federal law.

> constitute a condition of approval for this permit, whether or not that promise or recommendation is specifically set forth herein as numbered condition of approval below. [*See Central Oregon Landwatch v. Deschutes County (Taylor)*, 53 Or LUBA 290 (2007)]"

This condition would essentially make binding all promises and recommendations made by the applicant and its consultants during the application process. County Planning and Legal staff advised that as written, this condition would be troublesome for the County to enforce and administer. They recommended that the Board strike this condition as being too broad. The Board agrees with staff and finds that imposing the remaining conditions of approval hereinbelow incorporate the written representations and promises made by the applicant and ensure that the applicant will implement the project consistent with applicable approval criteria and related performance measures. The Board deletes Condition A.1 and identifies it as "Intentionally deleted" in the conditions below.

2. Condition of Approval A.7

The Hearings Officer recommended that the Board adopt the following condition as Condition of Approval A.1:

> The applicant's plans to protect the 7-NA district from adverse impacts due to the temporary construction phase of the pipeline shall be provided to the Planning Department.

Staff recommended that this condition be deleted. The Board concurs. The applicant addressed this issue in its final argument letter at page 28 by demonstrating that there would be no direct impact to lands located in the CBEMP 7-NA zoning district and that indirect impacts would be avoided through implementation of the mandatory ECRP. Based upon this substantial evidence, the Board deletes this condition and notes it as "Intentionally deleted" in the conditions below.

3. Construction Impacts to County Roads

At the Board deliberations in this matter, Commissioner Stufflebean expressed concern that, although Condition of Approval A.12 requires the applicant to identify construction impacts to County roads, the condition does not ensure that the applicant will address any such impacts in a timely manner. The Board finds that this is an issue of public concern. To ensure that the applicant addresses any impacts to County roads in a timely manner, the Board finds that it is appropriate to require that the applicant file an irrevocable letter of credit or similar instrument with the County. The Board further finds that the letter of credit or similar instrument should remain in place for a five-year period in order to address any impacts identified through that time period. Consistent with CCZLDO 6.5.400 regarding public improvements for new developments, the letter of credit should be in the amount of 120% of the estimated cost of the improvements. Accordingly, the Board modifies Condition of Approval A.12 to add the following two sentences:

"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."

The Board finds that this modified condition addresses this issue.

III. CONCLUSION

For the above stated reasons, and after consideration of the applicable law and all argument and evidence in the record, the Board finds that the applicant has met its burden of proof to demonstrate that the applications satisfy all applicable approval standards and criteria, or that those standards or criteria can be satisfied through the imposition of conditions of approval. Accordingly, the Board hereby approves the application, subject to the following conditions of approval, which are authorized by Section 5.2.800 of the CCZLDO:

A. Staff Proposed Conditions Of Approval

1. Intentionally deleted.

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. The pipeline will be rerouted, where feasible, in order to avoid impacts to the property identified on Drawing No. 3430.33-X-9007. (MP 13.8 to MP 14.4). If requested, the applicant shall work with affected property owners within the pipeline's alignment to make "minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands" pursuant to FERC Order Condition #6 in order to avoid or minimize impacts to structures or the owner's use of the property."

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. [*See ORS 772.210(4) and Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.*]

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

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

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

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

1. Pre-Construction

7. Intentionally deleted.

8. To protect residences and structures, evidence of compliance with FERC's Certificate Order, Condition #43 must be provided prior to issuance of zoning clearance.

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.

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

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. Prior to construction, the applicant shall be required to undertake the sampling and analysis set forth in the Sediment Analysis Protocol (SAP) in order to ensure that there will be no adverse water quality impacts from digging the trench for the pipeline across Haynes Inlet.

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. [*See Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 1.*]

23. The pipeline operator will conduct routine vegetation maintenance clearing on the 30-foot strip every 3-5 years. [*See Report entitled Forest Practices and Economic Issues related to Proposed Pacific Connector Gas Pipeline, by Dallas C. Hemphill, ACF, CF, PE., dated June 17, 2010, at p. 5.]*

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.

2. Intentionally deleted.

3. Intentionally deleted.

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. Fill and removal activities in Coos Bay shall be conducted between October 1 and February 15, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife.

7. The authorized work in Haynes Inlet shall be conducted in compliance with the required U.S. Army Corps of Engineers Section 404 Permit and OR DEQ's 401 Water Quality Certification and 402 NPDES permits, which will mandate turbidity standards, monitoring requirements, and reporting procedures.

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. For dredging activity conducted by clamshell bucket, activity shall be positioned from a floating crane or top-of-bank position. In the closed position, the bucket shall be sealed so as to minimize sediment re-suspension.

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 import 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. As detailed in Section 4.12.10 of the FEIS, 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. (a) This approval shall not become effective as to any affected property until the Applicant has acquired ownership of an easement or other interest in the property necessary for construction of the pipeline, and obtains either: (i) the signature of all owners of the property consenting to the application, or (ii) an order of a court in condemnation of the property interest required for the pipeline that operates to obviate the need for consent of owners of property other than the applicant. In the alternative, should this condition 20(a) be deemed insufficient on appeal to satisfy applicable code requirements, the applicant shall instead be subject to the alternative condition 20(b) immediately below.

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

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

22. Intentionally deleted.

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 issuance of a zoning compliance letter under CCZLDO Section 3.1.200, the County Planning Department shall make initial contact with the affected Tribe(s) regarding the determination of whether any archaeological sites exist within the area proposed for development, consistent with the provisions of CCZLDO Section 3.2.700. Once the Tribe(s) have commented or failed to timely comment under the provisions of CCZLDO Section 3.2.700, the County shall take one of the following actions: (1) if no adverse impacts to cultural, historical or archaeological resources have been identified, the County may approve and issue the requested zoning compliance letter and 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 CBEMP Policy #18 resources on the site and the applicant and the 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 archaeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of Section 5.8.200 of the CCZLDO with the Board of Commissioners serving as the Hearings Body.

5. Miscellaneous

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

Approved this 8th day of September, 2010.

Appendix A. Discussion of Federal Preemption Issues.

The proposed pipeline is authorized pursuant to Section 7 of the Natural Gas Act. ("The Natural Gas Act" or "NGA"), 15 U.S.C. §§ 717 *et seq.* Section 7 of the NGA authorizes the FERC to issue "certificate[s] of public convenience and necessity" for the construction and operation of natural gas facilities for the transportation of gas in "interstate commerce." The standard for evaluating an application for a certificate of public convenience and necessity is stringent: the FERC must find that the proposed project is "necessary or desirable in the public interest." To find that an action is necessary or desirable, the FERC must determine that the applicant is willing and able to satisfy a panoply of requirements enumerated in section 7, and that the action "is or will be required by the present or future public convenience and necessity." This higher standard is consistent with the extraordinary power of eminent domain that accompanies a certificate of public convenience and necessity.

The Supreme Court has held that the Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 1151, 99 L.Ed.2d 316 (1988). This creates an issue of whether state or local laws that conflict with FERC approvals are preempted by federal law.

Zoning laws are an exercise of the state's police power. Generally speaking, a state's exercise of its police power is subject to the rule that such power cannot place "a substantial burden on interstate commerce. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)." Courts have generally found attempts by state and local governments to stop federally authorized gas pipelines on zoning grounds to constitute a substantial and impermissible burden on interstate commerce *New York State Natural Gas Corp. v. Town of Elma*, 182 F.Supp. 1, 6 (W.D.N.Y.1960) (Operation of town zoning ordinance and building code so as to prevent natural gas company operating, in interstate commerce, a federally authorized pipeline, from construction of measuring and regulating station in connection with line at location which was reasonably necessary to accomplish purposes required was unconstitutional as an undue burden on interstate commerce); *Transcontinental Gas Pipe Line Corp. v. Milltown*, 93 F. Supp. 287, 295 (E.D. N.J. 1950). (Zoning authority was unreasonable, arbitrary and without foundation when it prevented interstate pipeline from going through the town.). *Kern River Gas Transmission Co. v. Clark County*, 757 F.Supp. 1110 (D.Nev.,1990); *FERC v. Public Service Commission*, 513 F.Supp. 653 (D.N.D.1981) (state regulation of pipeline route preempted). Some courts have even held that, in light of the federal grant of certificates of convenience and necessity and of the Congressional authorization for use of the eminent domain power to the party pipeline companies, state regulation could not thwart construction of necessary gas pipeline facilities. *See Transcontinental Gas PipeLine Corp. v. Hackensack Meadowlands Development Comm.*, 464 F.2d 1358 (3rd Cir.1972), *cert. denied* 409 U.S. 1118, 93 S.Ct. 909, 34 L.Ed.2d 701 (1973); *National Fuel Gas Supply Corp. v. Public Service Comm'n of State of N.Y.*, 109 P.U.R.4th 383, 894 F.2d 571 (C.A.2 N.Y.,1990).

Unlike the pipeline facility, which is authorized under Section 7 of the NGA, the proposed Jordan Cove LNG terminal itself is authorized pursuant to Section 3 of the Act. *See e.g., AES Sparrows Point LNG, LLC v. Smith*, 470 F.Supp.2d 586 (D.Md.,2007); *AES Sparrow*

Point LNG, LLC v. Smith, 527 F.3d 120 (DC Md. 2008); (LNG Terminals); Subject to the exceptions discussed below, FERC has exclusive authority under Section 3 of the Natural Gas Act to authorize the siting of LNG terminals.[58] That authorization is conditioned on the applicant's satisfaction of other statutory requirements for various aspects of the project. For example, FERC requires a party seeking to construct an LNG terminal to first obtain authorization from FERC. 15 U.S.C. § 717b(a). In order to do so, applicants must comply with the NGA's requirements as well as complete FERC's extensive pre-filing process. *See* 18 C.F.R. § 157.21. FERC must then consult with the appropriate state agency on numerous state and local issues. *See* 15 U.S.C. § 717b-1(b). *See also generally* Jacob Dweck, David Wochner, & Michael Brooks, *Liquefied Natural Gas (LNG) Litigation after the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473 (2006) (describing the history of conflict between federal and state authorities over the siting of LNG terminals).

However, as mentioned above, FERC's authority over LNG terminals is not absolute. The NGA contains a "savings clause" that provides that "nothing in the [NGA] affects the rights of States under" the Coastal Zone Management Act ("CZMA") and [the Clean Water Act and the Clean Air Act].[59] 15 U.S.C. § 717b(d). Although the exception created by the Savings Clause seems to only apply to Certificates issued pursuant to Section 7 of the Act, it does reflect provisions of the CZMA that apply to Certificates issued under Section 7 of the NGA as well.

Thus, the federal preemption issue in this case is complicated by the fact that much of the County is subject to the CZMA and the Oregon Coastal Management Program (OCMP). The CZMA act states: "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1). *See also* 15 CFR § 930.34 *et seq. Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458 (D.C. R.I. 2009).

The U.S. Congress passed the federal CZMA in 1972 to address competing uses and resource impacts occurring in the nation's coastal areas. The Act included several incentives to encourage coastal states to develop coastal management programs. One incentive was a legal authority called "federal consistency" that was granted to coastal states with federally approved coastal management programs. As relevant here, the federal consistency provisions of the CZMA require that any federal action occurring in or outside of Oregon's coastal zone which affects coastal land or water uses or natural resources must be consistent with the Oregon Coastal Management Program. 16 U.S.C. § 1456(c)(3)(A). The federal consistency requirement is a

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[58] "[FERC] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1). The pipeline, however, is apparently not part of a terminal.

[59] Under Section 401 of the Clean Water Act, a certification of compliance with the state's water quality standards is required from DEQ for any activity that may result in a discharge into navigable waters. If the 401 certification is denied, the LNG facility cannot be constructed. Similar permits are required from the U.S. Army Corps of Engineers and DEQ for discharge of dredged and fill material. Section 502 of the Clean Air Act, a permit is required for any person to operate a source of air pollution, as detailed in the Act.

rather unique concept in that state programs for coastal management cannot *generally* be preempted by federal law.

Nonetheless, the exact degree of regulatory power the CZMA exclusion gives the state is somewhat unclear. As mentioned above, under Section 307(c) of the Coastal Zone Management Act, an applicant must certify that the proposed activity in a designated coastal zone complies with the enforceable policies of the affected state's coastal zone management program. This applies to all Federal permits and authorizations, including FERC and the U.S. Army Corps of Engineers. If the state does not concur[60] with the certification, FERC approval to construct may not generally be granted. Having said that, the State's CZMA role is very limited. The Commission's only responsibility under the CZMA is to withhold construction authorization for a project until the state finds that the project is consistent with the state's NOAA-approved coastal zone management plan. In addition, there is also an appeals process established with the CZMA. On appeal, the Secretary of Commerce may determine that there are overriding national security interests that justify approval of the project over the state's objection.[61]

It is unlikely that the applicant in this case would ever have to resort to an appeal to the Secretary, however, since the OCMP does not appear to prohibit the proposed use in any event. Oregon's Coastal Management Program recognizes that water-dependant activities (such as LNG terminals) require priority consideration, and has set up management zones in areas that are suitable for such water-dependant uses. The proposed Jordan Cove LNG terminal is located in an area which the Comprehensive Plan deems suitable for such use. A pipeline itself is generally not a water-dependant use. However, in this case there is no feasible alternative that avoids a significant water crossing in the Coastal Zone.

Another key factor to consider is that Oregon's Coastal Management Program does not have an "alternatives analysis" requirement for evaluating the route of an interstate natural gas pipeline, unless an exception to a Goal is required. The OCMP is implemented via the Statewide Planning Goals (specifically Goals 16-19), which, in turn, have been adopted into the County's Comprehensive Plan. In this regard, the OCMP states:

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[60] DLCD is the state of Oregon's designated coastal management agency and is responsible for reviewing projects for consistency with the OCMP and issuing coastal management decisions. DLCD's reviews involve consultation with local governments, state agencies, federal agencies, and other interested parties in determining project consistency with the OCMP. DLCD's federal consistency decisions are called "coastal concurrences" [approvals] and "coastal objections" [denials]. Objections can be based on an inconsistency with coastal program policies or a lack of sufficient information to determine consistency. In the event of a formal DLCD objection, federal permits, licenses and financial assistance grants cannot be issued, and direct federal activities cannot proceed unless compliance with the OCMP is specifically prohibited by other federal law.

[61] Under Section 307(c)(3)(A), the CZMA provides that the Secretary must override a state's objection to a proposed project that requires a federal license or permit if the project is "necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A). A project is not "necessary in the interest of national security" unless a "national security interest would be significantly impaired were the activity not permitted to go forward as proposed." 15 C.F.R. § 930.122.

> Coastal comprehensive plans have been especially considerate of the national needs for new facilities for energy development, fisheries, development, recreation, ports, and transportation. Major deep and shallow draft ports have identified shoreland areas for new port facilities to support energy resource transshipment, development of new fish processing facilities and areas for expanded marinas.

Even in the event that a pipeline would violate a comprehensive plan standard, the applicant could pursue an exception to a Statewide Planning Goal. As mentioned above, that process would trigger an alternatives analysis.

In addition to other considerations, Congress has also 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 originally directed 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 Act's text,[62] its legislative history,[63] administration implementation,[64]

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[62] For example, 49 U.S.C. Chapter 601 sets out federal safety standards for gas pipelines. 49 U.S.C. § 60104(c) states: "Preemption: A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.

Prior to 1994, there were two Acts controlling the area of interstate pipeline safety - the Natural Gas Pipeline Safety Act of 1968 (NGPSA) and the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA). The NGPSA and the HLPSA were combined and recodified without substantial change at 49 U.S.C. §§ 60101 to 60125 in 1994. *See* P.L. 103-272, 108 Stat. 1371 (July 5, 1994). The two similar provisions from each Act pertaining to preemption were consolidated into what is now 49 U.S.C. § 60104(c). Compare 49 U.S.C. § 60104(c) with 49 U.S.C. § 1672(a)(1) (NGPSA) and 49 U.S.C. § 2002(d) (HLPSA). Title 49 U.S.C. 1672(b) (1972) originally provided for the establishment of minimum federal safety standards for the transportation of gas. The section concluded:

> 'Any State agency . . . may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standard applicable to interstate transmission facilities.'

[63] 'The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse a number of States and uniformity of regulation is a desirable objective. For this reason, section 3 provides for a Federal preemption in the case of interstate transmission lines.' H.R.Rep.No.1390, 90th Cong., 2d Sess. (1968); 3 U.S.Code Cong. & Admin.News, 90th Cong., 2d Sess. pp. 3223, 3241 (1968).

[64] In 1973, the Secretary of Transportation reported to Congress that the Department of Transportation through its Office of Pipeline Safety exercised exclusive authority for safety regulation of interstate gas transmission lines. *See* Federal-State Relations in Gas Pipeline Safety 3, 7, 10 (1973).

and judicial interpretation,[65] attest to federal preemption of the field of safety with respect to the establishment and enforcement of standards regulating the interstate transmission of gas by pipeline. *ANR Pipeline Co. v. Iowa State Commerce Commission,* 828 F.2d 465, 470 (8th Cir.1987) (Iowa may not impose its own safety standards on facilities). The constitutional basis of preemption is the commerce clause,[66] and the supremacy clause.[67]

In addition, FERC has ruled that state agencies could not use state law to "prohibit or unreasonably delay the construction or operation of [LNG] facilities approved by this Commission." *Weaver's Cove Energy, LLC,* 112 F.E.R.C. ¶61070, at ¶ 61,546, *on rehearing,* 114 F.E.R.C. ¶61058, at 61185-6.

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[65] '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).

[66] U.S.Const., art. I, 8.

[67] U.S.Const., art VI.

Map TRS #	Account # (s)	Landowner	Zoning
25S 13W 0 200	3102.00	WEYERHAEUSER NR COMPANY	6-WD
25S 13W 4 101	3097.03	WEYERHAEUSER NR COMPANY	6-WD
25S 13W 4 300	3101.00/3101.90	ROSEBURG FOREST PRODUCTS CO.	6-WD
25S 13W 4 400	3098.01	WEYERHAEUSER NR COMPANY	6-WD
25S 13W 4 100	3097.02/3097.00	WEYERHAEUSER NR COMPANY	6-WD, IND, 7-D
25S 13W 3 200	3096 / 3096.90	WEYERHAEUSER NR COMPANY	7-D, 8-WD, 8-CA
25S 13W 4 500	3098.00	OREGON INT'L PORT OF CB	8-CA, 13A-NA, 11-NA, 11-RS
24S 13W 36B 700	1899.9 / 1899.00	THOMPSON, DONALD J. & CAROL L.	11-RS, RR-2, F
24S 13W 36B 1101	1899.9 / 1899.00	BLOMQUIST, HAL D. & DONNA J.	RR-2, F
24S 13W 36B 1100	1897.00	WEYERHAEUSER COMPANY	F
24S 13W 36B 100	1897.01/1897.91	BLOMQUIST, HAL D. & DONNA J.	F
24S 13W 36 100	1896.00	WEYERHAEUSER COMPANY	F
24S 13W 36 200	1903.00	WEYERHAEUSER COMPANY	F
25S 13W 1 100	3034.00	WEYERHAEUSER COMPANY	F
25S 13W 1D 200	3034.91/3034.01	POWERS, JOHN W.; & POWERS, SHAWNEE	F
25S 13W 1D 100	3046.9 / 3046.00	GARY E. SMITH TRUST	EFU, F
25S 12W 6C 100	2587.00/2587.90	GERTRUDE E. WICKETT TRUST; ETAL OULP, JOANNE E., TRUSTEE TRUST A-CREDIT SHELTER TRUST	EFU, F
25S 12W 6C 601	2587.11	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 500	2605.00	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 400	2587.09	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 1300	2604.00	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 1301	2604.01/ 2604.91	LONE ROCK TIMBERLAND CO.	F
25S 12W 7 1301	13110.02	SPRINT NEXTEL CORP	
25S 12W 7 1301	13982.01	US CELLULAR NW OPERATIONS (154	
25S 12W 7 1301 A02	2604.02	U.S.A. FEDERAL AVIATION ADM	
25S 12W 7 2400	2609.01	SWEET, STEVEN H.	F
25S 12W 18 300	2748.01	SWEET, STEVEN H.	F
25S 12W 18 200	2746.93/2746.03	SWEET, STEVEN H.	F, EFU
25S 12W 17 300	2734.04	SWEET, STEVEN H.	EFU
25S 12W 17 400	2734.02/2734.92	RUTHERFORD, MONTE R.	EFU
25S 12W 17 600	2734 / 2734.90	SHAW, JACKIE L., L/E SHAW, JACKIE; & SHAW, BELINDA	EFU
25S 12W 17 700	2734.01 /2734.91	EDWARDS, WILLIAM R.	EFU
25S 12W 17 900	2736.00	LONE ROCK TIMBERLAND CO.	F, EFU
25S 12W 17 1000	2737.00	WEYERHAEUSER COMPANY	F
25S 12W 20 100	2767.00	WEYERHAEUSER COMPANY	F
25S 12W 29 1100	2887.00/2887.90	FISHER, DONALD & LAURA R.	F, EFU
25S 12W 30 501	2915.06	BRUNSCHMID, MARJORIE A.; ETAL BRUNSCHMID, JAMES V. BRUNSCHMID, YOSHIKO	EFU, 18-RS
25S 12W 30 600	2918.00/2918.90	DEMERS, GREGORY M	18-RS
25S 12W 30D 1501	2918.71	AGRI PACIFIC RESOURCES, INC.	18-RS
25S 12W 30D 508	2919.05	KRONSTEINER, KAY A.; ETAL	18-RS
25S 12W 30 700	2923.00	WEYERHAEUSER COMPANY	19-D
25S 12W 31 100	2931.00	WEYERHAEUSER COMPANY	19-D
25S 12W 32B 300	2984.00	WEYERHAEUSER COMPANY	19-D, 19B-DA, 20-CA

Map TRS #	Account # (s)	Landowner	Zoning
25S 12W 32B 600	2982.00	FRED MESSERLE & SONS, INC.	20-RS
25S 12W 32 100	2981.02/2981.90	FRED MESSERLE & SONS, INC.	20-RS, EFU
25S 12W 32 400	2989.03	FRED MESSERLE & SONS, INC.	EFU, F
26S 12W 5 200	4637.90	FRED MESSERLE & SONS, INC.	F
25S 12W 32 300	2987.00/2987.90	MCCARTHY, LOUIS M.; ETAL MCCARTHY, BETTY J. MCCARTHY, WILLIAM H.	F
26S 12W 5 300	4638.01/4638.91	SOLOMON JOINT LIVING TRUST	F
26S 12W 8B 100	4684.01/4684.91	PRUGH, MICHAEL; ETAL PRUGH, DEBRA A. REED, DENISE	F, RR-2
26S 12W 8 900	4682.00	HILL, JEFFREY L.	RR-5
26S 12W 8 1000	4683.02	HILL, JEFFREY L. & GIDGETTE N.	RR-5
26S 12W 8 1100	4683.01/4683.91	RODE, ALVIN & LOU ANN L/E	RR-5, EFU, F
		C/O HILL, JEFFREY L.	
26S 12W 8 500	4679.90	SHELDON, MARK & MELODY	RR-5
26S 12W 8B 1400	4688.00/4688.95	WHEEKER, LARRY & SHIRLEY	F
26S 12W 8 1102	4683.04/4683.94	HILL, JEFFREY L. & GIDGETTE N.	F
26S 12W 8B 1500	4688.01/4688.91	MCGINNIS, MICHAEL L.	F
26S 12W 8 1601	4689.02	GUNNELL FAMILY TRUST GUNNELL, GARY A. & BARBARA E.,TRSTE	F
26S 12W 8 1700	4667.90/4667.00	PAUL J. WOYTUS FAMILY TRUST WOYTUS, PAUL J. & YVONNE A., TRSTES	F, 21-RS
26S 12W 7 700	4673.00/4673.90	FRED MESSERLE & SONS, INC.	21-CA, 21-RS, F
26S 12W 18A 100	4760.01/4760.91	WRIGHT LOVING TRUST WRIGHT, W.J. & DOREEN, TRUSTEES	F
26S 12W 18A 200	4762.91/4762.01	WASHBURN, PAUL M. & EURA M.	RR-5
26S 12W 18A 201	4762.13	MCGRIFF, DAVID L. & EMILY J.	RR-5
26S 12W 18B 1900	4766.00	DAVENPORT, JAMES R. & ARCHINA J.	RR-5
26S 12W 18B 1700	4766.92/4766.02	LOVELL, NOVA D. & ELLEN M.	F
26S 12W 18C 103	4767.04	MUENCHRATH, A. JOHN & MARY M.	F
26S 12W 18C 300	4769.21	MAEYENS, EDGAR JR., & MELODY M.	RR-5
26S 12W 18C 200	4768.00	ROSEBURG RESOURCES CO.	F
26S 12W 19 200	4771.01	ROSEBURG RESOURCES CO.	F
26S 12W 19 300	4772.00	RIVER BEND RESOURCES CO.	F
26S 12W 30 100	4951.00/4951.90	MCCAULEY, ROBERT H. & LINDA S.	F
26S 12W 30 600	4951.22	SCOVILLE, ROBERT G.	RR-5
26S 12W 30 1000	4953.00/4953.90	KETCHUM, JIMMIE R. & CAROLYN E.	F
26S 12W 30A 500	4950.01	LONE ROCK TIMBERLAND CO.	F
26S 12W 30 1200	4956.00	MENASHA FOREST PRODUCTS CORPORATION	F
26S 12W 30 1400	4957.00	FRED MESSERLE & SONS, INC.	F
26S 12W 31A 100	4958.00	FOORD, RONALD L. & MOLLY A.	F
26S 12W 32 400	4967.00	FRED MESSERLE & SONS, INC.	F
26S 12W 32 500	4968.00/4698.90	WILLIS, DEE A.	EFU, F
26S 12W 31 700	4963.00	PLUM CREEK TIMBERLANDS, L.P.	F
26S 12W 31 900	4964.00	MANLEY, WARREN	F
27S 12W 6 100	6526.01	LONE ROCK TIMBERLAND CO.	F
27S 12W 6 200	6526.90/6526.00	STALCUP, STEVEN & CAROLE	F
27S 12W 6 300	6527.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 12W 5 100	6521.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 0 (8) 1700	6534.00	ROSEBURG RESOURCES CO.	F

Map TRS #	Account # (s)	Landowner	Zoning
27S 12W 0 (8)1600	6536.01	PACIFICORP NORMAN K. ROSS, PROP TAX MNGR	F
27S 12W 0 (8) 1500	6533.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 12W 0 2500	6588.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 0 (16) 2400	6584.00	COOS COUNTY SHEEP CO.	F, EFU
27S 12W 0 (15) 2300	6580.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 22 100	6616.00	COOS COUNTY SHEEP CO.	F
27S 12W 23 200	6625.00	U.S.A. (C.B.W.R.G.L.)	F
27S 12W 23 100	6624.00	COOS COUNTY SHEEP CO.	EFU, F
27S 12W 23 300	6627.00/6627.90	HEL BENTREE FARM, INC.	F
27S 12W 24C 1500	6656.94/6656.04	BREUER, JOHN D., III & KARA L.;ETAL BREUER, JOHN D., II & JOANNE W.	F
27S 12W 24C 1600	6661.00	WILLIAMS, VIRGIL D. & CAROL	RR-5
27S 12W 24C 1200	6659.00	METCALF, JAMES I. & MARY C.	RR-5
27S 12W 24C 1700	6659.04/6659.94	WILLIAMS, VIRGIL D. & CAROL F.	EFU
27S 12W 25 200	6667.90/6667.00	SCHLATTER, MARY L. YATES, CHARLES & JOHANNA	EFU
27S 12W 24C 1800	6662.05	DALTON, RODNEY A. WILLIAMS, VIRGIL D. & CAROL F.	EFU
27S 12W 24C 2100	6662.04/6662.94	TED L. FIFE FAMILY TRUST FIFE, TED L., TRUSTEE	EFU
27S 12W 25 201	6667.01 / 6667.91	FISHER, DONALD L. & SHIRLEY J.	F
27S 12W 25 203	6667.03/6667.93	OTTERBACH, DAVE & PATRICIA L. HAZEN, WALTER E. & WENDY A.	F
27S 12W 25 100	6666.00	U.S.A. (C.B.W.R.G.L.)	F
27S 11W 0 (30) 1500	6416.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 11W 0 1400	6356.00	U.S.A. (C.B.W.R.G.L.)	F
27S 11W 0 (29) 1700	6412.00	U.S.A. (C.B.W.R.G.L.)	F
27S 11W 32 1000	6428.00	PLUM CREEK TIMBERLANDS, L.P.	F
27S 11W 32 800	6426.00	MENASHA FOREST PRODUCTS CORPORATION	F
27S 11W 32 1300	6431.00	MENASHA FOREST PRODUCTS CORPORATION	F
28S 11W 5 100	8151.00	U.S.A. (C.B.W.R.G.L.)	F
28S 11W 5 200	8152.00	WINDLINX FAMILY TRUST WINDLINX, RUSSELL K & DIANA, TRSTES	F
28S 11W 4 600	8138.00/8138.90	MOORE MILL & LUMBER CO.	F
28S 11W 4 800	8148.00	MENASHA FOREST PRODUCTS CORPORATION	F
28S 11W 0 (9) 400	8179.90	U.S.A. (C.B.W.R.G.L.)	F
28S 11W 10 1000	8185.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 11W 10 900	8186.00	LONE ROCK TIMBERLAND CO.	F
28S 11W 10 901	8186.01	DORA CEMETERY ASSN.	F
28S 11W 10 1300	8189.00/8189.90	GARRETT, CYNTHIA A.	F, EFU
28S 11W 10 1400	8191.00/8191.90	LAIRD TIMBERLANDS, LLC	EFU
28S 11W 15 100	8224.01	LAIRD TIMBERLANDS, LLC	EFU, F
28S 11W 0 (14) 600	8219.00	MOORE MILL & LUMBER CO.	EFU, F
28S 11W 0 700	8217.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 11W 13 900	8213.00	U.S.A. (C.B.W.R.G.L.)	F
28S 11W 24 100	8278.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 11W 0 (25) 1900	8284.00	ROSEBURG RESOURCES CO.	F
28S 10W 0 (19) 3500	8028.00	ROSEBURG RESOURCES CO.	F

Exhibit B

Final Order No. 12-03-018PL, REM 11-01 (Mar. 13, 2012)

Map TRS #	Account # (s)	Landowner	Zoning
28S 10W 0 (19) 3400	8025.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 (19) 3600	8030.00	LONE ROCK TIMBERLAND CO.	F
28S 10W 0 (30) 3300	8031.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 10W 0 (19) 3800	8084.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 10W 0 (29) 4100	8080.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 (28) 4200	8072.00	U.S.A. (O & C)	F
28S 10W 0 (27) 4600	8066.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 4500	8068.00	LONE ROCK TIMBERLAND CO.	F
28S 10W 0 (26) 5000	8063.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 10W 0 (26) 4900	8064.00	PLUM CREEK TIMBERLANDS, L.P.	F
28S 10W 0 (26) 4800	8065.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 10W 0 (35) 5600	8113.00	U.S.A. (C.B.W.R.G.L.)	F
28S 10W 0 (36) 5500	8119.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 10W 0 (36) 5200	8118.00	TRI-W GROUP LIMITED PARTNERSHIP	F
28S 09W 0 (31) 3500	7869.00	U.S.A. (C.B.W.R.G.L.)	F
29S 09W 0 (6) 300	10558.00	PLUM CREEK TIMBERLANDS, L.P.	F
29S 09W 0 (5) 200	10554.00	U.S.A. (C.B.W.R.G.L.)	F
29S 09W 0 (8) 500	10567.00	LONE ROCK TIMBERLAND CO.	F
29S 09W 0 (8) 600	10566.00	PLUM CREEK TIMBERLANDS, L.P.	F
29S 09W 0 (9) 700	10570.00	U.S.A. (C.B.W.R.G.L.)	F
25S 13W 4 300	3101.00 / 3101.90	ROSEBURG FOREST PRODUCTS CO.	CBEMP
25S 13W 3 200	3096.00 / 3096.90	WEYERHAEUSER NR COMPANY	IND & CBEMP
28S 12W 7 101	8464.05	HW3, LLC	Q-IND
28S 12W 7C 1000	8463.01	HW3, LLC	CREMP & CREMP IND
28S 12W 7C 900	8463.91	HW3, LLC	CREMP & CREMP IND
28S 12W 18B 1500	8463.00 / 8463.90	LBA CONTRACT CUTTING, INC. @ ARRIOLA, BRIAN	CREMP & CREMP IND
27S 12W 26D 1200	6693.01	YATES, SPENCER C. & TRULY R.	EFU
28S 13W 01DB 300	8794.01	CITY OF COQUILLE	CITY
28S 13W 01DB 309	8794.11	CITY OF COQUILLE	CITY
28S 13W 01DB 310	8794.12	CITY OF COQUILLE	CITY
25S 13W 35 400	3952.00	GEORGIA-PACIFIC WEST, INC.	CBEMP
25S 13W 36 1000	4004.00	GEORGIA-PACIFIC WEST, INC.	CBEMP

NOTE: U.S.A = BLM

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) 396-3121 Ext.210
FAX (541) 756-8630 / TDD (800) 735-2900

NOTICE OF ADOPTION

March 14, 2012

Re: Coos County Planning Department File No. REM-11-01
Application for Pacific Connector Gas Pipeline (Remand of HBCU-10-01)
County Final Decision and Order No. 12-03-018PL

On March 13, 2012, the Coos County Board of Commissioners adopted the above-referenced Final Decision and Order No. 12-03-018PL attached to this notice.

The adoption of this final decision and order can be appealed to the Land Use Board of Appeals (LUBA), pursuant to ORS 197.830 to 197.845, by filing a Notice of Intent to Appeal within 21 days of the date of the final decision and order. For more information on this process, contact LUBA by telephone at 503-373-1265, or in writing at 550 Capitol St. NE, Suite 235, Salem, Oregon 97301-2552.

If you have any questions pertaining to this notice or the adopted ordinance, please contact the Planning Department by telephone at (541) 396-3121 or 756-2020, extension 210, or visit the Planning Department at 225 North Adams Street, Coquille, Oregon, Monday through Friday, 8:00 AM - 5:00 PM (closed Noon - 1:00 PM).

COOS COUNTY PLANNING DEPARTMENT

Jill Rolfe

Jill Rolfe, Administrative Planner

CERTIFICATE OF MAILING

I hereby certify that on March 14, 2012, I deposited the attached NOTICE OF ADOPTION into the U.S. mail, in an envelope with first class postage affixed thereto to the parties listed on the attached pages.

Dated: March 14, 2012

Jill Rolfe, Administrative Planner

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Joseph L. Cortez	54065 Echo Valley Rd.	Myrtle Pont OR 97458		
Keith Comstock	93543 Pleasant Valley Lane	Myrtle Pont OR 97458		
Kevin Westfall	PO Box 41	Broadbent OR 97414		
Knute Nemeth	PO Box 5775	Charleston OR 97420		
Larry Scarborough	1163 11th Street SE	Bandon OR 97411		
Lillie Clausen	93488 Promise LN	Coos Bay OR 97420		
Lucinda DiNovo	Bay Area Chamber of Commerce	145 Central Avenue	Coos Bay OR 97420	
Lydia Delqudo	555 Douglas SW	Bandon OR 97411		
Mark Chernaik	2355 Dale Ave	Eugene, OR 97408		
Mark Ingersoll, Vice Chairman	Confederated Tribes of Lower	Umpqua and Siuslaw Indians	1245 Fulton Ave	Coos Bay, OR 97420
Mark Sheldon	95204 Stock Slough LN	Coos Bay OR 97420		
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Mary Metcalf	58327 Fairview RD	Coquille OR 97423		
Monica Vaughan	2245 SE Brookly St.	Portland OR 97202		
Mr & Mrs Timothy Pearce	58746 Seven Devils Road	Bandon OR 97411		
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REM-11-01 Decision Notice 3/14/12

Proof of Mailing

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Carol Fischer	PO Box 1985	Bandon OR 97411		
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Corinne Sherton	247 Commercial St NE	Salem OR 97301		
Curt Clay	PO Box 822	Coos Bay OR 97420		
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Elizabeth Matteson	732 Gerguson Lane	Days Creek OR 97420		
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Jerry Phillips	1777 Kingwood	Coos Bay, OR 97420		
Joann Hansen	3420 Ash Street	North Bend, OR 97459		
Jody McCaffree	PO Box 1113	North Bend OR 97459		
Joe Serres, FLOW	PO Box 2478	Grants Pass OR 97528		
John B. Jones, III & Julie Jones	89056 Whiskey Run LN	Bandon OR 97411		

BEFORE THE BOARD OF COMMISSIONERS
OF THE COUNTY OF COOS, OREGON

In the Matter of LUBA Remand of Pacific Connector Gas Pipeline, L.P. REM-10-01 HBCU-10-01	))))	FINAL DECISION AND ORDER NO. 12-03-018PL

Whereas on September 8, 2010, the Coos County Board of Commissioners adopted Final Decision and Order No. 10-08-045PL, approving Pacific Connector's application in county file #HBCU-10-01 to develop 49.72 miles of interstate natural gas pipeline and associated facilities connecting the Jordan Cove LNG terminal to the pipeline segment in adjacent Douglas County.

Whereas the opponents appealed the County's decision to the Land Use Board of Appeals ("LUBA"). On March 29, 2010, LUBA remanded the decision for further consideration of two issues: (1) a procedural issue related to property owner consents under LDO 5.0.150; and (2) potential impacts to Olympia oysters in Haynes Inlet under the two applicable CBEMP Management Objectives.

Whereas Pacific Connector submitted a written request for a remand hearing on May 12, 2011. On June 7, 2011, the Board concluded that no additional evidence was required to address the issue regarding property owner consents. However, the Board determined that the Olympia oyster issue could not be fully resolved without an evidentiary hearing, and appointed a hearings officer to hold a *de novo* evidentiary hearing on remand, with the scope of the hearing limited to the second issue identified by LUBA regarding potential impacts on Olympia oysters.

Whereas Hearings Officer Andrew Stamp conducted a public hearing on September 21, 2011, and held the record open for additional evidence and argument until December 15, 2011. The hearings officer issued his decision on January 30, 2010, recommending that the Board approve the application on remand with conditions, and rejecting the opponents' arguments that the applicable CBEMP Management Objectives were not satisfied.

Whereas the County Planning Director provided the Board with a staff report dated February 15, 2012, which provides two substantive recommendations: (1) revised language for Condition of Approval #20 regarding property owner consents under LDO 5.0.150, as required by LUBA's opinion under Assignment of Error Two; and (2) proposed findings addressing a procedural issue identified by the hearings officer in his decision regarding authorization of witnesses to testify under LDO 5.7.300(4).

Whereas on March 13, 2012, the Board met to review the hearings officer's recommendation "on the record," without accepting additional evidence or argument from the parties, and to deliberate regarding: (1) whether to accept, reject, or modify the hearings officer's recommendation, and (2) whether to accept, reject, or modify the revised findings and conditions provided by staff.

WHEREAS, at the conclusion of the March 13, 2012 meeting the Board reached a decision to adopt the hearings officer's recommendation, with the modifications provided in the February 15, 2012 staff report regarding compliance with LDO 5.7.300(4). The Board finds that the applicant has addressed the remand issues and that all applicable approval criteria are met with the suggested new conditions of approval. The Board finds that staff's suggested revisions to Condition 20 address Assignment of Error Two. The Board hereby adopts the hearings officer's recommendation, as modified and attached as Attachment "A," as its own approval findings, along with the attached conditions of approval. All other findings and conditions of approval in Order No. 10-08-045PL adopted September 8, 2010, remain in full force and effect, except as modified herein.

ADOPTED this 13th day of March, 2012.

BOARD OF COMMISSIONERS

Fred R. Messerle
Commissioner

Cam Parry
Commissioner

Richard "Bob" Magrum
Commissioner

ATTEST:
Recording Secretary

APPROVED AS TO FORM:
Office of County Counsel

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS ON REMAND FROM LUBA

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
COOS COUNTY, OREGON

FILE NO. REM-10-01

I. BACKGROUND

A. Summary of the Remand Process and Due Process Afforded to the Participants.

On September 8, 2010, the Coos County Board of Commissioners (Board) adopted Final Decision and Order No. 10-08-045PL, approving Pacific Connector's application in county file #HBCU-10-01 to develop 49.72 miles of interstate natural gas pipeline and associated facilities connecting the Jordan Cove LNG terminal to the pipeline segment in adjacent Douglas County. Opponents appealed the Board's decision to the Land Use Board of Appeals ("LUBA").

The opponents appealed the County's decision to LUBA. On March 29, 2010, LUBA remanded the decision for further consideration of two issues: (1) procedural issue related to property owner consents under LDO 5.0.150; and (2) potential impacts to Olympia oysters. *Citizens Against LNG vs. Coos County*, ___ Or LUBA ___ (LUBA No. 2010-086, March 29, 2011). Neither party appealed LUBA's decision any further, and therefore LUBA's decision is final and governs this remand proceeding.

Pacific Connector submitted its written request for a remand hearing on May 12, 2011. On June 7, 2011, the Board expressly concluded that no additional evidence was required to address the issue regarding property owner consents. However, the Board determined that the Olympia oyster issue could not be fully resolved without an evidentiary hearing. The Board voted on June 7, 2011 to appoint a hearings officer to hold a *de novo* evidentiary hearing on remand, with the scope of the hearing limited to the second issue identified by LUBA regarding Olympia oysters. The evidentiary hearing on remand is intended to determine: (1) if Olympia oysters currently exist in Haynes Inlet, and if so, (2) determine whether applicant is proposing construction methods, best-management practices, protection efforts, and mitigation techniques that will adequately "protect" Olympia oysters in Haynes Inlet from impacts caused by construction of the pipeline.

The hearings officer instructed the parties that all evidence and testimony in this proceeding must be directed toward the standards set forth in the Notice of Hearing, and must relate exclusively to potential impacts on Olympia oysters.

The review timeline for this application is as follows:

March 29, 2011	Decision remanded by LUBA
May 11, 2011	Applicant initiates remand process.
September 21, 2011	Public Hearing held.
October 10, 2011	First Open Record Period Closed (rebuttal testimony only).
October 17, 2011	Second Open Record Period Closed (for surrebuttal testimony only)

After the initial two rebuttal periods, both parties indicated that they wished to invoke ORS 173.763(6) and submit further rebuttal evidence.[1] For this reason, on October 24, 2011, the hearings officer conducted a conference call with the parties and worked out a schedule for the submission of additional evidence. That schedule was subsequently modified at the parties' request, and ultimately resulted in the following deadlines:

November 14, 2011	Third Open Record Period Closed (for surrebuttal testimony only)
November 28, 2011	Fourth Open Record Period Closed (for surrebuttal testimony only)
December 15, 2011	Applicant's Final Argument
January 30, 2012	Hearings Officer's Recommendation.

B. Why Did LUBA Remand the County's 2010 Decision?

To recap, LUBA remanded the case for two reasons. For easement of reference, the hearings officer will refer to these two issues as the "property ownership" issue, and the "Olympia oyster" issue.

The property ownership issue was procedural in nature, and came about because the code requires all property owners to physically sign the land use application. That code provision created unintended consequences when the use at issue is a linear feature that traverses many properties, as such as a pipeline. The hearings officer essentially created a plan to defer evaluation of whether the application had sufficient signatures to a later stage in the approval process. Although the hearings officer had pointed out that this process may require additional public input *if* the issue of property ownership in any particular case resulted in the exercise of discretion, the County (subsequent to the time the hearings officer's recommendation was issued) argued to LUBA that the property ownership verification process was going to be a strictly ministerial (non-discretionary) process. LUBA agreed with the opponents that such a process might involve discretion, and therefore, *may* require a public hearing. Overall, that aspect of the case is fairly inconsequential and requires no further discussion.

The other remand issue concerned native oysters. In the initial land use proceeding, the opponents had placed into the record an article concerning the recent re-emergence of native Olympia oysters in the Coos Bay area. Specifically, the opponents relied upon an article published in 2009 in the Journal of Shellfish Research by Dr. Groth and Dr. Rumrill, which documented the discovery of Olympia oysters in certain portions of Coos Bay, including Haynes Inlet. Although the hearings officer (and, hence, the Board) adopted detailed findings regarding the absence of impacts from pipeline construction to *commercial* oyster populations in Haynes Inlet, the hearings officer did not specifically address native Olympic oysters. This was an

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[1] LUBA has limited the applicability of ORS 197.763(2), (3), (6), and (8) to the first evidentiary hearing in the initial proceedings, not to proceedings on remand. *Collins v. Klamath County*, 28 Or LUBA 553 (1995) (ORS 197.763(2)(3) and (8)); *Citizens for Responsible Growth v. City of Seaside*, 26 Or LUBA 458, 462 (1994) (ORS 197.763(6)). Nonetheless, LUBA has stated that if a local government considers new evidence on remand, all parties must be given an opportunity to respond to that new evidence. *DLCD v. Umatilla County*, 39 Or LUBA 715, 733 (2001). The hearings officer determined that the processes set forth in ORS 197.763 set forth sufficient due process protection to defeat any process-related attack at LUBA, and therefore followed the framework set forth in the statute for this case.

oversight on the hearings officer's part, who had considered oysters in a more generic fashion, as opposed to adopting "species-specific" analysis.

For this reasons, LUBA correctly held that the findings did not adequately consider potential impacts on this particular species of native oyster:

> Whether the county is obligated to address in its findings the specific issue of impacts on the Olympia oyster is a more difficult question. The 2009 article of course did not consider impacts of the pipeline on the Olympia oyster, and it may well be the case that the same measures and rationales Ellis relied upon to conclude that the pipeline would not significantly impact invertebrates in general and the commercial oyster beds apply equally to the Olympia oyster. However, we cannot tell from the findings and the record whether that is the case. The Ellis study assumed that no Olympia oysters were present in Haynes Inlet, something which is apparently no longer true. One of the specific measures suggested by Ellis was to route the pipeline away from the commercial oyster beds, presumably to reduce impacts to the non-native oysters that occupy the beds. That re-routing may take the pipeline directly through prime Olympia oyster habitat, for all we know. The Olympia oyster apparently depends upon the existence of a hard substrate. There may be no hard substrate on the pipeline route, or the dredging may not affect substrate, or the Olympia oyster may be no different in this regard from any other oyster or invertebrate, but again we do not know. Because the county's findings regarding protection of estuarine resources, including the adopted Ellis report, do not address these issues, which appear to be legitimate issues regarding compliance with applicable criteria, we agree with petitioners that remand is necessary for the county to adopt responsive findings addressing potential impacts on the Olympia oyster.

Citizens Against LNG, slip op 14-15. Thus, this proceeding is necessary to further consider whether the pipeline project will "protect" the existing population of native Olympia Oysters colonizing Haynes Inlet.

C. What Are the Key Issues on Remand?

The applicant's consultants had initially stated that they had not seen any Olympia oysters in the proposed pipeline right of way. As it turns out, additional investigation by the applicant confirmed that certain portions of the pipeline route is inhabited by Olympia oysters. Given that reality, there are ~~three~~ two fundamental questions before the hearings officer and the Board of Commissioners:

1. To what extent is Haynes Inlet populated by Olympia Oysters, and what factor(s) currently inhibit further increases in the population of these native oysters in Haynes Inlet?

Note: Because the parties submitted conflicting evidence on these two points, the Board is tasked with determining which party provided the better evidence regarding the number and location of Olympia oysters in Haynes Inlet.

2. Is there substantial evidence in the whole record to support a finding that the applicant's Oyster Protection Plan and Oyster Mitigation Plan will "protect" the resource productivity of existing Olympia oysters in Haynes Inlet?

Note: The question can be also framed in the following manner: Is there substantial evidence to support a finding that construction of the pipeline will not result in anything other than temporary, insignificant, and *de-minimus* impacts on the population of Olympia oysters due to causes such as loss of habitat / burial and/or loss of reproductive ability due to increased sedimentation?

This overarching question can be further expanded to include a set of more discrete questions:

2a. Will the applicant's "Protection Plan," which calls for the relocation of all oysters in the proposed pipeline right of way to a site a few hundred feet northwest of the right of way, "protect" the resource productivity of existing Olympia oysters?

2b. Will the applicant's "Mitigation Plan," which calls for the addition of 30 cubic yards of Pacific oyster shell to the mudflats (in the vicinity of MP 2.9-3.2), create additional hard substrate that will further enhance the recovery of Olympia oysters in Haynes Inlet?

2c. Will the dredging operations create sedimentation that will result in anything other than temporary, insignificant, and *de-minimis* impacts on the population of Olympia oysters in Haynes Inlet?

D. Scope of Review (Substantial Evidence)

1. Review of General Principles of Substantial Evidence

The outcome of this case turns on questions of substantial evidence; specifically, the question of which evidence the Board of Commissioners finds more credible and compelling. The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995). Stating the rule in the negative gives further insight into its meaning: "A finding lacks substantial evidence when the record contains credible evidence weighing overwhelmingly in favor of one finding and the agency finds another without giving a persuasive explanation." *Canvasser Services, Inc. v. Employment Dept.*, 163 Or App 270, 274, 987 P2d 652 (1999); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 752 P2d 312 (1988).

In a land use proceeding, the applicant has the burden of bringing forth substantial evidence in the whole record to demonstrate that all approval standards are met. When evidence

submitted by various parties conflicts, the County must review all of the evidence in the entire record to see if the undermining evidence outweighs the evidence on which the decision-maker seeks to rely on. *Younger v. City of Portland*, 305 Or 346, 357, 752 P2d 262 (1988).

The Board is allowed to draw inferences from the evidence presented by the parties. An inference has two parts: a primary fact and a logical deduction that arises from that primary fact. *See City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981). In many cases, the deduction may be obvious from common knowledge (such as a wet street indicating a recent rain event), but in other cases, the deduction may be less obvious. In the less obvious cases, the decision-maker should explain in the findings the basis for the deduction, so that a reviewing court can review the inference for substantial reason. *Id.*

As discussed in more detail below, the Board of Commissioners is afforded a great deal of authority to evaluate both the evidence presented by the parties, as well as the credibility of persons presenting that evidence. When faced with conflicting evidence, the decision maker is entitled to select which evidence to rely upon. That decision will not be second-guessed by LUBA or the courts, so long as it is evidence that a reasonable person would rely upon to support a conclusion. *See, e.g., Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258 (1995).[2]

If there is a complete absence of information on a particular point for which the applicant bears the burden of proof, the application must be denied. *Gray v. Clatsop County*, 18 Or. LUBA 561 (1989); *DLCD v. Curry County*, 33 Or LUBA 728 (1997)(local government must make appropriate findings based on substantive evidence, not an absence of findings, point a point that the applicant bears the burden of proof.). At the end of the day, however, the substantial evidence standard is a relatively low standard of proof. Courts consider the "substantial evidence" standard to be a less onerous standard than the "preponderance of the evidence" test and the "clear and convincing evidence" standards used in most civil lawsuits,

In this case, the hearings officer has determined that the applicant has provided the County with both expert and lay person testimony that a reasonable person could rely upon to reach the decision that the Oyster Protection Plan and Oyster Mitigation Plan will adequately protect Olympia oysters in Haynes Inlet. The only question is whether the opponents have provided rebuttal evidence that "so undermines" the applicant's testimony that a reasonable person would no longer rely on it in light of the opponent's testimony. *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff'd* 113 Or App 169, 831 P2d 77 (1992). The hearings officer does not

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[2] In reviewing the evidence, LUBA and the Courts may not substitute their judgment for that of the local decision maker. Rather, LUBA must consider and weigh all the evidence in the record to which it has been directed, and determine whether, based on that evidence, a reasonable person would have relied on that evidence to draw the conclusion the local government arrived at. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). *See also Whitaker v. Fair Dismissal Appeals Board*, 25 Or App 569, 550 P2d 455 (1976) (pointing out that review of whole record for substantial evidence does not authorize a reviewing court to substitute its judgment for that of the agency as to whether an examination of all the evidence justifies the agency's action).

believe that the opponent's evidence does so, but of course the Board is free to arrive at a different conclusion.

2. Expert testimony.

The substantial evidence questions faced in this case generally hinge on "expert" testimony. Expert testimony differs from lay person testimony because an expert is allowed to give his or "opinion" about whether a standard is met. LUBA has often stated that a local government may rely on the *opinion* of an expert in making a determination of whether a proposal satisfies an applicable standard. *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 236 (1990). Additionally, LUBA has also stated that an expert witness is generally not required to explain the basis for assumptions underlying the expert's evidence, nor is evidence supporting those assumptions required to be included in the record. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458, 465 (1994); *Miller v. City of Ashland*, 17 Or LUBA 147, 170 (1988); *Hillsboro Neigh. Dev. Comm. v. City of Hillsboro*, 15 Or LUBA 426, 432 (1987).

Nonetheless, the more that an expert does to back up his opinion with facts and evidence, the more weight that a reasonable person will typically give to that opinion. *Chance v. Alexander*, 255 Or 136, 465 P.2d 226 (1970); *ODOT v. Clackamas County*, 27 Or. LUBA 141 (1994) ("Of course, we recognize that if sufficient evidence undermining an expert's assumptions is submitted during the local proceedings, it may be unreasonable for the local decision maker to rely on that expert's conclusions. In such instances, the local government's decision has a better chance of withstanding a substantial evidence challenge made in an appeal to LUBA if the record includes an explanation of, or evidence supporting, the expert's assumptions.").

An expert's *failure* to back up opinions with facts and evidence can result in his or her opinion being rejected by a decision-maker. An expert's mere conclusion, without and supporting facts or analysis to back it up, may not constitute substantial evidence in all cases. *Liberty Northwest Ins. Corp v. Verner*, 139 Or App 165, 168-69, 911 P2d 271 (1996). Stated another way, the expert's opinion should generally have some sort of clear foundation in order to be relied upon by a decision-maker. *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988); ("[s]ubstantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based."); *Dickas v. City of Beaverton*, 17 Or LUBA 574, 580-85 (1989) (Finding of adequate school capacity not supported by substantial evidence where report by school district's expert was contradicted by other evidence). For example, in *Worchester v. City of Cannon Beach*, 10 Or LUBA 307 (1983) LUBA held that when an expert witness does not offer any supporting documentation and does not state how he arrived at his conclusions, and does not explain how he is qualified to make conclusions of a scientific nature, LUBA will not find the testimony to be convincing. *Id.* at 310.

It is also important to note that lay-person testimony can, under the right set of facts, undermine contradictory expert testimony. *See Johns v. City of Lincoln City*, 35 Or LUBA 421, 428 (1999); *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999). For example, local residents may often have a better understanding of local conditions and patterns, and can use such information to undermine factual assumptions in the expert's analysis.

3. "Battle of the Experts."

This case presents a classic "battle of the experts" situation: both parties have presented dueling expert testimony from scientists and other professionals. In a "battle of the experts" case, the decision-maker is tasked with the difficult decision of deciding which of two experts is presenting the more believable and substantial testimony. This involves a complex weighing process. There are no set rules for how conflicting evidence is to be weighed, and the question may boil down to which expert the decision-maker finds to be more believable. In *Westside Rock v. Clackamas County*, 51 Or. LUBA 264, 286-7 (2006), LUBA stated:

> Finally, we note that we agree with petitioner that in a case like this one, the testimony of experts is likely to be critical. Boards of county commissioners can understand most of the fundamental concepts that are in play here, even if they are not trained as engineers or geologists. * * *.
>
> But while a board of county commissioners (or the Land Use Board of Appeals for that matter) may be able to grasp these fundamental concepts, it takes experts to collect and analyze data and draw scientific and engineering conclusions from that data. In such cases it frequently will come down to which of the experts the decision maker finds more believable.

Some factors that *may* give a decision-maker reason to choose one expert's testimony over another include:

- Does one expert lack the correct qualifications to give an opinion on a particular topic? *Tipperman v. Union County*, 44 Or LUBA 98 (2003); *Westside Rock v. Clackamas County*, 51 Or. LUBA 264, 286-7 (2006).
- Are any of the expert's key factual or legal assumptions incorrect, or cast in doubt by other evidence in the record? *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or. LUBA 261 (2006); *Ekis v. Linn County*, 19 Or LUBA 15 (1990).
- Is there solid "foundation" evidence which the expert relies on to draw his or her conclusion? (For example, a conclusion based on one "study" may, in some cases, not be a reliable as a conclusion based on many studies. Conversely, a conclusion based on one study may be more substantial than opposing conclusions based on many other conflicting studies, if there is something that distinguishes that lone study, such as newer, more refined sampling technique, etc.). *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988); *Bartels v. City of Portland*, 20 Or LUBA 303 (1990) ("[i]n view of the undisputed develop constraints present on this site, the largely unexplained expressions of confidence by [geologists] that the proposed residential development is feasible are not sufficient to comply with [the code.]").

- Does the expert fail to consider alternatives? *Wal-Mart Stores v. City of Hillsboro*, 46 Or LUBA 680 (2004).
- Are there internal inconsistencies in the expert's testimony? *Concerned Citizens of the Upper Rogue and Don Carroll v. Jackson County*, 33 Or LUBA 70 (1997).

Finally, a decision-maker may take into account some less tangible factors as well:

- How confident and decisive is the expert in his or her assessments? Does the testimony contain significant qualifying language? Vague, waffling, or hair-splitting testimony may lead a decision-maker to question the expert's conclusions.
- Does the expert come across as non-credible for any reason?
- Is the expert's opinion entitled to less weight because of the fact that he or she has a track record of being wrong in the past?
- Is the expert someone who is particularly renowned in his or her field?
- Is the expert's opinion entitled to less weight because he or she is being paid, or because he or she is clearly aligned with a certain political philosophy, particular industry, or advocacy group, etc. Note: just because an expert is being paid or is associated with a particular policy perspective or "camp" does not necessarily make their testimony inherently unreliable or unsubstantial. However, these types of intangible factors are things that a decision-maker may take note of when undertaking the process of weighing conflicting testimony.

The above-list is not intended to be exhaustive. Rather, it is a non-exclusive list of the types of consideration that a decision-maker might reasonably take into account when weighing expert testimony.

If the County determines that either parties' expert testimony was credible and sufficiently substantial to support a conclusion, then the choice of which expert evidence to believe is up to the County. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to on recons* 151 Or App 16, 949 P2d 1225 (1997); *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002); *Eugene Sand & Gravel v. Lane County*, 44 Or. LUBA 50 (2003).

4. The Opponent's Conundrum: Provide Direct Evidence of Non-Compliance, or Present Evidence Intended to Critique the Applicant's Evidence.

In its arguments to the hearings officer, the applicant repeatedly chastises the opponents for not coming up with much in the way of *direct* evidence of a failure to protect the oyster resource, but instead merely offering critiques of the applicant's evidence. The hearings officer does, in this opinion, express a certain degree of agreement with the applicant's sentiment in this regard. At the same time, the hearings officer recognizes that opponents often do not have the financial resources to commission their own independent studies. It is important to remember that the applicant has the burden of proof on issue of whether its construction will protect the

resource. The opponents' evidence should not be discounted, *in and of itself*, merely because it is a critique and not direct evidence of non-compliance.

In *Wal-Mart Stores, Inc. v. City of Bend,* 52 Or. LUBA 261 (2006), the hearings officer denied a conditional use permit for a Wal-Mart store. The hearings officer chose to believe the opponents' testimony over that provided by the applicant's experts. The applicant, Wal-Mart, appealed to LUBA, and argued that the opponents' testimony should have been discounted because it consisted solely of a critique of the Wal-Mart's evidence. LUBA rejected that argument, as follows:

> Neither do we agree with petitioner's suggestion that the opponents' experts' testimony should be discounted significantly because it is largely a critical review of the work that petitioner's experts have done rather than an original effort by those experts to predict how the expected traffic will affect transportation facilities. As we have already noted, that difference in approaches is largely a function of, and dictated by, the fact that the applicant has the burden of proof and the opponents do not.

LUBA concluded by stating:

> The critical issue for the local decision maker will generally be whether any expert or lay testimony offered by * * * opponents raises questions or issues that undermine or call into question the conclusions and supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts.

Id. at 276. Thus, although an opponent's direct evidence will often be much more persuasive than a mere critique, an effective critique can be enough to put an expert's evidence into question. *See, e.g., Oregon Shores Conservation Coalition v. Coos County,* 55 Or LUBA 545 (2008), *aff'd w/o op.* 219 Or App 429, 182 P.3d 325 (2008).

5. Conclusion.

The hearings officer believes that the conclusions made herein would be affirmed if appealed. However, the Board of Commissioners does not have to accept the conclusions of the hearings officer. The Board has the authority to: (1) re-weigh the evidence, and (2) modify or overturn the hearings officer's conclusions. There are other conclusions that could be drawn from the evidence, as well as other plausible interpretations that could be adopted by the Board. As discussed above, the Board has fairly wide latitude under state law to draw its own conclusions about the evidence.

E. What are the Applicable Legal Standards?

On remand, there is only one core legal standard that the Board of Commissioners must apply. As a short-hand, the hearings officer will refer to this standard as the "protect" standard.

As relevant here, the "protect" standard is found in two places in the County's zoning code: the management objectives for the two aquatic zoning districts at issue: 11-NA and 13A-NA.

1. Overview of the Management Objective Standards: Aquatic Zoning Districts 11-NA and 13A-NA.

Under LUBA's remand order, the two applicable substantive standards are the management objectives for the aquatic zoning districts 11-NA and 13A-NA. Zoning district 11-NA is located on the east side of the Highway 101 Bridge, and consists primarily of intertidal mud flat areas. Zoning district 13A-NA is generally located on the west side of the bridge, and consists primarily of sub-tidal areas. The management objective for zoning district 11-NA is set forth at Coos County Zoning and Land Development Ordinance (LDO) 4.5.405, and provides, in relevant part:

> Management objective: This extensive intertidal/marsh district, which provides habitat for a wide variety of fish and wildlife species shall be managed to protect its resource productivity. (Emphasis added).

The management objective for zoning district 13A-NA is set forth at LDO 4.5.425, and provides, in relevant part:

> Management objective: This district shall be managed to allow the continuance of shallow-draft navigation while protecting the productivity and natural character of the aquatic area. (Emphasis added).

These two standards are nearly identical – 11-NA requires the county to "protect" resource productivity, and 13A-NA requires the county to "protect" the productivity and natural character of the aquatic area. Under LUBA's remand order, the County is required to consider potential impacts of the pipeline on the Olympia oyster, and to evaluate the extent to which the applicant's proposal will "protect" such oysters under the two objectives quoted above. Thus, the scope of this proceeding is narrow.

2. LUBA Case Law Interpreting the "Protect" Standard.

LUBA discussed what is required to "protect" aquatic resources in its final opinion remanding this case:

> Petitioners also argue that the obligation to 'protect' aquatic resources requires reducing harm to such a degree that there is at most a *de minimis* or insignificant impact on aquatic resources, including both commercial oyster beds and Olympia oysters, under the reasoning in *Columbia Riverkeeper v. Clatsop County*, ___ Or LUBA ___ (April 12, 2010), *aff'd* 238 Or App 439, 243 P3d 82 (2010), and that measures that simply reduce or mitigate impacts on estuarine resources are not sufficient to 'protect' those resources,

> for purposes of local comprehensive plan provisions that implement Statewide Planning Goal 16 (Estuarine Resources).
>
> Turning to the last argument first, intervenor argues that the county did not attempt to rely on measures that simply reduce or mitigate impacts, as was the case in *Columbia Riverkeeper*, but instead found, based on substantial evidence, that the impacts will be 'temporary and insignificant' and thus estuarine resources will be 'protected.' We agree with intervenor that the county did not misunderstand its obligation to 'protect' estuarine resources, and that findings that impacts will be 'temporary and insignificant' are focused on the correct legal standard for purposes of the comprehensive plan management district language that implements Goal 16.

Citizens Against LNG vs. Coos County, ___ Or LUBA ___ (LUBA No. 2010-086, March 29, 2011), slip op 13-14. Thus, LUBA concluded that Coos County's findings that impacts on Olympia oysters would be "temporary and insignificant" are sufficient to satisfy the "*de minimis*" standard of *Columbia Riverkeeper*.

The LUBA opinion in the *Columbia Riverkeeper* case is also instructive on the meaning of "protect" within the context of Goal 16. That case involved a proposed rezoning of 46 acres of submerged land from "Aquatic Conservation" to "Aquatic Development" in order to allow dredging of the river for a proposed LNG facility within the rezoned area. The submerged lands at issue would be permanently impacted by the proposal. The project proposed a new channel, turning basin and docking facility in a location identified as a "traditional fishing area" in the Columbia River. The county comprehensive plan included a requirement that traditional fishing areas "shall be protected when dredging, filling, pile driving or other potentially disruptive activities occur."

The county found that the resources could be adequately "protected" through use of very general minimization and mitigation measures designed to either reduce harm to general estuarine values or to attempt to reduce harm to the specified resources. One example of "protecting" the resource cited by the county was the fact that applicants designed the dredge footprint "to maximize efficient use of the current basin, minimize the amount of dredging and reduce impacts to fisheries, thereby reducing the area impacted and protecting the habitat as a whole." *Columbia Riverkeeper*, footnote 6. In other words, the applicant merely proposed to make the impacted area a little bit smaller.

LUBA noted that the word "protect" is defined in Goal 16 as "save or shield from loss, destruction, or injury or for future intended use," and that "the county's interpretation of the meaning of 'protect' appears to conclude that protection of specific resource can be accomplished through use of some measures that either reduce harm to general estuarine values or attempt to reduce harm to the specified resources." *Id.* at slip op 16. LUBA then discussed the meaning of the word "protect" within the context of Goal 16, and held:

> Thus, the development that is to be allowed by the disputed rezone is not consistent with the Goal definition of 'protect' unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a degree that there is at most a de- minimis or insignificant impact on the resources that those policies require to be protected."

Id. at slip op 18-19.

As discussed in more detail below, the applicant's proposal fits within the parameters of the type of measures described by LUBA that can "protect" resources within the meaning of Goal 16. Unlike the situation in *Columbia Riverkeeper*, where the proposal was just to *minimize* impacts on resources that would without question be permanently harmed by development, in the present case the evidence supports a finding that the Olympia oysters will - as a whole - not be impacted, either temporarily or permanently, by pipeline construction. Even the temporary impacts will be offset by the proposed mitigation plan, which will increase the population densities of Olympia oysters within Haynes Inlet.

In considering the question, the hearings officer notes that no party here argues that the "protect" standard is so strict that it absolutely precludes any individual oysters from being be killed or harmed (*i.e.* "taken."). The fact that the Code allows development of utilities, bridge crossings, and aquaculture in the 11-NA zone precludes such as strict interpretation. The standard allows some individuals to be "taken" so long as the overall level of harm to the population is *de minimis* or insignificant.

a. The Meaning of "*De minimis.*"

The hearings officer asked the parties to research Oregon case law to see if there is any useful guidance which would tend to give meaning to the phrase "*de minimis*." The hearings officer attempted some independent research on the issue as well. Neither the hearings officer or any other party was able to come up with any research that was particularly enlightening.

The phrase "*de minimis*" is defined as follows in Black's Law Dictionary, Sixth Edition:

> "De minimis non curat lex. The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles. Provision is made under certain criminal statutes for dismissing offenses which are "de minimis." *See, e.g.*, Model Penal Code §2.12."

The opponent's attorney, Ms. Corrine Sherton, cites to the Meriam Webster's On-Line Dictionary, which defines "*de minimis*" as "lacking significance or importance: so minor as to merit disregard. Along those same lines, the term "insignificance" is defined as "not worth considering, unimportant." Unfortunately, all of these are value-laden definitions that provide little in the way of concrete guidance.

Ms. Sherton has also points out that "temporary" impacts cannot be presumed, as a matter of law, to be "insignificant." *See Hashem v. City of Portland*, 34 Or LUBA 629, 632 (1998). While *Hashem* does say exactly that, the context in which the statement arises in that case makes it weak precedent for this case. Nonetheless, the hearings officer does agree, to a certain extent, with the general thrust of the argument. It is possible that a temporary impact on a resource could potentially be substantial. For example, a one-time release of toxic chemicals that kills a large quantity of oysters, would be substantial even though it only happens one time. To Ms. Sherton's point - excessive sedimentation could be the equivalent of a release of toxic chemicals in terms of its effects on the oyster population.

The applicant's attorney, Mr. Roger Alfred, states that "a detailed analysis of what constitutes "*de minimis* or insignificant impacts" is not necessary in this proceeding." According to the applicant:

> The applicant has provided substantial evidence to support a finding that there will be *no* negative impacts on Olympia oysters resulting from construction of the pipeline. The applicant's proposed relocation and mitigation plan will not merely *protect* existing oysters in Haynes Inlet, but will actually result in a significant increase in native oyster populations by expanding the amount of hard substrate habitat in the inlet.

In a letter dated October 10, 2011, Ms. Corrine Sherton agrees with Mr. Alfred that it is not important to parse out a precise definition of *de minimis*, but for diametrically opposed reasons. She believes that the evidence in the record leads to a clear finding of significant impact on the Olympia oysters and their habitat.

The hearings officer is not in agreement with the applicant that "that there will be *no* negative impacts on Olympia oysters resulting from construction of the pipeline." Certainly, it stands to reason that some of the Oysters proposed for relocation will be missed and ultimately killed. It is possible, though unlikely, that others may not survive transport and relocation. Finally, there may be some overall disruption with the rate of recovery of the oyster population, resulting from sedimentation and other effects. For this reason, the hearings officer believes that the concept of "*de minimis*" harm is highly relevant here. Thus, the hearings officer seeks to ensure that the applicant's plan is feasible and likely to "protect" the resource productivity of the Olympia oyster by demonstrating that the overall level of harm to the population is *de minimis* and insignificant.

II. LEGAL ANALYSIS

According to the applicant, there is a legitimate question as to whether the management objectives for both the 11-NA and 13A-NA zoning districts must be considered. Direct evidence provided by professional divers hired by the applicant indicates that there are *no* Olympia oysters, or suitable habitat, located within the pipeline right of way in the 13A-NA zoning district. However, there is evidence in the record of some Olympia oysters being located on the riprap along the southern edge of the Trans-Pacific Parkway, which is within the 13A-NA zoning district; therefore, the management objectives for both zoning districts should be applied.

A. Compliance with 11-NA Management Objective (Intertidal Mudflats East of Hwy 101).

The potentially applicable standards on which LUBA remanded are the management objectives for the 11-NA and 13A-NA aquatic zoning districts. The 11-NA zoning district is generally contiguous with the boundaries of Haynes Inlet, on the east side of the Highway 101 bridge, which is predominantly an intertidal mud flat area. The 13A-NA zoning district is located on the west side of the Highway 101 Bridge and to the south of Trans-Pacific Parkway, and includes more subtidal areas.

For purposes of this proceeding, the primary standard is the 11-NA management objective for Haynes Inlet. As noted in the Ellis Oyster Survey, Olympia oysters are typically most abundant in shallow subtidal areas but are also found on the lower elevation portions of subtidal flats. In Haynes Inlet, conditions appear to favor a portion of the intertidal mud flat habitat rather than subtidal habitat because no evidence of suitable substrate or Olympia oysters were found in the subtidal portion of the pipeline right of way. Figure 7 in the Ellis Oyster Survey depicts the grab sample locations in the subtidal areas of the 13A-NA zoning district, which did not reveal the presence of any Olympia oysters or the hard substrate that is required for their habitat.

1. Issues Related to the Density of Olympia Oysters Along the Pipeline Route.

a. Applicant's Initial Evidence on Remand: the "Ellis Oyster Survey."

In support of its application for approval by the Coos County Planning Department, PCGP submitted a report that was flawed with respect to how the proposed Pacific Connector Gas Pipeline might impact the Olympia oyster (*Ostrea lurida*) and the "resource productivity" of Haynes Inlet. Page 8 of the original 2010 report stated:

> "The only native oysters to Coos Bay are Olympia oysters * * *. However, they are not known to inhabit the Project Action Area (ODLCD, 1998)"

The applicants now concede that that the above statement is incorrect insomuch as it suggests that Olympia oysters are not present in the Project Action Area.[3]

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[3] Ms. McCaffree takes Dr. Ellis to task for this oversight, noting that Dr. Ellis and his team had previously opined that no Olympia oysters were found along the pipeline route. Ms. McCaffree challenges the credibility of Dr. Ellis based on a statement included in his March 2009 Wetland Mitigation Plan that no native oysters were observed on mudflat habitat or other habitat types along the pipeline route. This is addressed by Dr. Ellis in his letter dated October 17, 2011:

> "The prior statement that no Olympia oysters were observed on mudflat habitat or other habitat types along the pipeline route was included in our March 2009 Wetland Mitigation Plan, and was based on observations made during the eelgrass survey of the pipeline right of way . The eelgrass survey was conducted primarily from a boat when water depth was sufficiently low to allow observation of eelgrass on the substrate. The primary focus of the survey was to

In response to the LUBA remand, the applicant again hired Ellis Ecological Services to undertake a more specific survey of the 11-NA and 13A-NA zoning districts to identify the locations of any Olympia oysters in or around the proposed pipeline route.

The applicant's biologist, Bob Ellis of Ellis Ecological Services, undertook a survey of the intertidal portions of Haynes Inlet east of the Highway 101 bridge on June 28-30, 2011. Mr. Ellis and his two-person team spent two long days traversing, on foot, the entirety of the intertidal portions of the 250-foot right of way, using GPS units to map their tracks and the specific locations where they found Olympia oysters.

After completing the survey, Ellis Ecological produced a technical memorandum dated September 13, 2011 entitled "Pacific Connector Gas Pipeline: Olympia Oyster Survey," ("Ellis Oyster Survey"). Sections 1 and 2 of the Oyster Survey provide introductory and background information regarding Olympia oysters in general and their presence in the Coos Bay area. Section 3 of the Ellis Oyster Survey provides a detailed description of the survey methods and results, with Figure 8 illustrating specific locations within the 250-foot pipeline right of way where Olympia oysters were found. Section 4 provides an analysis regarding the potential impacts from pipeline construction on Olympia oysters. Section 4.1 provides proposed protection methods that will protect existing oysters from any adverse impacts, and will ensure the continued viability of Olympia oysters in Haynes Inlet.

The Ellis Oyster Survey provides the following direct evidence regarding the number and location of Olympia oysters within the pipeline right of way:

- The vast majority of the Haynes Inlet intertidal areas are mudflats with no hard substrate habitat that would support Olympia oysters.

- There are, generally speaking, only very low densities of Olympia oysters within the 0.3-mile section of the pipeline route between mileposts 2.9 and 3.2. Specifically, the surveyors found 79 Olympia oysters within the 0.3-mile segment and only 10 Olympia oysters in the remaining 2.1 miles. Oyster Survey, Figure 8.

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identify the location of eelgrass beds along the proposed pipeline crossing of Haynes Inlet. However, during the eelgrass survey no concentrations of substrate that would be suitable for Olympia oyster (*e.g.* Pacific oyster shells, large pieces of bark, rocks or gravel) and no Olympia oyster were observed. Observations made during the eelgrass survey provided the best available site-specific information at the time the previous testimony was submitted. The prior statement was accurate, because we observed no native oysters or their habitat in the mudflat areas during the eelgrass survey. Also, the statement is not inconsistent with our current survey because we encountered virtually no Olympia oyster or their habitat in the mudflat areas east of MP 3.2." Oct. 17 letter from Bob Ellis, page 2.

The applicant has provided direct and credible evidence regarding the amount and location of Olympia oysters in Haynes Inlet; meanwhile, the opponents have provided only estimates based largely on unsupported assumptions which are contradicted by their own evidence. The weight of the evidence strongly favors recognition that the applicant's Oyster Survey constitutes substantial evidence that can relied upon by the County.

- The surveyors found one high-density colony of Olympia oysters near milepost 2.9 where a large quantity of Pacific oyster shells had been discarded by a neighboring commercial oyster farm, creating a non-representative amount of habitat for Olympia oysters in that small location (approximately 1,400 square feet). *See* Oct. 7, 2011 letter from Bob Ellis, page 2.

- Ellis submitted testimony, based on his personal experience walking the length of the pipeline route and the Oyster Survey that his team produced, that the total number of Olympia oysters "were in the hundreds and probably would not fill a 5-gallon bucket if all were collected from the right of way." Oct. 7, 2011 letter from Bob Ellis, page 1.

The hearings officer finds that the Ellis Oyster Study constitutes substantial evidence with regard to the presence and densities of Olympia oysters located in the intertidal areas of the Project Action Area (*i.e.* between milepost 4.1 and 2.8.). No evidence presented by any party convincingly undercuts this evidence.

Perhaps the most illuminating information from the Ellis Oyster Survey relates to the fact that the mudflats comprising the pipeline route between mileposts 4.1 and 3.2 are mostly devoid of suitable Oyster habitat, which resulted in the absence of oysters. The applicant provided photographs that show representational depictions of the environment along the route. *See* Ellis Oyster Survey, at p. 11 (Figure 6), pg 18 (Figures 15 and 186). These images show mudflats devoid of any significant hard substrate needed for oyster habitat. What little hard substrate exists appears to be mostly of human origin (scrap metal, discarded Pacific oyster shells, etc.).

The area located between milepost 3.2 and 2.9 proved to have the highest densities of Olympia oysters in the pipeline route, but even then, the densities were relatively low (79 individuals over 3/10 of a mile, excepting the large colony attached to the patch of discarded Pacific Oyster shells).

The Ellis Oyster survey confirms one of the core findings of the 2009 Groth & Rumrill article:[4] that Olympia oysters generally require hard substrate for attachment, and typically are affixed to the shells of larger Pacific oysters, other Olympic oysters, clam shells, rock surfaces, scrap metal, metal pipes, etc. This explains their presence in the vicinity of existing oyster beds. It also explains why the rip-rap area is so heavily colonized: the Ellis Oyster Survey notes that Olympia oysters are "common and abundant" on the riprap that forms the eastern edge of Highway 101 where it crosses Haynes Inlet (Oyster Survey at 14).

In the hearings officer's estimation, the fact that it would be so easy to double-check the Ellis Oyster Survey makes this survey highly credible. In other words, Dr. Ellis and his team knew that they had to be accurate in how many Olympia oysters they reported at any given location, because their credibility would be completely destroyed if someone double-checked

[4] On page 54 of their 2009 article "*History of Olympia Oysters in Oregon Estuaries*," Groth & Rumrill concluded that "Hard surfaces (shell rubble, gravel, rip-rap, and rock) that are the preferred substratum for settlement of *O. lurida* in Coos Bay are not readily available in Haynes Inlet." As a side note, Groth and Rumrill seem to contradiction themselves on page 55 of the same study, when they state (in the context of a discussion about Haynes Inlet): "High densities of *O. lurida* are limited to locations where substrate is suitable. Hard substrate (i.e. sandstone, shell, bark, basalt, and gravel) is readily available throughout this area and lends to even distribution."

their work and found that Ellis' crew had under-reported oyster densities in any significant manner.[5] This is particularly true since Ellis' prior reporting on the issue had been found to be inaccurate.

b. Discussion of Dr. Rumrill's Oyster Survey Relied on By the Opponents.

On June 29th and June 30th, 2011, a team led by Dr. Steven Rumrill, Research Program Coordinator, South Slough National Estuarine Research Reserve Estuarine and Coastal Science Laboratory in Charleston, Oregon undertook a survey of Olympia oysters at nine sites within Haynes Inlet. It does not appear that the Rumrill survey was undertaken for the specific purpose of rebutting the applicant's evidence. Rather, the Rumrill survey appears to have undertaken independent of the PCGP case, and seems to merely be aimed at confirming the presence and densities of Olympia Oysters at selected locations within Haynes Inlet. That fact gives the Rumrill survey a high degree of reliability as evidence, as far as it goes, but it severely limits its usefulness in answering the key questions presented in this case.

Dr. Rumrill and his team chose nine (9) locations in which to look for Olympia Oysters, The locations selected for their search seems to be based on ease of access to those locations. Four of the nine locations were on the riprap along the sides of the Highway 101 bridge and the Trans-Pacific Parkway (opponents' locations numbered 1-4). High populations of adult and juvenile Olympia oysters (up to 28 individuals per a ~10" by 10" square) were found in the rip-rap. Another four of the nine locations were on rocky shorelines. Patchy populations of adults and juveniles were found at these four other sites. At one site, a mudflat the opponents call "site number 9," Olympia oysters were not found. That site is the only location that is actually within the pipeline's right of way. Dr. Ellis and his team found one Olympia oyster in that general vicinity.

Thus, the overall conclusion of the 2011 Rumrill survey is that the Olympia oysters in Haynes Inlet show a clear preference for rip-rap, and, presumably, other large rocky outcroppings. This is consistent with the findings of the article by Kerstin Wasson entitled *Informing Olympia Oyster Restoration: Evaluation of Factors that Limit Populations In a California Estuary*, Wetlands, 4 May 2010, at p. 455, 457.

Inexplicably, the opponents did not commission a targeted survey that searched for oysters along the proposed pipeline's actual route. Rather, the opponents cite to the Rumrill survey and state:

> Abundant adults and juveniles were found at four of the nine sites, including one site (Site 3) that is directly in the path of the proposed route of the Pacific Connector Gas Pipeline. At this site, the density of Olympia oyster was 448 individuals per square meter.

[5] In this regard, this case differs from the typical land use case because opponents have equal access to the site. In most land use cases, opponents cannot gather evidence on the applicant's site without running the risk of being found guilty of criminal and/or civil trespass.

See Dr. Chernaik's Letter dated Sept. 13, 2011, at p. 5. However, a closer look at the Rumrill survey reveals that "site 3" is located on the riprap supporting the bridge and causeway, and it not a site that will be directly disturbed by the pipeline construction. Therefore, it is simply not true to state that site 3 is "*directly in the path*" of the proposed route of the Pacific Connector Gas Pipeline. In the hearings officer's opinion, these types of overstatements tend to lower the credibility of Dr. Chernaik's[6] analysis and predictions.

Nonetheless, the opponents seek to draw conclusions about the potential density of oysters along the pipeline route from the Rumrill survey. Dr. Chernaik opines:

> During a recent field survey conducted in June 2011, Olympia oysters were observed to occur in the intertidal zone of Haynes Inlet at densities as high as 28 Olympia oysters/0.0625 m^2 (site 3) and at densities as low as zero (site 9). These values scale up to a range between 0 to 448 Olympia oysters/m^2 in the intertidal zone. The distribution and abundance of Olympia oysters that inhabit the deeper subtidal regions of Haynes Inlet and North Inlet is currently unknown, however their abundance is patchy in intertidal zone and assumed to be patchy in the subtidal zone as well. Considering that, as of 2006, Olympia oysters were observed within Haynes Inlet at the relatively low density of 5 oysters per square meter, it is possible to use this low-density value to estimate that the proposed 2.5 mile segment of the Pacific Connector Gas Pipeline may result in a direct "take" of nearly 1.5 million Olympia oysters within the 74.3 acres of intertidal and subtidal habitat.[7]

See Dr. Chernaik's Letter dated Sept. 13, 2011, at p. 9. This analysis is deeply flawed for the simple fact that it assumes, without any evidentiary support, that the entirety of the 2.5 mile pipeline segment contains oysters at an average density of 5 oysters per square meter. The unstated assumption, that the entity of the pipeline route contains hard substrate that supports oysters, is simply wrong. Thus, this portion of Dr. Chernaik's analysis does not constitute substantial evidence because it based on an assumption that is specifically contradicted by undisputed facts in the record. *Friends of Oregon v. LCDC*, 83 Or App at 286 ("[s]ubstantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based.").

The hearings officer finds that the 2011 Rumrill survey constitutes substantial evidence regarding both the confirmed presence of Olympia oysters at nine locations in Haynes Inlet (and presumably, other locations within Haynes Inlet which features similar habitat, including hard substrate, similar salinity, water depth, etc), as well as the reported densities of Olympia oysters

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[6] Giving him the benefit of the doubt, the hearings officer believes that Dr. Chernaik meant to say that site three is very close in proximity to the pipeline route.

[7] (5 Olympia oysters per m^2) X (4,000 m^2 per acre) = 20,000 Olympia oysters per acre. (20,000 Olympia oysters per acre) x (74.3 acres) = 1,486,000 Olympia oysters directly impacted by the Pacific Gas Connector Pipeline.

at those locations. However, the hearings officer specifically rejects any effort to estimate the total population of Olympia oysters in Haynes Inlet or in the pipeline route based off of the 2011 Rumrill Survey, the 2006 survey, or any other survey. It seems rather obvious that locations that feature similar habitat to that identified in the Rumrill survey will potentially have similar densities of oysters, all other environmental factors being equal. However, estimates of oyster densities on rip-rap or rocky shorelines says little about the population densities of oysters living in the mudflats or in the sandy subtidal areas of Haynes Inlet.

If the opponents really wanted to credibly challenge the Ellis Oyster Survey, it was incumbent upon them to conduct a survey of their own *along the pipeline route*. At the very least, the opponents should have spot-checked the Ellis Oyster Survey. Any evidence of underreporting in the Ellis study would have been highly damning evidence. However, the opponents never generated such direct evidence. At the hearing, the hearings officer went out of his way to indicate the need for such evidence, and gave both parties enough time to develop this sort of evidence.

The opponents' failure to present direct evidence about the density of Olympia oysters in the proposed pipeline route severely undermines their approach to this case. The opponents seek to use the Rumrill survey as evidence of overall population densities, but that would only work if the habitat along the route were both (1) fairly uniform, and (2) similar to the areas in the Rumrill study where oysters were found. The hearings officer is reminded about the old joke about the guy who looked for his keys at night in an area where the light was plentiful, even though he knew he lost his keys in a different location.[8] A similar analogy occurs here: the opponents point to high populations of Olympia Oysters in the rip-rap next to the causeway, and yet seem to have been unwilling or unable to look for Olympia oysters along the actual pipeline route.

Jody McCaffree states that the hearings officer should believe the opponent's experts over PCGP's "hired gun" experts: "It would seem more reasonable and reliable to have the word of an Olympia Oyster expert over someone who is paid by the very industry wanting to do to the development, particularly since it would be in the best interest of the Pacific Connector Gas Pipeline to find that there were no Olympia oysters or very few that would have to be dealt with." *See* McCaffree letter dated Oct. 10, 2011.

In the abstract, the hearings officer is sympathetic with the sentiment set forth in Ms. McCaffree's statement quoted above. After all, it can be expected that all experts hired by

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[8]The joke goes as follows:

> A drunk was crawling about on the sidewalk under a lamppost at night.
> A police officer came up to him and inquired, "What are you doing?"
> The drunk replied, "I'm looking for my car keys."
> The officer looked around in the lamplight, then asked the drunk, "I don't see any car keys. Are you sure you lost them here?"
> The drunk replied, "No, I lost them over there", and pointed to an area of the sidewalk deep in shadow.
> The policeman then asked, "Well, if you lost them over there, why are you looking over here?"
> The drunk looked at him and said, "Because the light is better over here."

advocates to a land use proceeding are going to present evidence in a light favorable to their clients, at least to the extent that they can credibly do so. However, the hearings officer must make a decision based on the evidence in the record, while keeping in mind that the applicant bears the burden of proof. In this case, there are only two pieces of direct evidence that provide information about the presence of Olympia oysters along the pipeline route: the Ellis Oyster Survey and the portion of the 2011 Rumrill study addressing "Site 9." There has been no "Olympia Oyster expert" that has actually walked the proposed right of way. None of the opponent's "critique evidence" sufficiently undermines the direct evidence set forth in either of the two surveys mentioned above. As Dr. Ellis correctly notes, "it is interesting that * * * the opponents prefer to criticize the methodology of the [Ellis] survey and challenge its results, rather than simply conducting their own survey of the pipeline right of way." *See* Ellis letter dated Oct. 17, 2011. Moreover, while it seems true that Dr. Rumrill is very credible expert on Olympia oysters, he specifically does not provide his "word" (opinion) regarding the presence of Olympia oysters along the pipeline route.

Again, had the opponents actually provided evidence that proved that the PCGP scientists had actually missed significant quantities of oysters in their survey, then the Ellis Oyster Survey would not constitute substantial evidence. However, merely providing evidence that oysters are abundant in the nearby rip-rap and rocky shoreline, combined with evidence that Olympia oysters are hard to visually locate and identify on the mudflats, is not sufficient to undermine the Ellis Oyster Survey to the point where it can be said that a reasonable person would not rely on the Ellis Oyster Survey to support a conclusion regarding the rough number of oysters in the pipeline right of way. The applicant has met its burden of proof to demonstrate that the amount of oysters in the actual pipeline route is so low as to be insignificant to the overall productivity of the resource.

To some extent, the Rumrill survey actually supports the applicant's case. First, the fact that the Rumrill survey found no Olympia oysters in the single mudflat location they surveyed supports a finding that the mudflat areas do not typically provide hard substrate habitat, and therefore do not contain significant numbers of Olympia oysters. Indeed, the fact that the Ellis Oyster Survey actually found an oyster in that same general location lends further credibility to the Ellis Survey.

Second, the presence of relatively large number of adult Olympia oysters in the rip-rap, indicates that these mature oysters will be able provide an ample supply of larvae to populate the Pacific oyster shells that will be deposited over the pipeline route by PCGP after the construction is complete. The hearings officer finds, in this regard, that it is the lack of hard substrate that is the primary factor that is inhibiting the expansion of Olympia oyster habitat in Haynes Inlet. *See* Groth & Rumrill (2009), at p. 57 ("Our field observations indicate that the availability of suitable substrate is likely a key limiting factor that hinders further recovery [of Olympia oysters] in Coos Bay."); Chernaik Leteter dated Oct. 10, 2011, at p. 7 (Quoting USACE study). There is no evidence of other limiting factors, such as predation by snails or flatworms, competition from other space occupants, water pollution, or disease. *See Factors Preventing the Recovery of Historically Overexploited Shellfish Species Ostrea Lurida*, (Trimble 2009). In this regard, the oft-repeated real estate adage "built it, and they will come," seems to be particularly instructive: if the goal is to increase the density of Olympia oysters in Haynes Inlet, the solution is more hard substrate. *See* Groth email dated Nov. 10, 2011. *Compare* Wasson, *Informing Olympia Oyster*

Restoration: Evaluation of Factors that Limit Populations in a California Estuary, Wetlands, 4 May 2010, at p. 457 (noting that the *presence* of hard substrates in a California estuary did not guarantee the presence of oysters, the *absence* of hard substrate in the same estuary did guarantee the absence of oysters).

2. Issues Related to the Applicant's Oyster Protection/Relocation Plan (11CA Zone)

a. Relocation of Olympia Oysters who Currently Live in the Pipeline's Proposed Right of Way

In order to avoid impacts from pipeline construction, the applicant is proposing to protect the Olympia oysters by collecting all live oysters within the 250-foot wide pipeline right of way and relocating them by hand to adjacent mud flat areas to the northwest of the pipeline route. Because Olympia oysters typically attach themselves to hard substrate such as rocks, shells, and metal, the applicant's proposal essentially involves moving all of the hard substrate in the route which harbor oysters.

The applicant's three-person team found 89 Olympia Oysters along the pipeline route over a two-day period (not including the 1400 s.f. "hotspot" caused by the man-made introduction of hard substrate in the form of discarded Pacific oyster shells). At the hearings, Dr. Ellis estimated the number of oysters that would need to be relocated as a "bucketful." Even if Dr. Ellis's team found only 10% to 25% of the Olympia oysters in the right of way, it still seems feasible for a larger team to capture most, if not all, of the oysters in one or two days.

i. The Applicant Can Feasibly Train a Team to Locate Oysters.

The opponents do not believe that the applicant's relocation plan is feasible. The opponents argue that Dr. Ellis and his team of workers will miss too many oysters during the removal process, because they may have an insufficient level of training in locating and identifying oysters. The hearings officer agrees that it would be inappropriate to use untrained day laborers to conduct this task. However, with a reasonable amount of training and supervision, a team of college undergraduate or graduate-level biology students or other similar personnel could easily master the task. In the case of the Glenbrook Nickel site, the oyster removal was conducted by personnel from ODFW and the South Slough National Estuarine Reserve (SSNERR). It is not clear from the record whether these personnel had any specialized training in oyster location / identification.

The opponents take great pains to explain that oysters can be hard to detect and identify. In a letter dated October 8, 2011, Dr. Danielle Zacherl points out that "[o]ysters are notoriously morphologically plastic, difficult to identify, and in the case of the species of the genus *Ostrea*, cryptic in appearance." She further states that Olympic oysters have additional features that make them hard to spot, including: small size, heavily fouled shells, muddy habitat, and their preference for the underside of hard substrates. Dr. Chernaik uses Dr. Zacherl's statement to cast doubt on Bob Ellis' team's ability to locate oysters.

Dr. Ellis responds to in his letter dated October 17, 2011, where he acknowledges that it could be difficult to locate and identify Olympia oysters in Dr. Zacherl's study sites in Newport Bay, California. The Newport Bay site varied between 48% and 85% hard substrates. *Compare* photograph of Newport Bay, CA site, Figure 1 of Ellis Letter dated Oct, 17, 2011. However, Dr. Ellis notes that "this is a much different situation than Haynes Inlet, which is essentially a vast mudflat that contains little or no rocks, shells or other substrates, as illustrated in Figures 2 through 5." Dr. Ellis's argument seems intuitively correct to the hearings officer.

Dr. Zacherl rebuts Dr. Ellis's comments with the following discussion excerpted from her letter dated November 14, 2011:

> If the conditions are as the expert of PCGP contends ("essentially a vast mudflat that contains little or no rocks, shells, or other substrates"), then significant training would be even more essential for finding and identifying Olympia oysters in Haynes Inlet. The visual profiles of Olympia oysters can be more difficult to discern in mudflats , where individuals can be partially submerged, or otherwise obscured by the muddy floor of the intertidal zone, than in areas with large amounts of hard substrate . When we survey for oysters, the easiest locations to survey are those containing hard substrate, particularly vertically oriented substrate where mud deposition is much reduced. (Emphasis in Original)

See Zacherl Letterdated Nov. 14, 2011, at p.2. This last statement lacks credibility, in part because Dr. Zacherl has not visited Haynes Inlet and is not familiar with the conditions at that site. All of the previous testimony from both parties' experts was universally consistent in stating that the oysters generally *required* hard substrate to settle on and grow, and were only rarely found lying directly on the mud. *See e.g.,* Wasson, *Informing Olympia Oyster Restoration: Evaluation of Factors that Limit Populations in a California Estuary*, Wetlands, 4 May 2010, at p. 457 (noting that the *presence* of hard substrates in a California estuary did not guarantee the presence of oysters, the *absence* of hard substrate did guarantee the absence of oysters). Hard substrate, whether it is rocks, shells, or scrap metal, is particularly easy to spot on the mudflats in Haynes Inlet, in part because of color differences, but also because the water traveling around the objects creates long indentations in the sand and mud that are easy to spot.

Dr. Zacherl's comment, quoted above, seems to imply that Olympia oysters can routinely grow *without* the presence of hard substrate. If this is indeed the correct interpretation of the above quoted language, then the conclusion is rejected as being inconsistent with all of the other expert testimony in the record, including the Wasson article cited above. If, on the other hand, the suggestion is that both the oyster itself as well as the hard substrate to which it is attached can be concealed by the mud, that suggestion is contradicted by the photographic evidence in the record. In particular, the photographs included with the Ellis Oyster Survey seem to provide convincing evidence that the Olympic Oysters in Haynes Inlet are relatively easy to spot on the mudflat.

In this regard, Dr. Ellis's ultimate point on this issue is well-taken: even if the Olympic oyster it itself hard to identify, the hard substrate that it lives on is certainly not hard to identify.

Indeed, the photos included in the Ellis letter Dated Oct. 17, 2011 depict a large flat expanse of mud with no rocks or other obvious hard substrate. *See Id.* at Figure 2-5. In layman's terms, the primary job of the Ellis team in conducting its survey was to look for anything sticking out of the mud and turn it over. As more scientifically stated by Dr. Ellis, "the surveyors examined both the upper and lower sides of all hard substrates that were encountered, and hard substrates were exceedingly rare." Oct. 17 letter from Bob Ellis, page 4.

If Dr. Chernaik, Dr. Zacherl, Dr. Trimble, or any of the other experts had taken the time to physically photograph an example of one of these hard-to-spot oysters on the mudflat, then the hearings officer's opinion might be different. However, all the hearings officer can base his opinion on is the evidence in the record. In this case, the two PhD-level scientists who actually walked the same portion of right of way (*i.e.* site 9), did not find any significant quantities of Olympia oysters. The hearings officer is not prepared to find that a California biologist with no known experience in Haynes Inlet is somehow better at finding these oysters than the two Oregon biologists with specific experience in Haynes Inlet (*i.e.* Dr. Rumrill and Dr. Ellis).

In conclusion on this issue, the hearings officer finds the opponents' concerns about "hard to find" oysters is somewhat overblown. The hearings officer finds that the credibility of the opponent's argument is lessened due to the fact that none of the opponent's experts actually traversed the actual right of way in question. While Dr. Rumrill's team did search site 9, they found no oysters at that location. It's one thing to say that oysters in a rocky intertidal area in Southern California are difficult to survey, but that does not lead to the conclusion that oysters on an Oregon mudflat lacking hard substrate are difficult to spot. As Dr. Trimble notes, "locations are different." *See* Trimble letter dated October 5, 2011, at p. 2.

Dr. Chernaik's attempt to discredit the Ellis survey team is further hampered by the fact that, at site 9, the Rumrill survey found no Olympia oysters, whereas the Ellis team located and identified several Olympia oysters on two Pacific oyster shells. *See* Ellis letter dated Nov. 23 2011, at p. 2.

The hearings officer also finds that it is feasible for the applicant to train a team of workers to identify and collect all of the oysters along the pipeline right of way between milepost 4.1 and 2.8, and then relocate those oysters to the proposed relocation site. If nothing else, the team can be trained to pick up all hard substrate which might support Olympia oysters. Granted, it is going to take more than a three-person team to do a thorough job. The hearings officer would anticipate that a 10-15 person team is needed if the job is going to get done correctly in one or two sets of negative tides.

ii. The Relocation Plan is Feasible.

The next issue concerns the issue of whether the relocation area is a suitable environment for the survival of the displaced Olympia oysters. The Ellis Oyster Survey notes that the mud flats to the northwest of the pipeline, on the east side of Highway 101 are a good area for relocation due to the similarity to the right of way site:

> [The relocation site] is indistinguishable in terms of habitat from those areas within the right of way, and were observed by EES staff to contain

> Olympia oysters in densities at least as high as those within the right of way. Therefore, the proposed relocation area provides habitat that is known to support a population of Olympia oysters and is a viable relocation area. The occurrence of Olympia oysters in this area suggests that oysters relocated from the construction zone would have a high probability of survival.

Ellis Oyster Survey, at p. 21. A proposed relocation area is shown in the shaded area of Figure 19 in the Oyster Survey. That area is in close proximity to existing Olympia oyster colonies inhabiting the Highway 101 riprap area.

Dr. Chernaik contends that the area proposed for relocation is at a higher elevation than the oyster's current location in the right of way, which will preclude their survival. Opponents cite to alleged discrepancies in the elevations shown on figures provided by Coast & Harbor Engineering and Ellis Ecological.

Again, the opponents seem to grasping at straws with this testimony, which undermines their credibility. First, and most fundamentally, there is direct evidence in the Mitigation Plan describing the on-site observations of Dr. Ellis's team regarding the relocation area:

> The mud flats that are adjacent to the northwest of the pipeline right of way, on the east side of Highway 101, are indistinguishable in terms of habitat from those areas within the right of way. These adjacent areas were observed by EES staff to contain Olympia oysters in densities at least as high as those within the right of way . Therefore, the proposed relocation area provides habitat that is known to support a population of Olympia oysters and is a viable relocation area. The occurrence of Olympia oysters in this area suggests that oysters relocated from the construction zone would have a high probability of survival.

Mitigation Plan, at p. 4. This evidence, based on direct observation, constitutes substantial evidence which is not sufficiently undermined by the opponents' conjecture about elevations based on various unrelated maps and figures in the record.

But perhaps even more importantly, Olympia oysters *are currently living in the relocation area.* Even Dr. Trimble admits that "[t]he most informative measure of local and historical conditions as they relate to *Ostrea lurida* is the presence / absence of adults." Trimble letter dated Oct. 53, 2011, p. 5. Dr. Trimble goes on to say that "[i]t is ecologically safe to say that locations containing oysters are different than locations that don't." *Id.* Thus, a reasonable person would find that the presence of live Olympia oysters is a very strong indicator that Olympia oysters can live in that area.

The hearings officer finds that Dr. Chernaik's arguments to the contrary lack credibility. His arguments are particularly weak given that neither Dr. Chernaik or any other person testifying on behalf of the opponents personally conducted a site visit of the proposed re-location area. After all, if Dr. Chernaik has not physically visited the relocation site, why would anyone

believe his opinion testimony concerning that site over that of Dr. Ellis, who specifically walked the relocation site? Were the relocation site somehow physically off limits to the opponent's experts, the hearings officer might be less critical of their failure to conduct a site visit. But when the site is open to the public, it seems inexcusable for the opponents' experts not to have physically traversed the right of way prior to opining on the density of oysters in that location.

Also, the fact that the elevation in the pipeline right of way is virtually identical to the elevation in the adjacent relocation area is photographically depicted in the aerial photo included in the letter from Dr. Ellis dated October 17, 2011. On page 13 of that letter (Figure 7), Dr. Ellis includes an aerial photo of Haynes Inlet during the early stages on an incoming tide. That aerial photo includes overlays showing the location of the pipeline route, existing Olympia oysters, and the proposed relocation area. The relative depth of the mudflat area is readily discernible because the deeper areas are darker and the higher areas are lighter. As shown on that photo, several Olympia oysters were found by the Ellis team at the far end of the pipeline route in areas that are significantly higher than the relocation area (and therefore not yet touched by water when the photo was taken). That fact directly contradicts the opponents' assertion that the relocation area is too high for Olympia oysters to survive. Dr. Ellis states:

> The edge of the incoming water is visible and extends beyond the relocation area and the area where Olympia oysters were found in the pipeline right of way . Note that both areas are under water at this early stage in the incoming tide, and that the relocation area appears to be slightly deeper than the adjacent pipeline right of way . Therefore, the photographic documentation is in agreement with our observations in the field. As discussed in the mitigation plan, oysters removed from the right of way would be placed toward the southern end of the relocation area, which is slightly lower in elevation than the northern end. However, the entire area within the relocation area presently supports adult Olympia oyster and would be suitable habitat for relocation of oysters from the right of way.

See Ellis Letter dated Oct. 17, 2011, at p. 12.

Dr. Chernaik's argument premised on one piece of data that is originally cited at page 11 of his October 10, 2011 submittal; however, the significance of this data as it relates to the proposed relocation plan is never explained:

> At three sites, more than half of the tiles at +0.3 m MLLW had lost 90% of their oysters by the time photographs were taken in October 2002. In any case, juvenile oysters fare poorly when exposed to air for even short periods of time ([out of water] 2-10% [of the time], Fig. 8), with survival dropping by half or more.

See Chernaik letter dated Oct. 10, 2011, at p. 11. These facts lead to the following conclusions: (1) 90% of half of the oysters located at a certain elevation died within some unidentified time

frame, and (2) survival of juvenile oysters drops by half or more when they are out of the water 2-10% of the time. However, as the applicant points out:

> [A]t no point does Dr. Chernaik attempt to explain how this applies to the relocation area, *e.g.*, would the oysters proposed for relocation be anywhere near the elevation cited in the study? Or would the oysters being relocated (which are likely not juveniles as in the study) *actually be* out of water between 2 and 10% of the time based on their new elevations? Based on the evidence provided, there is no way to know how or why the results of this study would actually apply to the applicant's proposal. Dr. Chernaik's entire argument is flawed because he fails to connect the dots between the cited study and the proposed relocation area. His entire line of evidence and argument fails to undermine the direct evidence submitted by Ellis Ecological on the issue of the viability of the relocation plan.

The hearings officer agrees with the applicant's analysis on this point.

Moving on, Dr. Chernaik's memorandum dated November 28, 2011 leads off with the following statement: "There is no evidence in the record that relocating oysters is a successful mitigation measure." The hearings officer disagrees.

There is substantial evidence in the record that relocating existing oysters will be successful. First, Dr. Chernaik previously pointed out that the Olympia oysters in Coos Bay were extinct until they were accidentally reintroduced in the 1950s as hitch-hikers during commercial transport of Pacific oysters from Willapa Bay. It stands to reason that transport from Willapa Bay would be more stressful to those oysters than a move of a few hundred feet.

Second, the evidence shows that the state of Oregon thinks re-introduction techniques can be successful, as the South Slough NERR has "re-introduced about 4,000,000 juvenile oysters to the Slough." *See* Native Shellfish Recovery, at p. 1. It stands to reason that the reintroduction techniques used by South Slough NERR cause more trauma to individual oysters than by simple moving adult oysters and their hard substrate a few hundred feet.

Even more important than the evidence discussed above, however, is the fact that native oysters are currently found at the relocation site. This evidence is sufficient to draw an inference that the relocation site is suitable Olympia oyster habitat. Furthermore, there is no evidence in the record that suggest that the oysters are too fragile to survive the short relocation process,[9] or that they will otherwise die in transport. There is also no evidence to suggest that oysters need to

[9] Dr. Trimble briefly mentions that "moving oysters (and other organisms) increases mortality; hundreds of millions of *Ostrea lurida* adults have been moved within and between estuaries since the 1850s * * * with the vast majority of events resulting in massive mortalities." *See* Trimble letter dated Oct. 5, 2011 at p. 3. The hearings officer does not find Dr. Trimble's comments to constitute substantial evidence to support a conclusion that oysters would not survive a move of a few hundred feet to similar habitat in Haynes Inlet. Dr. Trimble's comments are simply to vague and too unspecific to give a clear understanding of the context of the transportation-related mass mortalities he refers to. An expert's opinion does not constitute substantial evidence if the foundation for the opinion is not provided, or if it is contradicted by other facts in the record. *1000 Friends of Oregon v. LCDC*, 83 Or App at 286 .

be oriented in any particular way. Obviously, it would not be advisable to place an oyster "face down" or buried in the mud, but presumably Dr Ellis can train the relocation team on the proper way to orient the oysters in their new home, to the extent there is a "proper" way. Indeed, Dr Ellis has testified that "oysters will be picked up by hand, and placed "in the same orientation within the substrate as they had in their original location." Mitigation Plan at 4. Additional evidence includes:

- There are undoubtedly no more than a few bucketfuls of oysters that require relocation.
- The contour map recently provided by Dr. Ellis shows that, at most, there is an approximate 1.5-foot difference in the elevation of the relocation area, and less than a foot difference in the area where most of the oysters would be placed. Nov. 23 letter from Bob Ellis, page 3 (Figure 1).
- The relocation area is directly adjacent to the oysters' existing location, and is "indistinguishable habitat" where there are currently Olympia oysters in densities at least as high as those within the right of way . Mitigation Plan at 4.
- As stated by Dr. Ellis, "the occurrence of adult oysters in the proposed relocation zone indicates that an appropriate microclimate is present" and relocated oysters would therefore have a high probability of survival. Oct. 17 letter from Bob Ellis, page 11; *Id.*.
- Rex Miller testimony: "In my opinion, based on my experience with growing native Olympia oysters in the Coos Bay area, any oysters that exist along the pipeline route can be easily protected by relocating them to nearby portions of Haynes Inlet." Sept. 9 letter from Rex Miller, page 2.

In addition to Rex Miller's project, the record contains evidence regarding two other successful oyster restoration projects that have recently occurred in Coos Bay: the Glenbrook Nickel site and the Isthmus Slough bridge. These projects provide evidence that native Olympia oysters can thrive in Coos Bay under restoration plans that are properly designed and managed.

Dr. Chernaik relies heavily on a statement from Dr. Alan Trimble in support of his argument that oysters cannot possibly survive relocation; however, Dr. Chernaik has quoted very selectively from Dr. Trimble's response. Dr. Chernaik has repeatedly quoted the following portion of Dr. Trimble's letter:

> While it is trivial to suggest that moving existing oysters from locations where they currently exist to locations where they don't is sufficient to preserve them, this isn't a fact based on solid evidence.

See Chernaik letter dated Oct. 10, 2011, at p. 10. However, as noted by Dr. Ellis in his response, the applicant's proposal is *not* to relocate Olympia oysters *to a place where they do not exist*; rather, the proposal is to move them to a nearby location that is currently inhabited by adult and juvenile Olympia oysters. As discussed earlier, Dr. Trimble does cite to two studies conducted in 1892 and 1896 for the proposition that transportation of oysters increases their mortality, but does nothing to explain the context of those studies or explain why the facts in this case are

similar. Dr. Trimble's letter does not constitute substantial evidence to support the conclusion that the relocation plan is not feasible, because an adequate foundation for Dr. Trimble's comments and opinion has not been provided.

The opponents also attempt to argue that, by the time construction of the pipeline commences in 2014, there will be substantially more Olympia oysters than currently exist. However, as explained by Dr. Ellis, there is no firm evidentiary basis for opponents' assertion that there will be an exponential increase in the number of Olympia oysters in the mudflat in that timeframe. Dr. Chernaik's assertions are based on the fact that a 2006 survey revealed many more oysters than were found in a 1996 survey. However, the primary impediment to oyster population increases in the right of way portion of Haynes Inlet, as the applicant correctly points out, is that there is very little hard substrate habitat in the mudflats. Thus, as explained by Dr. Ellis, even if there were an increase in the numbers of Olympia oysters in the next two years, any such increase would be limited to existing substrates: "In other words, there would simply be larger clumps of oysters on the existing substrates," which would not result in much more effort to relocate. *See* Ellis letter dated Oct. 17, 2011, at p. 11.

Finally, it is worth noting that even if the applicant's protection / relocation plan were to completely fail, it does not appear that the overall resource productivity of the oysters in Haynes Inlet would suffer. With the exception of the one 1400 s.f. hot spot, the applicant has identified only 89 oysters in the pipeline right of way. Even if those 89 oysters were killed, that would be inconsequential to the overall population of Olympia oysters in Haynes Inlet. Given that predators such as sea otters, sharks, rays, crabs, native snails (small whelks and moon snails) could predate 89 oysters in a few days, it does not seem like the loss of 89 oysters (or even a few thousand oysters, for that matter) would be significant.

3. The Applicant's Oyster Mitigation Plan.

a. The Applicant's Plan is Feasible.

At the time of the public hearing, the applicant initially proposed an "Oyster Protection Plan," which was intended to meet, but not exceed, the requirements of the applicable management objective requirements by *protecting* the existing Olympia oysters within the pipeline right of way . The applicant proposed to simply relocate every single Olympia oyster within the pipeline right of way to similar habitat adjacent to the construction area, which is also currently populated with Olympia oysters. Because the relocated oysters would be protected from the direct impacts of construction, and because the evidence from Coast & Harbor Engineering indicates a lack of impacts from sedimentation, the applicant's original relocation plan would have been sufficient to "protect" the resource under applicable standards.

However, after the public hearing the applicant decided to go beyond "protecting" the resource. Rather, the applicant decided to make an attempt to assist in the overall recovery of the Olympia oyster. During the public hearing, the hearings officer asked a significant question of the opponents' primary witness, Mark Chernaik. The hearings officer asked Dr. Chernaik if the opponents would support the pipeline application if the applicant could provide additional habitat that would hypothetically triple or quadruple the amount of Olympia oysters in Haynes Inlet. The hearings officer was primarily interested in assessing the credibility of the witness,

and was trying to solicit a response that would indicate whether Dr. Chernaik's focus was on protecting oysters or simply stopping the PCGP project. Although Dr. Chernaik protested the premise behind the question, he ultimately agreed that if the applicant could provide habitat that would ensure such a population increase, that he would, in theory, support the application.

The applicant took note of Dr. Chernaik's response, and in light of other suggestions from the hearings officer, the applicant submitted a revised plan dated October 7, 2011, which is entitled Olympia Oyster Mitigation Plan (the "Mitigation Plan"). The Mitigation Plan goes beyond the protection of existing Olympia oysters and their habitat by providing mitigation in the form of new additional habitat within the pipeline right of way that will result in a significant *increase* in the numbers of Olympia oysters in Haynes Inlet. Specifically, in addition to relocating existing oysters prior to pipeline construction, the Mitigation Plan calls for the placement of 30 cubic yards of Pacific oyster shell in the area of existing oyster colonization between MP 2.9 to 3.4. Mitigation Plan, at p. 4. The proposed placement of new hard substrate for recruitment of oyster larvae would necessarily occur *after* pipeline construction is complete.

The hearings officer finds that there is substantial evidence in the record to support the conclusion that the applicant's Mitigation Plan will, at a minimum, "protect" the resource productivity of Olympia oysters in Haynes Inlet.

b. Responses to arguments raised by opponents regarding the mitigation component of the Mitigation Plan.

The opponents have raised numerous arguments challenging the likelihood of success of the mitigation component of the plan. None of the evidence submitted by the opponents on this topic is sufficient to compel a conclusion that the applicant's testimony would not be relied upon by a reasonable person.

i. "Recruitment sink"

Dr. Chernaik argues that placing Pacific oyster shells in the pipeline right of way to provide new habitat could result in a "recruitment sink" that actually harms Olympia oyster recovery efforts. *See* Chernaik letters dated October 10 and Oct 17, 2011, (discussing Trimble letter dated Oct. 5, 2011.). Dr. Chernaik first suggests that evidence shows that Olympia Oysters growing on Pacific oyster shells are less vital than if those Olympic oysters were instead to grow on Olympia oyster shells. He states that "there are several reasons for these observations one being greater competition from 'fouling organisms' that preferentially cover Pacific Oyster shells." *See* Chernaik letter dated Oct. 10, 2011. However, the photos of the oysters in the Ellis Oyster Survey do not appear to have any attached "fouling organisms" that would impede the growth of Olympic oysters. Without any direct evidence indicating that fouling organisms are an issue in Haynes Inlet, the hearings officer is inclined to discount the significance of this issue. Again, the only direct evidence in the record is that there is a colony of Olympia oysters colonizing discarded Pacific oyster shells at MP 2.9. That evidence strongly suggests that the habitat is good for the continued survival of the Olympia oyster at this particular location.

The remainder of Dr. Chernaik's "recruitment sink" argument is based on data from an out-of-state study (Willapa Bay, WA) which concluded that native oyster larvae were attracted

to Pacific oyster shells in the higher elevation intertidal areas, rather than lower subtidal areas where theire survival rates were higher. *See* Chernaik letter dated Oct. 10, 2011, at p. 12. Dr. Chernaik attempts to rely on this study to argue that the applicant's proposed placement of Pacific oyster shells as new habitat could similarly "fool" juvenile oysters to settle in poor habitat where they are ultimately less likely to survive. *Id.*

As the applicant notes, Dr. Chernaik loses credibility when he contradicts himself via the "recruitment sink" argument. For example, Dr. Chernaik originally claimed that (a) there are an estimated 1.5 million Olympia oysters *along the pipeline route*, and (b) Olympia oysters can expect "exponential" population growth in Haynes Inlet in the next three years. In direct contrast to that argument,[10] his "recruitment sink" argument is based on a completely different premise: that the intertidal portions of Haynes Inlet are actually *poor* habitat for Olympia oysters as compared to other nearby habitat in the rip-rap and rocky outcroppings found in sites 1-8 because they are too high in elevation. He argues that placing more Pacific oyster shells in the mud-flat area will basically lure native oyster larvae to that location where they will ultimately experience a pre-mature death due to being frozen, or being out of the water too long, etc.

If that were indeed the case, then the hearings officer questions why the County would even be undertaking this entire exercise. Taking the recruitment sink argument to its logical conclusion, the applicant would presumably help protect the Olympia oysters by destroying all of the hard substrate in that portion of the pipeline route. Indeed, this entire hearings officer recommendation goes into great detail on the various issues raised in this case based on a core assumption to the contrary: that the pipeline route traverses good (or at least potentially good) Olympia oyster habitat from approximately milepost 4.1 to milepost 2.8. That core assumption is based entirely on the presence of a relatively small quantity of Olympia oysters found within the pipeline route. If the hearings officer were to buy in to the "recruitment sink" argument in tandem with Mr. Chernaik's 1.5 million oyster population estimate, then the logical conclusion would be that the death of a few thousand oysters out of a potential population of millions in Haynes Inlet is a *de minimis* loss, and that the pipeline ideally should destroy the marginal oyster habitat in its route in order to prevent further recruitment sinks on the mud-flats. The hearings offer does not accept the premise behind this argument. For this reason, the hearings officer firmly rejects the entire "recruitment sink" argument.

The "recruitment sink" issue is more thoroughly repudiated by Dr. Ellis in his October 17, 2011 letter at pages 13-14. Also, the November 10, 2011 email message from Scott Groth of ODFW explains that "all uses of [Pacific oyster] shell to attract [Olympia oyster] larvae in Coos Bay have been successful, numerous projects show this." The hearings officer adopts the discussion concerning recruitments sinks and Pacific oyster shells contained in those two sources as additional findings, and incorporates those discussions herein by reference.

To close on this issue, it appears, based on the evidence in the record, that the only real "recruitment sink" occurring in Haynes Inlet is the commercial culturing and harvesting of

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[10] Lawyers are, of course, allowed to make what are seemingly contradictory *legal* arguments "in the alternative." Scientists are not afforded that same luxury. When a scientist makes contradictory *fact-based* arguments, he or she simply loses their credibility.

Pacific oysters, particularly to the extent that live Pacific oysters are actually present and growing in the Inlet during the Olympic oyster's spawning season. *See, e.g.* Chernaik letter dated Sept. 21, 2011, at p. 11; Trimble, *Factors Preventing the Recovery of a Historically Overexploited Shellfish Species, Ostrea Lurida Carpenter1864.* Journal of Shellfish Research, Vol 28, No. 1 (2009), at p. 105 (identifying commercial harvest of Pacific oyster as a recruitment sink). When these commercial oysters are harvested, any native oysters that have selected the harvested oyster as a host will necessarily be killed. Based on the studies conducted in Willapa Bay, it appears that commercial oyster farming is much more harmful to the recovery of native oyster stocks than the construction of a gas pipeline. In comparison, the placement of Pacific oyster shells (or any other suitable hard substrate) in the right of way portion of the Haynes Inlet mudflats will surely result in viable colonies of Olympia oysters.

ii. Placement of Pacific Oyster Shells.

Dr. Chernaik contends that "there is no evidence in the record that evenly distributing 30 cubic yards of Pacific oyster shell over 15 acres of recently disturbed sediment would be a successful mitigation measure." See Chernaik Letter dated Nov. 28, 2011, at p. 2. Dr. Chernaik contends, in part, that the proposed distribution is not sufficiently deep to provide locations on the underside of the new substrate for Olympia oysters to attach. Dr. Chernaik is incorrect.

Most notably, the fact that Dr. Ellis and his team found a 1,400 s.f. bed of live Olympia oysters at milepost 2.9 which had colonized a pile of discarded Pacific oyster shells is proof that Olympia oyster larvae in Haynes Inlet will use discarded Pacific oyster shells as recruitment sites.

In addition, there is evidence in the form of the November 10, 2011 email message from Scott Groth stating that, based on Mr. Groth's review of the proposed Mitigation Plan (including the expressly stated proposal to spread 30 cubic yards of shells over 15 acres), that plan will "certainly achieve" an increase in the density of native oysters at the project site. Curiously, Dr. Chernaik does not attempt to explain his failure to recognize Mr. Groth's unequivocal statement as evidence, despite the fact that he directly quotes this same portion of the email from Mr. Groth later in his argument.

Moreover, the hearings officer has read Dr. Chernaik's rebuttal dated Nov 28, 2011, as well as the exhibits accompanying that submittal, and finds that none of the information presented therein alters the hearings officer's conclusions in any way.

Dr Zarchel's research conducted in Newport Bay, California, does indicate that Olympic oysters survive at a higher rate if they can attach to the underside of hard substrate. *See* Zercherl comments quoted on page 3 of Dr. Chernaik's November 28, 2001 letter. The applicant seems to concede this fact. However, that fact does not mean that Olympia oysters will not attach to the tops of hard substrate. The best evidence in the record as to whether Olympic oysters will attach and grow on discarded Pacific oyster shells comes the Ellis Oyster Survey. As mentioned above, the Ellis Oyster survey found a 1400 s.f. hot spot of Olympia oyster attached to discarded Pacific oyster shells. There is no evidence to suggest that the 1400 s.f. pile of discarded shells at MP 2.9 created high degrees of vertical habitat. Based on the fact that those Pacific oyster shells were discarded at random, there does not appear to have been any effort made to maximize the

made to maximize the potential for larval recruitment. Moreover, too much "vertical" habitat at this location might simply result in oysters that are out of the water for longer durations, which Dr. Chernaik admits will result in increased mortality rates.

The opponents also assert that the Pacific oyster shells will sink in the sediment above the pipeline. This argument is highly speculative and is not supported by any substantial evidence. In a letter dated November 3, 2011, Pacific Connector Project Manager Randy Miller rebuts the opponents' testimony:

> The trench will be excavated into unconsolidated sandy sediments washed into Haynes Inlet from the various streams that deposit their sediment-laden runoff into the Inlet. Following laying of the pipeline into the trench, the trench will be backfilled by excavation equipment that picks up the spoil mound material and places it back into the trench. The backfill technique includes the use of the excavator bucket to put compaction pressure on the material to assure that the pipe is completely covered and the trench backfilled in a stable condition. This backfilling technique will result in trench materials placed in a more compacted state than that existing prior to excavation.
>
> Ms. McCaffree's suggestion that Pacific oyster shells will sink in the mud is nothing more than imaginative speculation based on unrelated testimony. At the prior public hearing, Lili Claussen stated that the Haynes Inlet mudflats are like "quicksand" that are difficult to walk in. This is a true statement – it is difficult for a person to walk on the mudflats without special shoes like the ones worn by Bob Ellis and his team when they conducted their oyster survey. Based solely on this prior statement, Ms. McCaffree now suggests that Pacific oyster shells would also sink in the mud in the same manner as people. One does not need to be a physicist to understand that just because a 160-pound person might sink above their ankles in mudflats does not mean that a two-ounce oyster shell would also sink. Further, the present existence of significant numbers of Pacific oyster shells on the bed of Haynes Inlet indicates that Ms. McCaffree's alleged concerns are without basis.
>
> "Further, even if there were an evidentiary basis for Ms. McCaffree's suggestion that the backfilled area will become so unstable that even an oyster would sink (which is incorrect as addressed above), it should be noted that the backfilled trench area will only occupy between 22 and 30 feet of width within the entire pipeline right of way where Pacific oyster shells are proposed to be distributed as habitat.

See Miller letter dated Nov. 3, 2011, at pp. 1-2. Mr. Miller's discussion constitutes substantial evidence to support the conclusion that the replacement shell habitat will not sink into the mud of Haynes Inlet.

In their final November 28 submittal, Dr. Chernaik offers detailed suggestions in order to ensure that the Mitigation Plan will be a success. In response, the applicant proposes a series of conditions of approval incorporating these suggestions, in order to ensure the successful implementation of the Mitigation Plan. These proposed conditions address the new issues raised by Dr. Chernaik and incorporates the suggestions raised in the related Groth & Rumrill memorandum dated November 28, 2011.

PROPOSED CONDITION OF APPROVAL

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

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

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

c) Unless modified under the direction of ODFW during the consultation described above, the applicant will establish appropriate baseline conditions for the Olympia oyster mitigation effort in Haynes Inlet using the following guidelines for a before-after control impact study design in order to ensure that any impacts to Olympia oysters are insignificant or *de minimis*:

i. The "Before" conditions shall be determined by field surveys of the distribution, abundance, status, and condition of existing

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

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

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

Adoption of this condition of approval addresses all of the issues discussed in paragraphs numbered 2 through 6 of the memorandum from Steve Rumrill and Scott Groth that is attached to Dr. Chernaik's November 28, 2011 submittal regarding creation of the best possible habitat for Olympia oysters in the applicant's mitigation area.

This condition of approval also recognizes that the applicant is required, under existing conditions of approval from the county's original decision, to obtain all necessary state and federal permits for removal and fill in Haynes Inlet necessary to construct the pipeline. Under that condition, all such approvals must be obtained prior to commencing construction of the pipeline. That condition was not challenged by opponents in the LUBA appeal. The condition set forth above recognizes that the applicant's proposed Mitigation Plan will need to be incorporated into those state and federal permitting requirements, and also expressly requires the applicant to consult with ODFW on some of the finer details of the plan regarding methods for placing new hard substrate and background monitoring.

For the reasons addressed above, there is substantial evidence in the record to support a finding that, in conjunction with the applicant's Protection Plan, the Oyster Mitigation Plan will "protect" existing Olympia oysters in Haynes Inlet. The opponents have not provided evidence that undermines the evidence such that it would not be relied upon by a reasonable person in making a decision.

4. History of Previous Oyster Relocation Efforts.

There is substantial evidence in the record to support a finding that several Olympia oyster restoration projects similar to the applicant's proposal have been successful in Coos Bay. The applicant submitted direct evidence on this issue in the form of: (1) a memorandum from Scott Groth, a Shellfish Biologist with the Oregon Department of Fish and Wildlife dated August 10, 2010, regarding "Coos Bay native oyster restoration project updates" ("ODFW Memo"); (2) a letter from Rex Miller dated September 9, ~~2001~~ 2011; (3) a short DVD prepared by Rex Miller that describes the success of his Olympia oyster restoration project in Isthmus Slough; and (4)

email exchanges with Scott Groth of ODFW regarding Mr. Groth's review of the proposed Mitigation Plan and his comments regarding the likely success of the final plan.

As explained in the Oyster Survey, and in the ODFW Memo at least three similar Olympia oyster relocation and protection efforts have been completed to date: (1) the Glenbrook Nickel site, (2) Rex Miller's property, and (3) the reconstruction of the Isthmus Slough bridge.

a. Glenbrook Nickel Project

The ODFW Memo includes a detailed description of the work that has been done at the Glenbrook Nickel site regarding restoration of Olympia oyster habitat. The ODFW Memo states that the project "has been tremendously successful and an excellent learning experience that will guide future native oyster restoration efforts in Coos Bay." ODFW Memo at 2.

b. The Rex Miller Restoration Project

The applicant also submitted the testimony of Mr. Rex Miller, who undertook a successful Olympia oyster restoration project on his own property near Isthmus Slough.

Mr. Miller's restoration project is summarized in correspondence to the hearings officer from Rex Miller, ("Miller Letter"), and also in a video prepared by Mr. Miller on a DVD entitled "Isthmus Slough Oysters: Living on the Edge." It involved the placement of approximately 20 cubic yards of Pacific oyster shells on his tideland areas in Isthmus Slough. Mr. Miller also placed hard substrate (structures he calls "gabions") in the water. These gabions consist of large chain link bags of Pacific oyster shells with Olympia oysters attached, for the purpose of "pollinating" the area with Olympia oyster larvae. As described in his letter, and shown in the pictures included on his DVD, Mr. Miller's project has been successful:

> "As shown on the DVD, my efforts have resulted in a healthy new colony of Olympia oysters in Isthmus Slough. This project has been very successful, even though there is a relatively high amount of silt in the Isthmus Slough area (as compared to Haynes Inlet). I have reviewed the Oyster survey and proposal prepared by Bob Ellis of Ellis Ecological regarding the relocation of Olympia oysters from the proposed pipeline route. In my opinion, a project in the Haynes Inlet area like the one being proposed by Bob Ellis would also be very successful.
>
> "The Haynes Inlet area is actually a better location for native oysters than Isthmus Slough because the tideland areas are sandier, with less mud and silt. One of the potential problems for oysters is freshwater arising out of heavy rain events. I believe that would be less of a problem in Haynes Inlet because the area is more of a channelized mudflat area, and the freshwater would be able to flow through the area faster than in Isthmus Slough. Finally, as shown on my DVD and in the Ellis survey, there is already a very healthy colony of Olympia oysters inhabiting the rip rap along the eastern edge of the highway, which will provide a good seed crop of larvae

> that will 'pollinate' the area adjacent to the pipeline after completion of construction.
>
> In my opinion, based on my experience with growing native Olympia oysters in the Coos Bay area, any oysters that exist along the pipeline route can be easily protected by relocating them to nearby portions of Haynes Inlet. If substrate along the pipeline route is replaced, I believe the applicant's proposed efforts will not only completely protect the existing oysters but will also result in an increase in the further colonization of Olympia oysters in the *area adjacent to the proposed pipeline.*

See Rex Miller letter dated Sept. 7, 2011, at pp. 1-2. The hearings officer finds the Miller letter and DVD constitutes substantial evidence. In fact, it is some of the most compelling evidence in the entire file. As an initial matter, the Miller site appears in the video to a very muddy site. Mr. Miller's DVD includes photos and video of Pacific oyster shell habitat for Olympia oysters at Mr. Miller's site, clearly showing that many of the shells are covered in mud and silt. Mr. Miller is seen in the video washing mud off of his oyster bundles. Nonetheless, despite these less-than-ideal conditions, Mr. Miller has experienced success in his efforts to propagate Olympia oyster colonies on his submerged lands.

The opponents have made no attempt to rebut or otherwise challenge any of the testimony provided by Mr. Miller regarding the likelihood of success of the applicant's proposal. This photographic and video evidence, which has not been challenged by the opponents, directly contradicts the expert testimony that even the slightest amount of silt (*i.e.*, 50 microns) on a Pacific oyster shell will prohibit Olympia oyster larvae from attaching.

After reviewing the Miller DVD, it seems clear that Haynes Inlet provides more likely habitat for Olympia oysters than the Isthmus slough area, and would be an excellent location for a project designed to protect and restore native oysters and their habitat in the general vicinity of the pipeline alignment.

c. Use of Methods Similar to those Proposed by the Applicant Have Been Found to be Successful in these Three Previous Efforts.

The methods proposed by the applicant in the Mitigation Plan are largely modeled after the methods and success of the Glenbrook Nickel project, which also involved the collection and relocation of existing Olympia oysters, and the distribution of Pacific oyster shells for habitat enhancement. As described in more detail below, Dr. Ellis provided a draft of the proposed Mitigation Plan to Scott Groth for his review and comment, and incorporated Mr. Groth's suggestions into a revised plan.

Finally, prior to finalizing the Mitigation Plan, Dr. Ellis forwarded a draft of the plan to Scott Groth of ODFW for his review and comment. Mr. Groth's email response dated October 6, 2011 is included in the record as Exhibit 6 to the applicant's October 10, 2011 submittal. In that response, Mr. Groth states his professional opinion that "the plan looks very good" and that "I would expect positive results." Mr. Groth goes on to state a number of questions and

suggestions for Dr. Ellis, and those suggestions were largely incorporated into the final version of the Mitigation Plan.

After finalizing the Mitigation Plan and reviewing some of the challenges being raised by the opponents, Dr. Ellis sent an email inquiry to Mr. Groth asking for his opinion regarding certain aspects of the Mitigation Plan and opponents' attempts to challenge the success of the Glenbrook Nickel project. Mr. Groth sent an email response on November 10, 2011, which is attached to the applicant's November 14, 2011 submittal, and states:

> "If the goal of your project is to increase the density of native oysters at the site, the mitigation plan (for native oysters) you presented will certainly achieve that. Every Olympia oyster habitat restoration project I am aware of includes the addition of hard substratum (e.g., Crassostea gigas shell), as Ostrea lurida are known to prefer hard substrates. All uses of C. gigas shell to attract O. lurida larvae in Coos Bay have been successful, numerous projects show this.
>
> "In the Glenbrook nickel project, the relocated oysters were in fact outside of the surveyed area. Therefore the preliminary results of that project show significant increases in population after 2 years when the baseline population was completely removed. This was easily related to the increased availability of appropriate settlement substrate via the restoration (mitigation) effort."

This message from Mr. Groth states his professional belief that the proposed Mitigation Plan will "certainly achieve" an increase in the density of native oysters at the site. It also notes that the Glenbrook Nickel project showed "significant increases in population after 2 years" due to increased availability of new substrate at the site. These statements from Mr. Groth of ODFW constitute substantial evidence to support a finding that the applicant's Mitigation Plan will result in increased density of Olympia oysters, and that it is appropriate to rely upon the success of the Glenbrook Nickel project as evidence regarding the likely success of the applicant's proposal.

On October 10, 2011 the applicant submitted a letter dated September 9, 2011 from Nancy Pustis, the Western Region Manager for the Oregon Department of State Lands (DSL), which provides the basis for a finding that it is feasible for the applicant to obtain the short-term access agreement that would be necessary to relocate the existing Olympia oysters onto adjacent state-owned tidelands. This is the method typically used by DSL to allow access for mitigation projects that require the addition of new habitat (*e.g.*, eelgrass) on state-owned submerged and submersible land. The opponents have not raised any issues questioning the applicant's ability to obtain necessary state approvals to relocate oysters onto state lands.

The applicant will also be required to obtain many state and federal environmental permits in order to construct the pipeline, all of which are identified as conditions of approval attached to the county's prior approval of the pipeline. As described in more detail below, the applicant is proposing a new condition of approval that would require coordination with ODFW in the specific details regarding the placement of Pacific oyster shells in the mitigation area, and would involve incorporating the applicant's Mitigation Plan into the DSL permitting process.

B. Compliance with 13A-NA Management Objective (Subtidal Sandy-Bottomed Areas West of Hwy 101).

1. Ellis Oyster Survey of the Subtidal zone

Dr. Ellis and his team searched for Olympia oyster in the subtidal portion of the pipeline right of way located to the west of the Highway 101 bridge, between Milepost 2.8 and 1.8. Dr. Ellis's team took a series of approximately 38 sediment grab samples in this subtidal area. Those grab samples were evenly spaced across the right of way approximately every tenth of a mile. These grab samples revealed no evidence of Olympia oysters or the hard substrate that is necessary for Olympia oyster habitat. Ellis Oyster Survey, Figures 7, 18. The applicant's key finding is as follows:

> Grab sampling of substrate along the pipeline route in subtidal areas (Figure 7) recovered no evidence of Olympia oysters or their preferred substrate habitat. As reported by Coast and Harbor (2011) the bottom velocity in some subtidal areas of the pipeline route is quite high (up to 3.0 feet per second) during maximum tidal exchange. Consequently, the substrates in this area are generally coarse sand, grading to finer sand at the west end of the right of way . Under the Highway 101bridge, sediments appear to be dense sands; so dense that the sampler was only able to partially penetrate the surface layer. Most samples from this area were empty, with a few containing medium sand. Likewise, elsewhere along the pipeline route, samples consisted of sand with only rare shell fragments. The only soft sediments were found near MP 1.9. Figure 8 illustrates a typical sediment sample from subtidal areas of the pipeline route. No Olympia oysters, or Olympia oyster shells were recovered in the grab samples.

Ellis Oyster Study, at p. 19.

The opponents presented no direct evidence concerning the presence or absence of Olympia oysters in the portion of the Project Action Area that traverses the subtidal zone between mileposts 2.8 and 1.7. However, at the public hearing, the opponents complained that the grab sample approach could conceivably have missed some oysters or viable habitat. Dr. Chernaik repeats these arguments in his letter dated October 10, 2011. He enlists the opinion of Dr. Alan Trimble, who concludes that using 38 grab samples is not "continuous or exhaustive" and, as a result, individuals could have been missed.

The hearings officer finds that negative results from 38 grab samples, conducted at representative points along the pipeline right of way, provides a sufficient evidentiary basis to draw an inference that no significant levels of Olympia oysters reside in the subtidal portion of the right of way. While it is true that the grab samples could very well have missed an individual oyster or two (or more), it is reasonably clear from the grab samples that there are no large or

significant quantities of native oysters in the subtidal areas. The destruction of minor amounts of individual oysters does not prevent a finding that the pipeline use does not "protect[ ] the productivity and natural character of the aquatic area."

Even so, the applicant decided not leave opportunity for doubt, and hired professional divers to survey the entire length of right of way's subtidal area. The results of the two-day underwater survey are documented in the report from Dale Foster and Bob Ellis dated October 7, 2011 ("Diver Survey"). That survey notes that the entire subtidal portion of the pipeline right of way is composed entirely of sand and includes no Olympia oysters, and virtually no hard substrate habitat: "the divers described the area as an underwater desert with very little evidence of benthic invertebrate life." Diver Survey, page 2. The diver survey constitutes substantial evidence that confirms that the pipeline's construction activities in that area will "protect[ ] the productivity and natural character of the aquatic area" as it relates to oysters.

The opponents criticize the Diver survey for two reasons. *See* Chernaik Letter dated October 1417, 2011, at p. 3-4. First, the opponents argue that the divers might not have been trained sufficiently to recognize oysters under water. Second, the opponents argue that the Diver survey was not comprehensive enough because the divers could only see a portion of the 250 foot right of way.

If the standard were "clear and convincing" evidence, or "evidence beyond a reasonable doubt," then perhaps the opponents' points *might* have merit. However, the standard is "substantial evidence," which is a relatively low standard of proof. Substantial evidence is evidence that a reasonable person could rely on to draw a conclusion, after considering all countervailing evidence in the record. In employing this standard, the decision-maker is allowed to draw inferences from the evidence. Considering the results of the grab samples and diver survey in tandem, the hearings officer believes that a reasonable person could draw an inference and conclude that no significant quantity of oysters (or oyster habitat) exists in the subtidal portion of the proposed right of way. Had the opponents brought forth evidence that the terrain and habitat were highly variable in that portion of the right of way, or have provided evidence of actual oysters living in the subtidal portion of right of way , then they might have been successful in undermining the applicant's evidence. However, the best the opponents can do is provide evidence that oysters have been found in other portions of the subtidal lands in Coos Bay. Based on this record, the opponents' efforts to cast doubt on the applicant's evidence simply fail.

Despite the diver's direct evidence to the contrary, opponents continued to argue that the pipeline right of way could contain over a million Olympia oysters. *See* Oct. 17 memo from Mark Chernaik, page 8. The hearings officer finds that the opponent's expert testimony on this particular point is not convincing, and does not create sufficient doubt to cause the hearings officer to believe that the applicant's evidence regarding the absence of oysters or oyster habitat in the subtidal zone is not substantial.

C. Sedimentation (Joint Discussion of Both 11-NA-~~11~~ and 13A-NA Management Districts.

1. There is Substantial Evidence to Support a Finding that Construction of the Pipeline will not Result in Significant Impacts on Olympia Oysters Due to Sedimentation.

There appears to be agreement among the parties that there are two potential ways that Olympia oysters could be harmed as a result of pipeline construction: (1) direct impacts on oysters within the pipeline route due to pipeline construction, and (2) impacts from sedimentation resulting from pipeline construction. The first item is addressed above via the applicant's Protection Plan, which will protect all of the oysters within the pipeline route by relocating them to an area that will not be impacted by construction, and by the Mitigation Plan, which will provide additional habitat in the form of new hard substrate within the pipeline right of way after construction of the pipeline. The second item concerns the effect of sedimentation.

To be frank, this is the most difficult aspect of the case, because the evidence is the most difficult to decipher.

The opponent's chief scientist, Dr. Mark Chernaik, estimates that the hard substrate in Haynes Inlet would be covered by "a few millimeters of sediment." *See* Chernaik Letter dated Sept. 14, 2011, at p. 9. He asserts that such sedimentation could settle on hard surfaces and last for "several seasons." Even though he provides little to support his opinion, it does seem intuitive, at first glance, that he could be correct.

Conversely, the applicant relies primarily on a study by Vladimir Shepsis, Ph.D., P.E., and his company, Coast & Harbor Engineering ("CHE"),[11] to support findings that construction of the pipeline will not result in turbidity or sedimentation that will cause harm to existing Olympia oysters or impact their ability to reproduce.[12] The study is highly technical, and difficult for a layperson to understand.

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[11] As stated in his letter dated October 10, 2011, Vladimir Shepsis is a Coastal Engineer with 39 years of experience in coastal engineering project. He is a principal with Coast and Harbor Engineering ("CHE"). Mr. Shepsis's specialty is in the field of coastal hydrodynamics and sediment transport.

[12] Dr. Shepsis makes one statement that the opponents latch onto, in an effort to undermine his work. Dr. Shepsis discussed the scope of his analysis as follows:

> I am not a biologist and I cannot provide any specific conclusions regarding impacts of sedimentation on oysters. My analysis is limited to the question of whether the effect of flow velocities resulting from pipeline construction will cause an increase in suspended sediment concentration and deposition in Haynes Inlet.

See Shepsis letter dated October 10, 2011. The hearings officer interprets this statement to mean that Dr. Shepsis's analysis is not intended to evaluate how well oysters can survive the effects of sedimentation. Rather, Dr. Shepsis focuses his analysis on whether there will be a detectable increase in sedimentation as a result of the pipeline

Dr. Shepsis made a particularly impressive, high-tech, Powerpoint™ presentation at the September 21, 2011 public hearing. As some of the opponents correctly noted afterwards, it is easy to get dazzled by the "wow factor" of the special effects associated with Dr. Shepsis's presentation, and lose sight of the core concepts that are being addressed. *See, e.g,* Jan Dilley letter from dated October 10, 2011. In reviewing these materials, the hearings officer has made every effort to focus on the core of the argument to make sure it meets the substantial evidence standard.

Dr. Shepsis and CHE were originally hired to assist the LNG terminal applicant, Jordan Cove Energy Project (JCEP), in responding to information required by Oregon DEQ regarding potential sedimentation impacts that would result from construction of the JCEP terminal, dredging the access channel, and constructing the pipeline. In response to the DEQ request, CHE undertook a detailed sediment transport modeling analysis for much of Coos Bay, and produced a two-volume Technical Report to DEQ dated December 1, 2010 summarizing the results of that analysis. According to the applicant, those two volumes provided much of the background modeling that was relied upon by Dr. Shepsis in his presentation at the public hearing, and the two-volume report is included in the record as Exhibit 3 to applicant's October 17, 2011 submittal.

Prior to the public hearing, opponents raised concerns regarding potential impacts on Olympia oysters that due to increased sedimentation generated by pipeline construction. In order to respond to these concerns at the hearing, the applicant asked Dr. Shepsis to undertake a specific sediment transport analysis that was focused on potential impacts from construction of the pipeline within Haynes Inlet and specific locations where Olympia oysters had been identified by the applicant and the opponents. Dr. Shepsis completed this analysis and summarized his methods and conclusions in a detailed presentation at the public hearing on September 21, 2011. That presentation is included in the record in both video and hard copy format.

The methodology and results of Dr. Shepsis' study are summarized in his letter dated October 10, 2011. The analysis is based on a three-dimensional hydrodynamic model that shows the hourly flow velocities and directions for all of Coos Bay, and specifically, Haynes Inlet. The data supporting the model was calibrated against tides measured by NOAA at the Charleston Tide Station and actual currents recorded near the proposed LNG terminal in 2005 via Acoustic Doppler Profiler.

The analysis undertaken by Dr. Shepsis resulted in a qualitative study showing: (1) existing tidal and current flow velocities in and out of Haynes Inlet, and (2) the extent to which constructing the pipeline would result in any *increase* in suspended sediment concentration and sediment deposition in Haynes Inlet. As shown on slide #22 of the Shepsis Powerpoint™ presentation, his study considered potential impacts from stockpile placement in two locations that would be the most likely to result in sedimentation impacts. The first is located at

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construction. This statement does not provide much fodder for criticism. Other evidence in the record, including the Rex Miller video, provides substantial evidence supporting the conclusion that Olympia oysters will survive and multiply in relatively muddy environments.

approximately milepost 3.2, close to where Dr. Ellis found the highest concentration of Olympia oysters. The second is located at approximately milepost 2,8, close to the Highway 101 bridge where tidal flow velocities are highest and close to locations where Olympia oysters were identified on the rip rap and shorelines (see slide #30).

The results regarding the first location are shown on power point slides #24 through #28, and on the animation file on the CD submitted by the applicant that is titled "Haynes.avi." The tidal flow animation in that file shows no change in sedimentation levels that is visible to the naked eye. However, a closer review of the data shows that during two time periods of less than 15 minutes, at approximately hours 27.75 and 52.5, there is an increase in suspended sediment that is very limited in scope, and is only present in the immediate area of the base of the pipeline trench. This is shown by the red areas on slide #27. Thus, the only area potentially affected by sediment in this area is the immediate vicinity of the stockpile itself, and the small volume of increased turbidity will remain in that area and will not be detected in any other portion of Haynes Inlet.

The results regarding the second location are shown on power point slides #30 through #34, and on the animation file on the CD that is titled "Oyster.avi." The animation in that file shows very brief increases in suspended sediment, primarily during the outgoing tide, coinciding with the time of highest flow velocities. Timing of turbidity spikes corresponding with tidal velocities for four specific locations where oysters have been identified is shown on slides #31-#34.

As the applicant points out, there are four significant points regarding the increases in turbidity shown on the "Oyster.avi" animation file:

(1) the time period for the increase is very short, *i.e.*, less than 15 minutes per day;

(2) that short time period coincides with the period of highest velocity of water flowing west, and *out* of the intertidal area where virtually all of the Olympia oysters are located;

(3) although the areas of turbidity are larger than in the first study area (where they are miniscule), they are still very limited in scope and are located primarily in a small area immediately to the west of the stockpile; and

(4) as explained by Dr. Shepsis, the corresponding high velocity during this period of turbidity will ensure that sediments would not be able to settle on the hard substrate shorelines where Olympia oysters are present in that area.

The overall results of the study are summarized in the October 10, 2011 letter from Dr. Shepsis, which concludes:

> Based on the results of our detailed three-dimensional modeling, my conclusion is that pipeline construction will not result in any detectable increase of suspended sediment concentration and deposition in Haynes Inlet. Overall, our modeling indicates that changes in suspended sediment concentration during construction

> of the pipeline will be negligible compared to existing conditions in Haynes Inlet. Although there may be very temporary and localized increases in suspended sediment concentration due to high velocities in the area of the bridge, the sediment would not be able to deposit on the identified oyster locations.

See Shepsis letter dated Oct. 10, 2011, at p.4. The hearings officer finds that the expert testimony of Dr. Shepsis constitutes substantial evidence on which the County may rely to reach a conclusion that pipeline construction will not result in increases in sedimentation that will negatively impact Olympia oysters.

The only remaining question is whether the opponents have submitted evidence or argument that "so undermines" the testimony of Dr. Shepsis and the data provided by CHE that it is no longer evidence a reasonable person would rely upon. The remainder of this section provides responses to specific arguments raised by the opponents in challenging Dr. Shepsis's testimony and the CHE data.

2. The Opponents' Evidence Intended to Underline Dr. Shepsis's Testimony Does Not Accomplish Its Goal.

Sadly, the opponents have provided no actual modeling of their own regarding how much sedimentation they believe will be caused by construction of the pipeline. As the opponents point out, this is a bit of a "David and Goliath" fight, and it seems apparent that the opponents do not have the resources to provide their own study. Unfortunately, this is a common dilemma in land use proceedings.

Rather, the opponents attempt to critique Dr. Shepsis's work, hoping that the County will find sufficient flaws to warrant a denial based on a failure to meet the burden of proof. This is a risky approach in an administrative proceeding, because the substantial evidence standard is a very low standard. The opponents would have ultimately been better served by providing substantial evidence, in the form of modeling, to support their position that the sedimentation will be significant and will necessarily result in harm to oysters. At the end of the day, it is apparent that the applicant has met its burden of proof to demonstrate that the effects on the Olympia oyster from sedimentation, if any, will be temporary and insignificant.

a. Chernaik materials dated October 10, 2011, Including Comments by Dr. Trimble dated Oct. 5, 2011.

The opponents challenge the studies and testimony provided by Dr. Shepsis and CHE by having them informally peer reviewed by Dr. Thomas Ravens, a hydrologist from the University of Alaska Specializing in hydrodynamics and sediment transportation. In his October 10, 2011 memorandum, Dr. Chernaik first argues that the CHE modeling results for sedimentation in Haynes Inlet are not "negligible" because (1) only 50 microns of sediment can impair attachment of oyster larvae, and (2) Mr. Shepsis's presentation shows spikes of sedimentation increase "lasting several hours."

i. 50 Microns of Sediment.

Dr. Chernaik's assertion regarding the "50 micron" figure is based on personal conversations with Dr. Alan Trimble. *See* Chernaik letter dated Oct. 10, 2011, at p. 8; Trimble letter dated Oct. 5, 2011, at p. 3. The opinion does not appear to be supported scientifically, and is directly contradicted by other evidence submitted by Dr. Chernaik. The 50 micron figure seems to be rather outlandish, as it a thickness that more or less approximates the width of human hair. A layer of sediment that thick would barely be visible to the human eye. Given the success that Rex Miller has experienced in waters that produce much higher rates of sedimentation, the hearings officer finds the 50 micron figure to either be wrong, or used out of context in this case.

But even if it is true, Dr. Shepsis's response to this argument is as follows:

> Dr. Chernaik does not attempt to explain the significance of the 50 micron figure as it relates to my presentation. Note that 50 microns is 0.05 mm. Dr. Chernaik provides an analysis of dredging-induced sedimentation in Newark Bay prepared by T. Lackey, et al. (Chernaik Exhibit 7), which shows accumulation of sediment in the most unfavorable conditions at a maximum of only 0.03 mm or 30 microns. Based on actual conditions in Haynes Inlet, as discussed in my presentation and in responses below, my conclusion is that the maximum theoretical deposition in the Haynes Inlet area would be at a much lower detectable level than 30 microns.

See Shepsis letter dated Oct. 17, 2011, at p.4. The opponents never rebut Dr. Shepsis' response.

ii. Spikes of Sedimentation Concentration Lasting Several Hours.

Dr. Chernaik also states that Dr. Shepsis' analysis reveals "spikes of concentration lasting several hours." Dr. Shepsis responds as follows:

> As explained in my presentation at the public hearing, spikes of sediment concentration coincide with highest flow velocities. Durations of high velocities exceed the durations of suspended sediment spikes, which results in no deposition of sediment in these areas. I do not understand why Dr. Chernaik believes that my presentation shows spikes of sedimentation "lasting several hours." Slides 31-34 of my presentation show only one sedimentation spike of any theoretical significance, which was at the opponents' site 4 (slide 31). Slide 31 shows one spike lasting less than 15 minutes during every 24-hour tide cycle.

See Shepsis letter dated Oct. 17, 2011, at p.4. Given that Dr. Chernaik is a biologist and Dr. Shepsis is an engineer, the hearings officer's tendency would be to defer to Dr. Shepsis on

engineering issues such as this, particularly since Dr. Chernaik has been demonstrably wrong on various other issues in this case.

iii. Source Terms.

Next, Dr. Chernaik argues that the County should not rely on the testimony of Dr. Shepsis as evidence, because the modeling results are unsubstantiated insomuch as the study does not identify "source terms" regarding specific rates of expected sediment release. *See* Chernaik letter dated October 10, 2011, at p. 14. Dr. Chernaik submits an article regarding sedimentation impacts from a dredging project on winter flounder habitat in Newark Bay, and points out that it includes certain "source term" data that is missing from Dr. Shepsis's analysis. In his October 17, 2011 submittal, Dr. Chernaik raises the same "source terms" issue again, this time relying on comments provided by Dr. Thomas Ravens. *See also* Chernaik letter dated October 17, 2011, at p. 1, Raven Letter dated October 14, 2011, at p. 2-3. [13]

In his letter dated October 14, 2011, Dr. Ravens states:

> Sediment transport modeling of dredging operations should generally include a sediment production term that accounts for the introduction of suspended sediment into the water column. Data such as that cited [in the Newark Bay study] – showing the mass rate of sediment introduction due to clam shell dredging – should be used to assess the sediment transport impacts of dredging operations. However, a close reading of the statement provided by Vladimar Shepsis indicates that such an accounting of the particle generation of the dredging operation was not undertaken.

See Ravens letter dated Oct. 14, 2011, at p. 3. Stated in lay person terms, the hearings officer understanding Dr. Ravens to be finding fault with Dr. Shepsis's analysis because it fails to define a value representing how much sediment enters into the water column when the crane's bucket scoops mud out of the pipeline trench.

In his letter dated October 17, 2011, Dr. Shepsis responds to Dr. Ravens by explaining the differences between his studies and the Newark Bay Study, as well as by explaining the absence of "source terms" from his study:

> The analysis provided in the Lackey study of the Newark Bay project is very different from our study because that involved a project where dredged materials would be permanently removed from the bay by a clamshell dredge. In that type of project,

[13] The letter from Dr. Ravens stating his qualifications includes what the applicants see as a "significant admission" that only "*some* of the work that I have done *tangentially* addressed sediment transport impacts of dredging." Oct. 14 letter from Dr. Ravens, page 1. The applicant states that "[t]his does not exactly provide a ringing endorsement regarding Dr. Ravens's qualifications for review of this project." It is noteworthy that none of Dr. Ravens's scholarly articles appear to involve sediment transport impacts from dredging. Unfortunately Dr. Ravens did not appear before the hearings officer to offer testimony, so questions regarding his credibility and qualifications must be based on his resume and comments alone.

> potential turbidity is measured based on the impact of the dredging bucket on the bottom and amounts of sediment that come out of the bucket during ascent and descent. Those are the 'source terms' referenced and measured in Table 1 of the Lackey study. In contrast, the current project involves trenching and placement of a stockpile mound adjacent to the trench prior to placement of the material back in the trench. As explained in my letter dated October 10, 2011, turbidity arising from placement of dredged material in the mound and impacts from tidal currents on the mound will be significantly higher than impacts from dredging the same material. Therefore our analysis considers the 'worst case scenario' of sedimentation in the form of impacts of hydrodynamic flow on trenched material, but the different type of 'source terms' from the Lackey study regarding rates of sediment dispersal during dredging and removal are not part of our analysis. Instead, the computer model that we prepared provides the rate of release of sediment from the trenched stockpile material. The model allows constant erosion and re-suspension of trenched material in the water column instead of period releases of this sediment from the bucket. (Emphasis added).

See Shepsis letter dated Oct. 17, 2011, at p. 5. In essence, Dr. Shepsis states that the "source terms" for the crane's bucket do not matter in this case because, unlike a typical dredging operation where sediments are removed from the water, the dredge spoils in this case will be placed temporarily on the floor of the estuary. Dr. Shepsis notes that that much more sedimentation will occur from both the placement of dredged material in the mound as well as the corresponding impacts from tidal currents as it laps up against the mound and dislodges sediment from the pile.

Both Dr. Raven and Dr. Chernaik fail to reply to Dr. Shepsis's explanation set forth above regarding why this particular project did not require the same "source term" inputs as the Newark Bay dredging project.

iv. Actions Which Cause the Most Sedimentation.

To a certain degree, it seems that Dr. Shepsis and Dr. Ravens are talking past each other. One particular exchange between Dr. Shepsis and Dr. Ravens illustrates this problem. On page 2 of his Oct. 10, 2011 letter, Dr. Shepsis states:

> "Results from our analysis on this project and many other projects indicate that turbidity during placement of dredged material on an open (non-confined) bottom of a water body and storing this material under impact from current velocities is significantly higher than that during the digging of the same material."

Dr. Ravens responds as follows:

> "Although his statement is ambiguous, Vladamir Shepsis implies that more particles are generated **following** placement of dredged materials than during the dredging and placement process. If this is true, it is not common knowledge amongst sediment transport specialists." (Endnote omitted, Emphasis in original).

See Ravens Letter dated Oct. 14, 2011. Reading these two passages side by side, it is apparent that Dr. Ravens misreads and misquotes Dr. Shepsis. In his various materials, Dr. Shepsis identities four different periods of potential turbidity releases:

A = turbidity generated when the crane's bucket "digs the material" (*i.e.* removes mud from the trench and lifts it into the air)
B = turbidity generated when the crane's bucket places / deposits the removed mud on an open (non-confined) bottom of a water body (i.e. when the crane bucket opens and releases mud onto the storage pile).
C = turbidity generated from "storing this material under impact from current velocities" (i.e. when tidal currents lap up against the mud mound).
D = turbidity generated when the crane's bucket fills the trench back in.

In the quote set forth above, Dr. Shepsis is saying: B + C > A. However, Dr. Ravens states that Dr. Shepsis is wrong to assume that C > B + A. (Note that Dr. Ravens refers to A + B as the "dreging and placement process."). Therefore, it is clear that Dr. Ravens either did not understand what Dr. Shepsis was saying, or Dr. Ravens purposefully misquotes Dr. Shepsis. Either way, it is a misreading that is fatal to Dr. Ravens' credibility in this case.

"Substantial evidence" in the land use context is "evidence a reasonable person would rely upon in making a decision." It is a relatively low standard, as mentioned above. In this case, Dr. Shepsis's analysis constitutes substantial evidence, in part because he responds to Dr, Raven's testimony in a manner that does not seem to be unreasonable, at least to a lay person, and because Dr. Shepsis comes across as having greater expertise and greater credibility.

b. Dr. Raven's Letter dated October 14, 2011.

In his letter dated October 14, 2011, Dr. Ravens suggests that the CHE analysis is also faulty because: (1) it does not provide data regarding particle size of sediments; (2) it focuses on turbidity increases resulting from tidal flow effects on stockpiled material, but not from dredging; and (3) Dr. Shepsis's conclusion that any suspended sediments will not result in detectable accumulations in Haynes Inlet is not credible.

i. Grain Size.

The applicant responds to issue 1 as noting that specific data regarding sediment grain size is provided in Volume 1 of the CHE Technical Report at Section 5.2, and is discussed in more detail below.

ii. Impacts Related to Turbidity Caused by the Crane's Bucket.

With regard to issue 2, the applicant notes that Dr. Shepsis and CHE have explained the basis for their methodology concerning conducting turbidity modeling based on impacts on the stockpiled materials. The applicant cites to Volume 2 of the CHE Technical Report, at Section 10.1:

> "10.1 Methodology
>
> "The objective of analysis and modeling conducted in this section is to determine the potential impact of pipeline construction through Haynes Inlet on increases in turbidity (suspended sediments) at the area of interest. The location of the pipeline and area of interest for investigation of potential impact were defined in CHE (2010b) and are shown in Figure 10-1.
>
> "There will be three elements of dredging operations during pipeline construction that may generate turbidity in the water column:
>
> "1. Dredging (excavation) of the pipeline trench.
>
> "2. Placing (dumping) dredged material adjacent to the pipeline trench for temporary stockpiling.
>
> "3. Replacing material back into the pipeline trench following pipeline construction.
>
> "In order to address the worst case scenario of maximum turbidity and highest likelihood of impact, analysis and modeling of turbidity were conducted for the dredged material placement (dumping) adjacent to the pipeline trench. Results from the analysis and modeling suggest that turbidity during placement of dredged material on the open (non-confined) bottom is significantly higher than that during dredging of the same material. Similarly, re-placement of dredged material in the pipeline trench will create smaller amounts of turbidity because the material is more confined within the trench."

This methodology was adopted by CHE based on its modeling results for this particular project in Haynes Inlet, which involves not just dredging but also stockpiling and replacement of dredged material. According to the applicant: "this is a scientifically accepted methodology that has been accepted by DEQ for purposes of its review of potential water quality impacts from this project in Haynes Inlet."

The applicant further notes that Dr. Ravens admits that he has only "tangentially" reviewed dredging projects in "some" of his work, and it appears that he has *no* experience regarding this type of pipeline project involving not only dredging but also stockpiling and

replacement of material. For this reason, the applicant surmises that it is not surprising that Dr. Ravens is not familiar with the methodology. Under these circumstances, the hearings officer accepts the more specific expert testimony and conclusions of Dr. Shepsis and CHE regarding the appropriateness of their "worst case scenario" methodology for purposes of this particular project.

Further, even if the County looks past the "worst case scenario" methodology to also consider what the potential effects on turbidity could be from dredging and replacement of material in the pipeline trench, the evidence in the record from CHE and Dr. Shepsis support a finding that even if all three activities are considered, there would be no negative impacts from sedimentation on Olympia oysters. The analysis and reports prepared by CHE and Dr. Shepsis conclude that (1) turbidity resulting from tidal flows on stockpiled materials would not result in *any* detectable increase of sedimentation in Haynes Inlet, and (2) turbidity resulting from tidal flows on stockpiled materials would be "significantly higher" than that resulting from dredging or re-placement of the same material. CHE Technical Report Section 10.1, quoted above. Therefore, it is reasonable to conclude that if the activity causing "significantly higher" amounts of turbidity will result in no detectable sedimentation, then the activities that would cause significantly lower amounts of turbidity will also cause no increases in sedimentation in the area.

iii. Suspended Sediments Will Not Likely Result in Detectable Accumulations in Haynes Inlet.

The applicant responds to the third issue raised by Dr. Ravens by noting that Dr. Shepsis concluded that any suspended sediment caused by pipeline construction will disperse and not result in detectable accumulations of sedimentation in Haynes Inlet. Dr. Ravens states that this conclusion is "not credible." However, Dr. Ravens provides no analysis or explanation other than to say that "small concentration of particles can lead to significant deposition over time." See Ravens letter dated Oct. 14, 2011, at p. 3. A review of the specific results of Dr. Shepsis's study reveal that his conclusion is both credible and well-documented in his letter dated October 10, 2011.

The Shepsis study analyzed two potential stockpile locations, one at approximately milepost 3.2 and the other at approximately milepost 2.8. The modeling results for the milepost 3.2 location show a small volume of increased turbidity that is extremely limited in location to the immediate vicinity of the stockpile itself, and also limited to two time periods of less than 15 minutes per day. Therefore, it is certainly reasonable for Dr. Shepsis to conclude, as stated in his letter to the hearings officer, that any sediments in this area "will essentially remain in the immediate stockpile area and will not spread to the rest of Haynes Inlet." *See* Shepsis letter dated Oct. 10, 2011, at p. 3.

The second study area, located at milepost 2.8, is subject to much higher tidal velocities, and is therefore the more critical of the two sample locations. The modeling results in that location show very short increases in turbidity (less than 15 minutes per day) that coincide exactly with the highest outgoing tides. Therefore, to the extent there will be a very brief increase in suspended sediment in that area, such sediment would be immediately dispersed with the extremely fast-moving tidal currents of up to 4 feet per second and, essentially flushed out and under the Highway 101 bridge into an area where there is no documented evidence of

Olympia oysters. Therefore, Dr. Shepsis reasonably, and credibly, concluded his letter to the hearings officer as follows:

> 3. Conclusion
>
> Based on the results of our detailed three-dimensional modeling, my conclusion is that pipeline construction will not result in any detectable increase of suspended sediment concentration and deposition in Haynes Inlet. Overall, our modeling indicates that changes in suspended sediment concentration during construction of the pipeline will be negligible compared to existing conditions in Haynes Inlet. Although there may be very temporary and localized increases in suspended sediment concentration due to high velocities in the area of the bridge, the sediment would not be able to deposit on the identified oyster locations.

See Shepsis letter dated Oct. 10, 2011, at p. 4. The only evidence that Dr. Ravens presents on this subject is his statement that "small concentration of particles can lead to significant deposition over time." However, the timeframes associated with construction of the pipeline and the existence of stockpiled material in Haynes Inlet are relatively short for each segment of construction. As explained in the CHE Technical Reports, the total duration of trenching operations (excavation, placement of pipeline and trench refill) for each 800-foot pipeline reach is approximately seven days. CHE Technical Report, Volume 2 page 17, Section 11.1. As described in that report: "Considering the above, the objective of this analysis is narrowed to determining the possible dispersion of sediment and turbidity resulting from a stockpile of dredged (excavated) material along the pipeline route during seven days of construction." *Id.*

Thus, while Dr. Ravens is correct that even tiny concentrations of particles can result in significant deposition over significant periods of time, Dr. Ravens has not provided any evidence to suggest that the small amounts of turbidity referenced in Dr. Chernaik's study could actually result in significant deposition given that their duration is less than 15 minutes per day, and the stockpiled material will only be located in the water for an estimated seven days.

c. Chernaik Materials dated November 17, 2011.

There are three sediment-related issues raised in the opponents' November 17, 2011 submittal.

i. Newark Bay, NY Study.

As an initial matter, there is continued discussion regarding the details of the Newark Bay project and how it compares to the applicant's project. However, as the applicant's attorney Roger Alfred notes, this "back-and-forth between the two doctors regarding the Newark Bay project has gone beyond its significance to this proceeding." As discussed above, that study was originally provided by Dr. Chernaik solely to provide an example of the type of "source terms" that he believed should have been included in Dr. Shepsis's work. The debate regarding

comparisons of the amounts of sediment likely to be generated by that project versus the Haynes Inlet project is not particularly relevant to the issues at hand.

Moreover, in this particular exchange, Dr. Shepsis clearly gets the better of Dr. Chernaik. The Newark Bay study involved dredging, rather than trenching and stockpiling, and the dredging operation would produce much higher amounts of sediment because the dredging bucket pulls sediment out of the bottom of the bay and all the way through a 30-40 foot water column. On the other hand, this project involves the temporary removal of material from the bottom of the inlet, in water that is no more than 8 feet deep, and the temporary placement of that material in a stockpile right next to the dredged area.

ii. "Unvalidated" Sediment Transport Model Regarding Background Levels of Turbidity.

The report prepared by Dr. Ravens titled "Limitations of the Haynes Inlet sediment transport study" dated November 13, 2011 challenges two aspects of the Technical Report prepared by CHE that provides the background data for this study. Specifically, Dr. Ravens states that the CHE analysis is faulty because: (1) it relies upon an "unvalidated" sediment transport model regarding background levels of turbidity; and (2) it incorrectly relies upon an assumption of uniform sediment size despite data showing that sediments are smaller than assumed.

The two issues raised by Dr. Ravens are discussed by Dr. Shepsis in his letter dated November 23, 2011. First, Dr. Shepsis explains that the CHE sediment transport model is being used for qualitative purposes only, and does not apply the type of absolute quantitative values that would require the modeling results to be validated or calibrated against measurements of background turbidity from the subject site. In other words, the CHE analysis compares a model of background levels of turbidity against what would be generated by project construction, and reports the extent to which there will be an increase, decrease, or no change in turbidity resulting from construction. The applicant states that: "[i]n this type of qualitative analysis it is an accepted scientific practice to rely upon modeled background data that has not been independently verified at the site, because the point of the study is only to establish the extent project conditions will result in an increase over existing conditions; therefore, knowing the actual quantitative amount of background turbidity is not essential." Dr. Shepsis further states:

> I have clearly stated from the beginning of the project (see Technical Report entitled Jordan Cove Energy Project and Pacific Connector Gas Pipeline - Volume 1, Page 40) and have repeated several times in Volume 2 of the same technical report, that the model used for sediment transport and related parameters as turbidity, sediment concentration, etc..., has not been validated or calibrated for this study and that the modeling results for sediment transport and related parameters are used qualitatively for comparative analysis only. This means that the analysis is performed in terms of "relative to existing conditions." No quantitative absolute values are considered for this analysis. The study provides results of potential impact from the project

> construction in respect to existing conditions (background conditions). The increase, decrease, or no-change of sediment concentration, turbidity etc... in respect to the modeled background conditions has been provided as output of this study. This approach, use of a non-validated model in qualitative mode, is typical in the industry and has been previously used in many credible studies.
>
> Further, the argument used in Dr. Ravens' example is flawed because I did not perform the analysis in quantitative terms. In Dr. Ravens' example, the wrong assumption is to consider my results as absolute values. For example, if the modeled background concentration was even five times larger than the actual background concentration (as Dr. Ravens supposes in his example), then also the modeled post-project concentration would be five times larger than the actual post-project concentration. Therefore, the relative comparison between background and post-project would remain the same in nature as in the model. Regardless of what the actual background conditions are in nature, my results provide an increase, decrease, or no-change of the modeled parameter (turbidity, sediment concentration, etc...) for modeled post-project conditions in respect to modeled background conditions.

See Shepsis letter dated Nov. 23, 2011, at p. 2. Dr. Ravens does not respond to this testimony. The hearings officer finds Dr. Shepsis' analysis to be more credible and further finds that it constitutes substantial evidence that is not undermined by Dr. Raven's testimony to the contrary.

iii. Grain Size.

Next, regarding the allegations concerning improper assumptions of sediment size, Dr. Ravens argues that Dr. Shepsis' analysis is flawed because he assumes a single uniform grain size in his model (.27 mm), which is a typical size for a fine grain of sand. According to Dr. Ravens, the model should have used grain sizes that approximate silt and clay as well (i.e. grain sizes in the range of .10 mm and .05 mm). Dr. Ravens attributes two problems with this error: (1) "the calculation of background turbidity distribution at the study site would be inaccurate," and (2) the modeling of dredging-derived turbidity would be inaccurate. *See* Ravens letter dated Nov. 13, 2011, at p. 5-6.

The hearings officer notes that of the three representative grain sizes that Dr. Ravens places at issue. Of those three, the .10 mm grains are most likely to result in higher turbidity, according to his calculations. *See* Table 1 of Ravens letter, at p. 5. Table 1 shows .10 mm silt grains having an "average suspended sediment concentration" of 3000 mg/ltr, which is much higher than the sand sized-gains (10 mg/ltr), or the smallest silt sized grains (200 mg/ltr.). The hearings officer understand that the .05mm grains produce less turbidity than the .10 grains because the .05mm sized grains are "cohesive" in nature, which means that inter-particle forces start to dictate the resistance to motion, as opposed to mere gravitational forces. *Id.* at p. 5.

Nonetheless, Dr. Ravens conclusions do not seem to hinge specifically on the .10 mm sediments. Rather, Dr. Ravens' point is simply that finer grained silts and clay sediment will disburse farther than sand:

> The time a given dredging turbidity plume is suspended can be estimated based on the ratio of depth over the fall velocity. The fall velocity for .27 mm and .05 mm sediments is about 30 mm/sec and 2 mm/sec respectively. Consequently, the finer sediment would be suspended for about 15 times as long and would be dispersed over 15 times the distance.

Id. at p. 6. Essentially, Dr. Ravens point is that sand falls through water much faster than silt, which means that silt stays in suspension longer than sand, and, as such, has more time to get carried away in the tides than will the sand.

Dr. Shepsis responds that Dr. Chernaik and Dr. Ravens are factually wrong to assume that the CHE Technical Report only uses one grain size (*i.e.* the larger .27 mm grain size). The CHE Technical Report states that numerical modeling of sediment transport was conducted with two sediment sizes, 0.27 mm grain diameter (sand) and 0.05 mm grain diameter (silt), which the report says is representative of the typical sediment sizes present in Coos Bay including Haynes Inlet. *See, e.g.*, CHE Technical Report at p. 41. Dr. Shepsis states:

> These two sediment sizes are representative of the typical sediment sizes present in Coos Bay including Haynes Inlet, as it results from the study conducted by GeoEngineers (August 2010), referenced by Dr. Ravens. I was aware of the fact that the sediment size distribution in Coos Bay including Haynes Inlet was spatially variable, ranging from silt to sand. The modeling results presented in Section 10.1 of the Technical Report entitled Jordan Cove Energy Project and Pacific Connector Gas Pipeline - Volume 2 (quoted by Dr. Ravens) were conducted with 0.27 mm grain diameter because this is the type of sediment present in the majority of the study area. Dr. Ravens' statement that '*However, the sediment characterization study conducted by GeoEngineers (August 2010) indicates that the sediments are significantly finer than this in large portions of the study area*' is not supported by the GeoEngineers study of August 2010. According to the GeoEngineers study, the only section where the percentage of silt (50.4%) is comparable to the percentage of sand (48.4%) is section DMMU-1 (and not DWWU-1, as erroneously quoted by Dr. Ravens). This section is located in the north part of Haynes Inlet, far from the oyster relocation area. The other two sections (DMMU-2 and DMMU-3) have 67.0% and 86.2% of sand and only 33.0% and 13.1% of silt, respectively.
>
> I have shown in the paragraph above that the use of 0.27 mm sand is a reasonable assumption for our study and not a '*wrong grain*

> *size*' as Dr. Ravens commented. Nevertheless, I want to reiterate that Dr. Ravens is again reasoning in absolute terms ('... *the calculation of the background turbidity distribution at the study site would be inaccurate if the wrong grain size is assumed...*'), while my analysis was performed in terms of 'relative to existing conditions.' My study was a qualitative/comparative analysis. My modeling results are produced as "concentration in excess of ambient concentration.
>
> Again, the 0.27 mm grain size used in my modeling efforts is a reasonable sediment size, given the information in the Geo-Engineers study. Furthermore, not only did I use a reasonable grain size for analysis of sedimentation, but using a larger grain diameter (0.27 mm versus 0.05 mm) is conservative in terms of potential impact to oyster beds. Dr. Ravens should have known and should have educated Dr. Chernaik that larger sediment particles may deposit in close vicinity of the source of suspension and is more indicative factor for sedimentation of oyster beds.

See Shepsis letter dated Nov. 23, 2011, at p. 3. Thus, Dr. Shepsis states that the portions of the Haynes Inlet that have the most sand (as opposed to silt) are also the areas that have the highest flow velocities. Obviously, that is not a coincidence: the smaller sediment will not settle in high-velocity environments. The areas of low flow velocities will likely create less far-reaching turbidity, even though the percentage of silt is higher, due to the fact that the tides have less energy in those locations. Conversely, in areas where the flow velocities are the highest, the fact that the majority of the sediment is sand limits the distance that such sediments will travel. Dr. Shepsis seems to be of the opinion that the larger particles are the most dangerous in terms of potential impact to oysters for the simple fact that will deposit in close vicinity to the dredging location, and, therefore, will create thicker layers of sediment.

Although this issue presents somewhat of a close call due to its technical nature, the hearings officer finds Dr. Shepsis' analysis to be more credible and further finds that it constitutes substantial evidence that is not undermined by Dr. Raven's testimony to the contrary. Three issues factor into this conclusion. First, although Dr. Ravens criticizes Dr. Shepsis's study, he never really addresses the ultimate issue, which is to say that he never concludes that the dredging operations will fail to "protect" the oysters. Second, He never really accounts for, or weights in on, the use of best management practices such as silt curtains, etc. Third, the hearings officer does not believe that Dr. Ravens has done enough to make the case that the fine sediment (.05mm) will harm the oyster beds. As discussed elsewhere, Dr. Ravens does state that "small concentration of particles can lead to significant deposition over time," but he makes no effort to quantify what he means by "small quantities" or explain how much time he is referring to. In short, his statements and analysis are simply to vague and too perfunctory to cause a reasonable person to disregard Dr. Shepsis' analysis.

2. Even with some sedimentation, there will be only "temporary and insignificant" impacts on Olympia oysters.

The applicant argues that "the sedimentation issue is a red herring, because the opponents have greatly overstated the potential impacts of sedimentation from this project on Olympia oysters." The applicant points out that "the bucketful of Olympia oysters that will be relocated by the applicant are, generally speaking, already attached to hard substrate." There is substantial evidence in the record that (a) adult oysters can tolerate relatively high amounts of sedimentation (several millimeters), (b) Olympia oysters prefer to locate on the undersides of hard substrate, where sedimentation is not as much of an issue, and (c) the post-construction mitigation being proposed by the applicant will be successful, and obviously will not be impacted by sedimentation from the project, since it occurs after pipeline construction is complete.

Therefore, even if the opponents were somehow correct that Dr. Shepsis has underestimated the amount of sedimentation, that would not require the conclusion that there will be anything more than temporary or insignificant impacts on Olympia oysters. This is particularly true, given the applicant's proposal to provide post-construction mitigation in the form of new Olympia oyster habitat. Turbidity resulting from the project must be monitored as part of DEQ requirements. The hearings officer recommends a condition of approval requiring the use of turbidity curtains if monitored levels of turbidity exceed threshold levels mandated by DEQ,.

The opponents attempt to cast doubt on the Shepsis /CHE analysis by having the study informally peer reviewed by Dr. Zarcherl and Dr. Ravens. The opponents also rely on data from a sedimentation study for a dredging project in Newark Bay.

There is evidence in the record to support the conclusion that Olympia oysters can survive some amount of sedimentation. For example, there is evidence in the record, in the form of the opponents' own statements, the testimony of Dr. Ellis, and the video submitted by Rex Miller, that sedimentation is not necessarily going to harm Olympia oysters (particularly adult Olympia oysters) or their ability to reproduce. First, the opponents themselves submitted the following statement from a 2005 Corps of Engineers study:

> Although a thin layer (several mm) of sediments may not be fatal to adult oysters, it may affect reproduction. Because larval oysters require hard substrata for settlement, the presence of even a few millimeters of sediment covering an oyster reef may inhibit larval recruitment.

See Chernaik letter dated Oct. 10, 2011, at p. 8. Thus, opponents admit that several millimeters of sediment is not necessarily fatal to adult oysters, and that the real threat from sedimentation is on reproduction. However, even regarding reproduction, the above-quoted statement suggests that a millimeter or two of sediment is not going to "inhibit larval recruitement" on hard substrate. Thus, the opponents' later assertion that even 50 microns of sediment will prevent attachment of larvae is contradicted by their own evidence (one millimeter is a thousand microns, so 50 microns = 0.05 mm).

The Olympia oysters to be *relocated* under the Mitigation Plan are, by definition, adults that are already attached to hard substrates. Therefore, the evidence submitted by opponents indicates that those oysters can survive under "several millimeters" of sediment.[14] Also, as discussed below, Dr. Zacherl's restoration project in Newport Bay shows significant increases in Olympia oyster density in six months where Pacific oyster shell was placed, *in spite of an average mud deposition of 0.8 mm (800 microns) on the shells.*

This is also consistent with the oysters shown in the DVD submitted by Rex Miller (at approximately 6:50 through 9:15), which are covered in relatively thick layers of mud. According to Mr. Miller, those oysters are "doing pretty well" and are even continuing to reproduce.

Based on this evidence, the hearings officer finds that even some amount of sedimentation will not impact the oysters being relocated by the applicant, or other existing adult Olympia oysters in Haynes Inlet. This is particularly true regarding the Olympia oysters in the areas near the bridge where high tidal flow velocities will prohibit accumulation of sediment.

Meanwhile, the mitigation being proposed by the applicant will be specifically designed in consultation with ODFW to attract larval settlement of Olympia oysters (see proposed condition of approval above), and will obviously occur *after* construction. Therefore, there will be *no* sedimentation impacts from pipeline construction on the ability of larvae to attach on the new hard substrate that will be provided by the applicant. As a result, the hearings officer finds that some sedimentation will not result in impacts to adult oysters, and larval attachment in the mitigation area will not be impacted because that will occur post-construction.

The opponents submitted arguments that a sediment covering of less than 50 microns (1/500th of an inch) is enough to impair the attachment of Olympia oyster larvae to hard substrate. Oct. 10 memo from Mark Chernaik, page 7. However, this figure is not based on any scientific study, it is merely based on a personal estimate provided by a biologist, Dr. Ravens, recruited by the opponents (*Id.* at 8). This evidence is directly contradicted by the 2005 Corps of Engineers study quoted above. Moreover, Dr. Ellis provided data to the contrary from Dr. Zacherl's project in Newport Bay, which is actually based on a scientific study. As stated by Dr. Ellis:

> "Dr. Chernaik fails to mention that Olympia oyster spat have a strong preference for the undersides of hard substrates (Sawyer, 2011), which would be unaffected by sedimentation. Zacherl et al., (2011) found that six months after placement of Pacific oyster shell in Newport Bay, Olympia oyster density was up to 20-30 times greater than the control (where no Pacific oyster shell had been placed) in spite of an average mud deposition on that shell of 0.8 mm. The results of this study have not been published, but a presentation was given at the 2011 Headwaters to Ocean

[14] Dr. Shepsis included an estimate that any sedimentation resulting from the pipeline construction in Haynes Inlet would be "a much lower detectable level than 30 microns." Oct. 17 letter from Dr. Shepsis, page 4.

Conference, and this presentation (Zacherl, et al., 2011) is included as attachment A."

See Ellis letter dated Oct. 17~~th~~ 2011, at p. 10. Thus, Dr. Zacherl's own study found that Olympia oysters were thriving and reproducing despite an *average* sediment coverage of 0.8 mm. By way of contrast with the opponents' 50 micron figure, 0.8 mm is 800 microns. Dr. Zacherl admits that oyster larvae prefer attaching to the underside of hard substrate, and therefore relatively high levels of sedimentation cover on the topside of a shell is "less of an overall impediment" for the attachment of Olympia oyster larvae. *See* Chernaik letter dated Nov. 14, 2011, at p. 4.

The opponents' only substantive response is that the applicant's mitigation plan would distribute shells too diffusely for there to be any available undersides on which larvae can attach. *Id.* However, this misses the obvious fact that the applicant's proposed mitigation will occur *after* construction of the pipeline – when construction-related sediment will no longer be an issue. Moreover, it also ignores the fact that discarded Pacific oyster shells have been successfully colonized by Olympia oysters in Haynes Inlet.

Regardless, based on comments of this nature submitted by the opponents regarding a need for deeper dispersal of Pacific oyster shell to provide available "underside" for attachment, the applicant is proposing the condition of approval set forth above that requires the applicant to consult with ODFW regarding the best methods for and location of shell dispersal in order to ensure successful colonization, including greater depths of shells and placing thick groups in "bags" as documented in the Zacherl study. The hearings officer find~~ings~~ this proposed condition to be reasonable and likely to be effective. The hearings officer is satisfied that the applicant can work with the appropriate agencies to determine the best distribution of shells to maximize the recruitment / settlement of oyster larvae.

3. Discussion of Miscellaneous Arguments Associated with the Sedimentation Issue.

a. Reliance on 2005 data.

Jody McCaffree and other opponents challenge CHE's reliance on tidal flow data from June 2005, arguing that the data should have considered the months of October through February when construction of the pipeline will occur. Dr. Shepsis rebuts this assertion in his letter dated October 17, 2011. He states that tide fluctuations (*i.e.*, differences between highest and lowest tides) during the modeling period from June 18, 2005 through July 18, 2005 are similar to fluctuations during the month of October. Also, the maximum tide amplitudes for June are relatively high (11.12 feet), and are virtually the same or less for the months of October through February, with the exception of November which is only 0.2 feet higher. Therefore, as explained by Dr. Shepsis in his October 17, 2011 letter, tidal flow velocities during construction months would be lower or insignificantly higher than what is predicted in the model. Given this discussion, the hearings officer finds that the use of June 2005 data does not make the Shepsis analysis less "substantial."

b. Impact of Pipeline Trenching and Stockpiling on Flow Velocity.

Ms. McCaffree argues that the CHE analysis did not consider what the impact of the construction activities (*i.e.*, trenching and stockpiling) would be on flow velocities in Haynes Inlet. Dr. Shepsis responds in his letter dated October 17, 2011 by pointing out that the modeling does include consideration of trenched and stockpiled material on flow velocities, and the resulting turbidity analysis is therefore based on velocities that will occur upon trenching and stockpiling. Thus, the hearings officer finds that this concern does not ~~made~~ make the Shepsis analysis less "substantial."

c. Consideration of Proposed Port channel and LNG terminal.

Ms. McCaffree contends that the CHE analysis should have included (a) potential effects from the Port's proposal to deepen and widen the Coos Bay Channel, and (b) impacts from removal of material required to construct the new slip for the LNG terminal. Dr. Shepsis argues in his letter dated October 17, 2011 that the Port's proposal was not considered as part of the CHE analysis because it is, as of that date, just a speculative project that may or may not actually occur. Also, Dr. Shepsis further points out that the two-volume Technical Report prepared by CHE provides a detailed analysis of flow velocities related to dredging for the LNG terminal, and shows that construction of the terminal and dredging the access channel would not alter tidal flow velocities in the area of Haynes Inlet.

The hearings officer finds that, with regard to this very technical issue, that Dr. Shepsis's second response to this issue seems reasonable and constitutes substantial evidence. Again, it would be much more effective for the opponents to have brought forth evidence tending to show that the deepening of the Coos Bay channel would in fact alter tidal flow velocities in the area of Haynes Inlet.

d. Timing of Construction During Oyster Spawning Season.

One of the more significant and potentially meritorious issues in this case was raised by Dr. Chernaik in his oral presentation at the Sept. 21, 2011 hearing. This argument is essentially repeated in his October 10, 2011 memorandum. Therein, Dr. Chernaik cites a Master's thesis published by a graduate student with the Oregon Institute of Marine Biology (K. Sawyer 2011) which determined that the "settlement" season for Olympia oyster larvae begins in earnest in September, peaks in October and lasts until early December. This study conflicts with other studies from the Puget Sound, cited by the applicant, which concluded that settling begins in the first week of September and lasts until the second week of October. *See* Ellis Oyster Survey, at p. 4. Dr. Chernaik summarized Ms. Sawyer's results are summarized below.

> "Table 4 indicates that the maximum numbers of Olympia oyster settlers were counted on October 5, 2010 for almost all substratum types; this can be seen in the graph of total settlers per treatment (Figure 12) which illustrates the average density of settlers for all treatments on each collection date. Settlement varies significantly among the 20 collection dates with increased settlement from

September- November and a distinct settlement peak in October."[15]

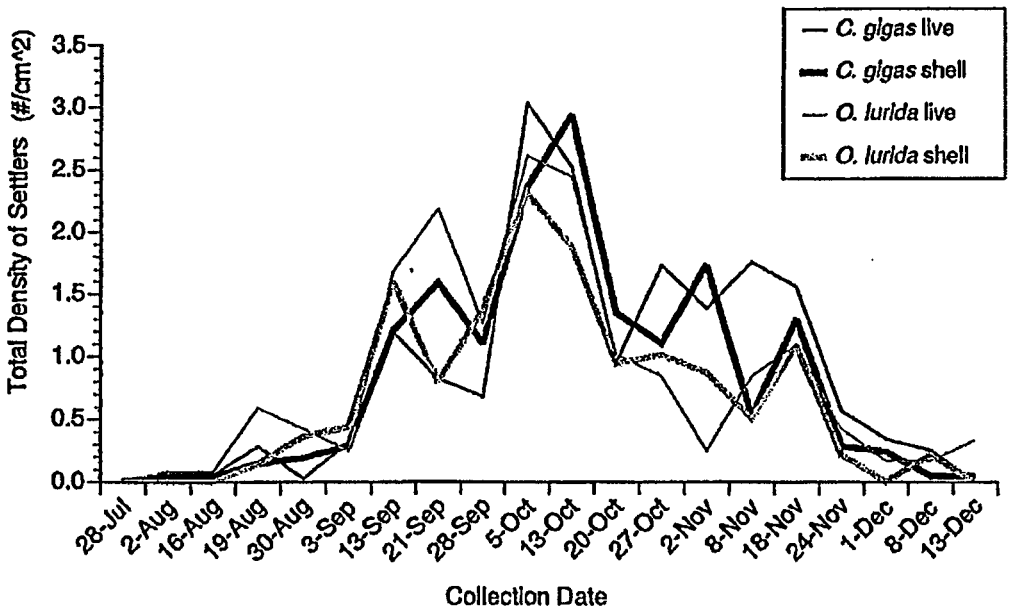

Figure 12. Total densities of Olympia oyster settlement (#/cm2) on each substratum throughout the season Settlement on all four substratum types follows the same temporal pattern.

Dr. Chernaik concludes as follows:

> The significance of these results is certain: not only would conditions placed on the construction of the Pacific Connector Gas Pipeline fail to protect Olympia oysters in Coos Bay, the timing of in-water work, beginning on October 1, would maximize the harm dredging activities in Haynes Inlet would have on the reproduction of Olympia oysters.

As a result, Dr. Chernaik contends that in order to protect Olympia oysters, pipeline construction should not be allowed to begin until the spawning season ends in early December.

Dr. Ellis rebuts Dr. Chernaik's argument in a letter dated October 17, 2011, which explains as follows:

> [Dr. Chernaik] contends that since the ODFW work period for Coos Bay is from October 1 to February 15 that suspended sediment generated during pipeline construction would occur at the

[15] Sawyer, K. (2011) " Timing of Settlement and Substrate Selection by Larvae of the Olympia Oyster (Ostrea lurida) in Coos Bay, Oregon." MsC Thesis, University of Oregon – Oregon Institute of Marine Biology, Charleston, OR. 53 pp.

most sensitive period for the larval oysters and cause widespread detrimental effects on Olympia oyster recruitment. This issue was addressed in our rebuttal testimony and is briefly summarized as follows:

> "1. Results of detailed 3-dimensional water velocity and sediment modeling indicate that dispersion of fine sediments will be spatially limited to the immediate vicinity of the trenching, stockpiling and backfilling areas of activity.
>
> "2. If fine sediments were to settle on hard substrates nearby to the construction area, it would be a very thin layer on the surface of the hard substrates and would not preclude larvae from attaching on the unaffected underside of hard substrates, which is their preferred location.
>
> "3. Placement of Pacific oyster shells in the right of way as mitigation for direct impacts to Olympia oyster habitat (i.e., MP 2.9 to 3.2) will occur post-construction and therefore, will not be subject to any construction-related sedimentation."

See Ellis letter dated Oct. 17, 2011, at p.10. Dr. Steve Rumrill weighs in on this issue in his letter dated November 28, 2011. His letter is notable by its matter-of-fact tone and a general lack of advocacy for either party. [16] Dr. Rumrill states:

> The data generated by [Ms. Saywer's] thesis work documented that Olympia oysters exhibited a distinct peak in larval settlement in October that was preceded by a smaller period of elevated larval settlement in August. The thesis work by Ms. Sawyer has excellent reliability and represents the best available science regarding the timing of larval settlement by Olympia oysters in Coos bay. From the perspective of the Olympia oysters, it is advisable to avoid activities that disrupt deposited sediments and/or increases in the load of suspended sediments in October because the suspended sediments may become deposited on the limited surfaces of suitable hard substrate (*i.e.* oyster shall, rock, cobble) and interfere with the settlement and attachment of the Olympia Oyster larvae.

[16] Dr. Rumrill has, surprisingly, not taken center stage in this proceeding, despite the fact that he likely has more expertise on Haynes Inlet Olympia Oysters than any of the other scientists. No doubt, he faced a concerted lobbying effort by both sides to solicit his testimony. Nonetheless, it is difficult to assess what to make of his overall lack of active participation in this process. Overall, the hearings officer believes that his lack of participation tends to favor the applicant, as it suggests a lack of concern on Dr. Rumrill's part.

See Rumrill letter at p. 6. The hearings officer assigns a high degree of credibility to the statements of Dr. Rumrill, due to his specific expertise with this particular bi-valve species. Nonetheless, it is unfortunate that Dr. Rumrill does not address the issues set forth in the Oct. 17, 2011 Ellis letter.

The hearings officer finds that that this is one of the more difficult issues in the case, and one that requires considerable thought and careful examination. The 2011 K. Sawyer study, viewed in light of Dr. Rumrill's endorsement, constitutes substantial evidence supporting the conclusion that pipeline construction could have negative effects on larval attachment if it results disrupted deposited sediments and/or increases in the load of suspended sediments in October. Since the Sawyer study is specific to Haynes Inlet, it carries with it substantial evidentiary weight. The only real weakness in the Sawyer evidence is that it only documents one season's worth of data (*i.e.* 2010). Since we know from the record that spawning is temperature dependent, and we know from common experience that 2010 was a cool summer throughout Oregon, one can draw an inference that 2010 may have been a late spawning season as compared to other years. That fact alone may account for the difference between Sawyer's results and the results of other studies from Puget Sound. Nonetheless, there is nothing to say that the year that pipeline construction takes place might not also be a late spawning season, and therefore the hearings officer is not dismissive of the Sawyer study on those grounds alone.

However, even if one assumes that the dredging activity will interfere, to some extent, with one spawning season, it does not follow that the construction activities result in management of the district that fails to "protect [the zoning district's] resource productivity." Under an unlikely worse-case scenario, the pipeline construction could - in theory - cause the complete failure of one spawning season in the portion of Haynes Inlet affected by siltation. Even that potential result, though unfortunate if it happened, would only set back the *recovery* of the Olympia oyster. It would not be expected have an effect on the adult Olympia oysters in the remaining portions of Haynes Inlet, nor would it reduce the overall population of Olympia oysters, given their long life spans.

The hearings officer finds it difficult to imagine a scenario where sedimentation from the construction activities will result in long-term or permanent siltation of Olympia oyster habitat. Given the effect of tidal activity in the bay and the high rainfall experienced in the Coos Bay area, there is sufficient hydraulic activity occurring in the Haynes Inlet to cause sediment to wash off of hard substrate. This is particularly true since the causeway creates a funneling effect that increases flow velocities in the southern portion of Haynes Inlet. Thus, under this worst-case scenario, the biggest effect on Olympia oysters would be a flat-lining of the population in a portion of the Haynes Inlet for one season. Such an effect would be temporary, and, in the hearings officer's estimation, insignificant to the overall population of Olympia oysters in Haynes Inlet.

Moreover, the applicant has already indicated that it would use turbidity curtains if needed to isolate in-water work zones and contain increased suspended sediment to a defined area. *See* Ellis Oyster Survey, §4.1.3 at p. 25. While these turbidity curtains are not likely

going to contain *all* sediment,[17] their effect would be substantial in limiting harm to Olympia oyster beds.

The hearings officer finds, in addition, that the "worst case scenario" set forth above is unlikely to occur. As an initial matter, Olympia oyster larvae will still be able to attach to the underside of hard substrate, even if the top and sides of such substrate are silted too heavily to allow for attachment. Moreover, even under the opponent's "October-peak" hypothesis, a significant number of oyster spat will have settled in the August and September time frame. It is assumed from the general discussion by the parties, that these early-settlers will not be affected by late season (October and later) siltation. Third, the applicant's statement that the "dispersion of fine sediments will be spatially limited to the immediate vicinity of the trenching, stockpiling and backfilling areas of activity," is reasonable and likely correct.

One final point warrants discussion. The applicant is already operating under a reduced work-window of 1 October to 15 February. Assuming that the applicant starts its in-water construction activities on October, it seems unlikely that the construction activities will have progressed far enough to reach the areas of oyster habitat (near the causeway, from Milepost 2.6 to MP 3.2.). Regardless from which direction construction begins, it will have to install at least one mile of pipe before reaching these critical areas. The applicant estimates that it can install 800 feet of pipe per week, which means that, at best, the applicant will only have traversed 3200 feet by the end of October. The high-density oyster beds near the causeway are fully a mile from either starting point within Haynes Inlet. Thus, given that schedule, it is unlikely that construction would reach the critical oyster habitat areas near the bridge until December at the earliest.

The hearings officer makes a number of recommendations:

1. It seems that the mitigation plan should be effectuated either in late-July or early August following the construction season. This would ensure that the oyster shells have been in the water only a short time prior to the time the larval oysters seek to attach to the shells.

2. Based on the potential for the larval settlement peak in October, PCGP should not be allowed to conduct dredging operations between Milepost 2.6 to MP 3.2. during the month of October.

These conditions will ensure that the potential harm is reduced to such a degree that there is at most a *de minimis* or insignificant impact on aquatic resources such as the Olympia oyster.

4. Discussion of Other Issues Raised by Opponents.

This section responds to issues raised by opponents that do not fit within the other sections set forth above.

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[17] *See* discussion on Chernaik letter dated Sept. 14, 2011, at p. 13.

a. Alternative Routes.

In her letter dated October 10, 2011, Jody McCaffree invites the hearings officer to apply Plan Policy 14 in a manner to compel an alternative route. However, that issue was not raised to LUBA and therefore the issue is waived on remand. The local government is entitled to limit the scope of the remand proceedings to issues that were the basis of the remand. *Hearne v. Baker County*, 89 Or App 282, 748 P2d 1016, *rev denied*, 305 Or 578 (1988); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419 (1990), *aff'd*, 106 Or App 266, *rev denied*, 311 Or 349 (1991). Coos County did so in this case.

Even if the issue were not waived, Ms. McCaffree's argument is wrong on the merits. In this case, FERC decided that the route it approved was better than a host of alternative routes. The County is not in a position to second guess FERC on this issue. But even if it were, Plan Policy 14 was not written in a manner that makes it obvious that it applies to linear features such as a pipeline. The policy sets up a preference for using urban or urbanizable lands as well as exception lands prior to using lands subject to Policy 14. The Plan policy simply has no applicability to linear features such as pipelines that traverse multiple zoning districts.

In her letter dated October 17, 2011, Ms. McCaffree presents additional arguments in favor of an alternative route for the pipeline. The hearings officer finds that these arguments are beyond the scope of issues in this remand proceeding, and are waived.

b. Impacts Results from other Pipeline Projects.

Some of the opponents, including Mr. Robert Fischer, submit photos and articles related to negative environmental consequences from other pipeline construction projects in other states and countries. In Mr. Fischer's case, much of this evidence comes from what the hearings officer assumes is a newspaper or periodical ("The Courier Mail") and a website with the domain name of www.dredgingtoday.com.

There are three primary problems with this kind of anecdotal evidence. First, the persons submitting this evidence have not provided a foundation to support the reliability and credibility of the source, its political perspective, etc. Depending on the source, the information presented in such materials could be one-sided, misleading, taken out of context, or completely false.

Second, the articles themselves provide varying theories as to what is causing the negative effects on the environment, and do not conclusively fault the LNG-related construction. Third, even making the huge leap of faith that the negative facts stated in these articles are true, there is no evidence to suggest that the situations are sufficiently analogous to support the conclusion that the adverse effects happening in those cases will necessarily happen in this case.

Thus, while it is possible that newspaper articles and other reporting can constitute substantial evidence in some cases, the hearings officer finds that a reasonable decision-maker would not draw any conclusions concerning the PCGP case based on this evidence. While interesting, that is not evidence a reasonable person would rely upon to make a decision regarding potential impacts on Olympia oysters in the current project.

c. Scour.

Ms. McCaffree points out that in some cases, pipelines have been scoured out by big storm events. However, this issue is beyond the scope of ~~eth~~ the remand proceedings. Moreover, this pipeline is going to be encased on four feet of concrete, a feature which was apparently not present on the other pipelines she mentioned that were affected by scouring action.

d. Pipeline Companies Don't Keep Their Promises.

Ms. McCaffree states that "gas and oil companies are notorious for promising all sorts of things but * * * they do not always follow through with the things they promise." McCaffree Letter dated October 10, 2011. Ms. McCaffree is undoubtedly correct that things do not always go according to plan. However, the suggestion that land use applications should be denied because the applicant *may* not comply with conditions of approval is not well taken. As an initial matter, the success or failure of the project will, to some degree, depend on how aggressive the County is with regard to its enforcement of conditions. The hearings officer cannot assume that the applicant will not comply, or that the county's enforcement of problems will be ineffective. More importantly, the land use process is not intended to guarantee that things will go according to plan. The reality is that the land use process only ensures that there IS a plan, and that engineering solutions to potential problems have been devised and are feasible and likely to succeed. If the hearings officer believed that the applicant's plan was not feasible and likely to succeed, a recommendation for denial would have been forthcoming.

e. Sediments from New Carissa.

Ms. McCaffree notes that contaminates from the New Carissa may be re-suspended by the PCGP pipeline. McCaffree Letter dated October 10, 2011, at p. 3. This issue was not preserved sufficiently to be considered on remand. On the merits, the issue is speculative, in the absence of something more in the way of scientific evidence tending to substantiate the claim. *Palmer v. Lane County*, 29 Or LUBA 436 (1995) (unsupported statements are mere conclusions, and do not constitute evidence). Even if the contaminants exist in the sediments, there is no information regarding their concentration

f. Dredging of Coos Bay Navigation Channel.

In her letter dated October 17, 2011, Ms. McCaffree argues that there will be a need to dredge the Coos Bay navigation channel to accommodate the transit of LNG vessels in Coos Bay, and that such dredging should have been considered as part of the CHE modeling. Mr. Bob Braddock of JCEP addresses this issue in his letter dated October 30, 2011. Therein, Mr. Braddock explains that Ms. McCaffree has her facts wrong and there is no need for additional channel dredging to accommodate LNG tankers. The Braddock letter is attached as Exhibit 2 to the applicant's November 14, 2011 submittal.

The hearings officer finds that "the navigational channel within the Coos estuary is routinely dredged to maintain adequate depths for commercial shipping." Groth & Rumrill 2009. Given this fact, the hearings officer finds that the results of routine dredging activity would already be accounted for in the data sets used by CHE modeling. Even if the channel

needs to be deepened to accommodate LNG-related shipping, there is no evidence in the record that suggests that that deepening channel would invalidate Dr. Shepsis's model. To the extent that Ms. McCaffree is asking the hearings officer to draw an inference based on common sense, the hearings officer finds that the issue is ~~no~~ not so obvious that such a deduction necessarily flows from the stated proposition.

g. Compliance with CCZLDO 5.7.300(4)(B).

On page 5 of her letter dated October 10, 2011, Ms. McCaffree argues that the applicants have not complied with CCZLDO 5.7.300(4)(B), because "it does not appear the record contains proper authorizations for written and oral testimony by Randy Miller, Vladimir Shepsis or Robert Ellis on behalf of the Pacific Connector Gas Pipeline, L.P...." The provision at issue states:

> ***4. Representatives***
>
> ***A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses[18] for any party, but may not appear as a legal representative.***
>
> ***B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:***
>
> ***(1) Be written on the group, company, or organization's official letterhead;***
>
> ***(2) Name the person authorized to appear on behalf of the group, company or organization;***
>
> ***(3) Specify the scope of the authorization; and***
>
> ***(4) Contain the signature of a person with authority to grant the authorization.***

[18] CCZLDO 5.7.300(6) is entitled "Definitions," and provides:

> ***As used in this Article the following definitions shall apply:***
>
> ***A. "Party" means any person, organization or agency who has established standing under the provisions of this Article 5.8.***
>
> ***B. "Witness" means any person who appears and is heard at a hearing and is not a "party". A witness shall not be considered a "party" unless the Board of Commissioners determines that the person is a party in accordance with Article 5.8.***

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

i. Failure to Raise in LUBA Appeal

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

ii. Interpretation of Authorization Requirement

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

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

The interpretation being urged by the opponents is not the outcome intended by the county when this code provision was adopted. Clearly the individuals who appeared and testified on behalf of the applicant were authorized to do so, and the opponents have not attempted to explain how the failure to include the letters from the applicant has harmed their rights to a full and fair hearing.

An analysis of the language of LDO 5.7.300(4) reveals that the more plausible interpretation of that section is that, where a party to the proceeding is represented by an attorney,

that attorney may provide any necessary authorization regarding individuals who submit evidence on behalf of the represented party. LDO 5.7.300(4) provides, in relevant part:

4. Representatives

   A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.

   B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

      (1) Be written on the group, company, or organization's official letterhead;
      (2) Name the person authorized to appear on behalf of the group, company organization;
      (3) Specify the scope of the authorization; and
      (4) Contain the signature of a person with authority to grant the authorization.

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

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

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

III. CONCLUSION

For all the reasons set forth above, the hearings officer finds 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 management objectives for the aquatic zoning districts 11-NA and 13A-NA require to be protected.

PCGP REMAND – CONDITIONS OF APPROVAL

Property Owner Signatures amended Condition 20

No. 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

CONDITIONS ON REMAND

Oyster Mitigation Plan

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"), as supplemented and modified by the following mitigation measures:

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

b) As part of the state permitting process for the pipeline discussed in subsection (a) above, the applicant shall consult with ODFW and OIMB on the specific details regarding how best to accomplish the actual amount and placement of Pacific oyster shells addressed in Section 4.2.1 of the Mitigation Plan in order to ensure success of the

project, including ideal depth and breadth of coverage of new hard substrate, specific methods for dispersal (*e.g.*, bagged vs. loose), and best locations for placement of substrate within the pipeline right of way .

c) Unless modified under the direction of ODFW during the consultation described above, the applicant will establish appropriate baseline conditions for the Olympia oyster mitigation effort in Haynes Inlet using the following guidelines for a before-after control impact study design in order to ensure that any impacts to Olympia oysters are insignificant or *de minimis*:

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

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

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

No. 2. In-Water Work Periods

(a) If the applicant's mitigation plan is approved by other regulatory agencies, the dispersal of Pacific oyster shells within the pipeline right of way will be effectuated either in late July or early August following the construction season.

(b) Based on the potential for the larval settlement peak in October, the applicant should not be allowed to conduct dredging operations between Milepost 2.6 to MP 3.2 during the month of October, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife.

No. 3. Turbidity

The applicant must comply with all DEQ regulations and requirements regarding turbidity. The applicant shall employ turbidity curtains and/or other appropriate control measures to assure that turbidity does not exceed the levels specified in the applicant's DEQ water quality permit.

Exhibit C

Final Order No. 14-09-063PL, ACU 14-08/AP 14-02 (Oct. 21, 2014)

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

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

EXHIBIT 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.

EXHIBIT A

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. **Procedural Issue: Contents of Record.**
In a letter dated July 11, 2014, Ms. McCaffree states:

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

EXHIBIT A

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)***

[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.

EXHIBIT A

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*.

EXHIBIT A

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

EXHIBIT A

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

EXHIBIT A

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.

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

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[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.

Exhibit D

***Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP*, 139 FERC ¶ 61,040 (2012)**

139 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Pacific Connector Gas Pipeline, LP	Docket Nos. CP07-441-001 CP07-442-001 CP07-443-001
Jordan Cove Energy Project, L.P.	Docket No. CP07-444-001

ORDER GRANTING REHEARING IN PART, DISMISSING REQUEST FOR STAY, AND VACATING CERTIFICATE AND SECTION 3 AUTHORIZATIONS

(Issued April 16, 2012)

1. On December 17, 2009, the Commission issued an order in this proceeding authorizing Jordan Cove Energy Project, L.P. (Jordan Cove) under section 3 of the Natural Gas Act (NGA) to site, construct, and operate a liquefied natural gas (LNG) import terminal on the North Spit of Coos Bay in Coos County, Oregon.[1] The Commission also issued a certificate of public convenience and necessity to Pacific Connector Gas Pipeline, LP (Pacific Connector) under section 7 of the NGA to construct and operate a 234-mile-long, 36-inch-diameter interstate natural gas pipeline extending from the outlet of the Jordan Cove LNG terminal to a point near Malin, in Klamath County, Oregon on the Oregon/California border, as well as blanket construction and transportation certificates under subpart F of Part 157 and subpart G of Part 284 of the Commission's regulations.

2. Requests for rehearing of the December 17 order were timely filed by Pacific Connector; the National Marine Fisheries Service (NMFS); the State of Oregon (Oregon) acting by and through the Oregon Department of Energy (Oregon DOE); and the Western

[1] *Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, L.P.*, 129 FERC ¶ 61,234 (2009) (December 17 Order).

Environmental Law Center (WELC).[2] NMFS also filed a request to stay the December 17 Order.

3. This order grants rehearing, in part, and vacates the December 17 Order.

I. Background

4. As approved, the Jordan Cove terminal would be located on approximately 159 acres of land on the North Spit of Coos Bay, north of the Cities of North Bend and Coos Bay, Oregon. The Jordan Cove terminal would consist of an access channel from the existing Coos Bay navigation channel to the terminal slip; a slip and berth at the terminal, including a dock for tugs and a dock for unloading LNG carriers, with three unloading arms and one vapor return arm; a 2,600-foot-long, 36-inch-diameter cryogenic transfer pipeline capable of a maximum unloading rate of 12,000 cubic meters (m^3) per hour, between the berth and the storage tanks; two full-containment LNG storage tanks, each with a capacity of 160,000 m^3 (1,006,000 barrels) or approximately 3.3 Bcf; an LNG transfer system from the storage tanks to the vaporizers, consisting of six LNG booster pumps (including one spare), each sized for 2,200 gallons per minute; a vaporization system consisting of six submerged combustion vaporizers capable of regasifying a total of 1.2 Bcf/d of LNG; a natural gas liquids extraction facility; a 37-megawatt natural gas-fired, simple cycle combustion turbine power plant to provide electric power for the LNG terminal; a boil-off gas and waste heat recovery system; an emergency vent system, LNG spill containment system, firewater system, utility system, hazard detection system, and control system; associated buildings and support facilities; and metering facilities capable of handling up to 1.2 Bcf/d of natural gas for delivery into the Pacific Connector pipeline.

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[2] WELC filed on behalf of a number of groups and individuals (referred to collectively as WELC): Citizens Against LNG, Friends of Living Oregon Waters, Klamath Siskiyou Wildlands Center, Umpqua Watersheds, Oregon Wild, Ratepayers for Affordable Clean Energy, Oregon Citizens Against the Pipeline, Southern Oregon Pipeline Information Project, Oregon Shores Conservation Coalition, Institute for Fisheries Resources, Pacific Coast Federation of Fisherman's Association, Oregon Women's Land Trust, Jody McCaffree, Bob Barker, Harry S. Stamper, Holly C. Stamper, Pacific Environment, and Francis Eatherington. Under Rule 713 of the Commission's rules of practice and procedure, a request for rehearing may be filed only by a party to the proceeding. 18 C.F.R. § 385.413 (2011). Neither Pacific Environment nor Francis Eatherington ever filed a motion to intervene. Therefore, they are not parties to this proceeding and have no standing to seek rehearing. However, their concerns will be addressed in answering WELC's request for rehearing.

5. The 234-mile-long Pacific Connector pipeline would originate at an interconnection with Jordan Cove's LNG facilities and interconnect at the proposed Clarks Branch Delivery meter station with Northwest Pipeline's Grants Pass Lateral and at the Shady Cove meter station with Avista Corporation, a local distribution company regulated by the Oregon Public Utilities Commission. At the Oregon/California border, the pipeline would terminate at interconnections with Gas Transmission Northwest Corporation, Tuscarora Gas Transmission Company, and Pacific Gas and Electric Company at the proposed Buck Butte, Russell Canyon, and Tule Lake meter stations, respectively.

6. The Commission's December 17 Order granted the requested authorizations subject to 128 conditions. In the order, the Commission found that with the adoption of the proposed mitigation measures recommended in the final EIS prepared for the project, construction of the project would result in limited adverse environmental impacts. The Commission also concluded that the project was required by the public convenience and necessity to meet the projected energy needs of the Pacific Northwest, northern California, and northern Nevada.

II. Rehearing Requests

7. Pacific Connector requests rehearing only of the December 17 Order's denial of its request to accrue Allowance for Funds Used During Construction (AFUDC) on certain expenditures it made prior to the filing of its application for a certificate of public convenience and necessity. Pacific Connector argues that the Commission erred in rejecting its request to begin accruing AFUDC prior to September 4, 2007, the date Pacific Connector filed its certificate application. Pacific Connector asks the Commission to replace AR-5 with the Generally Accepted Accounting Principles, specifically the Statement of Financial Accounting Standards No. 34 (FAS 34).

8. The requests for rehearing filed by NMFS, Oregon, and WELC essentially fall into three categories. The first category involves allegations that the Commission improperly concluded, under its Certificate Policy Statement[3] and otherwise, that the Jordan Cove LNG terminal and the Pacific Connector pipeline (referred to collectively as the Jordan Cove Project) was needed to serve the needs of the Pacific Northwest, northern California, and northern Nevada, contending that the natural gas needs for the region could adequately be met through domestic sources of natural gas.

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[3] *Certification of New Interstate Natural Gas Pipeline Facilities* (*Certificate Policy Statement*), 88 FERC ¶ 61,227 (1999), *orders clarifying statement of policy*, 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094 (2000).

9. The second category involves allegations that the Commission erred in issuing a decision authorizing the Jordan Cove Project prior to action by various agencies on other necessary permits required under federal law or prior to the completion of various consultations or studies. Specifically, Oregon and WELC argue that the Commission should not have issued its final order until other agencies had reached decisions on necessary permits and approvals, insisting that doing so violates: (1) the NGA and the Administrative Procedure Act (APA),[4] by not considering the entire administrative record before issuing a decision; (2) section 401 of the Clean Water Act (CWA),[5] because a water quality certification under section 401 had not been issued; (3) the Coastal Zone Management Act (CZMA),[6] because Oregon has not issued a consistency determination; (4) the Clean Air Act (CAA),[7] because the applicants have not secured the required permits; (5) section 404 of the CWA[8] and section 10 of the Rivers and Harbors Act,[9] because a dredge and fill permit from the U.S. Army Corp has not yet been acquired; and (6) the National Historic Preservation Act (NHPA),[10] because consultations are not yet completed. They assert that approval of the Jordan Cove Project before the issuance of these and perhaps other authorizations invalidates the Commission's environmental conclusions because the public has been unable to evaluate and comment on the effects of the proposed mitigation measures. Similarly, Oregon, WELC, and NMFS assert that the Commission erred by issuing the December 17 Order before initiating formal consultation with NMFS as required by section 7(a)(2) of the Endangered Species Act (ESA)[11] and section 305(b) of the Magnuson-Stevens Fishery Conservation Act (Magnuson-Stevens Act).[12]

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[4] 5 U.S.C. § 551 *et seq.* (2006).

[5] 33 U.S.C. § 1251 *et seq.* (2006).

[6] 16 U.S.C. § 1451 *et seq.* (2006).

[7] 42 U.S.C. §§ 7401-7671q (2006).

[8] 33 U.S.C. § 1344 (2006).

[9] 33 U.S.C. § 403 (2006).

[10] 6 U.S.C. § 470 *et seq.* (2006).

[11] 16 U.S.C. § 1536(a)(2) (2006).

[12] 42 U.S.C. §§ 4321-4347 (2006).

10. The third category comprises allegations that the Commission's environmental review or final EIS was inadequate to support the Commission's action in these proceedings. In particular, Oregon and WELC assert that the final EIS: (1) does not give a "hard look" in its analysis of many environmental and cumulative impacts of the project, as required by the National Environmental Policy Act;[13] (2) fails to document compliance with Migratory Bird Treaty Act, the Marine Mammal Protection Act, the NHPA, the National Forest Management Act, the Northwest Forest Plan, the Federal Land Policy Management Act, and the Oregon and California Lands Act; and (3) must be supplemented to evaluate the impacts of the post-authorization design plans and future studies.

III. Procedural Issues

A. Other Pleadings

11. On March 2, 2010, Jordan Cove and Pacific Connector filed a motion seeking leave to answer and an answer to the requests for rehearing filed by NMFS, Oregon, and WELC. Jordan Cove and Pacific Connector assert that their answer clarifies misstatements and misunderstandings raised in the rehearing requests regarding the legal sufficiency of the Commission's environmental review. In response, WELC filed a motion on March 9, 2010, asking the Commission to strike Jordan Cove's and Pacific Connector's answer to the requests for rehearing, or, in the alternative, to allow WELC to respond to the answer.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure provides that, unless otherwise ordered by the decisional authority, an answer may not be made to a request for rehearing or to an answer.[14] The Commission may find good cause to waive this rule, if the answers provide additional information to assist in our decision-making. We do not find good cause to waive the rule with respect to the subject pleading since the Commission finds no need for additional information to address the arguments raised in the rehearing requests regarding the legal sufficiency of the Commission's environmental review of the Jordan Cove Project. Therefore, we reject Jordan Cove's and Pacific Connector's answer to the requests for rehearing and dismiss as moot WELC's request for permission to respond to the answer.

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[13] *See* Oregon's *Request for Rehearing* at 27 and WELC's *Request for Rehearing* at 124 (*citing Robinson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-353 (1989)).

[14] 18 C.F.R. § 385.213(a)(2) (2011).

B. Request for Stay

13. In its request for rehearing, filed on January 26, 2010, NMFS requests that the Commission stay its December 17 Order until the Commission and the applicants have completed formal consultation with NMFS under section 7(a)(2) of the ESA[15] and section 305(b) of the Magnuson-Stevens Act.[16] NMFS argues that the Commission's decision to authorize the Jordan Cove Project prior to completing these consultations deprives NMFS of its right to seek rehearing with respect to issues that may arise in these consultations.

14. As discussed below, we are granting rehearing and vacating our December 17 Order's authorization of the Jordan Cove Project. Therefore, NMFS' request for stay of the order until completion of formal consultation is dismissed as moot.

C. Request to Reopen the Proceeding

15. On December 9, 2011, Oregon filed a motion to reopen the record. Specifically, Oregon seeks to present the following facts: (1) on July 27, 2011, the Commission authorized the construction of the Ruby Pipeline to transport natural gas from Rocky Mountain production areas to west coast markets; (2) on September 22, 2011, Jordan Cove applied to DOE for authorization to export natural gas and intends to ask the Commission to amend its existing authorization to add export facilities; and (3) the current price of domestic natural gas is significantly lower than the price relied upon by project proponents and the Commission to justify a benefit in the public interest from importation of LNG. Oregon states that in light of changed circumstances, any public benefit that existed at the time the Jordan Cove Project was proposed no longer exists.

16. On December 13, 2011, Jordan Cove and Pacific Connector filed a response to Oregon's motion stating that the facts cited by Oregon do not rise to the level of extraordinary circumstances to warrant a reopening of the record.

17. As discussed below, we are granting rehearing and vacating our December 17 Order's authorization of the Jordan Cove Project. Therefore, Oregon's request to reopen the record is dismissed as moot. However, as discussed below, we do find statements which were made by Jordan Cove in filings related to obtaining authorization to export LNG germane to our reconsideration of the authorizations granted in the December 17 Order.

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[15] 16 U.S.C. § 1536(a)(2) (2006).

[16] 16 U.S.C. § 1855(b)(2) (2006).

IV. Commission Determination

18. In deciding whether to authorize the construction of new natural gas facilities, the Commission balances the public benefits of a proposed project against the potential adverse consequences. The December 17 Order identified benefits associated with the Jordan Cove LNG terminal – giving the Pacific Northwest, northern California, and northern Nevada markets long-term access to an additional supply source, resulting in greater supply reliability for those markets and ensuring supply adequacy[17] – and found that those benefits outweighed any limited adverse effects the project might have.[18] The order also noted that Commission policy is to allow the market to drive decisions as to which gas infrastructure projects will go forward.[19]

19. The Commission's general policies as described in the December 17 Order remain unchanged. Long-term Commission policy dictates that, once the Commission has determined that a project would not result in substantial adverse impacts, the market is allowed to determine which gas infrastructure projects will actually be constructed.[20]

20. However, in this proceeding we are faced with the fact that Jordan Cove has expressed an intent, and begun the process of seeking the necessary approvals, to use the facilities authorized solely for the purpose of importing natural gas to instead export natural gas to foreign markets. On September 22, 2011, Jordan Cove filed an application with the Department of Energy's Office of Fossil Energy for long-term, multi-contract authorization to export the equivalent of up to 1.2 Bcf/d of LNG from the Jordan Cove LNG terminal, which, we note, equals the full capacity of its facilities previously

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[17] *December 17 Order*, 129 FERC ¶ 61,234 at P 25.

[18] *Id.* at P 28.

[19] *Id.* at P 26 (*citing Certificate Policy Statement,* 88 FERC ¶ 61,227 at p. 61,276 (1999).

[20] *Certificate Policy Statement,* 88 FERC ¶ 61,227 at 61,746 (1999) ("[a] number of commenters . . . urged the Commission to allow the market to decide which projects should be built, and this requirement [that a project be able to stand on its own financially without subsidies] is a way of accomplishing that result"). *See, also, AES Sparrows Point, LNG*, "we affirm our previously stated preference permitting determinations on the number, type, timing, and location of energy facilities to be guided by market forces, and not by Commission fiat." 61 FERC ¶ 61,245 at P 52. We note that the Certificate Policy Statement does not apply specifically to terminal and storage facilities authorized under section 3 of the NGA, although the rationale of balancing benefits against burdens is the same.

authorized for import usage. In its application to the Office of Fossil Energy, Jordan Cove states that it has developed modified plans to make use of the Jordan Cove LNG terminal as an export facility for domestically produced natural gas and that it is in the process of negotiating Liquefaction Tolling Agreements[21] with prospective customers for the export of LNG. Jordan Cove specifically states in that application that "[t]he terminal facilities already authorized by the FERC Order that will be used for exports include two 160 cubic meter LNG full-containment storage tanks, a single marine berth capable of accommodating LNG vessels up to Q-flex size, and on-site utilities and services."[22] On December 8, 2011, the Office of Fossil Energy issued an order granting Jordan Cove long-term, multi-contract authorization for the export of LNG.[23]

21. In addition, on February 29, 2012, Jordan Cove filed an application with the Commission to initiate a pre-filing review of a proposed Liquefaction Project to be located at the site of Jordan Cove's previously-certificated Jordan Cove LNG import terminal.[24] Jordan Cove states that "[g]iven current market conditions" it is seeking authorization to construct and operate export facilities.[25] Jordan Cove also states that it "does not intend to construct the facilities specific to importation of LNG at this time, but would add the equipment necessary for import of LNG should the natural gas market conditions change in the future."[26]

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[21] Liquefaction Tolling Agreements are commercial arrangements under which an individual customer that holds title to natural gas will have the right to deliver that gas to Jordan Cove's LNG terminal for liquefaction services and to receive LNG in exchange for a processing fee paid to Jordan Cove.

[22] Application of Jordan Cove Energy Project, L.P. to Department of Energy Office of Fossil Energy for Long-Term Authorization to Export Liquefied Natural Gas to Free Trade Agreement Nations, FE Docket No. 11-127-LNG, at p. 3.

[23] *Jordan Cove Energy Project, L.P.*, Department of Energy's Office of Fossil Energy Order No. 3041, *available at* http://www.fossil.energy.gov/programs/gasregulation/authorizations/2011_applications/Jordan_Cove_Energy_Project,_L.P..html.

[24] Application of Jordan Cove Energy Project, L.P. for pre-filing review in Docket No. PF12-7-000, filed on February 29, 2012.

[25] *Id.* at p. 2.

[26] *Id.*

22. The Commission recognizes that it is possible for LNG terminal facilities to be used for both the importation and exportation of natural gas, and that such operations might even occur simultaneously. However, the Commission's ability to rely on the usually valid assumption that a project sponsor will not go forward with construction of a project (in this case, an import terminal) for which there is no market is compromised here. Jordan Cove has explicitly stated that it is not desirable under current market conditions to construct facilities necessary for the importation of natural gas. It instead proposes to seek authorization to enable the use of the Jordan Cove terminal facilities for only the exportation of natural gas. Given that Jordan Cove no longer intends to implement the December 17 Order's authorization to the construct and operate an import terminal, we will vacate that authorization.

23. We note that Jordan Cove's decision that the construction and operation of an import facility is not viable under current market conditions is consistent with changes observed in the North American natural gas supply situation. The changes in the market go far beyond mere fluctuations in economic projections of prices and supply. In 2007, domestic natural gas production in the lower 48 states was reported at 18.88 Tcf.[27] In comparison, domestic natural gas production in 2011 was expected to reach 20.71 Tcf.[28]

24. The growth in domestic production has had a significant impact on LNG imports. Actual imports of LNG have dropped by almost 23 percent in the last two years, from 452 Bcf in 2009 to 349 Bcf through December 2011.[29] As a result, only 3 of the 12 existing United States LNG terminals are operating at more than 5 percent of their capacity.[30] Two of the 12 terminals, including one of the three with a utilization rate of over 5 percent (Golden Pass LNG, which operated at 6.14 percent of capacity), completed construction and received an initial cargo, thus, initiating service, but have

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[27] *See EIA Outlook 2009*, at Table 114, *available at* http://www.eia.gov/oiaf/archive/aeo09/supplement/supref.html.

[28] *See EIA Outlook 2011*, at Table 62, *available at* http://www.eia.gov/oiaf/aeo/tablebrowser/#release=AEO2011&subject=0-AEO2011&table=72-AEO2011&region=0-0&cases=ref2011-d020911a.

[29] *See* U.S. Department of Energy, Office of Fossil Energy, 2010 4th Quarter and December 2011 Monthly Reports on Natural Gas Imports and Exports.

[30] *Id.* The highest utilization rate was 32.27 percent, for the Distrigas of Massachusetts terminal in Everett, MA.

received no additional cargos to date.[31] Three of the other existing terminals have sought and/or received authorization to install additional facilities to enable them to preserve plant operations in the absence of imported LNG supply.[32] Four companies which where granted authorization to construct and operate LNG facilities in the past six years have allowed their authorizations to lapse, without ever starting construction,[33] and two others requested that the Commission vacate their authorizations prior to commencing construction, due to changes in market circumstances.[34]

25. Based on the foregoing, we vacate our December 17 Order's authorization for the Jordan Cove LNG import terminal. In addition, since the Pacific Connector pipeline was proposed as an integral part of the larger Jordan Cove Project, the stated purpose of the pipeline being to transport gas sourced from the Jordan Cove terminal, we will also

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[31] *See* Golden Pass LNG Terminal, LLC in Docket No. CP04-386-000 and Gulf LNG Energy, LLC in Docket No.CP06-12-000. We also note that Excelerate Energy, has announced that the Gulf Gateway Deepwater Port, another of the 12 existing terminals (completed in 2005 under authorization issued by the Department of Transportation's Maritime Administration), will be decommissioned in 2012, "due to the dramatic shift in the supply demand balance in the United States." *See* http://www.excelerateenergy.com/past-projects.

[32] *See Dominion Cove Point LNG, LP*, 135 FERC ¶ 61,261 (June 24, 2011). *See also* the Phase II Development Project proposed in Docket No. CP12-29-000 by Freeport LNG Development, L.P. for its Freeport LNG import terminal; and the Elba BOG Compressor Project proposed in Docket No. CP12-31-000 by Southern LNG Company L.L.C. for its Elba Island LNG Project.

[33] *See Port Arthur LNG, L.P. and Port Arthur Pipeline, L.P.*, 136 FERC ¶ 61,196 (2011); *Creole Trail LNG, L.P.*, 136 FERC ¶ 61,122 (2011); *Ingleside Energy Center, LLC and San Patricio Pipeline, LLC*, 136 FERC ¶ 61,114 (2011); *Vista del Sol LNG Terminal LP and Vista del Sol Pipeline LP*, 132 FERC ¶ 61,157 (2010).

[34] *See Weaver's Cove Energy, LLC and Mill River Pipeline, LLC*, 136 FERC ¶ 61,015 (2011); *Bayou Casotte Energy LLC*, 132 FERC ¶ 61,158 (2010). *See also State of Oregon v. Federal Energy Regulatory* Commission, 636 F. 3d 1203 (9th Cir. 2011) (vacating the Commission's section 3 authorization and section 7 certificate of public convenience and necessity issued to Bradwood Landing, LLC and NorthernStar Energy, LLC as a result of NorthernStar Energy, LLC bankruptcy proceeding) and *Southern LNG Company, L.L.C.*, 137 FERC ¶ 61,034 (2011) (Commission granting request by company to vacate authorization to construct previously-authorized expansion of existing LNG terminals).

vacate our authorization to construct those facilities, as well as the related blanket construction and transportation certificates.[35]

26. Given this action, we dismiss as moot the requests for rehearing filed by Pacific Connector and NMFS. To the extent that Oregon and WELC requested the Commission to vacate the December 17 Order, their requests are granted. However, the remaining issues raised by Oregon and WELC on rehearing are dismissed as moot.

27. Our actions here are without prejudice to Jordan Cove submitting a new application to construct and/or operate facilities to import natural gas should there develop a market need for import service in the future. We also note that Jordan Cove's pre-filing application for export authorization pursuant to section 3 of the NGA is pending in Docket No. PF12-7-000 and will be considered on its own merits in that separate proceeding.[36]

The Commission orders:

(A) The authorization under section 3 of the NGA, in Docket No. CP07-444-000, issued to Jordan Cove to site, construct, and operate an LNG terminal in Coos Bay County, Oregon is vacated.

(B) The certificate of public convenience and necessity under section 7(c) of the NGA, in Docket No. CP07-441-000, issued to Pacific Connector to construct and operate the Pacific Connector Pipeline is vacated.

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[35] We acknowledge that the proposal for the Pacific Connector pipeline was supported by precedent agreements for the full amount of the proposed capacity and that the December 17 Order conditioned commencement of construction of the pipeline on execution of service agreements at levels and equivalent to those represented in the precedent agreements. However, as stated, we view the Jordan Cove Project as an integrated project, comprising both the terminal and the pipeline. Accordingly, since we are vacating authorization for the LNG import terminal as proposed, we are also vacating our authorization for the Pacific Connector pipeline.

[36] Depending on the details of the proposed project, it is possible that portions of the environmental information and analysis developed in conjunction with the import terminal may remain viable for resubmission and use for the contemplated export terminal and associated pipeline facilities.

(C) The blanket construction certificate, in Docket No. CP07-442-000, issued to Pacific Connector under subpart F of Part 157 of the Commission's regulations is vacated.

(D) The blanket transportation certificate, in Docket No. CP07-443-000, issued to Pacific Connector under subpart G of Part 284 of the Commission's regulations is vacated.

(E) The requests for rehearing filed by Pacific Connector and the National Marine Fisheries Service are dismissed as moot.

(F) The requests for rehearing filed by the State of Oregon and the Western Environmental Law Center are granted in part and dismissed as moot in part, to the extent discussed in this order.

(G) The answer filed on March 2, 2010, by Jordan Cove and Pacific Connector is rejected.

(H) The motion to strike filed on March 9, 2010, by Western Environmental Law Center is dismissed as moot.

(I) The request for stay filed on January 6, 2010, by the National Marine Fisheries Service is dismissed as moot.

(J) The request to reopen the record filed on December 9, 2011, by the State of Oregon is dismissed as moot.

By the Commission. Chairman Wellinghoff concurring with a separate statement attached.
Commissioner Moeller dissenting with a separate statement attached.

(SEAL)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Connector Gas Pipeline, LP	Docket Nos. CP07-441-001 CP07-442-001 CP07-443-001
Jordan Cove Energy Project, L.P.	Docket No. CP07-444-001

(Issued April 16, 2012)

WELLINGHOFF, Chairman, concurring:

Today's order vacates the Commission's previous order granting authorization for siting, constructing, and operating the Jordan Cove Project. In addition to the reasons discussed in the order, I believe the decision to vacate authorization is further supported by concerns raised in the FEIS regarding the safety of locating the Jordan Cove Project less than one mile from the Southwest Oregon Regional Airport. As noted in my earlier dissent, such close proximity of an LNG terminal to an airport could result in the accidental or intentional crash of an aircraft into the LNG terminal. The absence of sufficient information on this issue reinforces my belief that the record does not support a finding that authorization of the Jordan Cove Project is in the public interest.

For this reason, I concur in today's order.

Jon Wellinghoff
Chairman

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Connector Gas Pipeline, LP	Docket Nos.	CP07-441-001 CP07-442-001 CP07-443-001
Jordan Cove Energy Project, L.P.	Docket No.	CP07-444-001

(Issued April 16, 2012)

MOELLER, Commissioner, *dissenting*:

Revoking an authorization to build during the third year of a five-year authorization could fundamentally change how the public views whether this Commission will stand by its decisions. This new policy could hardly have been anticipated by employees and investors in Jordan Cove, as this Commission has long followed a policy of allowing individual investors to decide what investments in energy made the most sense for them --- that is, this Commission did not "pick winners and losers". Had investors in Jordan Cove known that their continuing investment in that facility over the last three years would eventually be subject to a finding by the Commission about unfavorable market conditions, they certainly would have valued the Commission's approval differently.

Natural gas prices have a long history of changing. Jordan Cove recognizes this fact by asserting that it "would add the equipment necessary for import of LNG should the natural gas market conditions change in the future."[1] Yet somehow this is evidence to the current Commission that "Jordan Cove no longer intends to implement the December 17 Order's authorization to construct and operate an import terminal."[2]

Millions of people across the country are looking for employment. Millions of people across the country are looking for ways to invest their money in business activity that leads to more employment. But before people can invest their money into business plans, and before people can be hired to implement business plans, the public needs confidence that the government will not arbitrarily revoke its authorizations to conduct those business plans.

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[1] P21 of this Order.

[2] P22 of this Order.

On the same day that we revoke this authorization, this Commission is granting another five-year authorization to construct a facility capable of exporting LNG at Sabine Pass. While that five-year authorization is undeniably valuable, investors need certainty that the Commission will not revoke the Sabine authorization if it later finds that the "facility is not viable under current market conditions."[3] Investors need greater profits when the return of their investment becomes more doubtful, if they invest at all. And because greater profits require higher prices, government regulators should work to minimize risk through consistent decisions that are not second-guessed at a later time.

Because this order revokes a five-year authorization to build at year three, based upon little more than statements about current market conditions by Jordan Cove and the market views of three Commissioners, I respectfully dissent.

Philip D. Moeller
Commissioner

[3] See P23 of this order.

Exhibit E

***Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015)**

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project LP	Docket No. CP13-483-000
Pacific Connector Gas Pipeline LP	Docket No. CP13-492-000

NOTICE OF REVISED SCHEDULE FOR ENVIRONMENTAL REVIEW OF THE JORDAN COVE LIQUEFACTION AND PACIFIC CONNECTOR PIPELINE PROJECTS

(February 6, 2015)

This notice identifies the Federal Energy Regulatory Commission staff's revised schedule for the completion of the environmental impact statement (EIS) for Jordan Cove Energy Project LP's and Pacific Connector Gas Pipeline LP's Jordan Cove Liquefaction and Pacific Connector Pipeline Projects. The first notice of schedule, issued on July 16, 2014, identified February 27, 2015 as the final EIS issuance date. However, additional information was required to complete our review which delayed the issuance of the draft EIS. As a result, staff has revised the schedule for issuance of the final EIS.

Schedule for Environmental Review

Issuance of Notice of Availability of the final EIS	June 12, 2015
90-day Federal Authorization Decision Deadline	September 10, 2015

If a schedule change becomes necessary, an additional notice will be provided so that the relevant agencies are kept informed of the project's progress.

Additional Information

In order to receive notification of the issuance of the EIS and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription (http://www.ferc.gov/docs-filing/esubscription.asp). Additional information about the project may be obtained by contacting the Environmental Project Manager, Paul Friedman, by telephone at 202-502-8059 or by electronic mail at paul.friedman@ferc.gov.

Rich McGuire, Acting Director
Division of Gas – Environment
and Engineering

Exhibit F

Major Permits, Approvals, and Consultations for the JCE & PCGP Project, Table 1.5.1-1, *Jordan Cove Energy and Pacific Connector Gas Pipeline Project Draft EIS* (Nov. 7, 2014)

Other federal laws or regulations that require permits and approvals before this Project could be constructed include compliance with the RHA, CWA, CAA, Coastal Zone Management Act (CZMA), and Coast Guard regulations relating to LNG waterfront facilities. Some of these federal permits or approvals, such as Section 401 of the CWA, CAA, and CZMA, have been delegated to state agencies, as discussed below. For example, the ODEQ has been delegated CWA 401 and 402 responsibilities under the CWA and CAA, and the Oregon Department of Land Conservation and Development (ODLCD) has delegated responsibilities under the CZMA.

In accordance with Section 313(d) of the EPAct, the FERC is required to keep a complete consolidated record of all actions or decisions made by agencies undertaking federal authorizations. On October 19, 2006, in Order No. 687, the FERC issued implementing regulations regarding the maintenance of a consolidated record. Section 313(c) of the EPAct requires that the FERC establish a schedule for federal authorizations. Pursuant to Order No. 687, the FERC issued an initial Notice of Schedule for *Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects* on July 16, 2014. That notice stated that the FERC's target goal for producing the FEIS for the Project would be February 27, 2015, with the 90-day deadline for other federal authorizations projected to be May 28, 2015.

While the EPAct amended the NGA to give exclusive authority to the FERC to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal, it specified that nothing in the Act was intended to overrule other federal authorities. This includes the protection of the rights of states with federally delegated responsibilities under the CZMA, CAA, and CWA.

Table 1.5.1-1 lists the major federal, state, and local permits, approvals, and consultations identified for the Project.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
FEDERAL			
Federal Energy Regulatory Commission (FERC)	Sections 3 and 7 of the Natural Gas Act (NGA) [Title 15 United States Code [U.S.C.] 717]	Order Granting Section 3 Authorization and Issuing Certificate of Public Convenience and Necessity.	On May 21, 2013, Jordan Cove filed an application with the FERC under Section 3 of the NGA.
	Section 311 of the Energy Policy Act of 2005 (EPAct)		On June 6, 2013, Pacific Connector filed an application with the FERC under Section 7 of the NGA.
	Title 18 Code of Federal Regulations (CFR) 153, 157, 375, and 385 Order No. 687 National Environmental Policy Act (NEPA) 42 U.S.C. 4321 et seq. 40 CFR 1500-1508 18 CFR 380.12	Produce Environmental Impact Statement (EIS).	The FERC's decision is pending until after the FEIS is issued. On August 2, 2012, the FERC issued Notice of Intent (NOI) to Prepare an EIS. On July 16, 2014, the FERC issued its Notice of Schedule for Environmental Review with a projected FEIS date of February 27, 2015.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Advisory Council on Historic Preservation (ACHP)	Section 106 of the National Historic Preservation Act (NHPA) 16 U.S.C. 470 36 CFR 800	Opportunity to comment on the undertaking.	On August 30, 2011, the FERC submitted its Memorandum of Agreement (MOA) to the ACHP for original Pacific Connector project in Docket No. CP07-441-000. If the newly proposed Pacific Connector Project (Docket No. CP13-492-000) is authorized by the FERC, the MOA would be amended.
Federal Communication Commission	License for fixed microwave stations and service 47 U.S.C. 303 47 CFR 101	Review proposals for new or additions to existing communication towers.	Pending.
U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS)	Farmland Protection Policy Act 7 U.S.C. 4201-4209 7 CFR Part 658	Determine if the Project would result in the permanent conversion of prime farmland.	On August 30, 2012, the NRCS commented on the FERC's NOI. NRCS comments on impacts on prime farmland pending review of EIS.
USDA Forest Service (Forest Service)	Mineral Leasing Act (MLA) 30 U.S.C. 181 et seq. 43 CFR 2882	Concur with Right-of-Way (ROW) Grant.	On April 17, 2006, Pacific Connector submitted its initial SF 299 ROW Grant application. On February 25, 2013, Pacific Connector amended that application. Decision on ROW Grant pending until after issuance of FEIS.
	36 CFR 219.17	Amend Land and Resource Management Plans (LRMP).	On September 21, 2012, Forest Service and BLM issued a Supplemental NOI. Amendments pending review of EIS.
U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS)	Section 7 of the Endangered Species Act (ESA) 16 U.S.C. 1531 et seq. 50 CFR 222 50 CFR 224 50 CFR 402	Provide a biological opinion (BO) if the Project is likely to adversely affect federally listed threatened or endangered aquatic species or their habitat.	Concurrent with issuance of draft EIS (DEIS), the FERC would submit its biological assessment (BA) and essential fish habitat (EFH) assessment to the NMFS. The NMFS would issue its BO pending review of the FERC's BA and EFH Assessment.
	Marine Mammal Protection Act (MMPA) 16 U.S.C. 1361 et. seq. 50 CFR 82 50 CFR 216	Consult on protected marine mammals.	On October 8, 2014, Jordan Cove and Pacific Connector submitted their draft application for incidental harassment authorization to the NMFS. Review pending.
	Magnuson-Stevens Fishery Conservation and Management Act (MSA) 16 U.S.C. 1801-1884 50 CFR 600	Provide conservation recommendations if the Project would adversely impact EFH.	Pending review of the FERC's EFH Assessment.
U.S. Department of Defense (DOD)	Section 311(f) of the EPAct and Section 3 of the NGA 15 U.S.C. 717b 18 CFR 153, 157, 375, and 385 MOU between FERC and DOD	Consult with the Secretary of Defense to determine whether an LNG facility would affect the training or activities of an active military installation.	On September 27, 2012, the FERC sent a letter about the Project to the DOD Siting Clearinghouse. On November 2, 2012, the DOD replied that the Project would have minimal impact on military operations in the area.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
U.S. Department of the Army, Corps of Engineers (COE)	Section 10 of the Rivers and Harbors Act (RHA) 33 U.S.C. 403 33 CFR 320 to 330	Process permit application for structures or work in or affecting navigable waters of the United States.	On June 13, 2013, and July 8, 2013 Jordan Cove and Pacific Connector respectively submitted separate Joint Permit Applications (JPA) with the COE. On August 15, 2013, COE requested that a single comprehensive JPA be resubmitted for the complete Project. On October 15, 2013, Jordan Cove and Pacific Connector submitted a single comprehensive JPA. Permit pending review of JPA.
	Section 404 of the Clean Water Act (CWA) 33 U.S.C. 1344 33 CFR 320 to 330	Process permit application for the placement of dredged or fill material into waters of the United States.	On June 13, 2013, and July 8, 2013 Jordan Cove and Pacific Connector respectively submitted separate JPAs with the COE. On August 15, 2013, COE requested that a single comprehensive JPA be resubmitted for the complete Project. On October 15, 2013, Jordan Cove and Pacific Connector submitted a single comprehensive JPA. Permit pending review of JPA. Between March 2013 and March 2014, Jordan Cove submitted various wetland delineation reports to the COE. On March 13, 2014, the COE concurred with the boundaries and extent of Waters of the U.S. depicted in the Jordan Cove wetland delineation report. On June 26, 2013, Pacific Connector submitted its wetland delineation report to the COE. On August 5, 2014, the COE concurred with the boundaries and extent of Waters of the U.S. depicted in the Pacific Connector wetland delineation report.
	Section 103 of the Marine Protection, Research, and Sanctuaries Act (MPRSA) 33 U.S.C. 1401 et. seq. 33 CFR Part 324	Issue a permit for the ocean disposal of dredged material under MPRSA consistent with EPA criteria and subject to EPA concurrence.	Jordan Cove included a dredged material management plan with its JPA to the COE. Permit pending review of JPA.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
U.S. Department of Energy (DOE) Office of Fossil Energy	Section 3 of the NGA 15 U.S.C.§717b 18 CFR 153, 157, 375, and 385	Authority to export LNG to Free Trade Agreement (FTA) Nations.	On September 22, 2011, Jordan Cove filed an application with the DOE in FE Docket No. 11-127-LNG. On December 7, 2011, DOE issued DOE/FE Order No. 3041 granting authority for Jordan Cove.to export LNG to FTA Nations.
	Section 3 of the NGA 15 U.S.C.§717b 18 CFR 153, 157, 375, and 385	Authority to export LNG to Non-FTA Nations.	On March 23, 2012, Jordan Cove filed an application with the DOE in FE Docket No. 12-32-LNG. On March 24, 2014, DOE issued DOE/FE Order No. 3413 granting authority for Jordan Cove.to export LNG to non-FTA Nations.
DOE, Bonneville Power Administration (BPA)	Encroachment permit for electric transmission line crossings	Permit review.	Decision Pending.
U.S. Environmental Protection Agency (EPA)	Section 404 of the CWA 33 U.S.C. 1412 40 CFR 227, 228	Co-administers CWA 404 program with the COE. EPA retains veto authority for wetland permits issued by the COE.	On October 29, 2012, EPA commented on the FERC's NOI. Review pending issuance of COE permit.
	Section 103 of the MPRSA 33 U.S.C. 1344, and 40 CFR Part 230	COE issues a permit for the ocean disposal of dredged material under MPRSA consistent with EPA criteria. The permit is subject to EPA concurrence if disposal is proposed at an EPA ocean dredged material disposal site designated under Section 102 of the MPRSA.	Jordan Cove included a dredged material management plan with its JPA to the COE. EPA concurrence pending issuance of permit by COE.
	Section 309 of the Clean Air Act (CAA) 42 U.S.C. 7401 et seq. 40 CFR 1503.1(a)	Reviews and evaluates EIS for adequacy in meeting the procedural and public disclosure requirements of the NEPA.	Review of EIS pending.
U.S. Department of Homeland Security, Coast Guard	Ports and Waterway Safety Act 33 U.S.C. 1221 33 U.S.C. 1231 33 CFR 160	Captain of the Port (COTP) issues a Letter of Recommendation (LOR) and Waterway Suitability Report (WSR) recommending the suitability of the waterway for LNG marine traffic.	On July 1, 2008, COTP issued a WSR. On April 24, 2009, the Coast Guard issued an LOR.
	33 CFR 127	Review Emergency Manual.	On June 25, 2010, Coast Guard reviewed document and marked it "Examined."
		Review Operations Manual.	Pending. Must be completed prior to receiving first LNG vessel.
	33 CFR 165	Establish safety and security zones for LNG vessels in transit and while docked.	On May 17, 2011, Security Zone noticed in 76 FR 28317.
	Maritime Transportation Security Act 46 U.S.C. 701 33 CFR 105	Review and Approve Facility Security Plan.	Pending. Must be completed 60 days prior to receiving first LNG vessel at the facility

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
	Navigation and Vessel Inspection Circular – Guidance related to Waterfront Liquefied Natural Gas (LNG) Facilities NVIC 05-05 NVIC 05-08 NVIC 01-11	Develop LNG Vessel Transit Management Plan. Validate WSA and produce WSR.	Pending. Must be completed prior to receiving first LNG vessel. On July 1, 2008, the Coast Guard issued a WSR for original LNG import project. On February 21, 2012, the Coast Guard acknowledged validity of the current WSR when the facility changed from import to export. The WSA was updated as part of Jordan Cove's annual review in October 2012 and was updated to change the proposed terminal from import to export. On January 13, 2014, Jordan Cove submitted its most recent annual review of the WSA to the COTP. On February 24, 2014, COTP stated that the risk associated with the waterway and facility has not changed since the Project was originally evaluated.
U.S. Department of the Interior (USDOI), Bureau of Land Management (BLM)	Section 28 of Mineral Leasing Act of 1920 (MLA) 30 U.S.C. 181 43 CFR 2880	Issue ROW Grant for crossing federal lands.	On April 17, 2006, Pacific Connector submitted its initial SF 299 ROW Grant application. On February 25, 2013, Pacific Connector amended that application.
	Federal Land Policy and Management Act of 1976, as amended 43 CFR 1610	Resource Management Plan Amendments.	On September 21, 2012, BLM and Forest Service issued a Supplemental NOI. Decision pending review of EIS.
USDOI Bureau of Reclamation	MLA 30 U.S.C. 181 et seq. 43 CFR 288.23(l)	Concur with issuance of the ROW Grant	On April 17, 2006, Pacific Connector submitted its initial SF 299 ROW Grant application. On February 25, 2013, Pacific Connector amended that application.
USDOI Fish and Wildlife Service (FWS)	Section 7 of the ESA 16 U.S.C. 153 et seq. 50 CFR 402.02	Provide a BO if the project is likely to adversely affect terrestrial federally-listed threatened and endangered species or their habitat.	On September 4, 2012, FWS commented on FERC's NOI. Concurrent with issuance of DEIS, the FERC would submit its BA to FWS.FWS would issue its BO pending review of the FERC's BA.
	Fish and Wildlife Coordination Act (FWCA) 16 U.S.C. 661-667(d) 23 CFR Part 773	Provide comments to prevent loss of and damage to wildlife resources.	FWS generally addresses FWCA issues via comments on FERC NEPA and COE 404 permit processes.
	Migratory Bird Treaty Act (MBTA) 16 U.S.C. 703 Executive Order 13186	Consultation regarding compliance with the MBTA.	Pending review of this EIS and review of applicants' Migratory Bird Conservation Plan.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
U.S. Department of Transportation (DOT), Pipeline and Hazardous Materials Safety Administration (PHMSA)	Natural Gas Pipeline Safety Act (NGPS) 49 U.S.C. 601 49 CFR Parts 190-199	Administer national regulatory program to ensure the safe transportation of natural gas.	On September 19, 2013, Jordan Cove submitted to PHMSA data related to the analysis of a potential LNG leak source. On June 18, 2014, PHMSA stated it had no objections to Jordan Cove's methodologies for identifying credible leakage scenarios in siting its LNG terminal.
DOT, Federal Aviation Administration (FAA)	18 CFR Subchapter E Federal Aviation Regulations (FAR) Part 77 IAW FAA Order 7400.2G, 6-1-6	Aeronautical Study of Objects Affecting Navigable Airspace. Feasibility Study for Hazard Determination.	On May 8, 2007, the FAA issued an aeronautical study for the communication tower at the Jordan Cove Meter Station proposed under Docket No. CP07-444-000. On November 1, 2008, the FAA issued a limited aeronautical review of the LNG tanks proposed in Docket No. CP07-444-000. Continuing consultations with FAA are pending.
U.S. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms	Explosives User Permit 27 CFR 555	Issue permit to purchase, store, and use explosives during project construction.	Permits to be obtained by Jordan Cove and Pacific Connector, as necessary, before construction.
STATE – OREGON			
Oregon Department of Agriculture (ODA)	Oregon Endangered Species Act Oregon Senate Bill 533 and Oregon Revised Statute (ORS) 564	Consult on Oregon listed plant species, and ODA would review botanical survey reports covering non-federal public lands prior to ground-disturbing activities where state listed botanical species are likely to occur.	On September 15, 2008, ODA informed Jordan Cove that it was in compliance with state laws, and no species should be adversely affected. On July 24, 2006, ODA provided Pacific Connector with a list of state listed species. In September 2007 and November 2008 Pacific Connector submitted botanical survey reports to ODA. ODA's review of these botanical reports is pending.
Oregon Department of Energy (ODE)	State Authorities under Section 311 of the EPAct	Furnish an advisory report on state safety and security issues to the FERC regarding the Jordan Cove LNG Terminal proposal, and conduct operational safety inspections if the facility is approved and built.	On October 29, 2012, ODE filed environmental comments as part of the State of Oregon's response to the FERC's NOI issued August 2, 2012. On June 20, 2013, ODE filed a motion to intervene in response to the FERC's Notice of Application (NOA) issued May 30, 2013. ODE did not submit a State Safety Report to the FERC within 30 days of the NOA. On June 14, 2014, ODE entered into an MOU with Jordan Cove regarding LNG emergency preparedness at the export terminal. Safety inspections pending operation of facilities.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
ODE – Energy Facility Siting Council (EFSC)	Oregon State Siting Standards ORS 469.300 Oregon Administrative Rule (OAR) 345	Authority to review proposals for power plants generating more than 25 MW and issue a Site Certificate.	On November 30, 2012, Jordan Cove filed amended Notice of Intent for the South Dunes Power Plant. On February 14, 2013, EFSC issued Project Order. Site Certificate Pending.
	OAR 345-21 & 22	Enforce Oregon's CO_2 Standards. Enforce Oregon's Retirement Bond Requirements.	On June 10, 2014, ODE entered into a Memorandum of Understanding (MOU) with Jordan Cove regarding CO_2 and Facilities Retirement.
Oregon Department of Environmental Quality (ODEQ)	Water Quality Certification Section 401 of the CWA ORS 468B OAR 340-48	Issue a license or permit to achieve compliance with state water quality standards.	Pacific Connector submitted water quality information to ODEQ concurrent with its JPA to the COE. Review pending.
	Section 402 of CWA ORS 468B OAR 340-45	Issue National Pollutant Discharge Elimination System (NPDES) permits for discharge of stormwater.	On July 22, 2014, Jordan Cove submitted its modified NPDES permit application to ODEQ. Review pending. One year prior to construction, Pacific Connector intends to submit its NPDES permit applications to ODEQ.
	Ballast Water Management ORS 620-992 OAR 340-143	Review liabilities and offences connected to shipping and navigation.	Pending review of this EIS.
	CAA – Title V 40 CFR 98 ORS 468A OAR 340-215, 216, 218, 222, & 228	Issue Title V Air Quality Operating permit. Issue Title V Acid Rain permit. Enforce Greenhouse Gas (GHG) Reporting Requirements.	In March 2013, Jordan Cove submitted an air quality permit application to the ODEQ. Pacific Connector anticipates submitting an air quality permit application to ODEQ in 2014. GHG analysis pending review of this EIS.
	Prevention of Significant Deterioration CAA ORS 468B OAR 340-224 & 225	Review Best Available Control Technologies to minimize discharges from new major sources, and review air quality analyses to ensure compliance with National Ambient Air Quality Standards.	In March 2013, Jordan Cove submitted an air quality permit application to the ODEQ. Pacific Connector anticipates submitting an air quality permit application to ODEQ in 2014. Pending review of this EIS.
	Hazardous Waste Activity ORS 466 OAR 340-102	Review plans for storage and management of hazardous waste	Pending review of this EIS.
Oregon Department of Fish and Wildlife (ODFW)	Fish and Wildlife Coordination Act and the Oregon Endangered Species Act under ORS 496, 506, and 509 OAR 635	Consult on sensitive species and habitats that may be affected by the Project and, in general, regarding conservation of fish and wildlife resources.	In June 2014, Jordan Cove produced its latest revision of its Wildlife Habitat Mitigation Plan. ODFW Review pending. Pacific Connector has not yet submitted its Wildlife Habitat Mitigation Plan to ODFW.
	Fish and Wildlife OAR 345-22 & 60	Consult on and approve fish and wildlife mitigation plan.	On January 29, 2014, Jordan Cove submitted its Draft Wildlife Salvage Plan to ODFW. Review pending.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
	Fish Screening Criteria at Stream Crossings OrS 509-580 through 910 OAR 635-412-5 through 40	Review stream crossing plans for consistency with Oregon fish passage law and ODFW fish passage rules	Pacific Connector submitted its Fish Passage Waiver Application and Fish Passage Plan for Road and Stream Crossings. ODFW review pending.
	ORS 509-140, et al.	Consider issuance of in-water blasting permits.	Pacific Connector submitted In-Water Blasting Permit Application. ODFW review pending.
Oregon Department of Forestry (ODF)	Easement on State lands Oregon Forest Practices Act OAR 629 ORS 477 ORS 527	Management of State Forest lands for Greatest Permanent Value, develops Forest Management Plans, stewardship under State's Land Management Classification System, monitors harvests of timber on private lands, and protects non-federal public and private lands from wildfires.	Pacific Connector anticipates submittal of final plans to ODF during the first quarter of 2015.
Oregon Department of Geology and Mineral Industries (DOGAMI)	Building Code Section 1802.1 ORS 455-446 OAR 517	Review of structural designs in tsunami zones. Review of geotechnical investigations for geological hazards. Review of mining and reclamation activities.	Review and decision pending.
State Historic Preservation Office (SHPO)	Section 106 of the NHPA 36 CFR 800 ORS 338-920	Review cultural resources reports and comments on recommendations for National Register of Historic Places eligibility and project effects. Issue permits for excavation of archaeological sites on non-federal lands.	On June 3, 2011, the Oregon SHPO signed the FERC's MOA for the original Pacific Connector project in Docket No. CP07-441-000. If the FERC authorizes the newly proposed Pacific Connector Project (in Docket CP13-492-000) the MOA would be amended. SHPO review of future cultural resources investigations reports pending.
Oregon Department of Land Conservation and Development (ODLCD)	Coast Zone Management Act (CZMA) 15 CFR Part 930 ORS 196.435	Determine consistency with CZMA program policies.	On August 1, 2014, Jordan Cove and Pacific Connector submitted their applications for Certification of Consistency to the ODLCD. The six-month review period regarding federal consistency provisions of the CZMA began on August 1, 2014 and will end on February 1, 2015.
Oregon Department of State Lands (ODSL)	Submerged and Submersible Land Easement OAR 141-122	Grant submerged land easements.	On May 15, 2014, Pacific Connector submitted its easement Application. ODSL Review pending.
	Joint Removal-Fill Law ORS 196-795-990 OAR 141-85	Approve removal or fill of material in waters of the state.	On February 19, 2013, ODSL issued Amended Proposed Order allowing dredging of Jordan Cove access channel and slip. On December 2, 2013, ODSL found Pacific Connector's application to be complete.
	Compensatory Wetland Mitigation Rules OAR 141-85-121	Review and approve wetland mitigation plans.	On July 15, 2013, Pacific Connector filed an application with ODSL. Decision Pending.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Oregon Department of Transportation (ODOT)	Section 303(c) DOT Act 49 CFR 303	Consultation and clearance letter regarding recreational land disturbance and construction-related traffic impacts.	On August 2, 2012, ODOT commented on Jordan Cove's Traffic Impact Analysis. ODOT's review of Pacific Connector's Transportation Management Plans is pending.
	State Highway ROW ORS 374-305 OAR 734- 55	Permits to be issued from each DOT District Office to allow construction within State Highway ROW and use of State Highways for Project access.	Applications for ODOT road crossing permits would be submitted prior to and during construction on an as-needed basis.
Oregon Department of Water Resources (ODWR)	New Water Rights ORS 537 OAR 690-310	Issue permits to appropriate surface water and groundwater.	Pacific Connector submitted an application for a license to temporarily use surface waters for pipeline construction and testing. ODWR review pending.
	Temporary Water Use ORS 537 OAR 690-340	Issue limited licenses for temporary use of surface waters.	Pacific Connector anticipates submitting an application during the first quarter of 2015.
Oregon Public Utilities Commission (OPUC)	OAR 860-031	Authorize intrastate electric transmission lines. Inspect the natural gas facilities for safety.	Pending Pacific Connector's submittal of appropriate applications to OPUC. Pending operation of facilities.
LOCAL – COUNTIES			
Coos County	Coos County Zoning and Land Development Ordinance, Coos County Comprehensive Plan, and Coos Bay Estuary Management Plan (CBEMP) ORS 197.015(10)(b)(H)	Issue Conditional Use Permits. Zoning Changes and Verifications. Issue Land Use Compatibility Statement (LUCS) under Statewide Planning Goals.	On December 5, 2007, Coos County issued a Conditional Use Permit for the Jordan Cove LNG terminal. On January 3, 2008, Coos County approved conditional use of Jordan Cove's access channel and marine slip. On August 21, 2009, Coos County approved conditional use of Jordan Cove's upland terminal facilities, after remand from Oregon's Land Use Board of Appeals (LUBA). On September 23, 2009, Coos County approved Comprehensive Plan amendment and Zoning Map amendment for Jordan Cove's future use of the former Kentuck Golf Course for wetland mitigation. On December 16, 2009, Coos County approved a correction of maps of wetlands within CBEMP zoning district 6-WD for Jordan Cove's terminal. March 22, 2012, Coos County partly approved a correction of the Coastal Shoreline Boundary in the 7-D zone at the former Weyerhaeuser linerboard property.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
			On July 25, 2012, Coos County approved Jordan Cove's Notice of Planning Directors Decision – Administrative Boundary Interpretation for 6-WD and Administrative Conditional Use Request for Fill in 6-WD. On September 17, 2012, Coos County approved Jordan Cove's Notice of Planning Directors Withdrawal and Reissuance of Administrative Conditional Use and Boundary Interpretation ABI for CBEMP/To Allow Fill. On October 4, 2012, Coos County approved Jordan Cove's Notice of Planning Directors Decision – To Allow Fill in IND Zone, To Allow Fill in CBEMP 7-D Zone, Vegetative shoreline Stabilization in CBEMP 7-D. On December 13, 2012, Coos County approved Jordan Cove's Site Plan Review for Integrated Power Generation and Process Facility. On September 8, 2010, Coos County issued a Conditional Use Permit to Pacific Connector. On June 14, 2013, Coos County issued a LUCS to Pacific Connector.
	Section 311 of EPAct	Review and provide consultation regarding Jordan Cove's Emergency Response Plan.	On July 16, 2009, Jordan Cove signed concept agreements with the Coos County Sheriff's Office, Emergency Management, and Health Department.
Douglas County	Douglas County Comprehensive Plan and Douglas County Land Use and Development Ordinance ORS 197.015(10)(b)(H)	Issue Conditional Use Permits Issue LUCS	On December 11, 2009, Douglas County issued a Conditional Use Permit to Pacific Connector. On March 20, 2014, Douglas County Planning Commission approved a Major Amendment to its 2009 decision to allow the Pacific Connector pipeline to cross 7.3 miles within the Coastal Zone in Douglas County. That decision was affirmed by the Board of Commissioners for Douglas County on April 30, 2014. Douglas County then issued a revised LUCS on June 2, 2014 for the 7.3-mile portion of the pipeline within the Coastal Zone Management Area within Douglas County.

TABLE 1.5.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Jackson County	Jackson County Comprehensive Plan and Jackson County Land Development Ordinance ORS 197.015(10)(b)(H)	Issue Conditional Use Permits Issue LUCS	On June 18, 2013 Jackson County provided a LUCS for the Project. The LUCS indicated that the Project was not subject to the land development standards of the Jackson County Land Development Ordinance because it would be authorized by the FERC. Therefore, no conditional use permits would be necessary.
Klamath County	Klamath County Land Development Code ORS 197.015(10)(b)(H)	Issue Conditional Use Permits Issue LUCS	On August 21, 2012, Klamath County responded to the FERC NOI with a list of local permits that Pacific Connector should apply for. On June 10, 2013, Klamath County provided a LUCS for the Project. The LUCS indicated that if not authorized by FERC the Project would require county applications and review. Therefore, no conditional use permits would be necessary.
All Counties	Road Crossing Permits	Review permits to cross county roads.	To be submitted prior to construction.
	Grading Permits	Review permits for excavation and grading activities.	To be submitted prior to construction.
	Solid Waste Disposal	Review permits for disposal of solid waste generated by construction.	To be submitted prior to construction.
LOCAL – CITIES			
City of Coos Bay	CBEMP	Issue Conditional Use Permit Zoning Verification	On June 15, 2007, the City approved the establishment of a 2-acre eelgrass mitigation site in aquatic unit 52-NA.
City of North Bend	North Bend Comprehensive Plan	Conditional Use Permit Amend Chapters 18.04 and 18.44	On October 8, 2013, the City approved Jordan Cove's request to amend the M-H Heavy Industrial Zone to allow conditional use for temporary work force housing.
City of North Bend	North Bend City Code	Conditional Use Permit Amend Chapter 18.80	On February 14, 2014, the City approved variances to allow vehicle parking at drainage at Jordan Cove's proposed temporary work force housing site.
City of North Bend	North Bend City Code	Conditional Use Permit Amend Chapters 18.84 and 18.88	On March 25, 2014, the City approved an amendment to North Bend Shorelands Management Unit 48 to allow for bridge at Jordan Cove's temporary work force housing site.

1.5.1.1 Endangered Species Act

Section 7 of the ESA, as amended, states that "Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act," and any project authorized, funded, or conducted by a federal

Exhibit G

***McCaffree v. Coos County*, __ Or LUBA __, LUBA No. 2014-102 (Feb. 3, 2015)**

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JODY MCCAFFREE
and JOHN CLARKE,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

PACIFIC CONNECTOR
GAS PIPELINE, L.P.,
Intervenor-Respondent.

LUBA No. 2014-102

FINAL OPINION
AND ORDER

Appeal from Coos County.

Kathleen P. Eymann, Bandon, represented petitioners.

Josh Soper, County Counsel, Coquille, represented respondent.

Richard H. Allan, Portland, represented intervenor-respondent.

HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

DISMISSED 02/03/2015

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Holstun, Board Member.

Petitioner requests that this appeal be dismissed. Accordingly, this appeal is dismissed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2014-102 on February 3, 2015, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Josh Soper
Coos County Counsel
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Coquille, OR 97423

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Portland, OR 97204

Dated this 3rd day of February, 2015.

Kelly Burgess
Paralegal

Kristi Seyfried
Executive Support Specialist

Exhibit H

Final Order No. 14-09-12PL, AM-14-11 (Jan. 20, 2015)

BEFORE THE BOARD OF COMMISSIONERS
OF THE COUNTY OF COOS, OREGON

IN THE MATTER OF AMENDING THE COOS COUNTY ZONING & LAND DEVELOPMENT ORDINANCE CHANGES TO CHAPTER V (FILE NUMBER AM-14-11)	))))	FINAL DECISION AND ORDINANCE 14-09-012PL

WHEREAS, pursuant to Article 1.2 of the Coos County Zoning and Land Development Ordinance (hereinafter referred to as the "CCZLDO"); the Coos County Board of Commissioners initiated a text amendment to Chapter V Administration;

WHEREAS, staff drafted the proposed text amendment to address reorganization, clarification of process, readability issues and necessary updates to be in compliance with land use laws and to reorganize;

WHEREAS, staff presented the proposed text to the Citizen Advisory Committee, Planning Commission, and Board of Commissioners in work sessions;

WHEREAS, staff completed the draft and provided 35 day notice to Department of Land Conservation and Development and 20 day notice to the required land owners, interested parties and agencies;

WHEREAS, pursuant to the procedures as set forth in Article 1.2 of the CCZLDO, the proposed text amendments were considered by the Planning Commission at a public hearing on October 2, 2014 and a recommendation to the Board of Commissioners was made;

WHEREAS, on October 16, 2014 the Board of Commissioners held a public hearing for testimony on the matter and reviewed the Planning Commission recommendation. At said hearing the time period for written comments was extended until November 17, 2014;

WHEREAS, on December 19, 2014 after review of the record the Board of Commissioners deliberated on the proposed changes. The Board of Commissioners approved the proposal with modifications and instructed staff to make the changes and correct any typos; and

NOW THEREFORE, IT IS HEREBY ORDERED that the Coos County Board of Commissioners hereby adopts the proposed changes found in Attachment A, attached hereto and incorporated by reference herein. Also, attached in Attachment B are the findings that address the testimony received.

ADOPTED this 20th day of January 2015.

BOARD OF COMMISSIONERS

Commissioner

Commissioner

Commissioner

APPROVED AS TO FORM:

Office of County Counsel

CHAPTER V - ADMINISTRATION

ARTICLE 5.0 ADMINISTRATION AND APPLICATION REVIEW PROVISIONS

SECTION 5.0.100 PRE-APPLICATION CONFERENCE:

The purpose of a pre-application conference is to familiarize the applicant with the provisions of this Ordinance and other land use laws and regulations applicable to the proposed development.

A pre-application is strongly recommended prior to submission of plan or ordinance amendment application or rezone application. For other types of applications an applicant may request a pre-application conference under this Ordinance.

A pre-application conference shall be requested by filing a written request along with the applicable fee to the Planning Department. The written request should identify the development proposal, provide a description of the character, location and magnitude of the proposed development and include any other supporting documents such as maps, drawings, or models.

The Planning Department will schedule a pre-application conference after receipt of a written request and the appropriate fee. The Planning Department will notify agencies and persons deemed appropriate to attend to discuss the proposal. Following the conference, the Planning Department will prepare a written summary of the discussion and send it to the applicant.

SECTION 5.0.150 APPLICATION REQUIREMENTS:

(Chapter 6 Land Divisions have additional submittal requirements)

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

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 ~~the following~~ **all applications** ~~reviews:.~~

~~Amendment/Rezone 19 copies~~

~~Planning Commission (including appeals) 14 copies~~
~~Board of Commissioner (including appeals) 6 copies~~
~~Administrative 1 copy~~

~~The County may, at its sole discretion, reject materials that do not contain the requisite number of copies. It may be requested that the County make the requisite number of copies subject to the submitter paying applicable copy charges.~~ An application may be deemed incomplete for failure to comply with this section.

The burden of proof in showing that an application complies with all applicable criteria and standards lies with the applicant.

This was moved from Section 5.2

SECTION 5.0.175 Application Made by Transportation Agencies, Utilities or Entities:

1. A transportation agency, ***utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35*** may submit an application to the Planning Department for a permit or zoning authorization required for a ~~transportation~~ project without landowner consent otherwise required by this ordinance.
2. ***For any new applications submitted after the effective date of this section, such*** ~~A~~ transportation agency, ***utility, or entity*** must mail certified notice to the Planning Department and any owner of land upon which the ~~transportation~~ proposed project would be constructed at least ten (10) days before submitting an application to the Planning Department. Said notice shall state the transportation agency, ***utility, or entity's*** intent to file the application and must include a map, brief description of the proposed ~~transportation~~ project, and a name and telephone number of an official ***or representative of the project*** ~~with the transportation agency~~ available to discuss the proposed project.
3. ~~A~~ ***Such*** transportation agency, ***utility or entity*** (applicant) must comply with all ***other*** applicable requirements of this ordinance~~; however, a property divided by the sale or grant of property for state highway, county road, City Street or other right-of-way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned.~~ ***including property owners that were provided with notice of any hearing on any hearing on the application pursuant to ORS 197.763***
4. Notwithstanding any other requirement of this ordinance, approvals granted to ~~a~~ ***such*** transportation agency ~~for a transportation improvement~~, ***utility or entity*** shall not become effective ***for construction on a property under the approval*** until ***the transportation agency, utility or entity obtains either the written consent of the property owner or the property rights necessary for construction on that property*** ~~the subject property is acquired for the project.~~
5. Any permit subject to this section will be ~~effective~~ ***valid*** for two (2) years unless a request for renewal for another two (2) years is received from the transportation, ***utility or entity*** agency within 2 years ***after the date of approval***, ~~is received from the transportation agency within 2 year period~~, in which case renewal will be automatic to a maximum of 5 renewals. ***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.***[OR-92-07-012PL]

SECTION 5.0.200 APPLICATION COMPLETENESS (ORS 215.427):

1. An application will not be acted upon until it has been deemed complete by the Planning Department. In order to be deemed complete, the application must comply with the requirements of Section 5.0.150, and all applicable criteria or standards must be adequately addressed in the application. If the County Road Department recommends traffic impact analysis (TIA) the application will not be deemed complete until it is submitted.
2. ***For land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision, including resolution of all appeals under ORS 215.422 (Review of decision of hearings officer or other authority), within 120 days after the application is deemed complete unless an application has been deemed incomplete, voided or extended as discussed in this section . The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422 (Review of decision of hearings officer or other authority), within 150 days after the application is deemed complete, unless an application has been deemed incomplete, voided or extended as provided for in this section.***
3. ***If an application for a permit or limited land use decision is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection 2 upon receipt by the governing body or its designee of:***
   a. ***All of the missing information;***
   b. ***Some of the missing information and written notice from the applicant that no other information will be provided; or***
   c. ***Written notice from the applicant that none of the missing information will be provided.***
4. ***If the application was complete when first submitted or the applicant submits additional information, as described in Subsection 3, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251 (Compliance acknowledgment), approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.***
5. ***If the application is for industrial or traded sector development of a site identified under Section 11 below, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with Section 4 above.***
6. ***On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (3)of this section and has not submitted:***
   a. ***All of the missing information;***

b. *Some of the missing information and written notice that no other information will be provided; or*

c. *Written notice that none of the missing information will be provided.*

7. *The period set in Subsection 2 of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in Section 12 of this section for mediation, may not exceed 215 days.*
8. *The period set in Section 2 of this section applies:*
   a. *Only to decisions wholly within the authority and control of the governing body of the county; and*
   b. *Unless the parties have agreed to mediation as described in Section 11 of this section or ORS 197.319(2)(b) (Procedures prior to request of an enforcement order)*
9. *Timelines as described in this section do not apply to a decision of the county making a change to an acknowledged comprehensive plan or dependent on the approval of a comprehensive plan amendment.*
10. *Except when an applicant requests an extension of the timelines, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.*
11. *A county may not compel an applicant to waive the period set in ORS 215.429 (Mandamus proceeding when county fails to take final action on land use application within specified time) as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.*
12. *The periods set forth in this section may be extended by up to 90 additional days, if the applicant and the county agree that a dispute concerning the application will be mediated. [1997 c.414 §2; 1999 c.393 §§3,3a; enacted in lieu of 215.428 in 1999; 2003 c.800 §30; 2007 c.232 §1; 2009 c.873 §15; 2011 c.280 §10]*
13. ~~Within 30 days of the date the application is filed, the Planning Department will notify the applicant, in writing, specifying the information that is missing. The application will be deemed complete upon receipt of the missing information.~~
14. ~~An applicant will have 180 days from the date of filing of the application to provide the Planning Department any information requested to make an application complete. When an applicant fails to submit the requested information, the application will be deemed withdrawn on the 181st day after the application was filed.~~
15. ~~If the applicant who receives notice of an incomplete application refuses, to submit the missing information, the application will be deemed complete on the 31st day after the Planning Department first received the application.~~
16. ~~In the event the Planning Department fails to notify the applicant within 30 days of the date the application was filed, the application will be deemed complete on the 31st day.~~

SECTION 5.0.250 TIMETABLE FOR FINAL DECISIONS (ORS 215.427):
(Legislative decisions are not subject to the time frames in this section)

1. For lands located within an urban growth boundary, and all applications for mineral or aggregate extraction, the County will take final action within 120 days after the application is deemed complete.
2. For all other applications, the County will take final action within 150 days after the application is deemed complete.
3. These time frames may be extended upon written request by the applicant.
4. Time periods specified in this Section shall be computed by excluding the first day and including the last day. If the last day is a Saturday, Sunday, legal holiday or any day on which the County is not open for business, the time deadline is the next working day. [OAR 661-010-0075]
5. The period for expiration of a permit begins when the appeal period for the final decision approving the permit has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.
6. ~~Land use permits that have been approved by the county shall be held in abeyance until the decision is final and all fees are paid: That is, until the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.~~

SECTION 5.0.300 FINDINGS REQUIRED [ORS 215.416(9)-(10)]:
Approval or denial of an application shall be in writing, based upon compliance with the criteria and standards relevant to the decision, and include a statement of the findings of fact and conclusions related to the criteria relied upon in rendering the decision.

SECTION 5.0.350 CONDITIONS OF APPROVAL:

1. 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.
2. An applicant who has received development approval is responsible for complying with all conditions of approval. Failure to comply with such conditions is a violation of this ordinance, and may result in revocation of the approval in accordance with the provisions of Section 1.3.300.
3. At an applicant's request, the County may modify or amend one or more conditions of approval for an application previously approved and final. Decisions to modify or amend final conditions of approval will be made by the review authority with the initial jurisdiction over the original application using the same type of review procedure in the original review.

SECTION 5.0.400 CONSOLIDATED APPLICATIONS:

1. Applications for more than one land use decision on the same property may be submitted together for concurrent review. If the applications involve different review processes, they will be heard or decided under the higher review procedure. For example, combined applications involving an administrative review and hearings body reviews, will be

subject to a public hearing.

2. Applications that are paired with a Plan Amendment and/or Rezone application shall be contingent upon final approval of the amendment by the Board of Commissioners. If the Board denies the amendment, then any other application submitted concurrently and dependent upon it shall also be denied.

SECTION 5.0.450 COORDINATION WITH DIVISION OF STATE LANDS (DSL) STATE/FEDERAL WATERWAY PERMIT REVIEWS:

If the County is notified by DSL that a state or federal permit has been requested for a use or activity requiring County review, the County shall:

1. If the applicant has received prior County review (pursuant to this Article) for a use or activity requiring a state or federal waterway permit, Coos County shall notify DSL that the project was or was not found to be consistent with this Ordinance;
2. If the applicant has <u>not</u> received prior County review for a state or federal waterway permit, and if Coos County is notified by DSL requesting County comment on a proposed project, Coos County shall respond to DSL and the applicant within 3 working days. Said notification shall state that local authorization is required pursuant to the Coos County Comprehensive Plan or this Ordinance;
3. Notice shall be provided to the Division of State Lands, the applicant and owner of record within 5 working days for any permit or approval required under this ordinance for the following developments within wetlands as shown on the National Wetland Inventory Map:
    a. Subdivision or planned unit developments;
    b. New Structures;
    c. Conditional use permits or variances that involve physical alterations to the land or construction of new structures.

SECTION 5.0.500 INCONSISTENT APPLICATIONS:

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.

SECTION 5.0.550 HEARINGS BODY REVIEW OF ADMINISTRATIVE DECISIONS:

Notwithstanding Article 5.8 (Appeals), a contested quasi-judicial hearing shall be held to review ***all noticeable*** Planning Director's decision~~s regarding an administrative conditional use~~, when, within ~~fifteen (15) days of notice of the decision~~, ***the appeal period,*** two or more members of the Planning Commission advise the Planning Director, orally or in writing, of their desire for a public hearing to review the application.

Said hearing shall be held pursuant to Article 5.7.

SECTION 5.0.600 BOARD OF COMMISSIONERS REVIEW OF APPLICATIONS AND APPEALS:

A decision of the Planning Director or Hearings Body may be called up by the Board of Commissioners at any time prior to the expiration of the appeal period. Hearings will be one of

following:

1. Full de novo hearing. If there has been no hearing prior to the initial decision, a full de novo hearing is required for an appeal. New issues may be raised and new testimony, arguments, and evidence may be accepted and considered by the Board;
2. Limited evidentiary hearing. Evidence presented at the hearing shall be limited to only specific issues, criteria or conditions specifically identified by the Board;
3. Review of the record. Only the evidence, data and written testimony submitted prior to the close of the record will be reviewed. No new evidence or testimony related to new evidence will be considered, and no public hearing will be held.
4. The Board of Commissioners reserves the right to pre-empt any permit review process or appeal process and hear any permit application or appeal directly. The Board also reserves the right to appoint a Hearings Officer or Hearings Body to hear and consider any permit application or appeal. Notice of appeals of administrative actions shall be promptly forwarded to the Board of Commissioners, which may elect to hear the appeal instead of the Planning Commission.
5. ***The Board of Commissioners may elect to hire a hearings officer to conduct one or more hearings on any matter. The hearing will follow all notification requirements and timelines listed in this Chapter. After the hearings are complete and the record is closed:***
   - ***a. The hearings officer shall supply a recommendation with findings for the Board of Commissioners;***
   - ***b. The Board of Commissioners will review the recommendations in a public hearing but will not take further testimony unless the record is reopened in which a new public hearing will be scheduled;***
   - ***c. Planning Staff will provide a report to the Board of Commissioners at which time Planning Staff may suggest modifications;***
   - ***d. After reviewing the record, recommendations and staff's report the Board of Commissioners may:***
     - ***i. Accept the recommendation;***
     - ***ii. Accept the recommendation with modification;***
     - ***iii. Reject the recommendation and send it back to the hearings officer for new findings;***
     - ***iv. Reject the recommendation and instruct County Counsel to consult with Planning Staff to make new findings.***

The following section will be moved to 5.2

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

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

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

~~B. The Planning director finds:~~

~~i. that there have been no substantial changes in the land use pattern of the area or other~~

~~circumstances sufficient to cause a new conditional use application to be sought for the same use; and~~

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

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

SECTION 5.0.900 NOTICE REQUIREMENTS (ORS 197.763):

1. Notice Public Hearing :
   a. The Planning Department shall forward a copy of the application to any affected city or special district pursuant to applicable provisions of this Ordinance;
   b. The Planning Department shall mail a copy of the staff report to the city, special district, applicant and Hearings Body at least seven (7) days prior to the scheduled public hearing.
   c. Notice shall be mailed at least twenty days prior to the hearing, or ten before the first evidentiary hearing if there will be or more hearings. Notice shall:
      i. Describe the nature of the application and the proposed use or uses that could be authorized;
      ii. Set forth the address or other easily understood geographical reference to the subject property;
      iii. Include the name of the local government representative to contact and a telephone number where additional information may be obtained;
      iv. State that a copy of the application, all documents and evidence relied upon by the applicant, and applicable criteria are available for inspection at no cost, and will be provided at reasonable cost;
      v. List the applicable criteria that apply to the application;
      vi. State the date, time, and location of the hearing;
      vii. State that failure of an issue to be raised, in person or in writing, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals based on that issue;
      viii. State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and
      ix. Include a general explanation of the requirements of submission of testimony and the procedure for the conduct of the hearings.
      x. The Planning Director shall cause notice of the hearing to be mailed to ~~all affected property owners pursuant to this section,~~ **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**
         1) Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth

boundary;

2) **Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;**
3) **Within 500 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone**

d. Notice of the decision shall be afforded to the applicant and those persons participating in the public hearing.

2. Notice of Administrative Decisions
   a. Notice of an Administrative Decision will be provided to the following:
      i. The applicant and the owners of the subject property, affected cities, special districts, Hearings Body members and other parties requesting notification;
      ii. The owners of record of property as described in ORS 215.416(11)(c), the **applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**
         a. Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;
         b. Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;
         c. Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.
      iii. Notice of an Administrative Decision shall:
         1) Describe the nature of the application and the proposed use or uses that could be authorized;
         2) Set forth the address or other easily understood geographical reference to the subject property;
         3) Include the name of the local government representative to contact and a telephone number where additional information may be obtained;
         4) State that a copy of the application, all documents and evidence relied upon by the application, and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;
         5) State that any person who is adversely affected or aggrieved or who is entitled to notice under (i) may appeal the decision by filing a written appeal within fifteen days of the date the Notice was mailed;

6) State that the decision will not become final until the fifteen day period for filing an appeal has expired; and
7) State that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

3. Plan Map Amendment/Rezone
   a. If the application includes an exception to a goal, notice shall comply with ORS 197.732. The notice shall be published at least 20 days prior to the date of the hearing. All notice requirements in "A" of this Section shall apply.
   b. At least 35 days prior to the initial hearing, notice shall be provided as required by ORS 197.610. [OR 04 12 013PL 2/09/05]
   c. Notice of decision shall be afforded to the applicant and those participating in the process. Notice of the decision shall also be afforded to any witness participating in the public hearing and requesting such notification.
   d. Requirements for hearings on a rezone of property containing a mobile home park shall be provided pursuant to ORS 215.223(7).
   e. Special notice requirements for zone changes within the environs of public use airports shall be provided pursuant to ORS 215.223(4), (5), and (6).
4. Legislative Amendment
   a. The Board of Commissioners shall conduct one or more public hearings with 10 days advance published notice of each of the hearings.
   b. The public notice shall state the time and place of the hearing and contain a statement describing the general subject matter of the ordinance under consideration. (ORS 215.060 & ORS 215.223)
   c. Notice to DLCD shall be provided 35 days prior to the initial hearing per ORS 197.610. Notice of adoption is subject to ORS 197.615. [OR 04 12 013PL 2/09/05]
   d. Notice to Cities and Districts.
5. For conditional use applications within Urban Growth Boundaries and Areas of Mutual Interest, the Planning Department shall comply with the notice requirements contained in the Urban Growth Management and Special Districts Coordination Agreements.
6. The following agencies shall be notified of all Conditional Use determinations involving waterway permits:
   a. State Agencies: Department of State Lands
      Department of Fish & Wildlife-Charleston, OR
      Department of Environmental Quality
      Department of Forestry
      South Slough Estuarine Sanctuary Commission
   b. Federal Agencies: Army Corps of Engineers
      National Marine Fisheries Service
      U.S. Fish & Wildlife Service
   c. Other Notification: State Water Resource Department (uses including appropriation of water only)
      State Department of Geology and Mineral Industries (mining and mineral extraction only)
      State Department of Energy (generating and other energy facilities only)

Department of Economic Development (docks, industrial and port facilities, and marinas only)
Coquille Tribe
Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians

SECTION 5.0.950 FAILURE TO RECEIVE NOTICE:
The failure of the property owner to receive notice as provided in this Article shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice was given. The notice provisions of this Article shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television.

ARTICLE 5.1 PLAN AMENDMENTS AND REZONES

SECTION 5.1.100 LEGISLATIVE AMENDMENT OF TEXT ONLY:
~~SECTION 1.2.100.~~ An amendment to the text of this ordinance or the comprehensive plan is a legislative act within the authority of the Board of Commissioners. [OR 04 12 013PL 2/09/05]

SECTION ~~1.2.200~~ *5.1.110* WHO MAY SEEK CHANGE:
A text amendment may be initiated by the Board of Commissioners, Planning Commission or by application of a property owner or their authorized agent. An application by a property owner shall be accompanied by the required fee. [OR 04 12 013PL 2/09/05] **Text amendments initiated by the Board of Commissioners shall comply with ORS 215.110(2).**

SECTION ~~1.2.300~~ *5.1.115* ALTERATION OF A RECOMMENDED AMENDMENT BY THE PLANNING DIRECTOR:
The Planning Director may recommend an alteration of a proposed amendment if, in the director's judgment, such an alteration would result in better conformity with any applicable criteria. The Planning Director shall submit such recommendations for an alteration to the Hearings Body prior to the scheduled public hearing for a determination whether the proposed amendment should be so altered.

SECTION ~~1.2.325~~ *5.1.120* PROCEDURE FOR LEGISLATIVE AMENDMENT:
The Board of Commissioners shall conduct one or more public hearings with 10 days advance published notice of each of the hearings. The public notice shall state the time and place of the hearing and contain a statement describing the general subject matter of the ordinance under consideration. (ORS 215.060 & ORS 215.223). Notice to DLCD shall be provided 35 days prior to the initial hearing per ORS 197.610. Notice of adoption is subject to ORS 197.615. [OR 04 12 013PL 2/09/05]

SECTION ~~1.2.350~~ *5.1.125* MINOR TEXT CORRECTIONS:
The Director may correct this ordinance or the Comprehensive Plan without prior notice or hearing, so long as the correction does not alter the sense, meaning, effect, or substance of any adopted ordinance. [OR 04 12 013PL 2/09/05]

SECTION ~~1.2.400~~ *5.1.130* NEED FOR STUDIES:
The Board of Commissioners, Hearings Body, or Citizen Advisory Committee may direct the

Planning Director to make such studies as are necessary to determine the need for amending the text of the Plan and/or this Ordinance. When the amendment is initiated by application, such studies, justification and documentation are a burden of the initiator.

SECTION ~~1.2.650~~ *5.1.135* STATUS OF HEARINGS BODY RECOMMENDATIONS TO THE BOARD OF COMMISSIONERS:
A Hearings Body recommendation for approval or approval with conditions shall not in itself amend this Ordinance or constitute a final decision.

SECTION ~~5.1.100~~ *5.1.200* REZONES:
Rezoning constitutes a change in the permissible use of a specific piece of property after it has been previously zoned. Rezoning is therefore distinguished from original zoning and amendments to the text of the Ordinance in that it entails the application of a pre-existing zone classification to a specific piece of property, whereas both original zoning and amendments to the text of the Ordinance are general in scope and apply more broadly.

SECTION ~~5.1.200~~ 5.1.210 RECOMMENDATION OF REZONE EXPANSION BY THE PLANNING DIRECTOR:
The Planning Director may recommend an expansion of the geographic limits set forth in the application if, in the Planning Director's judgment, such an expansion would result in better conformity with the criteria set forth in this Ordinance for the rezoning of property. The Planning Director shall submit a recommendation for expansion to the Hearings Body prior to the scheduled public hearing for a determination whether the application should be so extended.

SECTION ~~5.1.250~~ 5.1.215 ZONING FOR APPROPRIATE NON-FARM USE:
Consistent with ORS 215.215(2) and 215.243, Coos County may zone for the appropriate non-farm use one or more lots or parcels in the interior of an exclusive farm use zone if the lots or parcels were physically developed for the non-farm use prior to the establishment of the exclusive farm use zone.

SECTION ~~5.1.350~~ 5.1.220 PROCESS FOR REZONES:
1. Valid application must be filed with the Planning Department at least 35 days prior to a public hearing on the matter.
2. The Planning Director shall cause an investigation and report to be made to determine compatibility with this Ordinance and any other findings required.
3. The Hearings Body shall hold a public hearing pursuant to hearing procedures at Section 5.7.300.
4. The Hearings Body shall make a decision on the application pursuant to Section ~~5.1.400~~ *5.1.225*.
5. The Board of Commissioners shall review and take appropriate action on any rezone recommendation by the Hearings Body pursuant to Section ~~5.1.550~~ *5.1.235*.
6. A decision by the Hearings Body that a proposed rezone is not justified may be appealed pursuant to Article 5.8.

SECTION ~~5.1.400~~ 5.1.225 DECISIONS OF THE HEARINGS BODY FOR A REZONE:
The Hearings Body shall, after a public hearing on any rezone application, either:
1. Recommend the Board of Commissioners approve the rezoning, only if on the basis of the

initiation or application, investigation and evidence submitted, all the following criteria are found to exist:

a. The rezoning will conform with the Comprehensive Plan or Section ~~5.1.250~~ *5.1.215*; and
b. The rezoning will not seriously interfere with permitted uses on other nearby parcels; and
c. The rezoning will comply with other policies and ordinances as may be adopted by the Board of Commissioners.

2. Recommend the Board of Commissioners approve, but qualify or condition a rezoning such that:
   a. The property may not be utilized for all the uses ordinarily permitted in a particular zone;
   b. The development of the site must conform to certain specified standards; or
   c. Any combination of the above.

   A qualified rezone shall be dependent on findings of fact including but not limited to the following:
   i. such limitations as are deemed necessary to protect the best interests of the surrounding property or neighborhood;
   ii. Such limitations as are deemed necessary to assure compatibility with the surrounding property or neighborhood;
   iii. Such limitations as are deemed necessary to secure an appropriate development in harmony with the objectives of the Comprehensive Plan; or
   iv. Such limitations as are deemed necessary to prevent or mitigate potential adverse environmental effects of the zone change.

3. Deny the rezone if the findings of 1 or 2 above cannot be made. Denial of a rezone by the Hearings Body is a final decision not requiring review by the Board of Commissioners unless appealed.

SECTION ~~5.1.450~~ 5.1.230 STATUS OF HEARINGS BODY RECOMMENDATION OF APPROVAL:
The recommendation of the Hearings Body made pursuant to 5.1.~~400~~ *225*(1) or (2) shall not in itself amend the zoning maps.

SECTION ~~5.1.550~~ 5.1.235 BOARD OF COMMISSIONERS ACTION ON HEARINGS BODY RECOMMENDATION: Not earlier than 15 days following the mailing of written notice of the Hearings Body recommendation pursuant to Section 5.1.~~400~~ *225*, the Board of Commissioners shall either:

1~~A~~.adopt the Hearings Body recommendation for approval or approval with conditions;
2~~B~~.reject the Hearings Body recommendation for approval or approval with conditions and dismiss the application;
3~~C~~.accept the Hearings Body recommendation with such modifications as deemed appropriate by the Board of Commissioners; or
4~~D~~.if an appeal has been filed pursuant to Article 5.8, the Hearings Body recommendation shall become a part of the appeal hearing record, and no further action is required to dispense with the Hearings Body recommendation.

SECTION ~~5.1.600~~ 5.1.240 REQUIREMENTS FOR "Q" QUALIFIED CLASSIFICATION: Where limitations are deemed necessary, Board of Commissioners may place the property in a

"Q" Qualified rezoning classification. Said "Q" Qualified Classification shall be indicated by the symbol "Q" preceding the proposed zoning designation (for example: Q C-1).

SECTION ~~5.1.650~~ 5.1.450 PERMITS AND APPLICATIONS MORATORIUM:

1. After a proposed rezoning has been set for public hearing, no building or ~~septic~~ ***sewage disposal system permits*** shall be issued until final action has been taken. Final action constitutes either:
   a. Withdrawal of the application by the applicant;
   b. Expiration of the County's appeal period without an appeal having been filed; or
   c. Final order of Board of Commissioners upon hearing the appeal.
2. Following final action on the proposed rezoning, the issuance of a verification letter shall be in conformance with the application approval.

ARTICLE 5.2 CONDITIONAL USES

SECTION 5.2.100 Conditional Uses.

1. Hearings Body Conditional Uses (HBCU or C). A Hearings Body conditional use is a use or activity which is basically similar to the uses permitted in a district but which may not be entirely compatible with the permitted uses. An application for a conditional use requires review by the Hearings Body to insure that the conditional use is or may be made compatible with the permitted uses in a district and consistent with the general and specific purposes of this Ordinance.
2. Administrative Conditional Uses (ACU). An Administrative Conditional use is a use or activity with similar compatibility or special conservation problems. An application for an administrative conditional use requires review by the Planning Director to insure compliance with approval criteria.

~~**SECTION 5.2.250 APPLICATION MADE BY TRANSPORTATION AGENCIES**~~ (Move to chapter 5.0)

SECTION 5.2.400 PROCESS FOR CONDITIONAL USES: 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 Planning Director, may at his or her discretion, refer any administrative conditional use to the Hearings Body. If such a referral is made the process for review and decision shall be the same as a conditional use otherwise reviewed by the Hearings Body.

SECTION 5.2.500 CRITERIA FOR APPROVAL OF APPLICATIONS: An application for a conditional use or an administrative conditional use shall be approved only if it is found to comply with this Article and the applicable review standards and special development conditions set forth in ~~Tables 4.2-a through 4.2-f, and Table 4.3-a~~ ***the zoning regulations*** and any other applicable requirements of this Ordinance.

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

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

1. ~~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 the proposal from beginning or the development from continuing within the approval period; and~~
2. ~~The Planning director finds:~~
    a. ~~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~~
    b. ~~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)~~

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.

ARTICLE 5.3. VARIANCES

SECTION 5.3.100 GENERAL: Practical difficulty and unnecessary physical hardship may result from the size, shape, or dimensions of a site or the location of existing structures thereon, geographic, topographic or other physical conditions on the site or in the immediate vicinity, or, from population density, street location, or traffic conditions in the immediate vicinity. Variances may be granted to overcome unnecessary physical hardships or practical difficulties. The authority to grant variances does not extend to use regulations, minimum lot sizes or riparian areas within the Coastal Shoreland Boundary.

SECTION 5.3.150 SELF-INFLICTED HARDSHIPS: A variance shall not be granted when the special circumstances upon which the applicant relies are a result of the actions of the applicant, ~~or~~ **current** owner(s) or previous owner(s) willful violation ~~including but not limited to:~~.

- ~~self-created hardship~~
- ~~willful or accidental violations~~

- ~~manufactured hardships~~

This does not mean that a variance cannot be granted for other reasons.

SECTION 5.3.200 VARIANCE: The Planning Director shall consider all formal requests for variances for zoning and land development variances.

Section 5.3.350 CRITERIA FOR APPROVAL OF VARIANCES: No variance may be granted by the Planning Director unless, on the basis of the application, investigation, and evidence submitted;

1. Both findings "a" and "b" below are made:
    a. That a strict or literal interpretation and enforcement of the specified requirement would result in unnecessary physical hardship and would be inconsistent with the objectives of this Ordinance;
    b. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply to other properties in the same zoning district; or
    c. That strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges legally enjoyed by the owners of other properties or classified in the same zoning district;
2. That the granting of the variance will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity.
3. In addition to the criteria in (1) above, no application for a variance to the Airport Surfaces Floating Zone may be granted by the Planning Director unless the following additional finding is made: "the variance will not create a hazard to air navigation".
4. In lieu of the criteria in (1) above, an application for a variance to the /FP zone requirements shall comply with Section 4.6.227.
5. ***Variance regulations in CCZLDO Article 5.3 shall not apply to Sections 4.11.400 through 4.11.460, Chapter VII and Chapter VIII.***

SECTION **5.3.360 EXPIRATION AND EXTENSION OF** VARIANCES:
Any Variance not initiated within the time frame set forth in subsection (3)of this section may be granted a an extension provided that an applicant has made a request and provided the appropriate fee for an extension prior to the expiration of the variance approval. Such request shall be considered an Administrative Action and shall be submitted to the Director.

5. ***Extensions on Farm and Forest 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 division 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. ***CoosCounty 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 (s) 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.*

6. *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 variance criteria have not changed under the 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 variance then that variance is deemed to be invalid and a new application is required.*

c. *If an extension is granted, the variance will remain valid for the additional two years from the date of the original expiration.*

7. *Time frames for variances and extensions as follows:*

f. *All variances within non-resource zones are valid four (4) years from the date of approval; and*

g. *All variances within resource zones are valid (2) years from the date of approval.*

h. *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.*

i. *Additional extensions may be applied.*

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

ARTICLE 5.4 VESTED RIGHT (MOVED FROM CHAPTER 1)

A parcel shall be considered vested for completion of the construction of a nonconforming use when an administrative conditional use is granted, based on findings establishing:

1. **The good faith of the property owner in making expenditures to lawfully develop his property in a given manner;**
2. **The amount of reliance on any prior zoning classification in purchasing the property and making expenditures to develop the property;**
3. **The extent to which the expenditures relate principally to the use of an applicant claims is vested, rather than to ancillary improvements, such as but not limited to roads, driveways, which could support other uses allowed as of right;**

4. **The extent of the purported vested use as compared to the uses allowed in the subsequent zoning ordinances;**
5. **Whether the expenditures made prior to existing zoning regulations show that the property owner has gone beyond mere contemplated use and has committed the property to the purported vested use which would in fact have been made on the subject property but for the passage of the existing zoning regulation; and**
6. **The ratio of the prior expenditures to the total cost of the proposed use.**

ARTICLE 5.5 TEMPORARY PERMITS

SECTION 5.5.100 TEMPORARY USES: **A temporary use permit may be approved to allow the limited use of structures or activities which are temporary or seasonal in nature and do not conflict with the zoning district in which they are located. No temporary use permit shall be issued which would have the effect of permanently rezoning or granting a special privilege not shared by other properties in the same zoning district. A temporary use permit is not required for events and gatherings permitted in the in a zoning district.**

SECTION 5.5.200 TEMPORARY EVENTS: **Temporary Events are events held outside of a public park or fairgrounds, that have an expected attendance of 1,000 or less people that will not continue for more than three days in any three month period, and that will be located in a rural or resource area. Temporary Events are exempt from administrative review, provided that proof of compliance with the following standards is demonstrated prior to the event, and ministerial authorization is obtained from the Director:**

1. **It must be demonstrated that health standards are met, including, County food handling requirements, a method for waste disposal, and provision for portable sanitation.**
2. **Off street parking shall be provided at no cost for all vehicles associated with the gathering.**
3. **There must be a plan for safe and adequate access to the event site. The plan for access shall be approved by the County Roadmaster.**
4. **It shall be demonstrated that fire protection and suppression will be provided by a public entity or that fire protection equipment will be on site and approved by the appropriate fire district or association.**
5. **Event organizers shall sign an agreement holding themselves responsible for any incidents of trespass or vandalism on adjacent or nearby properties.**
6. **Except for events sponsored by non-profit organizations, there shall be no commercial aspect including admission charges or vendors at the event.**

SECTION 5.5.300 TEMPORARY STRUCTURES, ACTIVITIES OR USES:
Temporary structures, activities or uses may be authorized, subject to notice pursuant to administrative notice procedures found in Article 5.0, as necessary to provide for housing of personnel on large construction sites, storage and use of supplies and equipment, or to provide for temporary sales offices for uses permitted in the zoning district. Other uses may include temporary signs, outdoor events, short term uses, roadside stands, or other uses not specified in this ordinance and not so recurrent as to require a specific or general regulation to control them.

No temporary permits shall be issued except upon a finding that approval of the proposed

structure, activity or use would not permit the permanent establishment within a zoning district of any use which is not permitted within the zoning district, or any use for which a conditional use permit is required.

Conditional Approval of Temporary Use Permits may have reasonable conditions imposed by the approving authority. The conditions of approval for temporary permits shall be directly related to minimizing the potential impact of the proposed use to other uses in the vicinity.

1. **Guarantees and evidence may be required that such conditions will be or are being complied with. Such conditions may include but are not limited to:**
    a. **Special yards and spaces.**
    b. **Fences or walls.**
    c. **Control of points of vehicular ingress and egress.**
    d. **Special provisions on signs.**
    e. **Landscaping and maintenance thereof.**
    f. **Maintenance of the grounds.**
    g. **Control of noise, odors or other nuisances.**
    h. **Limitation of time for certain activities.**
2. **Any temporary permit shall clearly set forth the conditions under which the permit is granted and shall clearly indicate the time period for which the permit is issued. No temporary permit shall be transferable to any other owner or occupant, but may be renewable through the ministerial process as long as the circumstances of the request have not changed.**
3. **All structures for which a temporary permit is issued:**
    a. **Shall meet all other requirements of the zoning district in which they are located;**
    b. **Shall meet all applicable County health and sanitation requirements;**
    c. **Shall comply with state building codes requirements; and**
    d. **Shall be removed upon expiration of the temporary permit unless renewed by the Director, or used in conjunction with a permitted use.**
4. **Temporary permits shall be issued for the time period specified by the Approving Authority but may be renewable upon expiration as an Administrative Action if all applicable conditions can again be met. In case shall a temporary permit be issued for a period exceeding one (1) year, unless the temporary permit is renewed.**
5. **Renewal of a temporary permit shall follow the same procedure as the initial application.**
6. **If a use is permitted in a zoning districted then a temporary permit may not be issued for that use. All structures must comply with floodplain and airport requirements.**

ARTICLE 5.6 NONCONFORMING

SECTION 5.6.100 NONCONFORMING USES:

The lawful use of any building, structure or land at the time of the enactment or amendment of this zoning ordinance may be continued. Alteration of any such use may be permitted subject to Sections 5.6.120 and 5.6.125. Alteration of any such use shall be

permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215 (Reestablishment of nonfarm use), a county shall not place conditions upon the continuation or alteration of a use described under this Section when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

As used in this Section, alteration of a nonconforming use includes:

1. **A change in the use of no greater adverse impact to the neighborhood; and**
2. **A change in the structure or physical improvements of no greater adverse impact to the neighborhood.**

SECTION 5.6.105 EXCEPTIONS TO RESTORATION OR REPLACEMENT OF NONCONFORMING USES:

Restoration or replacement of any use described in Section 5.6.100 may be permitted outright when the restoration is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster. If restoration or replacement is necessary under this Section, restoration or replacement shall be done in compliance with any Special Development Considerations of Article 4.11 that apply to the property.

SECTION 5.6.110 INTERRUPTION OR ABANDONMENT OF NONCONFORMING USES:

A non-conforming use or activity may not be resumed if it was subject to interruption or abandonment for more than one (1) year, unless the resumed use conforms to the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

SECTION 5.6.115 SURFACE MINING:

Surface mining use continued under Section 5.6.100 shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

1. **The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and**
2. **The surface mining use was not inactive for a period of 12 consecutive years or more.**
3. **For purposes of this subsection, inactive means no aggregate materials were excavated, crushed, removed, stockpiled or sold by the owner or operator of the surface mine.**

SECTION 5.6.120 ALTERATIONS, REPAIRS OR VERIFICATION:

Alterations, repairs or verification of a nonconforming use requires filing an application for a conditional use (*See* CCZLDO Article 5.2). All such applications shall be subject to the provisions of Section 5.6.125 of this ordinance and consistent with the intent of ORS 215.130(5)-(8). Alteration of any nonconforming use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. The County shall not

condition an approval of a land use application when the alteration is necessary to comply with State or local health or safety requirements, or to maintain in good repair the existing structures associated with the use.

SECTION 5.6.125 CRITERIA FOR DECISION:
When evaluating a conditional use application for alteration or repair of a nonconforming use, the following criteria shall apply:

1. **The change in the use will be of no greater adverse impact to the neighborhood;**
2. **The change in a structure or physical improvements will cause no greater adverse impact to the neighborhood; and**
3. **Other provisions of this ordinance, such as property development standards, are met.**

For the purpose of verifying a nonconforming use, an applicant shall provide evidence establishing the existence, continuity, nature and extent of the nonconforming use for the 10-year period immediately preceding the date of the application, and that the nonconforming use was lawful at the time the zoning ordinance or regulation went into effect. Such evidence shall create a rebuttable presumption that the nonconforming use lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of the application.

SECTION 5.6.130 GENERAL EXCEPTIONS TO MINIMUM PROPERTY SIZE REQUIREMENTS:
If a single parcel, lot or contiguous units of land existing in a single ownership were created in compliance with all applicable laws and ordinances in effect at the time of their creation and have an area or dimension which does not meet the property size requirements of the zone in which the property is located, such lots or units may be occupied by a use permitted in the zone.

1. **Nothing in this ordinance shall be interpreted to limit the conveyance of such lots or contiguous units of land, provided that such holdings are sold as a single ownership.**
2. **Nothing in this ordinance shall be deemed to prohibit construction of conforming uses on such lots or units or the sale of such lots or units within subdivisions or land partitioning approved prior to the adoption of this ordinance, subject to other requirements of this ordinance.**

ARTICLE 5.7 PUBLIC HEARINGS

SECTION 5.7.300 Quasi-Judicial Land Use Hearings Procedures

1. The presiding officer shall provide an opportunity for members to announce conflicts or abstain from participating and allow challenge to any member participating as a decision maker in a quasi-judicial hearing.
2. At the beginning of a hearing under the Comprehensive Plan or land use regulations of Coos County, a statement shall be made to those in attendance that:
    a. Lists the applicable substantive criteria;
    b. States that testimony and evidence must be directed toward the criteria listed or other criteria in the Plan or implementing ordinances which the person believes to

apply to the decision; and

c. States that failure to raise an issue with statements and evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals.

3. Presentation of Testimony (for hearings other than appeals on the record):
   a. ***For First Evidentiary Hearing including an appeal of a Planning Director's decision:***
      i. ***Staff Report;***
      ii. ***Applicant;***
      iii. ***Additional testimony by other parties in support of the application;***
      iv. ***Testimony by opponents;***
      v. ***Neutral parties;***
      vi. ***Applicant's rebuttal arguments;***
      vii. ***Upon completion of evidence and testimony, if there has been no request to continue the hearing or leave the record open, the Chair will close the public hearing. A request for continuance or an opportunity to submit additional evidence is subject to provisions of Section 5.7.400;***
      viii. ***After closing the record, the Hearings Body will deliberate and reach a decision. The final decision will be reduced to writing and will include the findings upon which the decision is based. Notice of the decision will be mailed to all parties; and***
      ix. ***Appeals of Planning Director's decision will be de novo and processed in accordance with § 5.7.300.***
   b. ***For Appeals of a Hearings Body decision (testimony may be limited to parties only):***
      i. ***Staff Report;***
      ii. ***Applicant or, in the case of an appeal of a prior decision, appellant;***
      iii. ***Additional testimony by other parties in support of the application or appeal;***
      iv. ***Testimony by opponents or, in the case of an appeal, the applicant and others in support of the application;***
      v. ***Neutral parties;***
      vi. ***Applicant's rebuttal arguments, or in the case of an appeal of a prior decision, appellant's rebuttal arguments;***
      vii. ***Upon completion of evidence and testimony, if there has been no request to continue the hearing or leave the record open, the Chair will close the public hearing. A request for continuance or an opportunity to submit additional evidence is subject to provisions of Section 5.7.400; and***
      viii. ***After closing the record, the Hearings Body will deliberate and reach a decision. The final decision will be reduced to writing and will include the findings upon which the decision is based. Notice of the decision will be mailed to all parties.***

4. Representatives
   a. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.
   b. Any person presenting ***written*** testimony on behalf of a group, company or any

other organization, except an attorney, **consultant, owner, officer, or employee of that group, company, or organization** must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

i. ***Be written on the group, company, or organization's official letterhead;***
ii. ***Name the person authorized to appear on behalf of the group, company, or organization;***
iii. ***Specify the scope of the authorization; and***
iv. ***Contain the signature of a person with authority to grant the authorization.***

Failure of a person to submit such written authorization shall cause the group, company, or organization to not achieve party status for the purposes of the proceeding and shall preclude the group, company, or organization from having standing to file an appeal.

c. ***Any person presenting oral testimony on behalf of a group, company or any other organization, with the exception of an attorney, shall present a letter of authorization at that time to show that the person testifying does in fact represent that group, company or organization. If the letter is not presented at the time the hearings body or designee shall in its discretion, allow the person to submit that authorization prior to the close of the record.***

Failure to provide written proof of authorization to represent a group, company or organization shall result in the group, company or organization not having standing in the event of an appeal. The person who provided the testimony shall be the only one to achieve party status in the event of an appeal. The hearings body or designee has discretion to not consider the testimony as part of the record if a person presenting testimony on behalf of a group, company, or organization fails to comply with the rules of Section 4. If this is the decision of the hearings body or designee then it will be made part of the final order and decision. If the determination is made that testimony was disqualified under this subsection then standing has not been achieved. That party may not appeal the matter unless other forms of testimony accepted forms of testimony was received and granted them standing under CCZLDO Section 5.8.160.

i. ~~Be written on the group, company, or organization's official letterhead;~~
ii. ~~Name the person authorized to appear on behalf of the group, company or organization;~~
iii. ~~Specify the scope of the authorization; and~~
iv. ~~Contain the signature of a person with authority to grant the authorization.~~ ~~[Amended OR-08-09-009PL 5/13/09]~~

5. Submission of Written Evidence
   a. Petitions: Any party may submit a petition into the record as evidence. The petition shall be considered as written testimony of the party who submitted the petition. A petition shall not be considered to be written testimony of any individual signer. To have standing, a person must participate orally at the hearing or submit other individual written comments. Anonymous petitions or petitions that do not otherwise identify the party submitting the petition, shall not be

accepted as evidence.

b. Required Number of Copies: Submission of written materials for consideration shall be provided ~~as follows for hearings before the:~~ ***in the form one original hard copy and one exact copy or one original hard copy and one electronic copy.***
   i. ~~Planning Commission—15 copies~~
   ii. ~~Board of Commissioners—7 copies~~

   The County may, at its sole discretion, reject any materials that do not contain the requisite number of copies. It may be requested that the County make the requisite number of copies subject to the submitter paying the applicable copy charges.
c. E-mail testimony may be submitted; however, it is the responsibility of the person submitting the testimony to verify it has been received by Planning Staff by the applicable Deadline.
d. All written testimony must contain the name of the person(s) submitting it and current mailing address for mailing of notice.
e. The applicant bears the burden of proof that all of the applicable criteria have been met; however, in the case of an appeal, the appellant bears the burden of proving the basis for the appeal, such as procedural error or that applicable criteria have not in fact been met. [Amended OR 08-09-009PL 5/13/09]

6. Definitions: As used in this Article the following definitions shall apply:
   a. "Party" means any person, organization or agency who has established standing under the provisions of this Article 5.8.
   b. "Witness" means any person who appears and is heard at a hearing and is not a "party". A witness shall not be considered a "party" unless the Board of Commissioners determines that the person is a party in accordance with Article 5.8.

SECTION 5.7.400. Requests to Present Additional Evidence.

1. Prior to conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. If such a request is received, the Hearings Body will either continue the public hearing, in accordance with subsection (~~B~~*2*), or leave the record open for additional written arguments, evidence or testimony, in accordance with subsection (~~C~~*3*).
2. If the Hearings Body grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial hearing. At the continued hearing, parties may present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, prior to the conclusion of the hearing any person may request that the record be left open for at least seven days to submit additional written evidence, arguments or testimony, but such additional evidence shall be limited to responding to the new written evidence submitted at the continued hearing.
3. If the Hearings Body leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any party may file a written request for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the Hearings Body shall reopen the record to a date and time certain to admit new evidence, argument or testimony but

any additional evidence shall be limited to responding to the new written evidence submitted during the period the record was left open. While the record is open, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria which apply to the matter.

4. Unless waived by the applicant, the Hearings Body will allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period will not be counted towards the 120- or 150-day decision time-frame.
5. Except for the time frame identified in Section 5.7.400(~~D~~ *4*), a continuance or extension granted pursuant to this section is subject to the 120- or 150- day decision time-frame unless the continuance is requested or agreed to by the applicant.
6. If the Hearings Body leaves the record open, prior to the conclusion of the initial evidentiary hearing they will specify the date the record will close and the date, time and location when they will reconvene to deliberate and make a decision on the application.

ARTICLE 5.8 APPEAL REQUIREMENTS

SECTION 5.8.100 Appeals General

Coos County has established an appeal period of ***fifteen*** (15) days from the date written notice of administrative or Planning Commission decision is mailed ***with the exception of Property Line Adjustments and lawfully created parcel determinations, which are subject to a twelve (12) day appeal period.***

The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article. [OR 04 12 013PL 2/09/05]

SECTION 5.8.150 Standing to Appeal a Planning Director's Decision:

A decision by the Planning Director to approve or deny an application shall be appealed as identified in the Sections below. The appeal must be filed within the appeal period and meet one of the following criteria:

1. In the case of a decision by the Planning Director, the ~~petitioner~~ **appellant** was entitled to notice of the decision; or
3. The person is aggrieved or has interests adversely affected by the decision.

SECTION 5.8.160 Standing to Appeal a Hearings Body, Appointed Hearings Officer(s) or Board of Commissioner Decision:

A decision by the Hearings Body, Appointed Hearings Officer(s) or Board of Commissioners to approve or deny an application shall be appealed as identified in the Sections below. The appeal must be filed within the appeal period. In the case of an appeal of a Hearings Body decision to the Board of Commissioners, the ~~petitioner~~ **appellant** must have appeared before the Hearings Body ***or appointed Hearings Officer(s)*** orally or in writing. [OR 04 12 013PL 2/09/05]

SECTION 5.8.170 Appeal procedures:

An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section. If an appellant fails to correctly fill out the form, and there has already been a public hearing on the matter, the Board of

Commissioners may deny the appeal based on failure to comply with this section. In the event the appeal is denied based on a failure to comply with this section, a refund of unexpended fees shall be returned to the appellant.

The appeal form shall contain the following:

1. *The name of the applicant and the County application file number;*
2. *The name and signature of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single Contact Representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative;*
3. *The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160;*
4. *The date that the notice of the decision was mailed as written in the notice of decision;*
5. *The nature of the decision and the specific grounds for appeal citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule.*
6. *The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application.*
7. *Appeals of Planning Director's decision will be de novo;*
8. *Appeals of Planning Commission's or appointed Hearings Officer(s) decision shall be reviewed by the Board of Commissioners or Hearings Officer if the Board of Commissioners so chooses. The Board of Commissioners shall, provided there has been an initial evidentiary hearing:*
    a. *Decline to hear the matter and enter an order affirming the lower decision; or*
    b. *Accept the appeal and:*
        i. *Make a decision on the record without argument;*
        ii. *Make a decision on the record with argument;*
        iii. *Conduct a hearing de novo; or*
        iv. *Conduct a hearing limited to specific issues.*
    c. *In the decision, the Board shall affirm, modify, or reverse the lower decision, and accept any or all of the findings and conditions in the Hearings Body decision, or modify or adopt new findings and conditions on a permit.*
    d. *If the Board allows argument only on the record, no new evidence shall be submitted.*
    e. *Any legal issues not specifically raised are considered waived for purposes of appeal to the Land Use Board of Appeals (LUBA).*
    f. *Where a hearing is limited to specific issues, any evidence or argument submitted must be relevant to the specific issue.*
    g. *All items to be submitted to the County must actually be received by the County Planning Department no later than 5:00 p.m. on the on the last day of the appeal period. If the last day of the appeal period falls on a weekend or County holiday, then the item must actually be received by the County Planning Department no later than 12:00 p.m. on the next County business day following*

the deadline date. All items to be mailed to another party must be postmarked no later than the end of the appeal period.

h. The decision of the Board of Commissioners shall not be final for the purpose of appeal until reduced to writing and signed by the Board.

~~**SECTION 5.8.200. Appeals of Administrative Decisions.**~~

~~1. Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee. Upon receipt of an appeal, the Department shall schedule a public hearing before the Hearings Body and provide public notice as provided in Section 5.0.900(A). The hearing on appeal of an administrative decision shall be de novo (ORS 215.416).~~

~~2. The appeal hearing procedure shall be in accordance with Section 5.7.300.~~
~~[OR-04-12-013PL 2/09/05]~~

SECTION 5.8.223 ~~Appeal of Hearings Body Decision to Board of Commissioners.~~

~~1. The review of the decision of the Hearings Body by the Board of Commissioners shall include:~~

~~a. All materials, pleading, memoranda, stipulations, and motions submitted by any party to the proceeding and received or considered by the Hearings Body as evidence;~~
~~b. All materials submitted by the Planning Department with respect to the application;~~
~~c. Minutes of the public hearing of the Hearings Body; and~~
~~d. The findings and action of the Hearings Body and the notice of decision.~~

~~2. A Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee.~~

~~3. The Planning Staff shall notify the Board of Commissioners of the Notice of Appeal and within ten days of receipt. Then planning staff shall provide the record to the Board of Commissioners for review. Provided there has been an initial evidentiary hearing, the Board of Commissioners Shall:~~
~~a. Decline to hear the matter and enter an order affirming the lower decision; or~~
~~b. Accept the appeal and:~~
~~(1) Make a decision on the record without argument;~~
~~(2) Make a decision on the record with argument~~
~~(3) Conduct a hearing de novo; or~~
~~(4) Conduct a hearing limited to specific issues.~~

~~In the decision, the Board Shall affirm, modify, or reverse the lower decision, and accept any or all of the findings and conditions in the Hearings Body decision, or modify or adopt new findings and conditions on a permit.~~

~~4. If the Board allows argument only on the record, no new evidence shall be submitted.~~
~~5. Any legal issues not specifically raised are considered waived for purposes of further appeal.~~

6. ~~Where a hearing is limited to specific issues, any evidence or argument submitted must be related to the specific issue. Any evidence or argument submitted must be related to those specific issues.~~
7. ~~All items to be submitted to the County must actually be received by the County Planning Department no later than 5:00 p.m. on the deadline date. If the deadline date falls on a weekend or County holiday, then the item must actually be received by the County Planning Department no later than 12:00 p.m. on the next County business day following the deadline date. All items to be mailed to another party must be postmarked no later than the deadline date.~~
8. ~~The decision of the board shall not be final until reduced to writing and signed by the Board~~.

SECTION 5.8.230 Board of Commissioners Action

1. The Board of Commissioners shall affirm, modify, or reverse all or part of the action of the Hearings Body or shall remand the matter for additional review or information. [OR 04 12 013PL 2/09/05]
2. A final decision by the Board of Commissioners or Hearings Officer shall be appealed to the Land Use Board of Appeals (LUBA).

SECTION 5.8.250 Reconsideration of Administrative Decision

1. During the period set forth at Section 5.8.100, the Planning Director shall withdraw the decision for the purposes of reconsideration, any administrative decision.
2. If an administrative decision is withdrawn for the purposes of reconsideration, the Planning Director shall, within 30 days of the withdrawal, affirm, modify or reverse the administrative decision.
3. Notice of the reconsidered administrative decision shall be provided in the same manner as notice of the original administrative decision, and any appeal of said decision shall proceed pursuant to Article 5.8. [OR-92-07-012PL]

SECTION 5.8.300 Record Presented to Hearings Body or Board of Commissioners

After notice of intent to appeal has been filed pursuant to Section 5.8.200, then: [OR 96-06-007PL 9/4/96]

1. For appeals of administrative decisions, the Planning Director shall forward to the Hearings Body a copy of:
   a. the application for the subject administrative permit; and
   b. the written findings establishing the basis for his decision; and
   c. the notice of intent to appeal.

2. For appeals of Hearings Body decisions, the Planning Director shall forward to the Board of Commissioners a copy of:
   a. the application for the requested action; and
   b. the staff report on the request; and
   c. the public hearing record of the Hearings Body's decision; and,
   d. the notice of intent to appeal.

SECTION 5.8.400 Multiple Appeals

Multiple appeals of the same land use decision shall be consolidated into one hearing, at the discretion of the Planning Director, Planning Commission or Board of Commissioners, provided the appeals involve the same or substantially similar issues and/or a common question of law or fact. The consolidation process must not work to deprive any appellant of his or her right to a full and fair hearing on the merits of their case. Such consolidation of the appeals into one hearing will avoid unnecessary costs or delay and will assist in the proper resolution of the matter in question. ***If consolidation is granted by then a reduction of fee may be due to the parties when the final decision is rendered.***

~~**SECTION 5.8.500. (RESERVED) [OR 04-12-013PL 2/09/05]**~~

~~**SECTION 5.8.600. (RESERVED) [OR 04-12-013PL 2/09/05]**~~

SECTION 5.8.700 Reconsideration of Final Decision by Board of Commissioners

1. At any time subsequent to the filing of a notice of intent to appeal a decision made by the Board of Commissioners, and prior to the date set by the Land Use Board of Appeals for filing the record on said appeal, the Board of Commissioners Shall withdraw its decision for the purposes of reconsideration. If the Board withdraws its final decision order for purposes of reconsideration, it shall, within such time as the Land Use Board of Appeals Shall allow, affirm, modify or reverse its decision. [OR 92-07-012PL]

2. Hearings on reconsidered decisions will, at the County's sole discretion, be either:
   a. Based on the record. New findings shall be drafted for the Board's consideration and shall be presented to the Board at a regularly scheduled Board meeting. No new evidence or testimony shall be considered, or;
   b. De novo allowing additional evidence and testimony. Participation shall be strictly limited to those persons or organizations who are parties to the LUBA appeal.

3. The Board of Commissioners shall limit the scope of a hearing on reconsideration.

SECTION 5.8.800 Review of Remanded Decisions

When LUBA remands a decision and orders the County to pay the cost of the filing fee to the petitioner, the applicant must provide to the County proof of payment before the remanded application will be considered. If the applicant does not pay the fee within 45 days from the date of the LUBA remand, the application shall be deemed withdrawn by the applicant.

Any request for hearing on remand shall be subject to the appropriate fee.

1. Decisions remanded by the Land Use Board of Appeals will be scheduled for hearing only if the applicant files a written request that the governing body take up the remand within 45 days from the date of the final LUBA order[1], the request must be accompanied by the appropriate fee;
2. Within 30 days of receiving the request a hearing will be scheduled before the Board of Commissioners.

[1] Subsequent appeals could change the date of the final LUBA order.

3. If no written request is submitted to take up the remand, the application shall be deemed to be withdrawn and action will be taken to void the implementing Ordinance.
4. Hearings on remanded decisions Shall be, in the sole discretion of the Board, either:
    a. Based on the record without argument. The remand will be based solely on the existing evidentiary record. No new testimony, evidence or argument will be considered. The scope of the hearing will be limited to the remand issues LUBA identified in its final opinion.
    b. Based on the record with argument:
        i. In written form with no oral argument. Written argument shall be submitted to the Planning Department at least 10 days prior to the hearing in order to be considered. No further written argument will be accepted after the 10 day deadline or at the hearing.
        ii. In written form with oral argument. Written argument shall be submitted to the Planning department at least 10 days prior to the hearing in order to be considered. No further written argument will be accepted after the 10 day deadline or at the hearing.
        iii. Written and oral argument that will be accepted prior to and at the hearing.
    c. Limited to the issues identified by LUBA in its decision. New evidence and testimony shall be presented solely on the issues remanded by LUBA in its decision.
    d. De novo allowing new evidence and testimony.
5. The Board of Commissioners solely in its discretion shall further limit the scope of any hearing on remand.
6. At the direction of the Board the party prevailing at the remand hearing shall prepare the findings of fact necessary to support the decision.
7. The decision of the Board shall not be final for the purpose of appeal until reduced to writing and signed by the Board.

ARTICLE 5.9 ZONING COMPLIANCE LETTER

SECTION 5.9.100 Zoning Compliance Required:
Zoning Compliance Letters (ZCL) are required to be obtained prior to engaging in any type of development or initiation of use or activity listed in the Coos County Zoning and Land Development Ordinance. However, there may be other types of reviews required before a zoning compliance letter may be issued. A compliance determination form must be submitted to verify compliance with regulations prior to the issuance of a zoning compliance letter by the Coos County Planning Department unless the following applies:

1. ***If the compliance letter is needed for a sewage disposal system permit or evaluation;***
2. ***If a final land use decision covering the property or site has been issued and is still valid; or***
3. ***If the use or activity involves a Coos County sign-off for a land use compatibility statement (LUCS) as found on state and federal forms a zoning compliance letter will***

not be required in addition to that form unless the project involves permits from State Building Codes or sewage disposal system permits from Department of Environmental Quality (DEQ).

A ZCL must be obtain***ed*** from Coos County Planning prior to applying for ***state building permits and/or sewage disposal system permits from DEQ.*** ~~the applicant shall first obtain a zoning compliance letter (verification letter) from the Coos County Planning Department.~~ Th~~is~~e **ZCL** ~~verification compliance letter~~ is valid for ~~one~~ **two** years from the date it is issued. **However, if the request for the ZCL has changed a new ZCL will be required prior to obtaining state permits.**

Prior to the expiration of a ZCL an applicant may request additional time to apply for building permits for the project. A new zoning compliance letter will be issued for a year subject to the fee set on the official fee schedule adopted by the Board of Commissioners.

If the request otherwise requires ***land use*** review (***compliance determination,*** conditional use, variance, partitioning, etc.), a compliance letter shall not be issued unless it is for a ***sewage disposal system*** evaluation or replacement of existing on-site system if a land use review has not been completed.

If the requested use or development is permitted in the zone or is authorized by a final land use approval of Coos County that has not expired, no further, ***land use*** review is required and the Planning Department will issue the compliance letter.

If the land use approval includes conditions of approval, the applicant will sign the ***ZCL*** ~~compliance letter~~ with the understanding that the conditions must be met or the authorization will be revoked.

A zoning compliance letter allows the state permitting (Sanitation and building) process to begin. A zoning compliance letter will not extend a land use authorization.

Fences, retaining walls, re-roofing and interior remodeling do not require zoning authorization but may require a permit from State Building Codes.

ARTICLE 5.10 COMPLIANCE DETERMINATIONS AND REVIEWS

SECTION 5.10.100 Compliance determinations:

An application for Compliance Determination (CD) are required to be submitted to the Planning Department with the elements described in § 5.10.200. Once the application is received the Planning Staff will review the CD against the applicable zoning district to determine if additional reviews or notifications are required.

If the application requires any type of discretionary analysis or interpretation, findings of compatibility or conditions of approval, then the application will be treated as an administrative conditional use and is subject to notice requirements of §5.10.400. If the application simply requires a check-off of clear and objective development standards, no administrative conditional use is required and a zoning compliance letter will be issued.

A compliance determination is not required in the following circumstances:

4. *If the compliance letter is needed for a sewage disposal system permits or evaluation; or*
5. *If a final land use decision covering the property or site has been issued and is still valid.*

There are two types of compliance determinations: one for Balance of County and the other for Estuary Plans.

SECTION 5.10.200 APPLICATION REQUIRMENTS:

The application form must be completed with a plot plan attached and include the following:

1. *If this is for an industrial or commercial use a parking plan is required (see Article 7.5).*
2. *If this is bare land and a driveway has not be completed a driveway confirmation form is required to be completed by the Roadmaster (see Article 7.6 for bonding options)*
3. *If this is bare land and the request is for a dwelling an address is required.*
4. *If this is for an estuary zoned property as defined in Chapter III then applicable zoning district standards and policies must be addressed.*

SECTION 5.10.300 REVIEW FOR BALANCE OF COUNTY ZONING DISTRICTS:

1. *Compliance determinations will be reviewed based on the zoning district requirements and any applicable special development considerations for permitted uses.*
2. *If it is determined that other land use reviews are required, staff will prepare a letter explaining what applications and criteria are required to be submitted. If other land use reviews are required, this application will automatically be upgraded to an administrative conditional use review and deemed incomplete until such time the application requirements for an administrative conditional use have been satisfied. Once a final land use decision is issued, then a zoning compliance letter will be issued.*
3. *If a compliance determination application is received for a use or activity that is not listed, a denial will be issued as a final land use decision (see § 5.10.400 for notification, unless the proposed use is subject to § 4.1.190 Uses Not Listed).*
4. *If no other reviews are required and discretion was used to make the determination of compliance then a final land use decision will be issued and notice under § 5.10.400.*

All new and replacement developments, with the exception of sewage disposal system permits, require a driveway confirmation and must be obtained as part of this review unless one has been completed. Industrial and Commercial development will require a parking plan and access plan in lieu of a driveway confirmation. Parking plans, driveways and accesses will be reviewed by the County Roadmaster in conjunction with the CD application.

SECTION 5.10.300 REVIEW FOR USES AND ACTIVES IN AN ESTUARY MANAGEMENT PLAN ZONE:

1. *Compliance determinations will be reviewed for any permitted uses subject to general conditions which require polices to be addressed. If the policies require a conditional use that process shall be followed.*
2. *If it is determined that other land use reviews are required the planning, staff will*

provide a letter explaining what applications and criteria are required to the applicant and the application will be deemed incomplete until all submittal requirements have been met. Once all conditional use applications have received a final land use decision a zoning compliance letter will be issued.

3. *If a compliance determination application is received for a use or activity that is not listed a denial will be issued unless § 4.1.190 Uses Not Listed applies.*
4. *If no other reviews are required the compliance determination and discretion was used to determine compliance the compliance determination decision will serve as the final land use decision. However, if the application simply requires a check-off of clear and objective development standards, no administrative conditional use is required and a zoning compliance letter will be issued and the compliance determination will not be characterized as a land use decision.*

All new and replacement developments, with the exception of sewage disposal system permits, require a driveway permit and/or parking permit prior as part of this review unless one has been completed. Industrial and Commercial development will require a parking plan to be submitted as part of the compliance determination review. Parking plans will be reviewed by the County Roadmaster.

SECTION 5.10.400 NOTIFICATION:

If the property is located within in an area that requires a notification to other agencies for comments that notification shall be mailed out for comments once the review of the Compliance Determination begins. Staff will review special development consideration maps and overlay maps to determine if a notice is required.

If the property is located in an area that requires one of the following notifications, the time line for a final land use decision will not be issued until the comment period has expired.

- *Oregon Department of Fish and Wildlife has 10 days to comment.*
- *Local Tribes have 30 days to comment.*
- *Department of State Lands (DSL) has 30 days to comment.*
- *Oregon Department of Aviation has 30 days to comment, unless notice has been submitted to FAA for comment.*
- *Review the files to see if a driveway confirmation has been completed by the Road Department.*
    - *Driveway confirmations are required for replacement and new dwellings. Driveways may be bonded to allow for all development to be completed.*
    - *If the development is commercial or industrial a parking plan will be required to be reviewed by the Roadmaster for compliance with parking standards.*

If the Compliance Determination is to serve as a final land use decision then there will be a notice of the decision mailed to the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:

1. *Within 100 feet of the exterior boundaries of the contiguous property ownership which*

is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;

2. *Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;*
3. *Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.*

If appealed the process in Article 5.8 will be followed. If a use is permitted outright the use may not be the subject of appeal unless discretion was used to determine if a standards or policies have been met then the decision may be appealed. Compliance determinations are only valid for a two year period. However, a two year extensions may be provided so long as the project has not changed which would requiring additional review.

AM-14-11

The findings document addresses the applicable comments that have been received for this text amendment. Several of the comments are repetitive covering the same issue. Therefore, staff has condensed those issues down by sections. This only addresses comments on the ordinance text changes for AM-14-11. There were other comments made that were beyond the proposed changes in which did not receive a response.

Chapter V

§ 5.0.175 Application Made by Transportation Agencies, Utilities or Entities:

1. A transportation agency, ***utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35*** may submit an application to the Planning Department for a permit or zoning authorization required for a ~~transportation~~ project without landowner consent otherwise required by this ordinance.
2. ***For any new applications submitted after the effective date of this section, such*** ~~A~~ transportation agency, ***utility, or entity*** must mail certified notice to the Planning Department and any owner of land upon which the ~~transportation~~ proposed project would be constructed at least ten (10) days before submitting an application to the Planning Department. Said notice shall state the transportation agency, ***utility, or entity's*** intent to file the application and must include a map, brief description of the proposed ~~transportation~~ project, and a name and telephone number of an official ***or representative of the project*** ~~with the transportation agency~~ available to discuss the proposed project.
3. ~~A~~ ***Such*** transportation agency, ***utility or entity*** (applicant) must comply with all ***other*** applicable requirements of this ordinance~~; however, a property divided by the sale or grant of property for state highway, county road, City Street or other right-of-way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned.~~ ***Including property owners that were provided with notice of any hearing on any hearing on the application pursuant to ORS 197.763***
4. Notwithstanding any other requirement of this ordinance, approvals granted to a ***such*** transportation agency ~~for a transportation improvement~~, ***utility or entity*** shall not become effective ***for construction on a property under the approval*** until ***the transportation agency, utility or entity obtains either the written consent of the property owner or the property rights necessary for construction on that property*** ~~the subject property is acquired for the project.~~
5. Any permit subject to this section will be ~~effective~~ ***valid*** for two (2) years unless a request for renewal for another two (2) years is received from the transportation, ***utility or entity*** agency within 2 years ***after the date of approval,*** ~~is received from the transportation agency within 2 year period~~, in which case renewal will be automatic to a maximum of 5 renewals. ***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.*** [OR-92-07-012PL]

Comments submitted by: Joan Lynch
Jody McCaffree
Janet C. Stoffel
Jan Dilley
Kathy Dodds
Jenmarie Frangopoulos
Katy Eymann
Jonathan Hanson
Richard Knablin
Beverly Segner
JC Williams

Response:

This provision only allows for submittal of an application and does not allow for a use or property takeover. A use should be determined allowable prior to eminent domain being used to obtain a portion of the property. If eminent domain was use to obtain a strip of land and then a use denied, you would have a strip of land that was unusable for any other purpose. This would allow an application to go through the process and, if denied, the property would stay intact. Notification would still be given to all parties as required. This is the same process that the County used in siting its own pipeline. Once the land use approvals were given then negations for easements and properties could be done.

This provision does not give anyone the authority of eminent domain and the utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 would have to provide documentation that they have that right.

There has been no legal argument provided by the opponents for staff to review. There has been some testimony provided regarding the Natural Gas Act which is not relevant as explained above the company or agency relying on this provision to submit an application would be required to justify they have the ability to use the *private right of property acquisition pursuant to ORS Chapter 35.*

Ms. Eymann suggested using Tillamook County Code in place of subsection 5 but she only provides an excerpt and no background on this provision; therefore, it may not be consistent with the intent of Coos County's ordinance. If anything should be changed in this section, it should be deleting subsection 6 all together. It seems that subsection 6 may be a conflict with the extension criteria proposed in § 5.2.600 and § 5.3.360, which is specific to the type of application that is applied for.

There were a few arguments that stated this provision would not be consistent with Coastal Zone Management (CZM) program. Administrative procedures are not found to be enforceable policies under the CZM program. See attached March 13, 2014 memo concerning acknowledgement of Coos County Comprehensive Plan and Zoning Ordinance compliance with the program. Please note, Chapter V of the CCLDO is not listed as an enforceable policy under the CZM because application procedures are not relevant or enforceable criteria in determining compliance with CZM. Therefore, there is nothing

legally presented in this written argument. Therefore, the Board of Commissioners adopted the proposed language changes.

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§ 5.0.200(2) Land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision, including resolution of all appeals under ORS 215.422 (Review of decision of hearings officer or other authority) ***

Comments submitted by: Katy Eymann
Beverly Segner

Response:
To make this clear the word "For" was included before the word "Land". The sentence now reads "For land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision, including resolution of all appeals under ORS 215***" The language is based on ORS 215.427.

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§ 5.0.200(5) If the application is for industrial or traded sector development of a site identified under Section 12 below, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with Section 4 above.

Comments submitted by: Katy Eymann

Response:
Ms. Eymann is correct this should be subsection 11 and not 12. This change was made.

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§ 5.0.250(6) ~~**Land use permits that have been approved by the county shall be held in abeyance until the decision is final and all fees are paid. That is, until the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.**~~

Comments submitted by: Katy Eymann
Jody McCaffree
Beverly Segner

Response:
The section is a conflict for the calculation of time periods under Expiration and Extension of conditional uses and variances. This provision could be construed to mean the permit would not be valid until all appeals have been resolved, meaning you would not calculate the time period for an extension or expiration until those decisions were made. This is a conflict with how the time periods are calculated under OAR 660-033-0140 and ORS 215.417. To alleviate these procedural issues, the language was removed. A project will not receive

zoning compliance until all appeals have been resolved and the applicable conditions of approval have been met.

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§ 5.0.550 HEARINGS BODY REVIEW OF ADMINISTRATIVE DECISIONS:
Notwithstanding Article 5.8 (Appeals), a contested quasi-judicial hearing shall be held to review a Planning Director's decision regarding an administrative conditional use, when, within ~~fifteen~~ **twelve (12)** days of notice of the decision, two or more members of the Planning Commission advise the Planning Director, orally or in writing, of their desire for a public hearing to review the application. Said hearing shall be held pursuant to Article 5.7.

Comments submitted by: Jody McCaffree
Jan Dilley
Kathy Dodds
Katy Eymann
Jonathan Hanson
Richard Knablin
Beverly Segner
Janet Stoffel
William York

Response:
Ms. Eymann's suggestion is inconsistent with the intent of the provision. Administrative decisions (Planning Director decisions) are appealable to the Planning Commission unless pre-empted by the Board of Commissioners. The Board reviewed this section and the suggestions by staff made the following modification:

Notwithstanding Article 5.8 (Appeals), a contested quasi-judicial hearing shall be held to review **all noticeable** Planning Director's decisions ~~regarding an administrative conditional use~~, when, within ~~fifteen (15) days of notice of the decision~~ **the appeal period,** two or more members of the Planning Commission advise the Planning Director, orally or in writing, of their desire for a public hearing to review the application. Said hearing shall be held pursuant to Article 5.7.

This section limits the Planning Commission to call up only conditional uses but did not include variances or other discretionary decisions made by the Planning Director. This is just for call up and does not extend to appeals of a Planning Director's decision. Normally an appeal of a Planning Director's decision is reviewed by the Planning Commission but the Board reserves the right to call the matter directly before them. This allows for flexibility for a hearings officer to meet a timeline.

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§ 5.0.600(4) The Board of Commissioners reserves the right to pre-empt any permit review process or appeal process and hear any permit application or appeal directly. The Board also reserves the right to appoint a Hearings Officer or Hearings Body to hear and consider any permit application or appeal. Notice of appeals of administrative actions shall be promptly forwarded to the Board of Commissioners, which may elect to hear the appeal instead of the Planning Commission.

Comments submitted by: Katy Eymann
Jonathan Hanson
Beverly Segner
JC Williams

Response:
The Board of Commissioner chose not to remove the ability to pre-empt a process. There are special circumstances that warrant the use of this provision especially if the application is approaching the 150 or 120 day time period and a final decision has not been made.

There have been request to have a hearing regarding hiring a hearings officer. When the contract is proposed it is reviewed in a regular board meeting which is a public meeting and contracting laws that are outside of the land use regulations. There is no legal basis for this suggestion. None of the opponents provide suggestions for criteria or how that process would function. There is also no consideration for the 120 or 150 timeline application requirements pursuant to ORS 215.416.

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§5.0.900 NOTICE REQUIREMENTS (ORS 197.763):
§ 5.0.900(1)(c)(x) The Planning Director shall cause notice of the hearing to be mailed to ~~all affected property owners pursuant to this section,~~ **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**

1) **Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;**
2) **Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;**
3) **Within 500 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone**

§ 5.0.900(2)(a)(ii) The owners of record of property as described in ORS 215.416(11)(c), **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**

a. **Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;**
b. **Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;**
c. **Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.**

Comments submitted by: Jody McCaffree
Jan Dilley
Beverly Segner
William York

Response :
The Board of Commissioners cannot base a notification area on one project. Several opponents of this section cite a case that is not within the jurisdiction of Coos County and failed to provide the facts for that case. It is understood that some of the opponents have suggested that all Commercial and Industrial projects (not zones) to have a 1,000 foot notification area from the project rather than be consistent with state law. So, if a pipeline were to be considered an industrial project and it is going through a very large property, such as 1000 acres, the neighbors may not receive notice because the 1000 feet of the project could be contained on the subject property. No notification would be given and that would be less restrictive than state law. The second issue raised was to have a use classified as a hazard before notice can be sent. That is also not consistent with state law and would require an interpretation of every project prior to notification. However, the interpretation would be a discretionary decision that would require notice and an opportunity for appeal. There are no criteria on how to determine if a project itself is industrial or commercial. The consequences of this type of proposal would be that the county would never be able to meet the 120 or 150 day deadline and would be required to refund the applicant half of their fee. The opponents are requesting to hold certain applicants to higher standards than others but they fail to provide any legal basis.

In ORS 197.763 provides for notices of hearings:

1. Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;
2. Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;
3. Within 500 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.

ORS 215.416 Notice of Administrative Decision (no public hearing)

ii. The owners of record of property as described in ORS 215.416(11)(c), **the applicant and to all neighborhood or community organizations recognized by the County and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:**
a. Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;
b. Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;
c. Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone.

The Board of Commissioner requested that staff review how other counties process notifications. Staff sent out a survey and did some research. Out of 19 of the counties only five have a different type of notification process. Out of the five counties the following changes were made: One county expanded the area for Goal 5 aggregate area, one expanded the notification area for mass gatherings and agri-tourism applications; One county has expanded the Farm/Forest from 750 to 1000; One county expanded the farm/forest to 1500; and One County expanded urban to 300 and rural to 500 but left farm/forest to minimum. Several counties responded that they objected to being more restrictive than state law due to the criticism from the citizens. As far as the recent pipeline case there were no properties that had the urban residential zoning so increasing the 100 boundary would not have gained any notification area in that specific case. The opposition is blending jurisdictions and the Board has to look at Coos County not the City of North Bend.

There have been comments received that imply that staff was mailing notice in a different manner than what the proposed language requires, but this is a false assumption. Staff has been following the notification rules of ORS 197.763 and ORS 215.416 to the current process. The changes in the ordinance list out the exact language from the ORS for clarification. The wording 'affected property owners' refers to adjacent property owners as described in the ORS. The Board of Commissioners chose to mirror state law and not be more restrictive.

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§ 5.0.900(b) The Planning Department shall mail a copy of the staff report to the city, special district, applicant and Hearings Body at least seven (7) days prior to the scheduled public hearing.

Response:
There is no proposed change to this section. This is based on ORS 197.763.

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§ 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

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

~~1. 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 the proposal from beginning or the development from continuing within the approval period; and~~

~~2. The Planning director finds:~~

~~a. 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~~

~~b. 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)~~

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 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. ***Approval of an extension granted under this section 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. (possible delete)***
    d. ***Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.***

e. *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.*

f. *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.*

g. *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.*

Comments submitted by: Jody McCaffree
Susan P. Smith
Katy Eymann

Response:
This proposed change mirrors Oregon Revised Statute and Oregon Administrative Rule for extensions. The change in the language removes any confusion and now it will be based on statute and rule. There have been multiple requests to incorporate the following sentence *"[t]hat 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."* However, there has been no legal argument given that supports leaving this language in place. Staff suggested the Board adopt the proposed language as it is based on the statute and rule as described below:

The language from the ORS and OAR is as follows.

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). [2001 c.532 §2; 2009 c.850 §10; 2013 c.462 §6]

OAR 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).

However, there was some confusion about the following wording *"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."* The language states that administrative decision are not land use decisions, however, the term administrative is a

conflict with the way it is utilized throughout the CCZLDO and CCCP. The Board chose to remove this sentence. It is shown in blue and tagged as a possible deletion. This response applies to § 5.3.360 Extensions for Variances. This allows the County to be in compliance with state law and the CCCP.

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§ 5.3.350(5) Variance regulations in the CCZLDO Article 5.3 shall not apply to Sections 4.11.400 through 4.11460, Chapter VII and Chapter VIII.

Comments submitted by: Susan P. Smith
Jody McCaffree

Response:
This specific variance criteria would not apply to Article § 4.11.400 through 4.11.460, Chapter VII and Chapter VIII. Each identified section or chapter has their own variance criteria. This came up in a LUBA case Sperber v. Coos County LUBA No. 2008-072 which explained the way the county's variance provisions are written and structured there is no reason why both variance standards in Chapter V and in Chapter VII would not apply. The county's ordinance failed to include language specifically explaining why one variance provision would apply and the other would not. Therefore, if there is specific variance criterion that applies or no criterion that applies it must be clear in this section. This is necessary to ensure that it does not become an issue in future decisions.

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§ 5.6.115 SURFACE MINING:
Surface mining use continued under Section 5.6.100 shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

1. **The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and**
2. **The surface mining use was not inactive for a period of 12 consecutive years or more.**

Comments submitted by: Jody McCaffree

Response:
This language is based on 215.130 Application of ordinances and comprehensive plan; alteration of nonconforming use. 215.130 (A) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and (B) The surface mining use was not inactive for a period of 12 consecutive years or more.

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§ 5.7.300 Quasi-Judicial Land Use Hearings Procedures

4. Representatives
    b. Any person presenting ***written*** testimony on behalf of a group, company or any other organization, except an attorney, **consultant, owner, officer, or employee of that group, company, or organization** must enter written evidence into the

record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

i. ***Be written on the group, company, or organization's official letterhead;***
ii. ***Name the person authorized to appear on behalf of the group, company, or organization;***
iii. ***Specify the scope of the authorization; and***
iv. ***Contain the signature of a person with authority to grant the authorization.***

Failure of a person to submit such written authorization shall cause the group, company, or organization to not achieve party status for the purposes of the proceeding and shall preclude the group, company, or organization from having standing to file an appeal.

Comments submitted by: Jody McCaffree
Philip Johnson, Oregon Shores Conservation Coalition
Katy Eymann

Response:
The new language is a reformat and clarification of the current language. The language concerning written testimony came from a prior county counsel who was concerned about the legality of representation and achieving standing. The last paragraph of the proposed language is important to explain the consequences of not providing authorization to appear on behalf of a group, company or any other organization. Currently there is no remedy or consequences provided if someone fails to present the required authorization. This point was brought up by the hearings officer in a past case as a procedural flaw.

The case cited by Oregon Shores and provided the head notes from LUBA below:
24.2.1 Standing - Before LUBA - Generally. Persons who made an appearance during the local government proceedings that led to a city decision that was remanded by LUBA satisfy the ORS 197.830(7)(b) requirement that a person who moves to intervene in a subsequent LUBA appeal of the city's decision following LUBA's remand must have "appeared." The appearance during the initial local government proceedings is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, and it does not matter that the local government refused those persons' attempt to appear during the remand proceedings. South Gateway Partners v. City of Medford, 53 Or LUBA 593 (2006).

The change in the local language proposed does not limit who can appear just how they appear. Anyone can appear on their own behalf but, if you are going to represent someone else or some type of group, company or organization, it needs to be shown that the person appearing has legal authority to do so. Furthermore, the LUBA citation provided seems to deal with remands and the failure of a county to understand that if a party has appeared at any point they have achieved party status. This case is not relevant as it does not provide an explanation regarding representation as used in §5.7.300. The Land Use Board of Appeals explained standing pursuant to ORS 197.830(7)(b) for filing an appeal at the Land Use Board of Appeals but does not cover standing at the local level or an opinion on local standing

issues outside of a remand. There has been no direct link to a statutory provision or case law that prohibits Coos County's language.

There was an opposing comment made concerning having § 5.7.300(4)(b)(i) and not requiring letter head but including a copy of the groups filing with the State to show that the person submitting testimony is qualified to speak. The document may not explain how an individual can represent a group. This was considered but the additional language was not chosen.

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§ 5.7.300(5) Submission of Written Evidence

c. Required Number of Copies: Submission of written materials for consideration shall be provided ~~as follows for hearings before the:~~ ***in the form one original hard copy and one exact copy or one original hard copy and one electronic copy.***

i. ~~Planning Commission – 15 copies~~

ii. ~~Board of Commissioners – 7 copies~~

Comments submitted by: Philip Johnson, Oregon Shores Conservation Coalition
Susan P. Smith

Response:
The reason for the two copies is to ensure that one paper copy is available for the public to review. This section takes into account people that do not have the ability to submit material electronically. Two copies allows staff to have one document to copy from and one to place in the file for public records and viewing. Again there is no legal basis for changing the language as it is proposed.

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§ 5.8.100 Appeals General
Coos County has established an appeal period of ~~15~~ 12 days from the date written notice of administrative or Planning Commission decision is mailed.

The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article. [OR 04 12 013PL 2/09/05]

Comments submitted by: Jody McCaffree
Jan Dilley
Philip Johnson, Oregon Shores Conservation Coalition
Katy Eymann
Beverly Segner
William York

Response:
There have been multiple statements made regarding the change in the date. Staff explained in the presentation that there would not be an issue with leaving the date at 15 days with the exception of property line adjustments and lawfully created parcels. Property line adjustments

and lawfully created parcels are a simple process with very limited criteria. However, the suggested change conforms with state law as shown below.

ORS 215.416(11) (C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

There was some testimony received from a few people in opposition, who referenced ORS 197.375 which is an Appeal of a decision on an application for expedited land divisions. Coos County does not have a process for expedited land divisions. This is an incorrect reference. The other repeated statement was that the normal appeal period is 21 days. That is unsubstantiated by any law; in fact, in Staff's research had concluded Coos County has one of the highest appeal deadlines. Most counties are either 12 or 14 days; however, some counties allow for comments from adjacent land owners prior to the final planning director decisions.

The Board of Commissioners decided to leave the timeline the same for all applications except property line adjustments and discrete parcels.

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§ 5.8.170 Appeal procedures:
An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section or the reviewing body may dismiss the appeal. The petition must be filed with the appropriate fee as adopted by the Board of Commissioners.

The appeal form shall contain the following:

1. ***The name of the applicant and the County application file number;***
2. ***The name and signature of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single contact representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative;***
3. ***The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160;***
4. ***The date that the notice of the decision was mailed as written in the notice of decision;***
5. ***The nature of the decision and the specific grounds for appeal citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule.***

6. *The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application.*
7. *Appeals of Planning Director's decision will be de novo;*
8. *Appeals of Planning Commission's or appointed Hearings Officer(s) decision shall be reviewed by the Board of Commissioners or Hearings Officer if the Board of Commissioners so chooses. The Board of Commissioners shall, provided there has been an initial evidentiary hearing:*
    a. *Decline to hear the matter and enter an order affirming the lower decision; or*
    b. *Accept the appeal and:*
        i. *Make a decision on the record without argument;*
        ii. *Make a decision on the record with argument;*
        iii. *Conduct a hearing de novo; or*
        iv. *Conduct a hearing limited to specific issues.*
    c. *In the decision, the Board shall affirm, modify, or reverse the lower decision, and accept any or all of the findings and conditions in the Hearings Body decision, or modify or adopt new findings and conditions on a permit.*
    d. *If the Board allows argument only on the record, no new evidence shall be submitted.*
    e. *Any legal issues not specifically raised are considered waived for purposes of appeal to the Land Use Board of Appeals (LUBA).*
    f. *Where a hearing is limited to specific issues, any evidence or argument submitted must be relevant to the specific issue.*
    g. *All items to be submitted to the County must actually be received by the County Planning Department no later than 5:00 p.m. on the on the last day of the appeal period. If the last day of the appeal period falls on a weekend or County holiday, then the item must actually be received by the County Planning Department no later than 12:00 p.m. on the next County business day following the deadline date. All items to be mailed to another party must be postmarked no later than the end of the appeal period.*
    h. *The decision of the Board of Commissioners shall not be final for the purpose of appeal until reduced to writing and signed by the Board.*

Comments submitted by: Jody McCaffree
Philip Johnson, Oregon Shores Conservation Coalition
Katy Eymann
Beverly Segner

Response:
The Board of Commissioners chose to change the language to read *"An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section. If an appellant fails to correctly fill out the form, and there has already been a public hearing on the matter, the Board of Commissioners may deny the appeal based on failure to comply with this section. In*

the event the appeal is denied based on a failure to comply with this section, a refund of unexpended fees shall be returned to the appellant."

In the case of an appeal of a Planning Director's decision, the hearing is de novo and new issues can be brought forward. The details of the appeal should be included at the beginning so they may be addressed in the staff report. This will save staff time and allow for better understanding of the issues that are being appealed. There is no legal reason given by Oregon Shores other than an inconvenience on the part of the potential appellant. The language is corrected under Subsection 8; however, staff agrees that it could be clarified, if an issue is not raised at the local level it is considered waived. This is referred to as the "raise it or waive it" law.

There was some testimony received that miss cites procedures for court of appeals and LUBA appeals. These procedures do not apply to local land use appeals. In urban areas all local processes must be completed within 120 days and outside of the urban area 150 days. There has been no legitimate legal argument provided. Having clear and concise language is beneficial to all parties. ORS 215 regulates local land use processes including timelines. In a first appeal or public hearing, the matter is always reviewed as a de novo hearing meaning that any issue can be raised even if it was not identified in the initial appeal. However, any subsequent appeals may be restricted to an issue or the record based on the appeal that was filed.

Ms. Eymann stated other appeal bodies only require notice of appeal. However, she fails to identify what other appeal bodies she is referring to. The staff reviewed other counties such as Washington, Douglas and Deschutes counties, and they require specific reasons for appeals. Their appeal period is only 12 days. Other appeal bodies may be a comparison of local hearings appeal boards (County) with the State (LUBA) but again there is not enough information to allow a response from the reviewing body.

The instructions for filing an appeal have been laid out in a manner such that everyone understands they will not be able meet the requirements. This is in line with Goal 1 as it provides a clear process to help citizens build a record.

Additionally, there was a suggestion to extend the time lines of subsection (g) to 5:00 p.m. the next business day. However, the appellant would have already been provided additional time due to the holiday or the weekend. There is no legal reason provide for this request.

The argument about Goal 1 is not valid in this situation. Goal 1, titled Citizen Involvement, states the purpose is to develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process. The County did develop a program and a committee to address citizen participation.

Furthermore, citizens can provide testimony in any form on their own behalf, which this provision does encourage. Therefore, the Board adopted the change as discussed.

~~SECTION 5.8.200. Appeals of Administrative Decisions.~~

~~1. Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee. Upon receipt of an appeal, the Department shall schedule a public hearing before the Hearings Body and provide public notice as provided in Section 5.0.900(A). The hearing on appeal of an administrative decision shall be de novo (ORS 215.416).~~

~~2. The appeal hearing procedure shall be in accordance with Section 5.7.300. [OR-04-12-013PL 2/09/05]~~

Comments submitted by: Philip Johnson, Oregon Shores Conservation Coalition

Response:
Oregon Shores stated that removal of § 5.8.200 was confusing because § 5.8.170 did not include a reference to § 5.7.300 for hearing procedures. Staff agrees that § 5.8.170 should be clarified to include the cross reference to § 5.7.300. Suggested change: "***Appeals of Planning Director's decision will be de novo and processed in accordance with § 5.7.300***"; . The Board accepted staff's suggestion.

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§ 5.10.100 Compliance determinations:
An application for Compliance Determination (CD) are required to be submitted to the Planning Department with the elements described in § 5.10.200. Once the application is received the Planning Staff will review the CD against the applicable zoning district to determine if additional reviews or notifications are required.*

Comments submitted by: Jody McCaffree

Response:
Currently, when someone requests a zoning compliance, staff looks at the property and the special considerations and makes a determination if the property is in compliance and, if so, a zoning compliance letter is then issued. Sometimes, however, discretion has to be applied in making this determination, which is an appealable action. This is not accounted for currently and a process needs to be formed. If discretion is used in making this type of decision it will be appealable. This is to ensure that the county is following the law for discretionary decisions.

Conclusion
Staff has made some suggested changes for clarity in this document. The opponents to the changes failed to make valid legal arguments for their testimony. In addition, there has been some case law provided by Ms. Eymann and Ms. McCaffree. Staff has printed out the final opinions on those cases for the Board of Commissioner to review as part of the record. The case law deals with comprehensive plan amendments and the Board of Commissioners has not proposed any comprehensive plan amendments. These are all ordinance text amendments. Any argument that has been raised has been addressed by explaining why the changes were necessary. The Board instructed staff to make the changes as discussed in the hearing as well as review the document one more time for typos. The final changes can be found at Attachment A to Ordinance 14-09-012PL.