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February 21, 2019

Seth J. King
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VIA EMAIL AND OVERNIGHT DELIVERY

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

Re: Application for Extension of Approval Period for Pacific Connector Gas Pipeline Brunschmid/Stock Slough Alternate Alignment (County Order No. 14-01-007PL, County File No. HBCU-13-04)

Dear Jill:

This office represents Pacific Connector Gas Pipeline, LP, the applicant requesting approval of an extension of the approval period for the Pacific Connector Gas Pipeline Brunschmid/Stock Slough alternate alignment (County Order No. 14-01-007PL, County File No. HBCU-13-04). Enclosed with this letter please find the following materials:

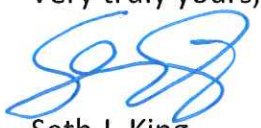
- Completed and signed Coos County "Extension of a Land Use Approval" application form
- Narrative explaining how request satisfies all applicable approval criteria, with seven exhibits
- Check in the amount of $561.00 payable to "Coos County" for application fee

We are also providing the County an electronic copy of these materials. We are hopeful that, upon receipt of these materials, the County will deem the application complete and proceed with processing it.

I am applicant's representative in this matter. Please copy me on all notices, correspondence, staff reports, and decisions in this matter. If you have any questions, do not hesitate to contact me. We look forward to working with the County toward approval of this request.

Thank you for your courtesies in this matter.

Very truly yours,



Seth J. King

SJK:rsr
Enclosures

cc: Client (w/encls.) (via email)
Steve Pfeiffer (w/encls.) (via email)
David Delmar (w/encls.) (via email)

EXTENSION OF A LAND USE APPROVAL

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

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

Date Received: 2/22/19 *Fee Received* $561.80 *Receipt #:* _____ *Received by:* A. Dibble
Please be aware if the fees are not with the included the application will not be processed.

File # EXT - 19 - 002 **Prior Application #** HBCU - 13 - 04 **Expiration Date:** 2/25/2019

Land Owner(s)

(print name): Multiple
Mailing address: _____

Phone: _____ Email: _____

Signature: _____

Applicant(s) If different from Property Owner

(print name): Pacific Connector Gas Pipeline, LP c/o Perkins Coie LLP / Attn: Seth King
Mailing address: 1120 NW Couch Street, Tenth Floor, Portland, OR 97209
Phone: 503-727-2024 Email: SKing@perkinscoie.com
Signature: _____

PROPERTY LOCATION: See original application materials in County File No. HBCU-13-04.

Township Range Section Tax lot(s)

Site address

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

See attached.

CRITERIA:

SECTION 5.2.600 EXPIRATION AND EXTENSION of Conditional Uses

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

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

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

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

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

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

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

BEFORE THE PLANNING DIRECTOR

FOR COOS COUNTY, OREGON

In the Matter of a Request for a Time Extension of the County Board of Commissioners' Approval, with Conditions, of a Conditional Use Permit (County Order No. 14-01-007PL, County File No. HBCU-13-04) to Authorize the Brunschmid/Stock Slough Alignment for a Segment of the Pacific Connector Gas Pipeline in the Exclusive Farm Use, Forest, CBEMP 20-RS, CBEMP 20-CA, and Floodplain Overlay Zoning Districts.	**NARRATIVE IN SUPPORT OF THE REQUEST FILED BY PACIFIC CONNECTOR GAS PIPELINE, LP**

I. Introduction and Request

Pacific Gas Connector Gas Pipeline, LP, a Delaware limited partnership ("Applicant"), submits this application ("Application") requesting that Coos County ("County") extend, by 12 months, the Board of Commissioners' approval with conditions ("Approval") of a conditional use permit (Order No. 14-01-007PL, County File No. HBCU-13-04) to authorize the Brunschmid/Stock Slough alternate alignment of the Pacific Connector Gas Pipeline ("Pipeline"). For the reasons explained below, the Application satisfies the limited approval criteria that apply to the request. Therefore, the County should approve the Application.

II. Background

On February 4, 2014, the County Board of Commissioners adopted and signed order No. 14-01-007PL, File No. HBCU-13-04, approving Applicant's request for a conditional use permit to authorize development of the Brunschmid/Stock Slough alternate alignment for a portion of the Pipeline and to authorize associated facilities, subject to conditions. Specifically, the Approval authorized an alternate alignment to: (1) avoid the Natural Resources Conservation Service's Brunschmid Wetland Reserve Program Easement; and (2) minimize the Stock Slough crossings. The Approval proposed an alternative

alignment for approximately two percent of the total length of the Pipeline. A copy of the Approval is attached as Exhibit 1. No one filed a timely appeal of the Approval.

The approval period for the Approval commenced on February 25, 2014, after the County approved the Pipeline in Order No. 14-01-007PL, and the ensuing 21-day appeal expired with no appeal being filed. The County approved extensions of the Approval on April 11, 2016 (County File No. ACU-16-003); May 17, 2017 (County File No. EXT-17-002); and November 20, 2018 (County File Nos. AP-18-001/EXT-18-01). As extended, the Approval expires on February 25, 2019. A copy of the most County's most recent extension decision is attached as Exhibit 2. Opponents have appealed this decision to LUBA.

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

III. Responses to Applicable CCZLDO Provisions

5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

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

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

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

RESPONSE: A portion of the alignment authorized by the Approval crosses resource-zoned property (Exclusive Farm Use and Forest). The approval period for the Approval is scheduled to expire on February 25, 2019. As further explained below, the County is authorized to extend the approval period if certain criteria are met, and the Application satisfies these criteria.

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

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

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

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

RESPONSE: The approval period for the Approval is scheduled to expire on February 25, 2019. The County will receive Applicant's request on February 22, 2019. The County should find that Applicant has submitted this request before the expiration of the approval period.

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

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

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

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

RESPONSE: Applicant was prevented from beginning or continuing development within the approval period because the Pipeline has not yet obtained federal authorization to proceed. The Pipeline is an interstate natural gas pipeline that requires pre-authorization by the Federal Energy Regulatory Commission ("FERC"). Until Applicant obtains a FERC certificate authorizing the Pipeline, the Applicant cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. As of the date of this Application, FERC has not yet authorized the Pipeline. Therefore, Applicant cannot begin or continue development of the Pipeline along the alignment that the Approval authorizes.

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

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

See County Final Order No. 14-09-063PL, ACU-14-08/AP 14-02, Exhibit 3 at 13. Likewise, in granting a previous extension of an approval for a different alignment of the Pipeline, the County Planning Director stated:

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

See Director's Decision for County File No. ACU-16-013, Exhibit 4 at 13.

Further, the delay in obtaining FERC approval of an alignment for the Pipeline has caused other agencies to also delay their review and decision on Pipeline-related permits. The Pipeline is a complex project that requires dozens of major federal, state, and local permits, approvals, and consultations needed before Applicant and the developer of the related Jordan Cove Energy Project can begin construction. *See* permit list in Exhibit 5 hereto. The County has previously accepted this explanation as a basis to find that a Pipeline-related time extension request satisfies this standard. *See* County Final Order No. 17-11-064PL, File No. AP 17-00/EXT 17-005, Exhibit 6 hereto at 11.

Therefore, Applicant has identified reasons that prevented Applicant from commencing or continuing development within the approval period.

In addition, Applicant is not responsible for FERC not yet approving the Pipeline. Applicant has worked diligently and in good faith to obtain all necessary Permit approvals. For example, FERC previously approved Applicant's original application for a certificate for an interstate natural gas pipeline in the County. Later modifications to the project nullified that approval, and Applicant applied for a new authorization, which FERC denied. The Board has previously determined that Applicant was not "responsible" for this denial. *See* Exhibit 6 at 10-15.

FERC's denial was *without prejudice*, and Applicant has reapplied for FERC authorization. Applicant has *at all times* since the County issued the Approval, and regardless of FERC's conduct, which the Applicant cannot control, continued to seek the required FERC authorization of the Pipeline. For example, during the 12-month period of the current extension (February 2018-February 2019), Applicant took steps in furtherance of the FERC permitting process. Applicant diligently responded to FERC's requests for additional information in support of the certificate request. *See* record of applicant submittals in the 12-month FERC docket in Exhibit 7. The certificate request is still pending before FERC. *Id.*

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

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

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

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

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

The approval criteria applicable to a conditional use permit to construct this segment of the Pipeline have not changed since the County issued the Approval on February 4, 2014. In the most recent extension of the Approval, the Board agreed with this conclusion and adopted detailed findings regarding same. *See* Exhibit 2 at 31-37.

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

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

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

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

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

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

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

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

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

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

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

RESPONSE: A portion of the alignment authorized by the Approval crosses property not zoned Exclusive Farm Use or Forest. The approval period for the Approval is scheduled to expire on February 25, 2019. As further explained below, the County is authorized to extend the approval period if certain criteria are met, and the Application satisfies these criteria.

(3) Extension Requests:

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

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

ii. Rezoned to another zoning district.

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

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

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

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

RESPONSE: The County will receive the extension request on February 22, 2019, which is before the expiration of the Approval period. Therefore, the Application meets the requirements of this provision.

2. Changes or amendments to areas subject to natural hazards[4] do not void the original authorization for a use or uses, as they do not determine if a use can or cannot be sited, but how it can be sited with the least amount of risk possible. Overlays and Special Development Considerations may have to be addressed to ensure the use can be sited with an acceptable level of risk as established by Coos County.

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

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

IV. Conclusion

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

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

IN THE MATTER OF CONSOLIDATED CONDITIONAL USE APPLICATIONS HBCU-13-04 SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE	)	FINAL DECISION AND ORDER NO. 14-01-007PL

WHEREAS, Pacific Connector Gas Pipeline applied for approval of portions of a pipeline to supplement the already approved route (Attachment "B") as adopted in the Board of Commissioners Final Decision and Order No. 10-08-045PL, dated September 8, 2010, as ratified by Final Decision and Order No. 12-03-018PL, dated March 13, 2012; and

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

Hearings Officer Stamp conducted a public hearing on this matter on September 20, 2013, 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 November 8, 2013.

Hearings Officer Stamp issued his Analysis, Conclusions, and Recommendations to the Board of Commissioners to approve the application on December 12, 2013, attached as Attachment A. At Pages 21-22 of the Hearings Officer's Recommendation, states: "the Hearing Officer understands that there may be other means to ensure a successful HDD bore, and suggests this proposed condition as one of several possible alternatives. County staff and County Counsel may have additional input for the Board on this issue."

In response, the County issued its Supplemental Report on January 7, 2014, attached as Attachment B, recommending two modifications to the conditions of approval and corrections to the timeline, which the Board

hereby adopts. Accordingly, the Board does not adopt the findings in the Hearing Officer's report appearing at the last three paragraphs of page 20 and the proposed condition appearing in the first paragraph at the top of page 21. The Board hereby finds that the concerns raised by the Hearings Officer are better addressed by the findings in the Supplemental Report submitted by Planning Staff in Exhibit C.

The Board agrees with the recommendation of the County staff and hereby adopts the staff's proposed findings and recommendation of a revised condition A.17(b) and a consolidation and revision of conditions A.15 and B.25. In adopting the Staff's recommendations, the Board adopts the Hearing Officer's recommendation as revised by the Staff's recommended amendments. The Board of Commissioners held a public meeting to deliberate on the matter on January 9, 2014. The Board of Commissioners, all members present and participating, unanimously voted to accept the Hearings Officer's recommended approval with the two modifications as proposed by Planning Staff, and above referenced, to the conditions of approval and corrections to the timeline.

NOW, THEREFORE, the Board adopts the Findings of Fact and Conclusions of Law attached as Exhibit A, as modified in the Supplemental Report attached as Exhibit C.

ADOPTED this 4th of February 2014.

BOARD OF COMMISSIONERS

COMMISSIONER

COMMISSIONER

COMMISSIONER

ATTEST:

Bobbi Brooks

Recording Secretary

APPROVED AS TO FORM:

Office of Legal Counsel

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

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

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

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

Attachment "A"

TABLE OF CONTENTS

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I. Summary of Proposal and Process

A. Summary of Proposal.

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

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

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

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

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

B. Process.

The review timeline for this application is as follows:

- August 19, 2013, Application submitted.
- August 23, 2013, Application deemed complete.
- August 30, 2013, County Mailed Public Notice for Hearing.
- September 5, 2013, County Mailed Correction to Notice of Hearing.

- September 13, 2013, County Planning Director issued Staff Report.
- September 20, 2013, Public hearing before the hearings officer.
- October 7, 2013, First Open Record Period Closed (New Testimony).
- October 14, 2013, Second Open Record Period Closed (Rebuttal Testimony).
- October 21, 2013, Third Open Record Period Closed (Surrebuttal Testimony).
- October 22, 2013 & October 24, 2013, Request to have record left open to address Richard Allan's e-mail testimony which was not made available to the public in time to respond.
- October 25, 2013, Hearings Officer allowed for response to new Richard Allan's letter only (Seven Days).
- November 1, 2013, Response to Richard Allan's letter only.
- November 8, 2013, Applicant's Final Argument.
- December 16, 2013, Hearings Officer's Recommendation.
- December 16, 2013, Notice of Board of Commissioners Deliberation and Decision.
- January 9, 2014 Deliberations and Decision by the Board of Commissioners.
- January 2014, Adoption of Final Decision by the Board of Commissioners.
- January 2014, 21-day Appeal Period.
- January 20, 2014, 150 Day Deadline.

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

C. Scope of Review.

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

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

The hearings officer believes that the conclusions made herein would be affirmed if appealed. However, the Board of Commissioners does not have to accept the legal or factual conclusions of the hearings officer. There are other possible factual conclusions that could be

drawn from the evidence. The Board may weigh the evidence and draw its own conclusion from that evidence. The Board also has the authority to modify or overturn the hearings officer's recommended interpretations and reach different legal conclusions.

The standard by which Land Use Board of Appeals (LUBA) and the courts will review the Board's decision is also an important consideration. ORS 197.829 provides as follows:

> ***197.829 Board to affirm certain local government interpretations. (1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:***
>
> ***(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;***
>
> ***(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;***
>
> ***(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or***
>
> ***(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. (Emphasis added).***

The Oregon Supreme Court has construed ORS 197.829(1) to require LUBA and the courts to affirm a local government code interpretation of its own code if the interpretation is "plausible." *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776 (2010). That deferential standard of review applies only to interpretations of local law adopted by the governing body (as opposed to the interpretations made by lesser bodies such as planning staff, hearings officers or planning commissions. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994).

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

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

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

[1] *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992); *Kenagy v. Benton County*, 115 Or App 131, 134, 838 P2d 1076 (1992); *Crosley v. Columbia County*, __ Or LUBA __ (LUBA No. 2011-093, April 11, 2012)(LUBA does not give deference to the County's interpretation of state law, or to its own code to the extent that those code provisions implement and mimic ORS 215.130(5)-(11)).

> determinations in the Prior Decisions apply equally to the proposed alternate alignment segments, and such interpretations and use determinations should be accepted and incorporated by reference in this application. *See Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873 (1994) (presupposing that inconsistent interpretations by a local decision maker might, under some circumstances, be a basis for a reversal of the local decisions).

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

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

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

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

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

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

Finally, it is important to note that LUBA has stated that there may be circumstances where a change in long-standing interpretations may require notice and an opportunity for comment. *Wicks v. City of Reedsport*, 29 Or LUBA 8, 19 (1995); *Heceta Water Dist. v. Lane County*, 24 Or LUBA 402, 419 (1993); *Buckman Community Assoc. v. City of Portland*, 36 Or LUBA 630, 638-9 (1999).

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

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

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

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

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

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

II. Legal Analysis.

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

1. Landowner Consent.

At the September 20, 2013 public hearing, there was considerable discussion concerning the applicant's ability to submit a land use application for a pipeline that will cross private property, when the landowner does not give consent to the applicant. The only applicable code section requiring landowner consent is Coos County Zoning and Land Development Ordinance (CCZLDO) §5.0.150.[3] The requirement that a property owner or contract purchaser sign the applicant is a mandatory prerequisite to a properly filed application. However, as discussed in the County's decision in Final Decision and Order No. 10-08-045PL (HBCU 10-01), it is a procedural requirement that can be deferred to a later stage in the approval process so long as additional process is afforded for decisions that involve the exercise of discretion. *See Citizens Against LNG v. Coos County*, 63 Or LUBA 162, 167-9 (2011).

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

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

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

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

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

The pipeline also falls within the ORS 757.005(1)(a)(A) definition of a "public utility," which includes "[a]ny corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power...." Thus private corporations can own and operate public utilities. In this regard, the term "public utility" referenced in the analogous provision of ORS 215.213(1)(d) is not concerned with whether the utility is owned by a public or private entity but whether the facility is so impressed with a public interest that it comes within the field of public regulation. 42 Or Att'y Gen 77 (1981) (cited in *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 773 P2d 779 (1989)).

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

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

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

We begin with CCZLDO §4.9.450, which is a provision intended to regulate uses in the EFU zone. CCZLDO §4.9.450(C) applies to "utility facilities necessary for public service." It is more or less a direct codification of ORS 215.283(1)(c).[4] As such, the hearings officer will

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

> (1) The following uses may be established in any area zoned for exclusive farm use: * * * *.
>
> (c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275.

assume that County intended §4.9.450 to both implement state law and be interpreted consistent with state law. See *WKN Chopin, LLC v. Umatilla Electric Cooperative*, __ OR LUBA __ (LUBA No. 2012-016 2012)(using same approach).

CCZLDO §4.9.450 provides:

> *The following uses and their accessory uses may be allowed as hearings body conditional uses in the "Exclusive Farm Use" zone and "Mixed Use" overlay subject to the corresponding review standard and development requirements in Sections 4.9.600[5] and 4.9.700.[6]*
>
> * * * * * *.
>
> *C. Utility facilities necessary for public service.... A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided.*

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

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

> ***215.275 Utility facilities necessary for public service; criteria; rules; mitigating impact of facility. (1) A utility facility established under ORS 215.213 (1)(c) or 215.283 (1)(c) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.***
>
> ***(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) must show that reasonable alternatives have been considered and that the facility***

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

[6] CCZLDO 4.9.700 Development Standards for dwellings and structures (CCZLDO 2.1.200 defines "Structure: Walled and roofed building includes a gas or liquid storage tank that is principally above ground." The proposed pipeline is not a "structure" under this definition and therefore the siting standards do not apply.

must be sited in an exclusive farm use zone due to one or more of the following factors:

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

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

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

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

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

The exception set forth in Subsection 6 of ORS 215.275 is important for two reasons. First, it indicates that the legislature views "interstate natural gas pipelines and associated facilities" as a

type of "utility facility." Where this not the case, then the legislature would surely have not felt the need to add subsection 6 to ORS 215.275.

Second, ORS 215.275(6) states that subsections 2-5 do not apply to "interstate natural gas pipelines." Since the criteria set forth in Subsections (2) through (5) are intended to inform the analysis of whether a particular type of facility must necessarily be sited in a EFU zone (as opposed to in other rural or urban lands), then the fact that the legislature excepted gas pipelines from such scrutiny appears to recognize federal preemption on the issue of route selection for interstate gas pipelines. LCDC has also recognized this fact in their administrative rule implementing ORS 215.275, as they exempt FERC-regulated pipelines from the "necessary for public service" test. *See* OAR 660-033000139(16).[7] Given the nature of ORS 215.275(6), the

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

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

(A) Technical and engineering feasibility;

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

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

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

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

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

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

hearings officer concludes that interstate natural gas pipelines are recognized under state land use laws as being a "utility facility" for purposes of rural zoning in EFU zones. Because of this fact, the County cannot conclude that "interstate natural gas pipelines and associated facilities" are not a "utility," notwithstanding any quirks in the zoning code's definition of "utility." To do so would be contrary to the legislative intent behind ORS 215.275.

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

> ***(1) Goal 4 requires that forest land be conserved. Forest lands are conserved by adopting and applying comprehensive plan provisions and zoning regulations consistent with the goals and this rule. In addition to forest practices and operations and uses auxiliary to forest practices, as set forth in ORS 527.722, the Commission has determined that five general types of uses, as set forth in the goal, may be allowed in the forest environment, subject to the standards in the goal and in this rule. These general types of uses are:***
>
> *****.
>
> ***(c) Locationally dependent uses, such as communication towers, mineral and aggregate resources, etc;***
>
> ***(3) The following uses may be allowed outright on forest lands:***
>
> *****.
>
> ***(c) Local distribution lines (e.g., electric, telephone, natural gas) and accessory equipment (e.g., electric distribution transformers, poles, meter cabinets, terminal boxes, pedestals), or equipment that provides service hookups, including water service hookups;***
>
> ***(4) The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:***
>
> ******.

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

(q) New electric transmission lines with right of way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width * * *. (Emphasis added).

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

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

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

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

If anything, the only express discussion of large-scale interstate gas pipelines in the LCDC administrative rules is set forth in the rules regulating uses in EFU zones. OAR 660-033-0130(16). As mentioned above, OAR 660-033-0130(16) states that FERC-regulated gas pipelines are exempt from the "necessary for public service" applicable to other utility facilities seeking to locate in EFU zones. LCDC's "hands off" approach to gas pipelines in EFU zones was apparently a response to the passage of ORS 215.275(1)-(6) in 1999. *See* Chapter 816 Oregon Laws 1999 (HB 2865). It would make little sense to create a highly permissive environment for gas pipelines

in EFU zones but then somehow prohibit them in Forest zones. This is particularly true since as a practical matter, it is not possible to construct gas pipelines for any significant distance in Oregon without routing them through a Forest zone.

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

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

> ***215.276 Required consultation for transmission lines to be located on high-value farmland. (1) As used in this section:***
> ***(a) "Consult" means to make an effort to contact for purpose of notifying the record owner of the opportunity to meet.***
> ***(b) "High-value farmland" has the meaning given that term in ORS 195.300.***
> ***(c) "Transmission line" means a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users.***
>
> ***(2) If the criteria described in ORS 215.275 for siting a utility facility on land zoned for exclusive farm use are met for a utility facility that is a transmission line, the utility provider shall, after the route is approved by the siting authorities and before construction of the transmission line begins, consult the record owner of high-value farmland in the planned route for the purpose of locating and constructing the transmission line in a manner that minimizes the impact on farming operations on high-value farmland. If the record owner does not respond within two weeks after the first documented effort to consult the record owner, the utility provider shall notify the record owner by certified mail of the opportunity to consult. If the record owner does not respond within two weeks after the certified mail is sent, the utility provider has satisfied the provider's obligation to consult.***
>
> ***(3) The requirement to consult under this section is in addition to and not in lieu of any other legally required consultation process. [2009 c.854 §1] (Emphasis added).***

Although the opponents in this case did not make the argument, it could be argued that the definition of "transmission line" in ORS 215.276 could be read in conjunction with a negative inference concerning the allowance of gas "distribution lines" in OAR 660-006-0025(4)(q). The argument would be that since gas "distribution lines" are allowed in Forest zones, and since the various statutes and rules – when read together – seem to differentiate between "transmission lines" and "distribution lines" (and specifically allow electrical transmission lines), that gas transmission lines are, by negative inference, not allowed in Forest zones.

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

> *Expressio unius est exclusio alterius,* another common-law aid to the construction of statutes, "hold[s] that to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary 620 (Bryan A. Garner ed., 8th ed 2004). The rule may also be stated as *inclusio unius est exclusio alterius. Waddill v. Anchor Hocking, Inc.,* 330 Or 376, 382, 8 P3d 200 (2000); *Fisher Broadcasting v. Department of Revenue,* 321 Or 341, 353, 898 P2d 1333 (1995).
>
> By way of example, saying that citizens are entitled to vote implies that noncitizens are not entitled to vote. Black's Law Dictionary, *supra,* at 620. Including one group impliedly excludes the other. However, saying that citizens may vote does not expressly say anything about the rights of noncitizens; it simply assumes the negative of the first statement about citizens.
>
> However, both the court of appeals and the supreme court have repeatedly warned the bench and bar that the maxim "is to be applied with caution and merely as an auxiliary rule to determine the legislative intention." *Cabell v. Cottage Grove,* 170 Or 256, 281, 130 P2d 1013 (1943).
>
> Although *expressio unius* is consistent with ORS 174.010, and the legislature's directive to the courts "not to insert what has been omitted or omit what has been inserted," which the court regularly relies on (*see* §§2.32, 5.3), the court rarely relies on the maxim. In fact, the supreme court has only looked to the rule as an aid to construction once in the last eight years. *See Waddill,* 330 Or at 382.
>
> *Expressio unius* applies only in limited circumstances. "Before the maxim *expressio unius est exclusio alterius* can be instructive as to what a statute *excludes,* one must first *identify what it includes.*"

> *Carlson v. Benton County,* 154 Or App 62, 67, 961 P2d 248 (1998) (emphasis added). And, because *expressio unius* is a rule of inference, it gives way to stronger evidence of legislative intent. *Cabell,* 170 Or at 281. Thus, lawyers should limit use of this maxim, and consider its application cautiously:
>
> The maxim "expressio unius est exclusio alterius" is not of universal, but of limited, use and application. It is an aid to construction, not a rule of law. It is not conclusive, is applicable only under certain conditions, is subject to exceptions, may not be used to create an ambiguity, and requires great caution in its application . . . It may not be used to defeat or override clear and contrary evidence of legislative intent.
>
> 73 Am Jur2d *Statutes,* §130 (2007).
>
> Judge Posner has pointed out another weakness: "The canon *expressio unius est exclusio alterius* is . . . based on the assumption of legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate." Richard A. Posner, The Federal Courts: Crisis and Reform 282 (1985). Judge Posner went on to say "[a]lthough this canon seemed dead for a while, it has been resurrected by the Supreme Court . . . Its recent disparagement by a unanimous Court [in *Herman & MacLean v. Huddleston,* 459 US 375, 386 n 23, 103 S Ct 683, 690 n 23 (1983)] puts its future in some doubt but more likely confirms that judicial use of canons of construction is opportunistic." Posner, *supra.*

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

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

Secondly, even if we assume that a mythical third category of "non-local distribution line" does exist, it is hard to envision what features this third category of pipeline would have that distinguish it from a "transmission line." In fact, the term would appear to be an oxymoron if it is interpreted to *mean anything other* than a "transmission line" as defined in ORS 215.276(1)(c). As a practical matter, there is really no way to create three categories of gas pipelines: any individual pipe will either provide local service (in which case it is a local distribution line), or it does not (in which case it will meet the definition of "transmission line" in ORS 215.276(1)(c)). If we are to believe that OAR 660-006-0025(4)(q) establishes some sort of third category of

intermediate non-local distribution line that serves a different function from either the "transmission lines" as defined in ORS 215.276(1)(c) and "local" lines as defined in subsection 3(c), it is certainly not obvious what function such a "distribution line" would serve. Stated another way, gas lines either serve local users (in which they fall under OAR 660-006-0025(3)(c), or they don't (in which case there are transmission lines under ORS 215.276. In light of this fact, the term "distribution line" as used in OAR 660-006-0025(4)(q) must mean the same thing as "transmission line" as that term is defined in ORS 215.276(1)(c).

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

Finally, the legislative history[8] of ORS 215.276 conclusively resolves any question about whether the definition of "transmission line" in ORS 215.276(1)(c) meaning and intent. ORS 215.276 was enacted in the 2009 legislative session. *See* House Bill 3153 (2009). On its face, the law applies only to EFU land, was intended to provide requirements for "transmission line" installers to consult with owners of farm land during the siting process.

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

> (1)(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.
>
> * * * * *.
>
> (3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

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

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

> But, contrary to this court's pronouncement in *PGE*, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step -- consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis.

Although the initial version of the bill was controversial, the final "Dash-11" amendments proved to be rather low-key and non-controversial. Northwest Natural Gas, Portland General Electric, League of Oregon Cities, Oregon Rural Electrical Cooperative Association, 1000 Friends of Oregon, and the Oregon Farm Bureau all testified at various public hearings in favor of the bill, as amended. At no point in the proceedings did any member of the legislature or any commenter opine that the effect of the bill was to prohibit the siting of interstate gas transmission pipelines on Forest land. In particular, Northwest Natural Gas, who owns and operates a large number of "transmission lines," would obviously not have testified in favor of a bill had the intent been to effectively make all gas pipelines that do not provide local service a prohibited use in the Forest zone.

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

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

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

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

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

Ms. Jody McCaffree argues that there is a high potential for landslides resulting from steep terrain in the vicinity of the location where the proposed route crosses the Coos River. *See* letter from Jody McCaffree dated October 7, 2013, at p. 18. She asserts that these landslides will have a negative effect on water quality. She supports her argument by citing to PCGP's "Resource Report 10," at p. 29. In that report, PCGP criticized what was then called the

"Landowner Amended Route" on the grounds that the location the opponents proposed for crossing the Coos River "would likely be infeasible for an HDD because of the topographic conditions on the north side of the river." Ms. McCaffree states that the alternative route proposed by the applicant in this case is "very close" to the "Landowner Amended Route" that PCGP criticized in its report. Thus, according to Ms. McCaffree, the PCGP report undermines any conclusion that the route proposed in this application is feasible.

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

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

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

And speaking of evidence of limited value, Ms. McCaffree also provides pictures which purport to show the effects of hydraulic fractures occurring in Coos County during the installation of the 12-inch pipe by MasTec, Inc. in 2003. *See* Exhibit E to McCaffree Letter dated October 7, 2013. These pictures are not correlated or authenticated to any specific location or map, and therefore, the photos are of limited value to the hearings officer. Furthermore, there is no expert testimony explaining the circumstances of these alleged frack-outs. Nonetheless, because of other testimony submitted in this case, as well as the hearings officer's recollection of the MasTec Inc. issue from the record in HBCU 10-01, the hearings officer is willing to view these photos as providing some evidence of the fact that things did not always go according to plan when the MasTec Inc. pipeline was constructed. However, even assuming for sake of argument that the

photos relate to HDD fractures and unplanned releases of drilling mud, it is unclear whether such HDD fractures were causes by the lack of experience of the MasTec Inc. contractors, or whether there was something inherent in the terrain and geology in Coos County that made it unsuitable for HDD operations. It is only the latter situation that would have direct relevance here, and without any evidence to connect these dots, the hearings officer is not inclined to give this testimony much weight.

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

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

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

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

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

Despite these conclusions, there is one aspect of the GeoEngineers letter that causes great concern. Although, surprisingly, no opponents flagged the issue, the report contains a paragraph entitled "Hydraulic Fracture and Inadvertent Returns" *in which potentially serious concerns over potential fracturing are raised by the applicant's own experts*:

> In general, it is our opinion that there is a relatively high risk of hydraulic fracture along the conceptual HDD profile. The risk of inadvertent surface returns is considered moderate along the alignment. However, the risk of inadvertent returns increases to high within approximately 150 feet of entry and exit.
>
> The contractor's means and methods, effectiveness at cleaning cuttings from the pilot and reamed holes, and the ability to maintain drilling fluid returns will be instrumental in reducing the risk of hydraulic fracture and inadvertent returns during construction.

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

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

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

The proposed condition 17b reads as follows:

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

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

d. Horizontal Directional Drill

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

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

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

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

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

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

Note: The hearings officer understands that there may be other means to ensure a successful HDD bore, and suggests this proposed condition as one of several possible

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

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

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

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

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

One common theme throughout much of the testimony provided by opponents stems from the concern that a gas pipeline would create secondary problems such as explosions and fire if the County is hit by a tsunami or earthquake. This issue was previously discussed in the County's decision in Final Decision and Order No. 10-08-045PL, pages 22-26. That discussion is incorporated herein by reference.

As far as tsunamis are concerns, the hearings officer can envision no risk that would affect the segment of the pipeline at issue here.

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

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

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

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

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

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

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

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

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

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

subject to the provisions of LDO 5.8.200 with the Board of Commissioners serving as the Hearings Body, and the related notice provisions, of LDO 5.0.900(A).

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

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

6. Request for Stay.

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

B. Coos Bay Estuary Management Plan (CBEMP)

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

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

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

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

1. CCZLDO Section 4.5.100.

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

2. CCZLDO Section 4.5.150.

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

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

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

3. CCZLDO Section 4.5.180(1).

CCZLDO Section 4.5.180(1) provides as follows:

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

1. Riparian vegetation within 50 feet of a estuarine wetland, stream, lake or river, as identified on the Coastal Shoreland and Fish and Wildlife habitat inventory maps, shall be maintained except that:

a) Trees certified by the Coos Soil and Water Conservation District, a port district or U.S. Soil Conservation Service posing an erosion or safety hazard may be removed to minimize said hazard; or

b) riparian vegetation may be removed to provide direct access for a water-dependent use; or

c) Riparian vegetation may be removed in order to allow establishment of authorized structural shoreline stabilization measures; or

d) Riparian vegetation may be removed to facilitate stream or streambank clearance projects under a port district, ODFW, BLM, Soil & Water Conservation District, USFS stream enhancement plan; or

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

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

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

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

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

4. 20-Rural Shorelands (20-RS)

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

> ***SPECIFIC BOUNDARIES:*** *This district consists of the majority of both shores of the Coos-Millicoma Rivers, plus Daniels and Lillian Creeks, from the mouth to above the heads-of-tide. The district does not include the Harbor Barge and Tug site, the barge site at the river forks or the log sorting sites at Allegany and Dellwood. Western Boundary - The north shore boundary begins at the eastern edge of the Christianson Ranch dike. The south shore boundary begins at the junction of East Catching Slough Road and Gunnell Road. Eastern Boundary - The district ends 1000-feet above heads-of-tide of the Coos and Millicoma Rivers.*

The proposed alternative pipeline route crosses the 20-RS zoning district. This segment of the pipeline is located on the south bank of the Coos River. Section 4.5.546(15)(a) lists the use as permitted subject to CBEMP Policies 14, 17, 18, 22, 23, 27, 28, 34, 49, 50 and 51.

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

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

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

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

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

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

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

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

5. 20-Conservation Aquatic (20-CA)

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

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

> ***Section 4.5.550*** *Management Objective: This aquatic district shall be managed to allow log transport while protecting fish habitat. Log storage shall be allowed in areas of this district which are near shoreland log sorting areas at Allegany, Shoreland District 20C, and Dellwood, Shoreland District 20D, as well as in areas for which valid log storage and handling leases exist from the Division of State Lands.*
>
> *SPECIFIC BOUNDARIES: This district extends from the banks to the shallow-draft channel on both sides of the Coos and Millicoma Rivers from River Mile 0 of the authorized channel to the heads-of-tide past Allegany and Dellwood. The district does not include the aquatic areas directly in front of the Harbor Barge and Tug facility, the barge site at the forks or the log sorting sites at Allegany and Dellwood. It does include the tidal portions of Lillian Creek and Daniels Creek.*
>
> ***SECTION 4.5.551. Uses, Activities and Special Conditions.*** *Table 20-CA sets forth the uses and activities which are permitted, which may be permitted as conditional uses, or which are prohibited in this zoning district. Table 20-CA also sets forth special conditions which may restrict certain uses or activities, or modify the manner in which certain uses or activities may occur. Reference to "policy numbers" refers to Plan Policies set forth in the Coos Bay Estuary Management Plan.*

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

As conditioned, the management objective is met.

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

1. CCZLDO Section 4.6.210 and CCZLDO Section 4.6 215.

CCZLDO Sections 4.6.210 and 4.6 215 provide as follows:

> *CCZLDO SECTION 4.6.210. Permitted Uses.*
>
> *In a district in which the /FP zone is combined, those uses permitted by the underlying district are permitted outright in the /FP FLOATING ZONE, subject to the provisions of this article.*
>
> *CCZLDO SECTION 4.6.215. Conditional Uses.*
>
> *In a district with which the /FP is combined, those uses subject to the provisions of Article 5.2 (Conditional Uses) may be permitted in the /FP FLOATING ZONE, subject to the provisions of this article.*

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

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

SECTION 4.6.230 provides as follows:

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

4. Other Development. "Other development" includes mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of a special flood hazard, but does not include such uses as normal agricultural operations, fill less than 12 cubic yards, fences, road and driveway maintenance, landscaping, gardening and similar uses which are excluded from definition because it is the County's determination that such uses are not of the type and magnitude to affect potential water surface elevations or increase the level of insurable damages.
Review and authorization of a floodplain application must be obtained from the Coos County Planning Department before "other development" may occur. Such authorization by the Planning Department shall not be issued unless it is established, based on a licensed engineer's certification that the "other development" shall not:
a. result in any increase in flood levels during the occurrence of the base flood discharge if the development will occur within a designated floodway; or,
b. result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.

Compliance with CCZLDO §4.6.230 is raised by Veneita and Duffy Stender in a letter dated September 20, 2013, but without any substantive analysis. Record Exhibit 14.

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

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

See staff report, dated Sept. 13, 2013, at p. 19.

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

Furthermore, the PCGP will be installed below existing grades and no permanent structures will be placed above existing grades within the FEMA 100-year floodplain. In addition, at the completion of the PCGP installation, all construction areas will be restored to their pre-construction grade and condition. Flood plain compliance will be verified prior to construction and the issuance of a zoning compliance letter. The applicant will use installation methods and mitigation measures to avoid or minimize flotation, collapsing, or lateral movement. A floodplain application addressing the requirements of other development must be obtained from

the Coos County Planning Department before the start of the project. Pursuant to CCZLDO § 4.6.285, the county may issue a permit on the condition that all applicable local permits are or will be obtained; therefore, the hearings officer has added a suggested condition of approval.

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

CCZLDO Section 4.6.235 provides as follows:

> *SECTION 4.6.235. Sites within Special Flood Hazard Areas.*
>
> *1. If a proposed building site is in a special flood hazard area, all new construction and substantial improvements (including placement of prefabricated buildings and mobile homes), otherwise permitted by this Ordinance, shall:*
> [remainder of text omitted here, but set forth below]

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

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

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.

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

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

1. CCZLDO §4.8.300(F).

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

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

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

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

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

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

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

> Because the provision mentions "electrical transmission lines" separately from "distribution lines," which, by the given list of examples, include more than just electrical lines, it is not clear that *non*-electrical *transmission* lines are allowed under the provision. The definitions section of the county code makes no distinction between transmission lines and distribution lines, though it does define utility "service lines" to include "distribution lines" for both electrical and non-electrical utility services. In any event, the applicant has the burden of showing how the proposed natural gas pipeline, which seems to be merely transmitting natural gas through the county (from the proposed LNG import facility to the main north-south interstate pipeline that transmits natural gas though multiple western states between the Canadian and Mexican borders), rather than distributing it to any Coos County users, falls within the defined administrative conditional use.

"distribution line" within the meaning of OAR 660-006-0025(4)(q). In any event, the hearings officer further concludes that even if the application is proposing an interstate gas "transmission" line, and even if CCZLDO §4.8.300(F) and OAR 660-006-0025(4)(q) could be read to bar such gas transmission lines in a Forest zone, those laws would be preempted by the Natural Gas Act .

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

2. SECTION 4.8.400.

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

> ***(1) A use allowed under ORS 215.213 (Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993) (2) or (11) or 215.283 (Uses permitted in exclusive farm use zones in nonmarginal lands counties) (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:***
>
> ***(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or***
>
> ***(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.***

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

> *– A use authorized by Section 4.8.300 ... may be allowed provided the following requirements are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands.*
>
> *A. The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands; and*

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

standard can be met.

The Staff Report for this case states:

> FINDING: Due to the fact that the farm and forest criteria are similar they are reviewed in one section. This review is only for about 3.7 miles of pipeline of which 1.7 is FMU and 1.2 will be in EFU which is minimal in comparison to the entire project which was found to be meet this criteria in the Board of Commissioners Final Decision and Order No. 10-08-045PL, dated September 8, 2010, as ratified by Final Decision and Order No. 12-03-018PL, dated March 13, 2012.
>
> The applicant must show that the use will not force a significant change in, or significant increase in cost of accepted farming or forest practices on agricultural or forestlands. Accepted forest practices can best be defined as the propagation, management and harvesting of forest products, consistent with the Oregon Forest Practices Act; however, by inclusion of listed uses in LDO there are other uses that can co-exist with these practices such as a gas distribution line.
>
> The prior Board adopted language that would mitigate for a loss of income and the current Board may choose to adopt the same method to mitigate the loss of income from forest practices.
>
> The applicant submitted testimony in the prior review from an expert (see attached pages 97 and 98 of Final Decision of Coos County Board of Commissioners Order No. 10-08-045PL) that stated that incremental increase to cost to timber operator generally amount to a range of 1 to 2 percent and staff finds that analysis applies to this application as well. The applicant will include any loss of forest production as part of the compensation paid to landowners by the pipeline operator; therefore, alleviating any cost of the property owners.
>
> In summary the applicant has shown that there will be no significant increased cost in accepted forest practices.
>
> Accepted farm use can be defined as means of current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry of any combination thereof. "Farm use" includes the preparation and storage of the products raised on such land for

human use and animal use and disposal by marketing or otherwise. However, by inclusion of listed uses in the LDO there are other uses that can co-exist with these practices.

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

The applicant will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel or equipment. The pipeline itself will be located underground and shall be maintained to conform with or exceed US Department of Transportation (DOT) requirements found in Title 49 Code of Federal Regulation (CFR), Part 192 *Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards; 18 CFR §380.15, Site and Maintenance Requirements;* and other applicable federal and state regulations. In the upland areas, vegetation within the permanent easement will periodically be maintained by mowing, cutting and trimming either by mechanical or hand methods. The permanent easement will be maintained in a condition where trees or shrubs greater than six feet tall will be controlled (cut or trimmed) within 15 feet either side of the centerline (for a total of 30 cleared feet). This will limit the overall fuel load within the corridor while discouraging the growth of "ladder fuels" that otherwise could allow fire to reach the lower limbs of mature trees.

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

The Board of Commissioners has already adopted the interpretation that the pipeline (distribution line) does not meet the definition of a structure which is a walled and roofed building including a gas or liquid storage tank that is principally above ground. This is a linear pipe that is completely located underground and the pipe is connected to a structure but cannot itself be defined as a structure. The Board made this interpretation in the Board of Commissioners

Final Decision and Order No. 10-08-045PL, dated September 8, 2010, as ratified by Final Decision and Order No. 12-03-018PL, dated March 13, 2012. § 4.8.600, § 4.8.700, § 4.8.750, § 4.9.600 and §4.9.700 only applies to structures and are not relevant to this review. Therefore, all of the criteria have been satisfied.

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

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

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

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

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

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

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

occasionally rupture, and cause death and serious to persons who happen to be in the vicinity at the time of the accident. *See* Discussion from HBCU 10-01, at p. 43-44.

However, the vast majority of these ruptures occur on older pipelines that were built without the benefit of modern technology. *Id.* Mr. Malone's argument is akin to pointing out that many cars from the 1950s are unsafe because they have poorly designed brakes, lack seatbelts and airbags, and tend to explode upon impact. Like modern cars, modern gas pipelines are subject to more exacting safety requirements that will significantly minimize the risk of a fire caused by the pipeline itself. Specifically, modern pipelines and all associated facilities are designed and maintained to conform with or exceed US Department of Transportation (DOT) requirements found in Title 49 Code of Federal Regulations (CFR), Part 192 *Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards*; 18 CFR § 380.15, *Site and Maintenance Requirements*; and other applicable federal and state regulations. Given the technology used in modern pipelines, Mr. Malone's argument about pipeline ruptures tends to support the conclusion that it presents overall sound policy to be replacing older gas pipelines with newer lines. However, it does not necessarily suggest that proposed pipeline projects should be denied due to impacts upon Forest lands.

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

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

> The cost of clearing the right-of-way and construction areas will be borne solely by Pacific Connector. In other words, the property owner will not pay for tree removal, pipeline construction, or restoration and revegetation activities. Additionally, pursuant to federal law, the underlying landowner will be compensated for both

> the permanent and temporary easement rights and the fair market value of the timber removed temporarily (the construction areas and the outer 10 feet on each side of the permanent right-of-way) and permanently (the 30 foot clearing), either through a negotiated agreement with Pacific Connector or through a formal condemnation process if an agreement cannot be reached. Timber cruises would be conducted in accordance with industry standards prior to vegetation clearing in order to determine timber volumes, values, and species composition. All timber cleared would be cut and cleared in accordance with landowner requirements whenever practicable, and merchantable timber would be removed and sold according to landowner stipulations.

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

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

Additionally, surrounding forestry operators will also be able to cross the right-of-way for the alternate alignments with heavy hauling and logging equipment, provided they coordinate those crossings with the pipeline operator and safety precautions are implemented to protect the integrity of the alternate alignments. For example, it may be necessary to provide additional cover directly over the areas of the alternate alignments to provide equipment crossing areas and logging roads. If a landowner demonstrates a need to cross areas of the alternate alignments in order to conduct forestry operations, Pacific Connector has stated that it "is committed to working with that property owner to develop an alternate alignment crossing plan that allows the access points to be constructed and used in a safe manner." *See* Letter dated Sept. 16, 2013 from Rodney P. Gregory and Bob Peacock, Williams Pipeline Co., at p. 13. The property owner will generally be compensated for any additional cost created by compliance with the pipeline crossing plan as it relates to the proposed alternate alignments. While the requirement to coordinate with the pipeline operator may be an inconvenience for some forest operators, it does not constitute a significant change in forestry operations, because the operator will be able to continue to cross the pipeline area in order to access or haul timber. Additionally, timber operators generally develop and carefully consider future harvesting and access plans. The need to consult with the pipeline operator if those plans include future crossings of the pipeline right-of-way is not a significant imposition or significant change in normal planning activities. The coordination requirement will also not significantly increase the cost of conducting forestry operations, as the operator will be compensated for any increase in cost created by the presence of the pipeline or any of the proposed alternate alignments.

For the reasons set forth above, the alternate alignments will not cause a significant change in accepted farming or forest practices, nor will they cause a significant increase in the cost of farm or forest practices on either surrounding farm or forestlands, or on farming or forest practices within the permanent right-of-way itself.

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

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

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

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

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

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

- High cost of fire trucks,
- No equipment to fight a gas fire,
- Lack of adequate rural roads,

- Unstable land,
- Presence of open coal seams,
- Low areas are too soft and high ground too rugged,

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

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

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

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

Attorney Courtney Johnson, arguing on behalf of Oregon Shores and other parties, notes that the difficult terrain and geologic hazards will create an "increased risk of fire." *See* Letter from Courtney Johnson, dated Sept. 20, 2013, at p. 2. It is not clear to the hearing officer how "difficult terrain" and "geologic hazards" increases the likelihood that a gas pipeline will *cause* a

forest fire. Reading between the lines, the hearings officer assumes that Ms. Johnson is really arguing that difficult, mountainous terrain *can impede efforts to extinguish a fire* caused by a pipeline, should one occur. Stated another way, the argument appears to be that a fire occurring in difficult, mountainous terrain will likely result in a larger area being burned due to the fact that it is more difficult to extinguish.

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

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

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

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

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

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

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

Additionally, each landowner impacted by the alternate alignment segments will be compensated for any temporary and permanent impacts associated with the alternate alignments. Any landowner requirements will be added as stipulations in the landowner agreements, and Pacific Connector will employ land agents during construction of the alternate alignments to ensure the stipulations are implemented. In addition to landowner compensation, a variety of measures will be implemented to ensure that construction activities associated with the alternate alignments will not impact the ability of landowners to continue normal farming operations following construction. Specific steps will be taken to eliminate or mitigate agricultural impacts.

First, topsoil segregation will be performed over the trench line in croplands, hayfields, and pastures. Pacific Connector will stockpile soil from the trench pile separately from all subsoil and will replace the two horizons in the proper order during backfilling and final grading. The purpose of the topsoil segregation is to prevent the potential loss of soil fertility or the incorporation of excess rock into the topsoil. Pacific Connector will also remove any excess rock from the top 12 inches of the soil to the extent practicable in croplands, hayfields, and pastures. In cases where additional topsoil must be imported into agricultural areas, an independent environmental investigator will ensure that the imported topsoil is free of noxious weeds or other deleterious materials, such as rock.

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

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

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

be determined during those discussions with individual landowners to ensure that the reclamation actions are appropriate for each specific crop type or land use.

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

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

3. Section 4.8.600, Section 4.8.700 and Section 4.8.750

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

Mandatory Siting Standards

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

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

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

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

c. CCZLDO Section 4.8.750 (Development Standards).

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

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

The applicant notes that the two (2) proposed alternative pipeline segments will cross approximately 1.2 miles of property in Coos County which are zoned Exclusive Farm Use (EFU). All of this property is privately owned. The hearings officer concludes that the pipeline is

consistent with the requirements of ORS Chapter 215, OAR 660, Division 33, and the applicable approval criteria of the CCZLDO.

1. CCZLDO Section 4.9.300

CCZLDO §4.9.300 provides as follows:

> *Administrative Conditional Uses. The following uses and their accessory uses may be allowed as administrative conditional uses in the "Forest" zone subject to applicable requirements in Section 4.8.400 and applicable siting criteria set forth in this Article and elsewhere in this Ordinance. § 4.8.300(F) New electrical transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal) with rights-of way 50 feet or less in width.*

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

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

CCZLDO §4.9.450 is more or less a direct codification of ORS 215.283(1)(c).[11] CCZLDO §4.9.450 provides:

> The following uses and their accessory uses may be allowed as hearings body conditional uses in the "Exclusive Farm Use" zone and "Mixed Use" overlay subject to the corresponding review standard and development requirements in Sections 4.9.600[12] and 4.9.700.[13]

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

> (1) The following uses may be established in any area zoned for exclusive farm use: * * * *.
>
> (c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275.

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

[13] CCZLDO 4.9.700 Development Standards for dwellings and structures (CCZLDO 2.1.200 defines "Structure: Walled and roofed building includes a gas or liquid storage tank that is principally above ground." The proposed pipeline is not a "structure" under this definition and therefore the siting standards do not apply.

* * * * * *.

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

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

Under state law, utility facilities sited on EFU lands are subject to ORS 197.275, as well as the administrative rules adopted by LCDC.[14] ORS 215.275 provides:

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[14] OAR 660-033-0130(16) provides as follows:

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

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

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

(a) Technical and engineering feasibility;

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

(c) Lack of available urban and nonresource lands;

(d) Availability of existing rights of way;

(e) Public health and safety; and

(f) Other requirements of state or federal agencies.

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

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

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

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

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

The negative inference created by the stated exceptions to subsections 2 through 5 is that an applicant for an interstate natural gas pipeline is, *technically speaking,* supposed to be subject to ORS 215.275(1). This subsection contains the requirement that the applicant show that the proposed facility "is necessary for public service." According to subsection 2, the "necessary for public service" requirement is met if the applicant demonstrates that "the facility must be sited in an exclusive farm use zone in order to provide the service." Of course, given that the determination of whether something is "necessary" is dependent on analysis which is set forth in subsections 2 through 5, it remains unclear exactly what an applicant proposing a natural gas pipeline is required to do to demonstrate that its facility is "necessary." LCDC seems have recognized this in their administrative rule implementing ORS 215.275, as they exempt FERC-regulated pipelines from the "necessary for public service" test. *See* OAR 660-033000139(16).[15]

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

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

(A) Technical and engineering feasibility;

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

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.

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

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

Given the nature of ORS 215.275(2)-(5), the hearings officer concludes that ORS 215.275(1) contains no substantive standards applicable to interstate natural gas pipelines, but even if it did, those requirements would be preempted by federal law.

As the County pointed out in HBCU 10-01, the case law makes clear that the issue of whether new gas pipelines are "needed" is not relevant to any approval standard contained in ORS 215.275 or CCZLDO §4.9.450. *Sprint PCS v. Washington County*, 186 Or.App. 470, 63 P.3d 1261 (2003); *Dayton Prairie Water Ass'n v. Yamhill County*, 170 Or.App. 6, 11 P.3d 671 (2000).

F. CBEMP Policies – Appendix 3 Volume II

1. Plan Policy #5

#5 Estuarine Fill and Removal

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

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

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

c. No feasible alternative upland locations exist; and

d. Adverse impacts are minimized.

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

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

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

(f) The provisions of subsections 16(a) to (d) of this rule do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

f. *The activity is consistent with the objectives of the Estuarine Resources Goal and with other requirements of state and federal law, specifically the conditions in ORS 541.615 and Section 404 of the Federal Water Pollution Control Act (P.L.92-500).* (Emphasis added).

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

In her letter dated Sept. 27, 2013, Jody McCaffree cites CBEMP Policy 5 (I)(b), which requires that an applicant who is proposing dredging and fill operations in an estuary to show that "a need (*i.e.*, a substantial public benefit) is demonstrated," and that "the use or alteration does not unreasonably interfere with public trust rights." Ms. McCaffree does not explain why a policy involving dredging and/or removal or filling applies to this particular project, and it is not apparent to the hearings officer why it would apply to this case.

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

Although Ms. McCaffree does not cite to it, the code language she references has its origins in Statewide Planning Goal 16. Under the Section of the Goal entitled "Implementation Requirements," the following is provided:

> *2. Dredging and/or filling shall be allowed only:*
> *a. If required for navigation or other water-dependent uses that require an estuarine location or if specifically allowed by the applicable management unit requirements of this goal; and,*
> *b. If a need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights; and*
> *c. If no feasible alternative upland locations exist; and,*
> *d. If adverse impacts are minimized.*

Coos County's Zoning Code defines the terms "dredging" and "fill" as follows:

> *DREDGING: The removal of sediment or other material from a stream, river, estuary or other aquatic area: (1) Maintenance Dredging refers to dredging necessary to maintain functional depths in maintained channels, or adjacent to existing docks and related facilities; (2) New Dredging refers to deepening either an existing authorized navigation channel or deepening a natural channel, or to create a marina or other dock facilities, or to obtain fill for the North Bend Airport runway extension project; (3) Dredging to Maintain Dikes and Tidegates refers to dredging necessary to provide material for existing dikes and tidegates; (4)*

Minor dredging refers to small amounts of removal as necessary, for instance, for a boat ramp. Minor dredging may exceed 50 cubic yards, and therefore require a permit.

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

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

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

A general overview of the Public Trust Doctrine is provided here to provide background to the Board on this issue. *See generally Illinois Central Railroad v. Illinois*, 146 U.S. 387, 13 S Ct 110, 36 L Ed 1018 (1892); *Shively v. Bowlby*, 152 U.S. 1, 54-55, 58 (1983), *aff'd sub nom. Bowlby v. Shively*, 30 P. 154 (Or. 1892); *Morse v. Division of State Lands*, 34 Or App 853, 859, 581 P2d 520 (1978), *aff'd* 285 Or 197, 590 P2d 709 (1979). *Brusco Towboat v. State Land Bd.*, 30 Or App 509, 567 P2d 1037 (1977), *aff'd in part as modified, rev'd in part,* 284 Or 627, 589 P2d 712 (1978); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–89 (1970).

Under English common law, title to lands underlying tidal waters was held by the king as an element of sovereignty. After the American Revolution, each of the original colonies became

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

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

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

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

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[16] *Shively v. Bowlby*, 152 U.S. 1, 14 S Ct 548, 38 L Ed 331 (1894); *Mumford v. Wardwell*, 73 U.S. (6 Wall) 423, 18 L Ed 756 (1867); *Pollard's Lessee v. Hagan et al.*, 44 U.S. (3 How) 212, 11 L Ed 565 (1845); *Martin v. Waddell*, 41 U.S. (16 Pet) 366, 410, 10 L Ed 997 (1842).

[17] *United States v. Holt Bank*, 270 U.S. 49, 46 S Ct 197, 70 L Ed 465 (1926); *Scott v. Lattig*, 227 U.S. 229, 33 S Ct 242, 57 L Ed 490, 44 LRA (ns) 107 (1913); *Shively v. Bowlby*, 152 U.S. 1, 14 S Ct 548, 38 L Ed 331 (1894).

> "The Supreme Court upheld the state's claim and wrote one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of a state legislature. It is that result which has made the decision such a favorite of litigants. But the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited. What a state may not do, the Court said, is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power; to grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation."

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

> "* * * what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use. * * *.
>
> "* * *.
>
> "These traditional cases suggest the extremes of the legal constraints upon the states; no grant may be made to *a private party* if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely *because it diminishes in some degree the quantum of traditional public uses*." (Emphasis added.)

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

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

This discussion brings us back to the point asserted by Ms. McCaffree. In her letter dated October 7, 2013, she quotes a sentence out of Professor Michael Blumm's 2012 law review article, cited above, as follows:

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

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

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

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

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

Id. at 203-4. The Supreme Court went on to read ORS 541.610 in conjunction with ORS 541.625(2) [now ORS 196.825(3)] and concluded:

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

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

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

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

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

Furthermore, the discussion of the Fill and Removal law brings up a final point related to the Public Trust Doctrine. It is the State of Oregon, not Coos County, that owns the *jus publicum* in the navigable waters. *See* ORS 196.825(1) & (2). Since the county does not own the lands subject to the Public Trust Doctrine, it is unclear why the county would seek to independently enforce the doctrine on a landowner. It is true that the county, in an effort to comply with Goal 16, added an approval standard for Fill and Removal in an estuary which requires that the *use or alteration does not unreasonably interfere with public trust rights.* That requirement is not an absolute prohibition on interference with public trust rights, but does seem to establish some

limits based on the reasonableness of such interference. Nonetheless, it is ultimately a question for DSL (*i.e.* the state agency tasked with implementing the Fill and Removal law) to resolve. Statewide Planning Goal 16 Implementation Requirement 3 states:

> *3. State and federal agencies shall review, revise, and implement their plans, actions, and management authorities to maintain water quality and minimize man-induced sedimentation in estuaries. Local government shall recognize these authorities in managing lands rather than developing new or duplicatory management techniques or controls. Existing programs which shall be utilized include:*
>
> * * * * *.
>
> *d. The Fill and Removal Permit Program administered by the Division of State Lands under ORS 541.605 - 541.665.* (Emphasis Added).

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

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

Plan Policy 5 does not apply.

#5a Temporary Alterations

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

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

a. The temporary alteration is consistent with the resource capabilities of the area

(see Policy #4);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "The proposed LNG terminal is an industrial and port facility that is water-dependent and consistent with the uses allowed in the 6-WD

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

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

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

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

Under Policy #14, the pipeline must be considered a necessary component of the primary industrial and port facilities use, at least in zoning district 6-WD, where the pipeline segment situated within the boundaries of JCEP's LNG terminal is connected to the LNG terminal meter station at MP00.00, and where other LNG terminal components were described in the decision approving the LNG terminal as "associated facilities." Compare how that same term is utilized in

ORS 215.275(6): "The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.

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

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

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

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

Furthermore, even to the extent that the hearings officer were to agree with Ms. McCaffree that, as a general matter, that the applicant has the burden to demonstrate that "for each rural shoreland management unit impacted by the application, the pipeline cannot be re-routed to non-

shoreland areas or shoreland areas committed to non-resource use," the result would not change. By any reasonable interpretation of Policy 14, it seems apparent that linear pipeline features will need to cross rural shoreland management units in order to get from the coast to and across the inland portions of Coos County. Given the number of rivers and waterbodies in Coos County, it is apparent that it would not be physically possible to completely avoid any water crossings. Ms. McCaffree's sole alternative in support of this argument is that the County should have considered a route that went North from the LNG terminal, as opposed to a route that went directly to the East. The hearings officer is not convinced that such an alternative would be a feasible alternative that would avoid other rural shoreland management units.

This plan policy is met.

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

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

I. Local government shall protect:

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

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

c. "Coastal headlands"; and

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

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

II. This strategy shall be implemented through:

a. Plan designations, and use and activity matrices set forth elsewhere in this Plan that limit uses in these special areas to those that are consistent with protection of natural values; and

b. Through use of the Special Considerations Map, which identified such special areas and restricts uses and activities therein to uses that are consistent with the protection of natural values. Such uses may include propagation and selective harvesting of forest products consistent with the

Oregon Forest Practices Act, grazing, harvesting wild crops, and low-intensity water-dependent recreation.

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

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

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

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

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

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

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

Over the years, however, the "Coos Bay Estuary Special Considerations Map" was either lost or destroyed, and now Coos County relies directly on the detailed inventory maps to determine the location of specific resources.

The Linkage Matrix is another type of index document. Contrary to Mr. Malone's assertions, it does not state that every square foot of land zoned 20-RS contains "significant wildlife habitat" or "historic & archaeological sites." Rather, it merely recognized that lands with those features exist within the boundary of the 20-RS zone. At this point, the only place where the "significant wildlife habitat" and "historic & archaeological sites" are inventoried is in the Coos Bay Estuary Management Plan's Inventory Maps. Thus, the *specific location* of those features is only found on the inventory maps.

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

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

This plan policy is met.

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

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

> *Local government shall provide protection to historical, cultural and archaeological sites and shall continue to refrain from widespread dissemination of site-specific information about identified archaeological sites.*
>
> *I. This strategy shall be implemented by requiring review of all development proposals involving a cultural, archaeological or historical site, to determine whether the project as proposed would protect the cultural, archaeological and historical values of the site.*
>
> *II. The development proposal, when submitted shall include a Plot Plan, showing, at a minimum, all areas proposed for excavation, clearing and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify the Coquille Indian Tribe and Coos, Siuslaw, Lower Umpqua Tribe(s) in writing, together*

with a copy of the Plot Plan. The Tribe(s) shall have the right to submit a written statement to the local government within thirty (30) days of receipt of such notification, stating whether the project as proposed would protect the cultural, historical and archaeological values of the site, or if not, whether the project could be modified by appropriate measures to protect those values.

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

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

This plan policy is met, as conditioned.

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

Plan Policy 22 States:

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

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

~ "Low Priority" designated mitigation sites are not permanently protected by the Plan. They are intended to be a supplementary inventory of potential sites that could be used at the initiative of the landowner. Pre-emptory uses shall be allowed on these sites, otherwise

consistent with uses and activities permitted by the Plan. Any change in priority rating shall require a Plan Amendment.

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

I. This policy shall be implemented by:

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

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

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)."

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

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

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

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

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

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

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

6. Plan Policy #23 Riparian Vegetation and Streambank Protection

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

> *I. Local government shall strive to maintain riparian vegetation within the shorelands of the estuary, and when appropriate, restore or enhance it, as consistent with water-dependent uses. Local government shall also encourage use of tax incentives to encourage maintenance of riparian vegetation, pursuant to ORS 308.792 - 308.803.*
>
> *Appropriate provisions for riparian vegetation are set forth in the CCZLDO Section 4.5.180 (OR 92-05-009PL).*
>
> *II. Local government shall encourage streambank stabilization for the purpose of controlling streambank erosion along the estuary, subject to other policies concerning structural and non-structural stabilization measures.*
>
> *This strategy shall be implemented by Oregon Department of Transportation (ODOT) and local government where erosion threatens roads. Otherwise, individual landowners in cooperation with the Oregon International Port of Coos Bay, and Coos Soil and Water Conservation District, Watershed Councils, Division of State Lands and Oregon Department of Fish & Wildlife shall be responsible for bank protection.*
>
> *This strategy recognizes that the banks of the estuary, particularly the Coos and Millicoma Rivers are susceptible to erosion and have threatened valuable farm land, roads and other structures.*

Staff addresses Policy 23 as follows:

> Section 4.5.180 Riparian Protection Standards in the Coos Bay Estuary Management Plan requires riparian vegetation protection within 50-feet of an inventoried estuarine wetland, lake, or river with the following exception: (e) Riparian vegetation may be removed in order to site or properly maintain public utilities and road right-of-ways, provided that the vegetation to be removed is the minimum necessary to accomplish the purpose…The pipeline is a public utility project, and therefore is not subject to the 50-foot riparian vegetation protection. Riparian vegetation may be removed in order to site the pipeline pursuant to the exemption cited above, so long as it is the minimum necessary to accomplish the purpose. Also, the applicant must comply with all FERC requirements for

> wetland and water bodies protection and mitigation both during and after construction, and will restore riparian vegetation 25 feet from the streambanks on either side of water bodies on private lands where riparian vegetation existed prior to construction, consistent with the applicant's erosion control and re-vegetation plan.

See Staff Report dated Sept. 13, 2013, at p. 14.

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

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

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

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

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

In a section of a letter containing the heading "CBEMP Policy 18," attorney Sean Malone argues that the "applicant has not demonstrated that the riparian vegetation that will be removed to install the pipeline will be the minimum necessary." *See* letter dated September 20, 2013, at p. 4. Record Exhibit 13. The hearings officer assumes that the argument is intended to be directed at Plan Policy 23. In its Erosion Control and Revegetation Plan, the applicant said that it will only remove as much vegetation as is needed to construct the pipeline, and has provided plans to re-vegetate disturbance areas. The applicant has previously agreed to a condition making it

responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the utility facility. Mr. Malone does not address those plans or otherwise explain why they are deficient, and it is not apparent that they are lacking in any way.

This plan policy is met.

7. Plan Policy #27 Floodplain Protection within Coastal Shorelands

Plan Policy 27 provides as follows:

> *The respective flood regulations of local government set forth requirements for uses and activities in identified flood areas; these shall be recognized as implementing ordinances of this Plan.*
>
> *This strategy recognizes the potential for property damage that could result from flooding of the estuary.*

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

The applicant addresses this policy by showing compliance with the provisions of Article 4.6. The county has indicated that the Flood Insurance Rate Map (FIRM) is consistent with the Federal Emergency Management Agency's (FEMA) flood hazard map for Coos County. As in the applicant's narrative, the PCGP is consistent with the applicable floodplain approval criteria for all areas identified on the FEMA flood hazard map/FIRM as a designated flood area. The FEMA maps identify the 100-year floodplain, which is typically a larger area than the floodplain[18] and floodway[19] 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.

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

[19] "Floodway" is defined by the CCZLDO as "the normal stream channel and that adjoining area of the natural floodplain needed to convey the waters of a regional flood while causing less than one foot increase in upstream flood elevations." Pursuant to CCZLDO Sections 4.6.205 and 4.6.270 "floodways" are identified as special flood hazard areas in a Federal Insurance Administration report entitled "Flood Insurance Study for Coos County, Oregon and Incorporated Areas" and accompanying maps.

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

Plan Policy 28 provides as follows:

> *Unless otherwise allowed through an Exception, Coos County shall manage all rural lands designated within the Coastal Shorelands Boundary as being suitable for "Exclusive Farm Use" (EFU) designation consistent with the "Agricultural Use Requirements" of ORS 215. Allowed uses are listed in Appendix 1, of the Zoning and Land Development Ordinance.*
>
> *This policy shall be implemented by using the Special Considerations Map (Policy #3) to identify EFU suitable areas, and to abide by the prescriptive use and activity requirements of ORS 215 in lieu of other management alternatives otherwise allowed for properties within the "EFU-overlay" set forth on the Special Considerations Map, and except where otherwise allowed by exceptions for needed housing and industrial sites.*
>
> *The "EFU" zoned land within the Coastal Shorelands Boundary shall be designated as "Other Aggregate Sites" inventories by this Plan pursuant to ORS 215.298(2). These sites shall be inventoried as "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 and 20-RS. These two CBEMP zones list the pipeline as a permitted use. Staff addressed this criterion as follows:

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

Therefore, this criterion has been met.

See Staff Report, at p. 14.

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

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

Subsection 1 of Appendix 4 states, "Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213." ORS 215.213 describes uses permitted in exclusive farm use zones. ORS 215.213(1)(c) permits the following use allowed outright in any area zoned for exclusive farm use: "utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275."[20] As discussed in the EFU zone section of this narrative, the PCGP is a utility facility necessary for public service pursuant to ORS 215.275. Therefore, the PCGP is also an allowed use in those areas identified as Agricultural Lands on the CBEMP Special Considerations Map.

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

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

[20] The County is not one of the two "marginal lands" counties. and so the provisions of ORS 215.213 do not apply. The parallel provisions of Oregon law applicable to marginal lands counties (set forth in ORS 215.283) do apply. ORS 215.283(1)(c) is identical to ORS 215.213(1)(c).

might do. Obviously, an explosion and resulted fire could burn buildings that are nearby, but that does not necessarily prevent the land from being used for farms uses.

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

Finally, the hearings officer agrees that in most cases, it would be appropriate to add condition of approval to the approval to ensure that the pipes will be adequately maintained. However, it is not certain that such a condition is enforceable. Congress has expressly pre-empted a state or local government's ability to regulate issues related to the safety of pipelines. The Natural Gas Pipeline Safety Act of 1968 directs the Secretary of Transportation to establish minimum federal safety standards for the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities used for the transportation of gas. The pipeline company is bound to abide by these safety standards. "'The 'Natural Gas Pipeline Safety Act of 1968' . . . has entered the field of 'design, installation, inspection, testing, construction, extension, operation, replacement and maintenance of pipeline facilities.' . . . As applied to interstate transmission pipelines, the Safety Act must prevail over and pre-empt any state (law).' *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F.Supp. 1138, 1139 (E.D.La. (1970), *aff'd* 445 F.2d 301 (5th Cir. 1971). *See also generally Northern Border Pipeline Co. v. Jackson County,* 512 F.Supp. 1261 (D.Minn.1981) (Natural Gas Pipeline Safety Act of 1968 barred a condition on a construction permit requiring that the gas line be buried a minimum of six feet); *Williams Pipe Line Co. v. City of Mounds View*, 651 F Supp. 551 (1987).

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

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

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

10. Plan Policy #49 Rural Residential Public Services

This policy applies to CBEMP zone 20-RS, and addresses acceptable services for rural residential development. This policy does not apply to the proposal.

11. Plan Policy #50 Rural Public Services

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

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

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

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

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

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

Similarly, courts have held that local regulation of a county or municipality's streets,

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

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

This plan policy is met.

12. Plan Policy #51 Public Services Extension.

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

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

G. <u>Miscellaneous Concerns Unrelated to Approval Criteria</u>.

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

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

The hearings officer pointed out in HCBU 10-01, the Board does not have the ability to propose major changes to the proposed route. Such action is within the purview of FERC, and it is the hearings officer's understanding that the two route changes are being proposed at FERC's request. Nonetheless, comments which express support for the so-called "Blue Ridge" route or

other alternative routes cannot be considered as part of this land use review process. Opponents should raise these types of issues to FERC.

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

2. NEPA Is Not Applicable to this Proceeding.

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

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

NEPA was signed into law on January 1, 1970. Congress enacted NEPA to establish a process for reviewing actions carried out by the federal government for environmental concerns. NEPA imposes certain obligations on the federal government, but not state or local governments. See 42 U.S.C. § 4331(b). The Act establishes national environmental policy and goals for the protection, maintenance, and enhancement of the environment and provides a process for implementing these goals within the federal agencies. NEPA does not generally apply to state or local actions, but rather applies to the decisions of federal agencies, as "major federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added).

A requirement of NEPA is that all agencies of the federal government prepare an environmental impact statement ("EIS") when they undertake or fund "major federal actions" that significantly affect the quality of the human environment, but once again the obligation is on a federal agency and not on a local or state government. 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. § 1501.4 (the Council on Environmental Quality's NEPA regulations also explicitly reference that a federal agency is the responsible party for completing an EIS, "[i]n determining whether to prepare an environmental impact statement the Federal agency shall ... .") (emphasis added).

The courts have also found that "NEPA does not regulate the conduct of private parties or state or local governments. NEPA requires the federal government to issue an environmental impact statement before taking any action 'significantly affecting the quality of the human environment.' 42 U.S.C. § 4332(2)(C). Since NEPA requires only action by the government, no private party can comply with NEPA. It is for that reason that in a lawsuit to compel compliance with NEPA, no one but the federal government can be a defendant." *Forest Guardians v. Bureau of Land Management,* 188 F.R.D. 389, 393 (D.N.M. 1999).

NEPA also establishes the Council on Environmental Quality ("CEQ"). As the Federal agency tasked with implementing NEPA, the CEQ promulgated regulations in 1978

implementing NEPA. *See* 40 CFR Parts 1500-15081. These regulations are binding on all federal agencies. The regulations address the procedural provisions of NEPA and the administration of the NEPA process, including preparation of EISs.

Among the rules adopted by the CEQ is 40 CFR §1506.1, which is entitled "Limitations on actions during NEPA process." This section provides as follows:

> *(a) Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:*
>
> *(1) Have an adverse environmental impact; or*
>
> *(2) Limit the choice of reasonable alternatives.*
>
> *(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.*
>
> *(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:*
>
> *(1) Is justified independently of the program;*
>
> *(2) Is itself accompanied by an adequate environmental impact statement; and*
>
> *(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.*
>
> *(d) <u>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</u>. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.*

Thus, under 40 CFR §1506.1(3)(d), .

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

Of course, the answer is quite simple: the Coos County land use approvals have no effect on the FERC process, as they do not "limit the choice of reasonable alternatives" being considered by the EIS. If, as part of the NEPA process, FERC ends up choosing a different route as the preferred alternative, then the applicant simply has to go back to the drawing board and re-apply for new land use permits. As a case in point, we see exactly taking place here: FERC apparently did not like a portion of the applicant's preferred route, and, as a result, the applicant is back before the County seeking new land use approvals for an alternative route.

Contrary to the position taken by opponents, there do seem to be legitimate reasons why an applicant would seek land use approvals either before seeking FERC approval or via concurrent processes. If the County were to find that land use approval was not forthcoming, then FERC would need to have that into consideration to some extent. *See* 40 CFR 1506(2)(d).[21] However, the reverse is not necessarily true – land use approval does not limit FERC's evaluation in any way.

As the hearing officer stated at the public hearing, the County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. The opponents have identified nothing in the county plan or implementing ordinances or in any other document which makes either the NEPA statute or the Environmental Impact Statement ("EIS") a "plan" provision or other approval criterion for this application. *See Seto v. Tri-Met*, 21 Or LUBA 185, 202 (1991), *aff'd*, 311 Or 456 (1995); *Standard Ins. Co. v. Washington County*, 16 Or LUBA 717 (1988), *aff'd*, 93 Or. App. 78 (1998), *pet for review withdrawn*, 307 Or 326 (1989). The hearings officer has found nothing from his own independent research which would either require or allow the County to put a local land use process on hold pending NEPA review by FERC.

In short, the NEPA process and the state-mandated, County-implemented land use process are operating on separate tracks, and appear to have little, if any, intersection. LUBA has held that in cases where a NEPA process must be undertaken in conjunction with a local land use process, that the NEPA process need not precede the land use process. *Standard Ins. Co.*, 16 Or LUBA at 724. In *Standard Ins. Co.*, LUBA recognized that even after an EIS is prepared, that local comprehensive plans are "subject to future change." *Id.* LUBA acknowledged the

[21] 40 CFR 1506(2)(d) provides:

> To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

possibility that the adoption of a plan amendment or a series of amendments might result in the need to prepare a supplementary EIS. *Id.* (citing *Comm. for Nuclear Responsibility v. Seaborg*, 463 F. 2d 783, (D.C. Cir. 1971)). Nonetheless, LUBA noted that "there is no requirement that a new EIS precede such plan amendments."

Finally, it is worth noting that under NEPA regulations, until a decision is made and an agency issues a record of decision, no action can be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives. The NEPA process is to be implemented at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delay later in the process and to avoid potential conflicts. 40 CFR 1501.2. In this case, FERC will not issue a "Notice to Proceed" until all of its conditions are satisfied. The hearings officer has recommended a condition of approval to ensure that no construction occurs until the Notice to Proceed is issued.

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

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

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

It should also be reasonably clear to all involved that County land use approval of the proposed route should not be viewed by FERC as any sort of endorsement by the County Board of Commissioners. In this regard, PCCG should not attempt to use this case (or the prior approval in HBCU 10-01) as ammunition in the FERC approval process. At best, County land use approval of the pipeline route simply means that, as conditioned, the proposed route does not violate land use standards and criteria.

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

3. Evidence of Past Misdeeds by Pipeline Companies Is Not a Basis for Denial Unless Evidence Shows Impossibility of Performance, as Opposed to a Propensity Not to Perform.

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

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

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

The case of *Stephens v. Multnomah County*, 10 Or LUBA 147 (1984) provides a good example of how LUBA views this type of "prior violations" testimony. The applicant in *Stephens*

was a business that rented out portable toilets. The applicant was seeking a permit to store empty Port-a-Johns on a site. Opponents cited the company's prior history of DEQ violations as a reason for denial. LUBA responded as follows:

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

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

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

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

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

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

regulations prior to the pipeline being placed in service to ensure integrity of materials and construction.

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

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

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

4. "Public Need" or "Public Benefit".

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

Furthermore, there is no general "public need" or "public benefit" standard applicable to land use proceedings. *Compare Hale v. City of Beaverton,* 21 Or LUBA 249 (1991) (Public need

is not an approval criterion) *with Ruef v. City of Stayton*, 7 Or LUBA 219 (1983) (Code standard required that a "public need" for a project be established). Although "public need" became a common code standard after the landmark *Fasano case,* it is no longer a generally applicable criterion in quasi-judicial land use proceedings. *Neuberger v. City of Portland*, 288 Or 155, 170, 603 P2d 771 (1979).

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

5. Compliance with CCZLDO 1.1.200(2).

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

6. Mary Metcalf Letter dated Sept. 4, 2013.

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

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

7. Some of the Opponent's Arguments Were Not Made with Specific Specificity to Enable a Response.

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

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

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

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

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

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

[22] As part of a conditional use process, many zoning codes in Oregon require an applicant to demonstrate that "the proposal is consistent with the goals and objectives of the Comprehensive Plan * * *." The effect of such as provision is to make certain plan policies in the comprehensive plan mandatory approval criteria applicable to individual land use decisions, depending on their context and how they are worded. *See Stephan v. Yamhill County*, 21 Or LUBA 19 (1991), *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990). Coos County has such a standard for zone changes, but not for conditional use permits.

appears to be neither credible nor sufficiently knowledgeable of the actual project being considered to warrant a detailed response.

Generally speaking, an issue is raised with sufficient specificity if either the specific approval criterion or its operative terms are cited, along with some statements or evidence to explain the issue. Conversely, failing to mention either the specific criterion at issue or its operative terms will usually result in a LUBA finding the issue waived. For example, in *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993), LUBA held that an issue was waived because there was no discussion of the specific code provisions or its operative terms. *See also Yontz v. Multnomah County*, 34 Or LUBA 367, 376 (1998) (raising general concerns about "equal protection" locally is not enough to preserve a legal challenge at LUBA based on Art 1, Section 20 of the Oregon Constitution or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution); *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003); *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001); *Bruce Packing Co., Inc. v. City of Silverton*, 45 Or LUBA 334, 350-352 (2003); *Craven v. Jackson County*, 29 Or LUBA 125 (1995), *aff'd*, 135 Or App 428, *rev den.*, 321 Or 512 (1995). *See also Hale v. City of Beaverton*, 21 Or LUBA 249 (1991).[23] *Cf Miller v. City of Joseph*, 31 Or LUBA 472 (1996) (a person can sometimes raise an issue sufficiently without specifically relating that issue to the precise criterion cited to LUBA).

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

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

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

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

(raising issue under ORS 215.284(2)(d) that the proposed facility would not be operated primarily *for* the rural residents of the area is not sufficient to raise an issue to LUBA regarding whether the facility is operated primarily *by* the rural residents of the area.).

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

8. "Independent Review".

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

9. Timber Cut During Pipeline Construction Will "Flood the Market with Timber," Causing a "Negatively Impact" on Timber Prices.

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

10. Requirement for Bonds.

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

III. CONCLUSION AND RECOMMENDATION

For the above stated reasons, the hearings officer concludes that the applicant has met its

burden of proof to demonstrate that it has satisfied all applicable approval standards and criteria, or that those standards or criteria can be satisfied through the imposition of conditions of approval.

A. Staff Proposed Conditions of Approval

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

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

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

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

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

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

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

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

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

1. Pre-Construction

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

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

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

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

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

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

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

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

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

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

17. (a). The pipeline operator shall maintain an emergency response plan in compliance with 49 CFR 192.615.

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

2. Construction

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

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

3. Post-Construction

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

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

22. In order to minimize cost to forestry operations, the applicant agrees to accept requests from persons conducting commercial logging operations seeking permission to cross the pipeline at locations not pre-determined to be "hard crossing" locations. Permission shall be granted for a reasonable number of requests unless the proposed crossing locations cannot be accommodated due to technical or engineering feasibility-related reasons. Where feasible, the

pipeline operator will design for off-highway loading at crossings, in order to permit the haulage of heavy equipment. If technically feasible, persons conducting commercial logging operations shall, upon written request, be allowed to access small isolated stands of timber by swinging logs over the pipeline with a shovel parked stationary over the pipeline, subject to the requirement that, if determined by the applicant to be necessary, the use of a mat or pad is used to protect the pipe. The pipeline operator will determine the need for additional fill or a structure at each proposed hard, and shall either install the crossing at its expense or reimburse the timber operator / landowner for the actual reasonable cost of installing the crossing.

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

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

B. Applicant's Proposed Conditions Of Approval

1. Environmental

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

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

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

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

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

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

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

8. Petroleum products, chemicals, fresh cement, sandblasted material and chipped paint or other deleterious waste materials shall not be allowed to enter waters of the state. No wood treated with leachable preservatives shall be placed in the waterway. Machinery refueling is to occur off-site or in a confined designated area to prevent spillage into waters of the state. Project-

related spills into water of the state or onto land with a potential to enter waters of the state shall be reported to the Oregon Emergency Response System at 800-452-0311.

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

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

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

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

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

2. Safety

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

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

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

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

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

19. At least six (6) months' prior to delivery of any gas to the Jordan Cove Energy Project LNG terminal, the applicant shall: (1) submit a project-specific Public Safety Response Manual to

the County, and (2) in order to comply with federal safety regulations, coordinate with local emergency response groups. Pacific Connector will meet with local responders, including fire departments, to review plans and communicate specifics about the pipeline. If requested, Pacific Connector will also participate in any emergency simulation exercises and provide feed-back to the emergency responders.

3. Landowner

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

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

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

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

4. Historical, Cultural and Archaeological

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

development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of LDO 5.8.200 with the Board of Commissioners serving as the Hearings Body, and the related notice provisions, of LDO 5.0.900(A).

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

5. Miscellaneous

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

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

Respectfully submitted this 17th day of December, 2013.

ANDREW H. STAMP, P.C.

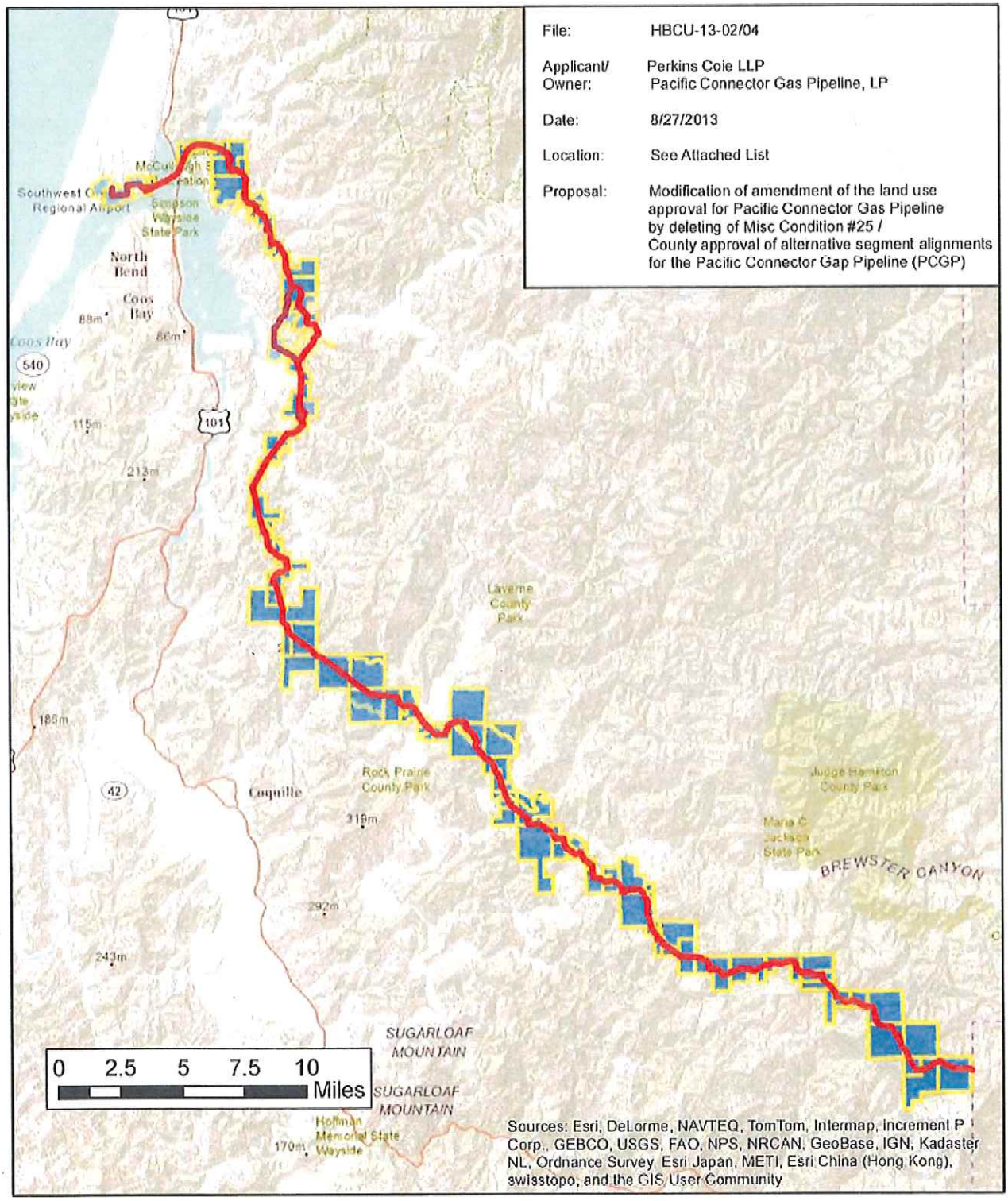
Andrew H. Stamp

Andrew H. Stamp

AHS:ahs
Exhibit 1: Map of Proposed Route.
Exhibit 2: Map of Proposed Route.

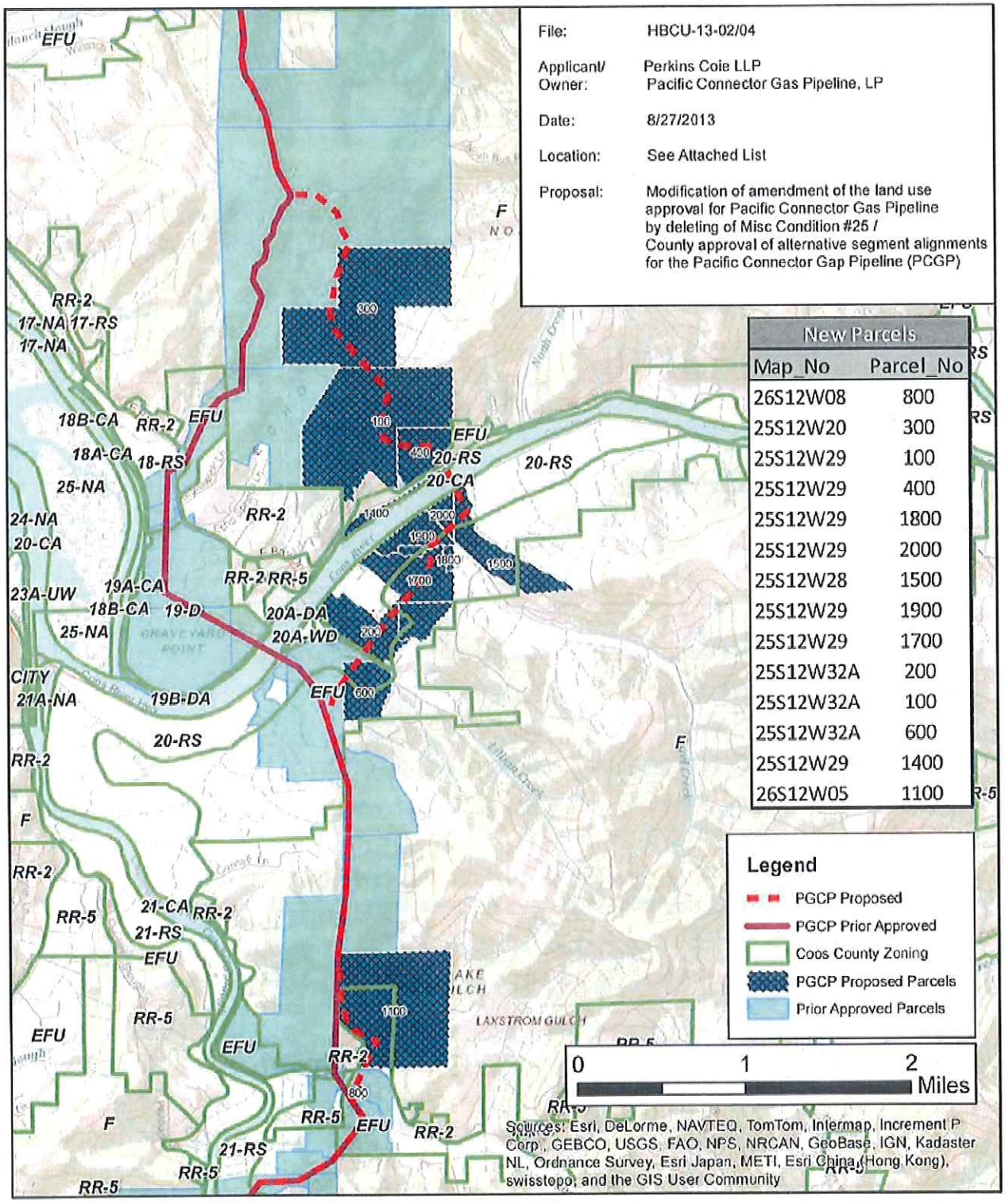
COOS COUNTY PLANNING DEPARTMENT

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



COOS COUNTY PLANNING DEPARTMENT

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



Coos County Planning Department
Land Use Application

Official Use Only
FEE: $2500.00
Receipt No. 152548
Check No./Cash Check received 7/1/13
Date 8/19/13
Received By JR
File No. HBCU-13-04

Please place a check mark on the appropriate type of review that has been requested.

☐ Administrative Review
☐ Site Plan Review
☑ 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, LB Telephone: 503.727.2073
Address: c/o Perkins Coie LLP, Attn: Mark D. Whitlow, 1120 NW Couch Street, 10th Floor
City: Portland State: OR Zip Code: 97209

B. Owner: See Attached Owner and Property List

Name:_____ Telephone: _____
Address: _____
City: _____ State: _____ Zip Code: _____

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).
☑ N/A See Condition of approval 20(a) & (b) of Final Decision and Order No. 12-03-018PL dated March 13, 2012

D. Description of Property: See Attached Owner and Property List

Township _____ Range _____ Section _____ Tax Lot _____

Tax Account _____ Lot Size _____ Zoning District _____

E. Information (please check off as you complete)

See attached owner and property list. 50 miles linear project regarding numerous ownerships and properties - see narrative with exhibits for further explanation.

- ☑ 1. Existing Use See attached list
- ☑ 2. Site Address N/A
- ☑ 3. Access Road N/A
- ☑ 4. Is the Property on Farm/Forest Tax Deferral N/A
- ☑ 5. Current Land Use (timber, farming, residential, etc.) N/A
- ☑ 6. Major Topography Features (streams, ditches, slopes, etc.) N/A
- ☑ 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)
- ☑ 8. Identify any homes or development that exists on properties identified in #8. (N/A)
- ☑ 9. A copy of the current deed of record. (N/A)
- ☑ 10. Covenants or deed restrictions on the property, if unknown contact title company.
- ☑ 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) (NA) Linear project regarding numerous ownerships and properties see application narrative with exhibits

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 alternative segment alignments for the Pacific Connector Gas Pipeline (PCGP) alignment approval in the Board of Commissions Final Decision and Order No. 10-08-045PL, dated September 8, 2010, as ratified by the Final Decision and Order No. 12-03-018PL, dated March 13, 2012, without amending the prior decisions. The applicable criteria are set fourth in the attached application narrative. Please see Condition 20(a) & (b) to Final Decision and Order No. 10-08-045PL 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.

MW 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.

MW **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.

MW 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 bare 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.

MW 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.

Mark Whitlow
Applicant(s) Original Signature
Attorney for Pacific Connector Gas Pipeline, LP

Applicant(s) Original Signature

Updated 2013

TOWNSHIP	RANGE	SECTION	TAX LOT	ACREAGE	ZONE(S)	PROPERTY OWNERS	SPECIAL CONSIDERATION AND OVERLAY ZONES
25	12	20	300	161.19	FMU	ECHO CREEK, LLC	None identified
25	12	28	1500	44.11	20-CA , 20-RS , EFU , FMU	JEANNETTE M. BRUNELL TRUST BRUNELL, JEANNETTE M., TRUSTEE	FP, CSB
25	12	29	100	160.26	FMU	WEYERHAEUSER COMPANY	ARC
25	12	29	400	28.68	FMU	ZINK, MICHELLE S.	ARC, FP
25	12	29	1400	9.92	20-CA, 20-RS, FMU	WEYERHAEUSER COMPANY	ARC, FP, CSB
25	12	29	1700	40.04	20-CA, EFU, 20-RS	MINEAU, HELEN B.; ETAL	ARC, FP, CSB
25	12	29	1800	10.52	20-RS, 20-CA, EFU	FRED MESSERLE , SONS, INC	ARC, FP, CSB
25	12	29	1900	21.93	20-RS, 20-CA, EFU	FRED MESSERLE , SONS, INC	ARC, FP, CSB
25	12	29	2000	10.18	20-CA, 20-RS, EFU	JEANNETTE M. BRUNELL TRUST BRUNELL, JEANNETTE M., TRUSTEE	ARC, FP, CSB
25	12	32A	100	18.96	20-RS, EFU	MINEAU, HELEN B.; ETAL	ARC, FP, CSB
25	12	32A	200	41.12	20-RS, EFU	MINEAU, HELEN B.; ETAL	ARC, FP, CSB
25	12	32A	600	31.85	20-RS, EFU	FRED MESSERLE , SONS, INC.	ARC, FP, CSB
26	12	5	1100	148.65	FMU, EFU	STALCUP LIVING TRUST STALCUP, JEAN, TRUSTEE	FP
26	12	8	800	0.08	EFU	MARK , MELODY SHELDON PROP., LLC	FP
FMU = FOREST MIXED USE						ARC = ARCHAEOLOGICALSITES	
EFU = EXCLUSIVE FARM USE						FP = FLOOD PLAIN	
20-RS = 20-RURAL SHORELAND						CSB = COATAL SHORELANDS BOUNDARY - ESTURAINE	
20-CA= 20-CONSERVATION AQUATIC							

NARRATIVE IN SUPPORT OF LAND USE APPLICATION FOR THE PACIFIC CONNECTOR GAS PIPELINE

Applicant:	Pacific Connector Gas Pipeline, LP 295 Chipeta Way Salt Lake City, UT 84108 (801) 584-6564 Contact: Bob Peacock
Applicant's Representatives:	Edge Environmental, Inc. 405 Urban Street, Suite 310 Lakewood, CO 80228 (303) 988-8844 Contact: Carolyn Last Perkins Coie LLP 1120 NW Couch Street, 10th Floor Portland, OR 97209 (503) 727-2000 Contact: Mark D. Whitlow
Request:	Approve alternate alignments for segments of the previously approved alignment for the Pacific Connector Gas Pipeline under Board of Commissioners Final Decision and Order No. 10-08-045PL dated September 8, 2010 and Board of Commissioners Final Decision and Order No. 12-03-018PL dated March 13, 2012.

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FIGURES:

NARRATIVE IN SUPPORT OF LAND USE APPLICATION FOR THE PACIFIC CONNECTOR GAS PIPELINE

I. INTRODUCTION

Pacific Connector Pipeline Company, LP ("Pacific Connector") submits this application requesting hearings body conditional use approval of alternate alignments for identified segments of the previously approved alignment for the Pacific Connector Gas Pipeline ("PCGP"). The previously approved PCGP alignment across 49.72 miles of Coos County ("County") under Final Decision and Order No. 10-08-045PL dated September 8, 2010 and Board of Commissioners Final Decision and Order No. 12-03-018PL dated March 13, 2012 ("Prior Decisions") will remain valid and unmodified. This application requests approval of three (3) minor alternate alignments for specific segments of the PCGP, which represent less than 2% of the total route through the County. [1]

As noted in the Prior Decisions, the pipeline's alignment requires approval by the Federal Energy Regulatory Commission ("FERC"). While this application proposes alternate segment alignments for County approval, FERC will make the ultimate selection of the pipeline's alignment. As a practical matter, even though Pacific Connector seeks approval for three (3) minor alternate alignments along the route previously approved by the Prior Decisions, only one continuous alignment for the entire pipeline will be constructed.[2]

This application requests County approval of alternate segment alignments that would 1) allow the starting point of the PCGP to be located next to the meter station of the South Dunes Power Plant, 2) allow the PCGP to avoid the Brunschmid Wetland Reserve and, 3) to reduce the number of crossings of Stock Slough and the steep road cut crossing of Stock Slough Road. The PCGP alignment approved in the Prior Decisions crossed through five Coos County zoning designations and 14 zones within the CBEMP. The proposed PCGP alternate segment alignments affect only three Coos County zoning designations and three CBEMP zoning districts. Of the previously approved 49.72 miles of PCGP alignment approved in the Prior Decisions, the proposed alternate segment alignments affect only a small 2% of that total.

This narrative explains the reasons for these requested alternate segment alignment approvals and demonstrates how these alternate segment alignments satisfy the applicable provisions of the Coos County Zoning and Land Development Ordinance ("CCZLDO"), the Coos Bay Estuary Management Plan ("CBEMP"), and are consistent with the Prior Decisions.

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[1] Since the PCGP alignment was approved in the Prior Decisions, Pacific Connector has conducted a detailed analysis of that alignment. In many instances, the approved PCGP alignment has moved in minor ways to conform to the surveyed centerline or to accommodate small project refinements, without changing the location of the alignment into different ownerships or into a different zone within the same ownership. Based upon consultation with Planning staff, those refinements to the approved alignment do not constitute alternate segments which need additional approval with respect to applicable review criteria.

2 Pacific Connector proposes a Condition of Approval ensuring that only one continuous alignment for the entire pipeline will ultimately be constructed, per FERC's approval.

A. Background and Planning History.

Pacific Connector has applied for authorization from the Federal Energy Regulatory Commission ("FERC") under Section 7c of the Natural Gas Act ("NGA") to construct, install, own, operate, and maintain an interstate natural gas pipeline to transport natural gas to the Jordan Cove LNG Terminal in Coos Bay from the existing interstate natural gas transmission pipeline near Malin, Oregon. The 36-inch diameter pipeline will be approximately 232 miles in length and will provide natural gas for liquefaction by Jordan Cove Energy Project LP to be marketed domestically and throughout the Pacific Rim. Through this application to Coos County, the applicant is seeking a determination from Coos County that the requested alternate alignments to a few segments of the previously approved 49.72-mile segment of the PCGP located within Coos County are consistent with all applicable Coos County land use regulations.[3]

As discussed in the original application and recognized in the Prior Decisions, because of the linear nature of the proposed interstate gas pipeline, it will traverse numerous zoning districts within the County, with slightly different use descriptions between one zone and the other:

(a) 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;

(b) within the Agricultural (EFU) zone, the pipeline use is characterized as a utility facility necessary for public service; and

(c) within the Coos Bay Estuary Management Plan (CBEMP), the pipeline is characterized in the respective management units as a low intensity utility.

As established in the Prior Decisions, the subsurface nature of the proposed PCGP minimizes pipeline impacts following construction. Construction impacts will be minimized through appropriate methodologies and technologies. As was also established in the Prior Decisions, Pacific Connector proposes to utilize a standard 95-foot wide temporary construction easement, with a 50-foot permanent right-of-way and associated temporary extra work areas ("TEWAs"). Other forms of temporary construction areas will be utilized, all of which have been designed to disturb the minimum area necessary in order to safely construct the pipeline and minimize the total overall project disturbance.

B. Procedural Status.

As stated above, Pacific Connector previously received land use approval in the Prior Decisions from Coos County for the 49.72-mile segment of the PCGP located within Coos County.

[3] By submitting this application, the applicant is seeking to comply with applicable land use regulations and the consistency requirements of the Coastal Zone Management Act. However, submittal of this application is not a waiver of any federal jurisdiction over the Coos County segment of the PCGP.

This application does not seek to modify or amend the Prior Decisions, but references will be made to them for a number of reasons including the characterization of the use in the various zoning districts, and regarding references to interpretations and findings in the Prior Decisions that are equally applicable to this application.

A pre-application conference was conducted with respect to this application on February 6, 2013. As stated above, this new application does not seek to modify or amend the PCGP alignment approved in the Prior Decisions, nor does it seek to modify or amend the related conditions. Accordingly, this application is not subject to the provisions of Section 5.0.350.

However, Pacific Connector has filed a separate application seeking to amend Miscellaneous Condition No. 25 to the Prior Decisions. Request is made to consolidate this application with Pacific Connector's other application under the provisions of Section 5.0.400. As discussed below, Section 4.9.450 requires hearings body conditional use approval of the use in EFU zones. Accordingly, all reviews requested by this application will be upgraded to that higher review procedure when consolidated under Section 5.0.400A.

Finally, the Prior Decisions determined that Section 5.0.150 requiring that a property owner or contract purchaser sign the application is merely a procedural requirement that can be deferred to a later stage in the approval process. Pacific Connector proposes to handle that procedural issue as it is being handled through Condition of Approval No. 20.(a) to the County's Final Decision and Order No. 10-08-045PL dated September 8, 2010. Pacific Connector requests that the same condition of approval be imposed by the County as part of the County's approval of this application.

II. REQUESTED ALTERNATE ALIGNMENTS

As stated above, Pacific Connector requests approval of alternate segment alignments in two Coos County zoning designations: Forest (F) and Exclusive Farm Use (EFU), and two Coos Bay Estuary Management Plan (CBEMP) zoning districts: Rural Shorelands (20-RS) and Conservation Aquatic (20-CA). The alternate segment alignments proposed by this application will not introduce the PCGP into any zoning district beyond those previously subject to the approved alignment in the Prior Decisions, and will affect different ownerships only in relatively few instances. The two (2) proposed alternate segment alignments are described as follows:

1. Brunschmid Wetland Reserve – this alternate alignment will avoid the National Resources Conservation Service's (NRCS's) Brunschmid Wetland Reserve Program easement; and

2. Stock Slough – this minor alternate alignment will avoid multiple Stock Slough crossings and will avoid crossing the steep road cut of Stock Slough Road.

The remainder of this section summarizes the applicable approval criteria and Pacific Connector's responses for the requested alternate segment alignments. The proposed alternate segment alignments are shown in attached Sheets 1 and 2, which will be referenced in the following sections.

A. Balance of County Zoning Districts

1. Exclusive Farm Use Zone.

The Prior Decisions approved the PCGP to cross approximately 3.72 miles of properties zoned Exclusive Farm Use (EFU), all of which are privately owned. During the FERC review process, Pacific Connector has determined that alternate alignments are needed, two of which will cross EFU zoned parcels. *See* Sheets 1 and 2.

As demonstrated below, Pacific Connector's requested approval for alternate alignments for segments of the approved PCGP alignment in the EFU zone is consistent with the requirements of ORS Chapter 215, OAR 660, Division 33, and the applicable approval criteria of the CCZLDO.

CCZLDO Section 4.9.450 Hearings Body Conditional Uses

The following uses and their accessory uses may be allowed as hearings body conditional uses in the "Exclusive Farm Use" zone and the "Mixed Use" overlay subject to the corresponding review standard and development requirements in Section 4.9.600 and 4.9.700.

C. Utility facilities necessary for public service, except for the purpose of generating power for public use by sale and transmission towers over 200 feet in height. A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided.

As determined in the Prior Decisions, CCZLDO Section 4.9.450 is more or less a direct codification of ORS 215.283(1)(c).[4] In this regard, it is perhaps worthwhile to note that a "utility facility" necessary for public service is a use that is allowed "outright" ORS 215.283(1). *See Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) ("legislature intended that uses delineated in ORS 215.213(1) be uses 'as of right,' which may not be subjected to additional local criteria").

Accordingly, under state law, utility facilities sited on EFU lands are subject only to ORS 197.275, as well as the administrative rules adopted by LCDC. *See* Final Decision and Order, No. 10-08-045PL, page 116.

As determined in the initial Prior Decisions, the PCGP is a utility facility under CCZLDO Section 4.9.450.C. that, due to its linear nature and the points of connection it must make, it is necessary for some segments of the PCGP to be situated in agricultural land, in satisfaction of this review criterion and the companion criterion of ORS 215.275(1). Final Decision and Order, No. 10-08-045PL, pp. 115-23. The same is true of the selection of alternate

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

> (i) the following uses may be established in any area zoned for Exclusive Farm Use: * * * *.
> (ii) 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.

segment alignments. As recognized in the Prior Decisions, 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.

As referenced above, the reasons for the requested alternate segment alignments affecting EFU lands are as follows:

1. Brunschmid Wetland Reserve – This proposed alternate segment alignment would avoid an approved mitigation site on the north side of the Coos River (e.g., the Brunschmid Wetland Reserve Project, which has an easement held by the USDA Farm Services Agency). The amount of EFU land affected by the alternate alignment is only 525.78 feet more than the amount affected by the PCGP alignment previously approved in the Prior Decisions. *See* Sheet 1; Resource Report 2, Table 10.6-2. The alternate alignment affects EFU land as it crosses Vogel Creek and Lillian Creek in order to minimize effects on these water bodies by crossing in a perpendicular manner. *See* Resource Report 2, Appendices 2C and 2D for a detailed description of water body crossing methods.

2. Stock Slough alternate alignment – The proposed alternate segment alignment is only approximately 1500 feet in length. It avoids crossing Stock Slough Road (County Road 54) in an area of a steep road cut as the alignment descends a steep ridge slope. Further, the route modification avoids two crossings of Stock Slough in the tight meandering bends which were crossed immediately below Stock Slough Road and adjacent to a residence. *See* Sheet 2.

In sum, the PCGP is a locationally dependent linear facility and the proposed alternate alignments must cross EFU land in order to achieve a reasonably direct route and to avoid the Brunschmid Wetland Reserve, to avoid multiple crossings of Stock Slough and to avoid the steep road cut crossing of Stock Slough Road. It is important to note that placing the pipeline under EFU land does not take cropland out of production. The pipeline easement agreement allows full use of the landowner's property by the landowner for crop production once the pipeline is constructed.

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

The siting criteria of this section apply to dwellings and structures within the EFU zone. No dwellings are proposed and, under the County's prior interpretation in the Prior Decisions, a subsurface interstate gas pipeline is not a "structure," so the provisions of this code section are not applicable to the proposed PCGP alternate segment alignments or its necessary components. *See* Final Decision and Order, No. 10-08-045PL, pp. 108-12.

CCZLDO Section 4.9.700

As stated above, the proposed alternate segment alignments in the EFU zone subsurface and do not constitute a "structure" as above described. Accordingly, Section 4.9.700 which is applicable to "all dwellings and structures" does not apply to this application.

2. Forest Zone.

The Prior Decisions approved the PCGP alignment to cross approximately 39.47 miles of Forest-zoned lands within Coos County, 10.76 miles of which are on BLM-managed lands, with the remaining segments located on privately owned lands.

The proposed alternate alignment segments affecting Forest-zoned land that are different than any Forest-zoned land affected by the PCGP alignment previously approved by the Prior Decisions are the Brunschmid Wetland Reserve and Stock Slough alternate alignments. The Mill Site alternate alignment does not affect Forest-zoned land. As discussed above, the changes in alignment within the Forest zone, as shown on Sheets 1 and 2, are occasioned by the need to avoid the Brunschmid Wetland Reserve Program (WRP) easement and the need to avoid multiple Stock Slough crossings and the steep road cut crossing of Stock Slough Road. The alternate segment alignments cross other ownerships of Forest-zoned land than the previously approved PCGP alignment did. Otherwise, the applicable review criteria for the proposed PCGP alternate segment alignment in the Forest-zoned land are the same as for the approved PCGP alignment.

CCZLDO Section 4.8.300 Administrative Conditional Uses

The following uses and their accessory uses may be allowed as administrative conditional uses in the "Forest" zone subject to applicable requirements in Section 4.8.400 and applicable siting criteria set forth in this Article and elsewhere in this Ordinance.

F. New electrical transmission lines with right-of-way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g. gas, oil, geothermal) with right-of-way 50 feet or less in width.

The PCGP is a new gas line with a permanent easement width of 50 feet. Therefore, the PCGP and its associated facilities are classified as an administrative conditional use within the Forest zone. *See* Final Decision and Order, No. 10-08-045PL, p. 87.

As detailed below, the proposed PCGP alternate segment alignment in the F zone satisfies all of the applicable review criteria for a Hearings Body conditional use in the F zone.

CCZLDO 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

As detailed in the Prior Decisions, this criterion is limited to regulation of "significant" impacts and cost increases. The criterion does not require that there be no impacts on farming and forest practices. Final Decision and Order, No. 10-08-045PL, p. 91. As explained in the Prior Decisions, 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 a cleared corridor. In the Prior Decisions, the Board found that the PCGP's limited impacts will not force a "significant" change in the accepted forest practices in the vicinity of the pipeline. Final Decision and Order, No. 10-08-045PL, p. 94. For the same reasons discussed in the Prior Decisions, the proposed alternate segment alignments for the subsurface interstate gas pipeline and its associated facilities in the F zone will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agricultural or forest lands. As with the original PCGP alignment, the remaining 20 feet of permanent right-of-way for the alternate segment alignments, as well as the temporary construction areas, will be replanted in a manner consistent with Pacific Connector's Erosion Control and Revegetation Plan ("ECRP"). Both during and following construction, forestry activities will be able to continue on the forest lands nearby or adjoining the PCGP.

CCZLDO Section 4.8.600 Mandatory Siting Standards Required for Dwellings and Structures in the Forest Zone

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

No dwellings are proposed by this application. As detailed in the EFU section above, the Board previously determined that the PCGP is not a "structure" as that term is defined in CCZLDO Section 2.1.200 because the PCGP will be located under, rather than on top of, the land which it crosses. Final Decision and Order, No. 10-08-045PL, pp. 108-12. Consequently, the siting standards at CCZLDO Section 4.8.600 are not applicable to the proposed subsurface PCGP alternate segment alignment or its necessary components or associated facilities in the F zone.

CCZLDO Section 4.8.700 Fire Siting Safety Standards

All new dwellings and permanent structures and replacement dwellings and structures shall, at a minimum, meet the following standards.

As discussed above, the PCGP is neither a structure nor a dwelling. Consequently, the fire siting and safety standards of this Section are not applicable to this application.

CCZLDO Section 4.8.750 Development Standards

All development and structures approved pursuant to Article 4.8 shall be sited in accordance with this Section.

A. Minimum Lot Size:

The proposed PCGP alternate segment alignment in the F zone will not require or create any land divisions. Consequently, the minimum lot size standard is not applicable.

B. Setbacks: All buildings or structures with the exception of fences shall be set back a minimum of thirty-five (35) feet from any road right-of-way centerline or five (5) feet from any right-of-way line, whichever is greater.

The PCGP is a linear, underground utility facility that crosses several property lines, but is not a building or structure. Final Decision and Order, No. 10-08-045PL, pp. 108-12. Consequently, the setback standard is not applicable to the proposed PCGP alternate segment alignment in the F zone.

C. Structure Height:

D. Lot Coverage:

There are no requirements for either of these standards in the F zone.

E. Fences, Hedges and Walls: No requirement, except for vision clearance provisions in Section 3.3.400 and Fire Siting and Safety Standards in Section 4.7.700.

The PCGP is not a hedge, fence or wall, and therefore this standard does not apply to the proposed PCGP alternate segment alignment in the F zone or its necessary components.

F. Off-Street Parking and Loading: See Chapter X.

The off-street parking and loading standards are not applicable to the proposed PCGP alternate segment alignment use in the F zone.

G. Minimum Road Frontage/Lot Width: 20 feet.

The proposed PCGP alternate segment alignment in the F zone will not impact the existing configuration of the parcels it crosses. Therefore, this standard is not applicable.

H. Minimizing Impacts:

This standard only applies to dwellings within the F zone. No dwellings are proposed by this application. Therefore, this standard is not applicable to the proposed PCGP alternate segment alignment application in the F zone.

I. Riparian Vegetation Protection.

1. Riparian vegetation within 50 feet of a wetland, stream, lake or river, as identified on the Coastal Shoreland and Fish and Wildlife habitat inventory maps shall be maintained except that:

e. Riparian vegetation may be removed in order to site or properly maintain public utilities and road rights-of-way; or

The PCGP is a public utility project within the state of Oregon. Therefore, the proposed PCGP alternate segment alignment in the F zone is not subject to the 50-foot riparian protection vegetation zone, and riparian vegetation may be removed in order to site the PCGP pursuant to the exemption cited above. Nonetheless, the proposed PCGP alternate segment alignment in the F zone will comply with all FERC requirements for wetland and waterbody protection and mitigation both during and after construction.

For the reasons set forth above, the proposed PCGP alternate segment alignment should be approved as a Hearings Body conditional use within the F zone.

B. Coos Bay Estuary Management Plan.

As discussed above, the Prior Decisions approved the PCGP alignment to cross 14 CBEMP Management Districts. The proposed alternate alignment segments will cross only two CBEMP zoning districts: 20-CA and 20-RS.

The stated purpose of the CBEMP article in the CCZLDO is to provide requirements for individual zoning districts that are consistent with the CBEMP. The consistency of the PCGP with all applicable management unit purpose statements and applicable conditions is discussed separately under each applicable zoning district below.

Table 4.5 Development Standards

The CBEMP purpose statement further explains that the land development standards of Table 4.5 govern all development within the Coos Bay Estuary Shorelands Districts. The proposed PCGP alternate segment alignments will not alter the lot configurations and do not constitute a structure subject to height restrictions or building setbacks. Consequently, the standards included in Table 4.5 are not applicable to the PCGP itself nor its necessary components or associated facilities, or to the proposed alternate segment alignments.

CCZLDO Section 4.5.175 Site-Specific Zoning Districts

The Coos County Development Ordinance divides the lands affected by the CBEMP into specific zoning districts. Each zoning district contains a "use and activities" table and "management objectives." Pursuant to CCZLDO Section 4.5.175, the use and activity tables for each district are subordinate to the management objectives, and, therefore, the uses and activities must be consistent with the applicable management objective. As stated above, the proposed alternate segment alignments will only traverse CBEMP zoning districts 20-CA and 20-RS. As demonstrated below, the proposed alternate alignment segments are consistent with the management objectives, the allowed use and activities, and the applicable general and specific conditions of the 20-CA and 20-RS zoning districts.

C. Zoning Districts.

1. 20 – Conservation Aquatic (20-CA)

The proposed Brunschmid Wetland Reserve alternate segment alignment crosses the 20-CA zoning district. The 20-CA district is aligned with the Coos River.

> ***CCZLDO 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 will use the HDD method to install the pipeline below the Coos River. Using this crossing method, the Brunschmid alternate alignment segment will be installed beneath the bottom of the Coos River and will not impact log transport and will not impact fish habitat. Upon successful HDD completion, impacts to aquatic species, sensitive resources and water quality can be avoided. Additional details on the HDD process are included in Resource Report 2, Appendix 2G. Construction will use appropriate measures to minimize impacts. All impacts will be mitigated as demonstrated in the Prior Decisions. The Board previously found that the HDD construction method and mitigation met this management objective. Final Decision and Order, No. 10-08-045PL, pp. 70-72. Likewise, development of the proposed PCGP alternate segment alignment in 20-CA will not preclude log transport or interfere with fish habitat.

> ***CCZLDO Section 4.5.551*** *Uses, Activities and Special Conditions*

The proposed PCGP alternate segment alignment is permitted, subject to general conditions, as a low intensity utility in the 20-CA district. The 20-CA 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 proposed PCGP alternate segment alignment is consistent with each of those policies.

2. 20 – Rural Shorelands (20-RS)

The proposed Brunschmid Wetland Reserve alternate alignment segment crosses the 20-RS zoning district on the south bank of the Coos River. *See* Sheet 1.

> ***CCZLDO 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 salmonid protection. This district contains two designated mitigation sites, U-17(a) and (b), "medium" priority, which shall be protected as required by Policy #22.*

The proposed PCGP alternate segment alignment will not impact mitigation sites U-17(a) and (b). As discussed above addressing the 20-CA zone, the HDD method for crossing Coos River 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. Additional details on the HDD

process are included in Resource Report 2, Appendix 2G. Once installed, the subsurface PCGP alternate segment alignment will not prohibit rural uses or recreational access.

CCZLDO Section 4.5.546 *Uses, Activities and Special Conditions*

The proposed PCGP alternate segment alignment is permitted, subject to general conditions, as a low intensity utility in the 20-RS district. The 20-RS General Conditions state that permitted uses and activities shall be consistent with Policy #23 and that inventoried resources requiring mandatory protection in the district are subject to Policies #17 and #18. Additionally, permitted uses occurring within "agricultural lands" or "forest lands" as identified in the "Special Considerations Map" are limited to those permitted in Policies #28 and #34. The proposed PCGP alternate segment alignment crosses agricultural lands within 20-RS. The agricultural uses under ORS Chapter 215 and their applicability to the PCGP are described above in Section IIA under "Exclusive Farm Use." The proposed PCGP alternate segment alignment does not cross any lands identified on the Special Considerations Map in Forest lands. Uses are permitted as stated in Policy #14 and must be consistent with Policy #27. On designated mitigation/restoration sites, uses/activities may be permitted subject to Policy #22. However, the proposed PCGP alternate segment alignment will not impact any of the designated mitigation/restoration sites within the 20-RS district. Finally, in rural areas, utilities, public facilities, and services will only be provided subject to Policies #49, #50, and #51. As addressed under the CBEMP Policy section below, the proposed PCGP alternate segment alignment in zoning district 20-RS is consistent with each of the identified policies.

Appendix 3 – CBEMP Policies

As detailed above, the proposed PCGP alternate segment alignments cross through the 20-CA and 20-RS zoning districts. As also discussed above, those crossings trigger CBEMP Policies #s17 and 18 in zoning district 20-CA; and trigger CBEMP Policies #s14, 17, 18, 22, 23, 27, 28, 34, 49, 50, and 51 in zoning district 20-RS. As discussed below, the proposed PCGP alternate segment alignments comply with the applicable CBEMP Policies for each zoning district as described below.

1. ***20 – Conservation Aquatic (20-CA)***

The proposed PCGP alternate segment alignments comply with the applicable policies in zoning district 20-CA as described below.

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.

Based on Coos County's maps, the proposed PCGP alternate segment alignments in the 20-CA zoning district do not cross identified major marshes, coastal headlands, or exceptional aesthetic resources. This policy is satisfied.

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.

The proposed PCGP alternate segment alignments do not cross areas of special consideration identified under this strategy in zoning district 20-CA. This strategy is satisfied.

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 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.

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) can not agree on the appropriate measures, then the governing body shall hold a quasijudicial 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.

The proposed PCGP alternate segment alignments do not cross areas of potential cultural, archeological or historical sites in zoning district 20-CA. This strategy is satisfied.

2. *20 – Rural Shorelands (20-RS)*

Policy #14 General Policy on Uses within Rural Coastal Shorelands

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

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

Zoning district 20-RS requires compliance with Policy #14. In the Prior Decisions, the Board determined that the PCGP is characterized as "other uses" under subsection g. of Policy #14. Final Decision and Order, No. 10-08-045PL, pp. 124-26. The proposed alternate segment alignments could not be accommodated at other upland locations or in urban or urbanizable areas due to the fact that the PCGP alignment has been previously approved by the County and the alternate alignments must connect to the pipeline in the locations approved by the County in its Prior Decisions. Therefore, this policy is met.

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.

Based on the County's Maps, the proposed PCGP alternate segment alignment in zoning district 20-RS will not cross any areas identified as major marshes, significant wildlife habitats, coastal headlands or exceptional aesthetic resources. This policy is satisfied.

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.

Response: This strategy is a legislative directive to the County to exact plan designations and maps to identify resources to be protected. This strategy does not apply to this application.

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 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.

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) can not agree on the appropriate measures, then the governing body shall hold a quasijudicial 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.

As determined in the Prior Decisions, Coos County has clearly indicated that the "Site Plan Application" requirement contemplated by Policy #18 is intended to be implemented through the submittal of a "plot plan" under CCZLDO Section 3.2.700 at the time the applicant requests a zoning compliance (verification) letter under CCZLDO Section 3.1.200. CCZLDO Section 3.2.700 makes it clear that the time for compliance with applicable requirements regarding protection of archeological resources is at any time before a "zoning compliance letter"[5] is

[5] Coos County has previously held in the Prior Decisions that a "zoning compliance letter" under CCZLDO Section 3.2.700 is equivalent to a "zoning verification letter" under CCZLDO Section 3.1.200.

requested, not at the time of conditional use permit approval. Pursuant to CCZLDO Section 3.2.700, this is accomplished through the submittal of a "plot plan showing exact location of excavation, clearing, and development." Therefore, the time for application for Policy #18 and CCZLDO Section 3.2.700 is prior to obtaining a zoning compliance (verification) letter under CCZLDO Section 3.1.200. Final Decision and Order, No. 10-08-045PL, p. 130.

Given the above, Pacific Connector recommends the following condition of approval, which is the same condition as Condition No. 24 imposed on the PCGP alignment in the Prior Decisions:

> At least 90 days prior to issuance of a zoning compliance (verification) 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 archeological 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 archeological resources have been identified, the County may approve and issue the requested zoning compliance (verification) 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 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 modification deemed necessary by the governing body to protect the cultural, historical and archeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of Section 5.8.200 of the CCZLDO with the Board of Commissioners serving as the Hearings Body.

Implementation of this proposed condition would ensure compliance with Policy #18.

Policy #22 Mitigation Sites: Protection Against Preemptory Uses Consistent with permitted uses and activities:

I. This policy shall be implemented by:

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

This is a legislative directive to the County to adopt mitigation sites on the County's maps. This strategy does not apply to this application.

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:

The proposed PCGP alternate segment alignment would not cross any approved mitigation sites in zoning district 20-RS.

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

This criterion does not apply.

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

This criterion does not apply.

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

This criterion does not apply.

Policy #23 Riparian Vegetation and Streambank Protection

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).

Zoning district 20-RS through which the proposed PCGP alternate segment alignment crosses requires compliance with Policy #23.

First, in its Prior Decisions, the Board has found that Policy 23 does not create a mandatory approval standard, but rather, is aspirational, hortatory, and non-mandatory in nature. Final Decision and Order, No. 10-08-045PL, p. 134. However, 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 an estuarine wetland, stream, lake or river, as identified on the Coastal Shorelands 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 proposed PCGP alternate segment alignment 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 proposed PCGP alternate segment alignment installation. However, Pacific Connector has designed the project to minimize impacts to riparian vegetation as much as possible.

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.

While Pacific Connector will restore areas disturbed during construction to their pre-construction condition, the proposed PCGP alternate segment alignment does not include independent streambank stabilization projects. Therefore, the provisions of subsection II are not applicable.

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.

Zoning district 20-RS, through which the PCGP alternate alignment segment crosses, requires compliance with Policy #27.

Policy #27 is satisfied through compliance with the implementing floodplain ordinance in the CCZLDO Article 4.6, the Floodplain Overlay zone. The Floodplain Overlay section provided below, describes how the proposed PCGP alternate segment alignment satisfies the applicable floodplain standards within CBEMP district 20-RS.

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 alternates 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).

Zoning district 20-RS, through which the PCGP alternate alignment segment crosses, requires compliance with Policy #28.

As stated above, 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 above, the PCGP is allowed as a utility facility necessary for public service under the agricultural provisions of ORS 215.283(1)(c) and ORS 215.275(6). Therefore, the PCGP is consistent with the Policy #28 requirements for mapped Agricultural Lands.

In addition to referencing ORS Chapter 215, the Policy states that allowed uses are listed in Appendix 1 of the CCZLDO. However, Appendix 1 is entitled CCCP and does not apply within the CBEMP boundaries and does not provide a list of uses permitted within agricultural zones. Therefore, it appears that the reference is intended to be to Appendix 4, Agricultural Land Use, which does describe uses allowed within exclusive farm use zones. This interpretation was made by the Board in the Prior Decisions. Final Decision and Order No. 10-08-045PL, at page 126. 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."[6] 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 proposed PCGP alternate segment alignment in district 20-RS is also an allowed use in those areas identified as Agricultural Lands on the CBEMP Special Considerations Map. Therefore, this policy is satisfied.

[6] 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 non-marginal lands counties (set forth in ORS 215.283) do apply. ORS 215.283(1)(c) is identical to ORS 215.213(1)(c). As stated above, under the *Brentman* case, ORS 215.275 provides the applicable review criteria for the proposed alternate segment of the interstate gas pipeline.

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

Unless otherwise allowed through an Exception, Coos County shall manage all rural lands designated on the Special Considerations Map as "Forest Lands" within the Coastal Shorelands Boundary consistent with the "Forest Uses" requirements of LCDC Goal #4. Allowed uses are listed in Appendix 3 of the Zoning and Land Development Ordinance.

Where the County's Comprehensive Plan identified major marshes, significant wildlife habitat and riparian vegetation on coastal shorelands subject to forest operations governed by the Forest Practices Act, the Forest Practice program and rules of the Department of Forestry shall be carried out in such a manner as to protect and maintain the special shoreland values of the major marshes, significant wildlife habitat areas, and forest uses especially for natural shorelands and riparian vegetation.

This policy shall be implemented by using the Special Considerations Map (Policy #3) to identify "Forest Lands", and to abide by the prescriptive use and activity requirements of LCDC Goad #4 in lieu of other management alternatives otherwise allowed for properties within the "Forest Lands-Overlay" set forth on the Special Considerations Map, and except where otherwise allowed by Exception for needed housing and industrial sites.

This policy recognizes that the requirements of LCDC Goal #4 are equal and not subordinate to other management requirements of this Plan for "Forest Lands" located within the Coastal Shorelands Boundary.

The proposed alternate segment alignment does not cross any lands identified as Forest Lands shown on the Special Considerations Map. Therefore, development of the PCGP is consistent with this policy.

Policy #49 Rural Residential Public Services.

Coos County shall provide opportunities to its citizens for a rural residential living experience, where the minimum rural public services necessary to support such development are defined as police (sheriff) protection, public education (but not necessarily a rural facility), and fire protection (either through membership in a rural fire protection district or through appropriate on-site fire precaution measures for each dwelling). Implementation shall be based on the procedures outlined in the County's Rural Housing State Goal Exception.

I. This strategy is based on the recognition:

a. that physical and financial problems associated with public services in Coos Bay and North Bend present severe constraints to the systems' ability to provide urban level services, and b. that rural housing is an appropriate and needed means for meeting housing needs of Coos County's citizens.

Zoning district 20-RS through which the proposed PCGP alternate segment alignment crosses requires compliance with Policy #49. The proposed PCGP alternate segment alignment is not in need of rural residential public services nor will it preclude these services. This strategy is satisfied.

Policy #50 Rural Public Services

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

Zoning district 20-RS through which the proposed PCGP alternate segment alignment crosses requires compliance with Policy #50. The proposed PCGP alternate segment alignment is not in need of rural public services nor will it preclude these services. This policy is satisfied.

Policy #51 Public Services Extension

I. Coos County shall permit the extension of existing public sewer and water systems to areas outside urban growth boundaries (UGBs) and unincorporated community boundaries (UCB's) or the establishment of new water systems outside UGB's and UCB's where such service is solely for:

Zoning district 20-RS through which the proposed PCGP alternate segment alignment crosses requires compliance with Policy #51. The PCGP is not requesting a public services extension. This policy is satisfied.

D. Floodplain Overlay Zone.

The proposed PCGP alternate segment alignment will cross through the Coos County Floodplain Overlay zone. As described below, the proposed PCGP alternate segment alignment satisfies each of the applicable floodplain approval criteria.

CCZLDO SECTION 4.6.205. Designation of Flood Areas.

a. The area of Coos County that is within a special flood hazard area identified by the Federal Insurance Administration in a scientific and engineering report entitled "The Flood Insurance Study for Coos County, Oregon and Incorporated Areas", dated September 25, 2009, with accompanying Flood Insurance Map (FIRM) is hereby adopted by reference and declared to be part of this ordinance. The Flood Insurance Study and the FIRM are on file at the Coos County Planning Department.

The County has indicated that the Flood Insurance Rate Map (FIRM) is consistent with the Federal Emergency Management Agency's (FEMA) flood hazard map for Coos County. As addressed below, the proposed PCGP alternate segment alignment 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[7] and floodway[8] areas defined in the Floodplain Overlay standards.

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 proposed PCGP alternate segment alignment 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

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

[8] "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.

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 expressly 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 proposed PCGP alternate segment alignment 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 proposed PCGP alternate segment alignment 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 proposed PCGP alternate segment alignment installation, all construction areas will be restored to their pre-construction grade and condition. Therefore, development of the pipeline will not result in any increase in flood levels or result in a cumulative increase of more than one foot. These standards are met. Flood plain compliance will be verified prior to construction and the issuance of a zoning compliance letter.

CCZLDO SECTION 4.6.235. <u>Sites within Special Flood Hazard Areas.</u>

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 proposed PCGP alternate segment alignment 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. This criterion is satisfied.

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

The entire proposed PCGP alternate segment alignment will be constructed with corrosion-protected steel pipe. Where deemed necessary, the proposed PCGP alternate segment alignment will be installed with a concrete coating to protect against abrasion and maintain negative buoyancy. This criterion is satisfied.

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

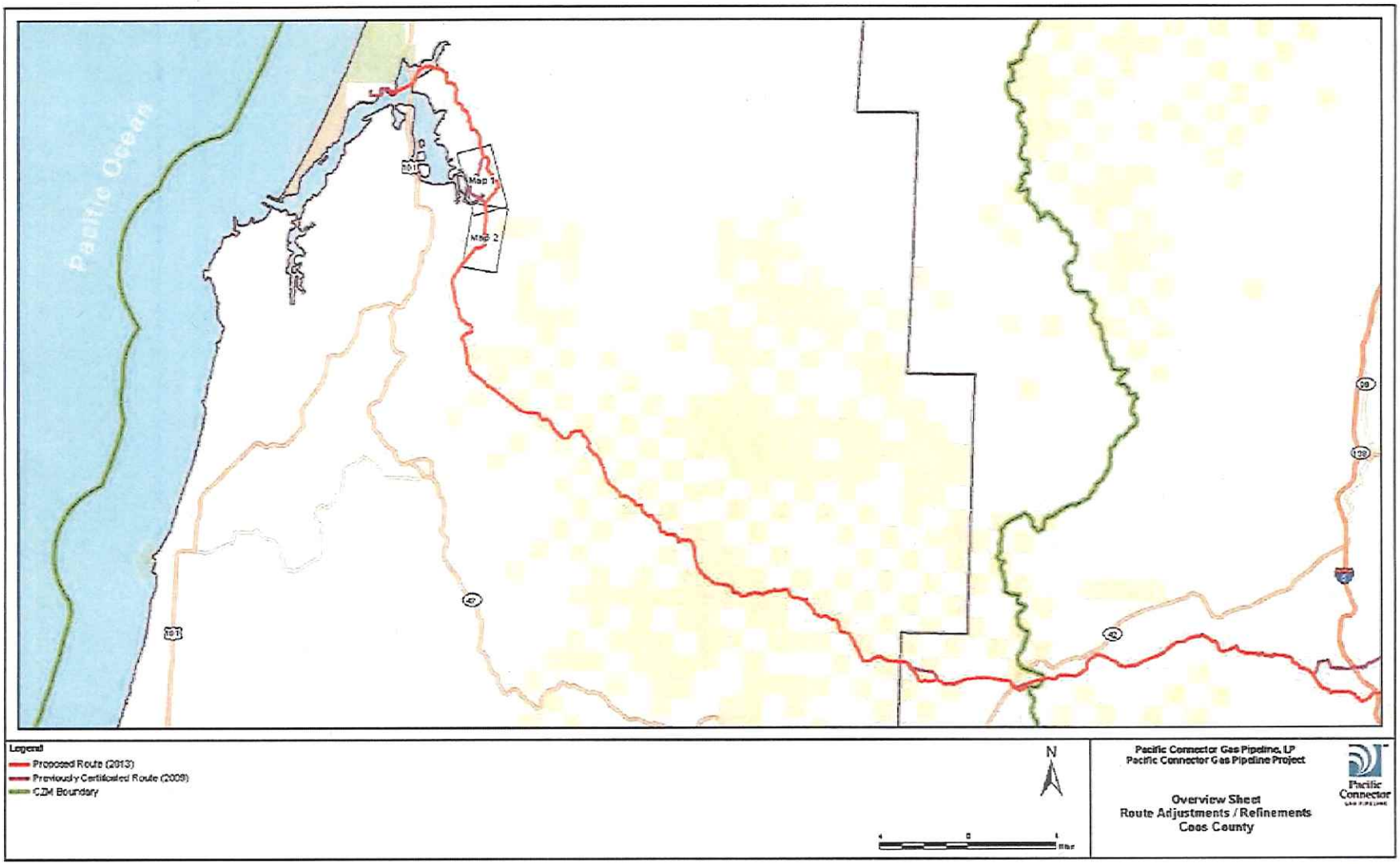
The proposed PCGP alternate segment alignment will be constructed by methods and practices that minimize flood damage. This criterion is satisfied.

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 proposed subsurface PCGP alternate segment alignment does not include electrical, heating, ventilation, plumbing, or air conditioning components. Therefore, this criterion is not applicable.

III. CONCLUSION

For the reasons set forth above, the requested approvals for alternate alignments for only two (2) relatively short segments of the previously approved PCGP alignment in Coos County satisfy all of the applicable approval criteria within the requested zones. Consequently, the applicant requests that the County approve the requested alternate segment alignments addressed in this application, with the conditions of approval proposed by Pacific Connector in the application.


Pacific Ocean
Map 1
Map 2
101
42
39
Legend
Proposed Route (2013)
Previously Certificated Route (2009)
CZM Boundary
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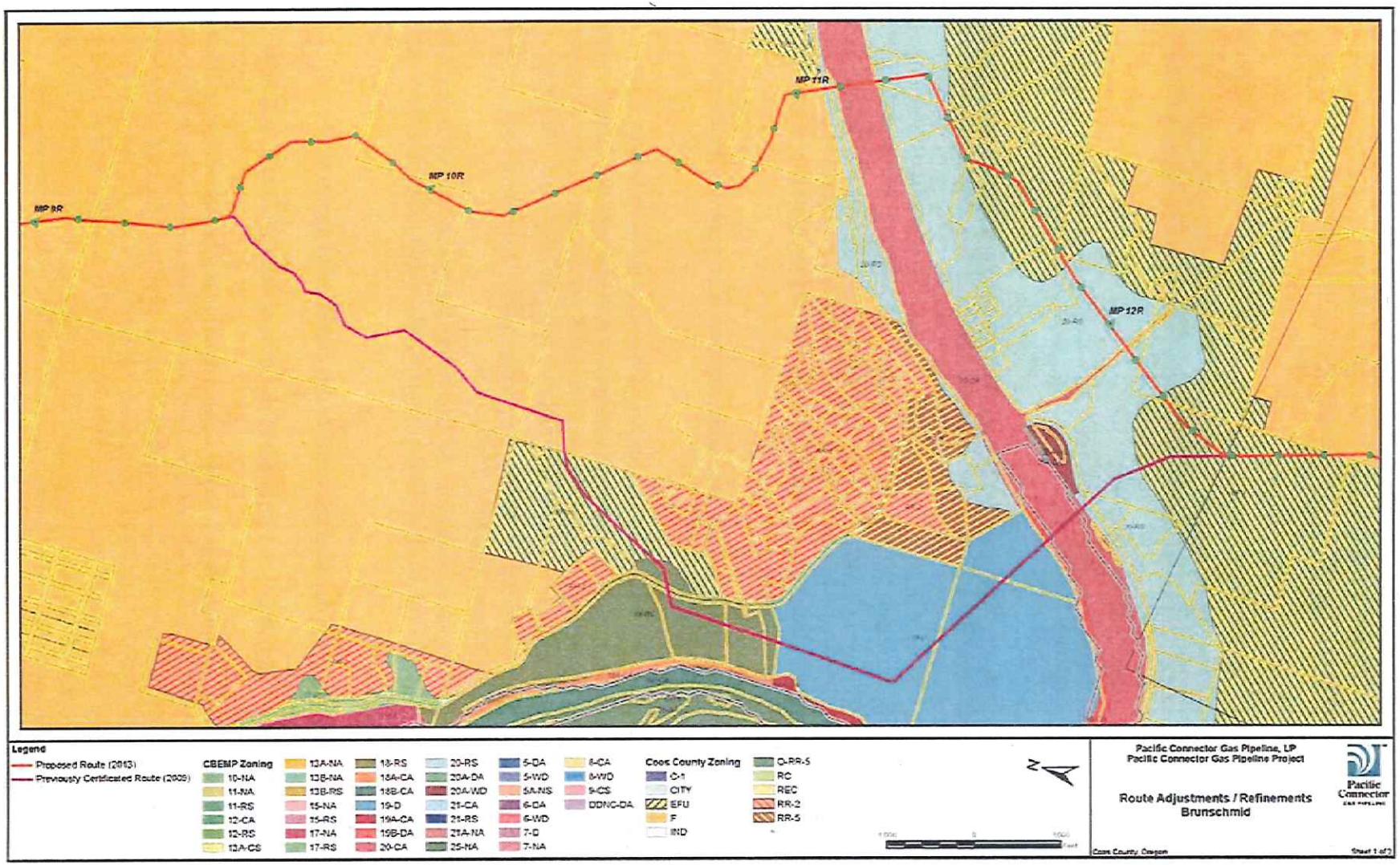
Pacific Connector Gas Pipeline, LP
Pacific Connector Gas Pipeline Project
Overview Sheet
Route Adjustments / Refinements
Coos County
Pacific Connector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Proposed Route (2013)
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CBEMP Zoning
10-NA
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11-RS
12-CA
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13A-CS
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13B-NA
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17-NA
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18A-CA
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20A-WD
21-CA
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21A-NA
25-NA
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8-CA
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Coos County Zoning
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REC
RR-2
RR-5
N
Pacific Connector Gas Pipeline, LP
Pacific Connector Gas Pipeline Project
Route Adjustments / Refinements
Brunschmid
Coos County, Oregon
Sheet 1 of 2

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Supplemental Report

APPLICANT:	Pacific Connector Gas Pipeline, LP
REVIEWING BODY:	Board of Commissioners
STAFF CONTACT:	Jill Rolfe, Planning Director
REPORT DATE:	January 7, 2014
FILE NUMBER:	HBCU-13-04

DECEMBER 12, 2013 RECOMMENDATION

The hearings officer provided his recommendation on the alternate section of the pipeline. The recommendation supports an approval but has some conditions that are listed that staff would like to address. The conditions were carried forwarded from the original approval with the exceptions of the ones that did not apply to this area of change. The hearings officer explained why the conditions were excluded from this decision. Staff has two conditions that they would like to address. One is listed on page 92 listed as B.25 under Historical, Cultural and Archaeological and the other one is on page 88 listed as A.17(b) under Pre-Construction.

The first condition on page 92 should be consolidated with condition A.15 page 87 listed under Pre-Construction and should read as follows:

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

Reasons for change
This will allow for consistency in the decision and clarifies this condition of approval.

The second condition on page 88 listed as A.17(b) under Pre-Construction should read as follows:

17(b). *To minimize impacts to wetlands or waterbodies at the horizontal directional drill (HDD) bore under the Coos River, the applicant must comply with a plan for the HDD crossing of the Coos River approved by FERC under FERC's Wetland and Waterbody Construction and Mitigation Procedures referenced at 18 C.F.R. 380.12(d)(2). The FERC Wetland and Waterbody Construction and Mitigation Procedures shall be the May 2013 version (notice of which was provided at 78 Federal Register 34374, June 7, 2013). The applicant shall submit a copy of the FERC-approved plan for the HDD crossing to the County Planning Department prior to beginning construction of the Coos River crossing.*

Reasons for change: The current proposed condition would require that Board of Commissioner be responsible for approving a report detailing the qualification and work history of the contractor selected by the applicant. In part, the current proposed condition states, "[t]he contractor shall demonstrate to the satisfaction of the County Board that it has sufficient experience conducting successful HDD bores of a similar scale and under similar conditions without significant hydraulic fractures or inadvertent surface returns so as to harm aquatic or wetland resources." Basically this would make Coos County responsible for determining who the contractor would be based on their experience with HDD borers which could make Coos County liable in case of an incident or potentially could cause a lawsuit from the applicants in the event of a disagreement over the contractor's expertise. There are no land use criteria in place for the Board of Commissioners to use when hiring such contractor because it is beyond the scope of land use and would fall within a building codes area. Coos County does not administer building codes, further substantiating the fact that Coos County lacks expertise in this area.

Staff agrees that the Board of Commissioners needs to make sure that there are safeguards in place to address the criteria but the hearings officer went beyond the criteria with the suggestion of the condition. Staff appreciates the detail and the fact the hearings officer went to great lengths to address all of the issues. However, the hearings officer repeats in several areas the word "experience" and Coos County lacks experience in the engineering field which is what would be required to apply such language. Coos County has experienced the difficulty and financial burden of installing its own pipeline. In that case, which is also referenced in the hearings officer's decision, Coos County Board of Commissioners contracted with MasTech, Inc and incurred liability. This case again proves the point that the Coos County Board of Commissioners does not have the expertise to issue approval for a contractor to complete this project. The hearings officer states it is highly unusual for a local governmental unit to exercise this sort of control over an applicant. Even if the current Board of Commissioners had the expertise there is no guarantee that this would be the same governmental unit that would review this matter because they are elected officials.

The fact that this condition was not suggested to satisfy the review criteria directly makes it inconsistent with CCZLDO § 5.0.350 Conditions of Approval and not enforceable. The condition also would create another discretionary review and at that point it is unclear what criteria would be applied. The Board of Commissioners should require that the applicant provide their full plan after it is approved by FERC to address the issue that was raised. FERC has the expertise to evaluate such a plan. Furthermore, water crossings are permitted through other agencies that do have the expertise to review and oversee this project as well as the ability to enforce against the contractor or applicant. We have conditions in place that require the applicant to comply with all state and federal agencies. The hearings officer also notes that the applicant has already agreed to provide much of this same information to FERC. See letter from W. Randall Miller to Jill Rolfe dated Sept. 18, 2013.

Finally, on page 21 of the Hearings Officer's Recommendation, the hearings officer notes that there may be other means to ensure a successful HDD bore, and that his condition was just one of several possibilities. Furthermore, he states "County staff and County Counsel may have additional input for the Board on this issue." In accordance with the hearings officer's suggestion, County staff and County Counsel have conferred and are in agreement that condition A.17(b) should read as stated above.

If you have any questions please contact staff.

COOS COUNTY PLANNING DEPARTMENT

Jill Rolfe, Planning Director

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. 18-11-072PL

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 segment of a natural gas pipeline (Brunschmid & Stock Slough Alternative Alignments)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

Office of Legal Counsel

FINAL DECISION AND ORDER NO. 18-11-072PL
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 13-04) COOS COUNTY, OREGON

FILE NO. AP-18-001
(APPEALS OF COUNTY FILE NOS. EXT-18-01)

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 13-04 (Brunschmid & Stock Slough Alternative Alignments) to February 25, 2019. The staff decision for the file, which was assigned file No. EXT-18-001 is dated May 21, 2018. Staff assigned County File No. AP-18-001 to the appeal.

Previous one-year extensions are documented as follows:

- File No. ACU 16-003 Staff decision dated April 11, 2016 (no local appeal filed).
- File No. EXT-17-002 Staff decision dated May 21, 2017 (no local appeal filed).

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 the current (third) extension request for the Brunschmid and Stock Slough alignments ("Application"). The Planning Director approved this extension on May 21, 2018 (HBCU-13-04 / EXT-18-01). 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 fifth extension request of the original pipeline alignment. 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 Request on Farm and Forest Lands**

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

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 February 21, 2018 (EXT-18-01), 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 Brunschmid/Stock Slough alignment was operating on the second one-year extension request and was set to expire on February 25, 2018 (EXT-18-003). The extension application was filed on February 21, 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 third extension request, so the County has previously addressed the extension criteria. 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 be the same as arguments that were resolved in the decision in AP-17-004 or 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 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,

[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); *BenjFran Development v. Metro Service Dist.*, 17 Or LUBA 30, 46-47 (1988); *S & J Builders v. City of Tigard*, 14 Or LUBA 708, 711-712 (1986).

> 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*, 27 Or LUBA 243 (1994), or

- the first decision resulted in a denial. *Kingsley v. City of Portland*, 55 Or LUBA 256,

[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.

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 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*

[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).

> *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 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.

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[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.

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 table.

Many LUBA cases refer to the term "collateral attack" but do not make it clear if that is

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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).

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 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).

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."

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*

[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).

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 correctly 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. <u>The Criteria Governing the PCGP CUP Have Not Changed.</u>

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 I, 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 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

[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.

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 the current proceeding 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

[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 theproperty.

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.

* * * * *.

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.

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 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.***

[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.

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. <u>Additional Extensions Are Authorized.</u>

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 two extensions on the Brunschmid/Stock Slough alignment, and a third 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. <u>Pacific Connector's Right of Condemnation.</u>

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 for this alignment. 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 February 25, 2019. Accordingly, the Board affirms the Planning Director's May 21, 2018 decisions granting the one (1) year extension for County File No. HBCU-13-04, to February 25, 2019 (EXT-18-01), 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-14-02) OF AN ADMINISTRATIVE CONDITIONAL USE (ACU-14-08) SUBMITTED BY PACIFIC CONNECTOR GAS PIPELINE, L.P.	FINAL DECISION AND ORDER NO. 14-09-063PL

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

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

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

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

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

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

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

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

ADOPTED this 21st day of October 2014.

BOARD OF COMMISSIONERS

COMMISSIONER | COMMISSIONER | COMMISSIONER

ATTEST: Bobbi Brooks

Recording Secretary

APPROVED AS TO FORM:

Office of Legal Counsel

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

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

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

EXHIBIT A

I. Summary of Proposal and Process

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

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

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

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

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

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

Thus, this application concerns two rather narrow questions:

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

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

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

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

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

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

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

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

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

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

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

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

B. Process.

The review timeline for this application is as follows:

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

C. Scope of Review.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Legal Analysis.

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

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

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

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

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

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

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

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

ORS 215.417 was enacted in 2001 and provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The original approval for the pipeline under County File No. HBCU-10-01 (REM-11-01) included the following condition of approval ("Condition 25"):

> The conditional use permits approved by this decision shall not be used for the export of liquefied natural gas.

2010 Decision[3] at 154 (Ex. A). The County included Condition 25 when it approved the pipeline because the applicant voluntarily agreed to it, not because any applicable Oregon or Coos County land use standard distinguished between a natural gas pipeline associated with an import terminal and an otherwise identical natural gas pipeline associated with an export terminal. The Board of Commissioners adopted findings which found the direction of gas flow to be irrelevant under the land use approval standards applied by Coos County:

> Frankly, the Board fails to understand why, from a land use perspective, it matters which direction the gas is traveling, or why exporting gas is a "threat." * * * * * *. Nonetheless, if "reams of testimony" were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning Ordinance provision that requires the County to make that decision.
>
> At the hearing, the applicant agreed to a condition of approval limiting the use of the pipeline to import use. Regardless, the case law makes clear that the issue of whether new gas pipelines are

[3] The 2010 Decision is included in the record of this proceeding, AP-14-02, as Exhibit 5.

> "needed" is not relevant to any approval standard contained in ORS 215.275 or CCZLDO §4.9.450. *Sprint PCS v. Washington County*, 186 Or App 470, 63 P2d 1261 (2003); *Dayton Prairie Water Ass'n v. Yamhill County*, 170 Or App 6, 11 P3d 671 (2000).

2010 Decision at 120. The 2010 Decision does not identify Condition 25 as necessary to ensure compliance with any applicable land use approval standard for the Pipeline.

In 2013, Pacific Connector submitted an application requesting to amend Condition 25. The Board of Commissioners approved that application on February 4, 2014. *See* Final Decision and Order No. 14-01-006PL (the "Condition 25 Decision"). Condition 25 was modified to read:

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

The Board's Final Decision and Order was appealed to the Oregon Land Use Board of Appeals (LUBA). LUBA upheld the Board's decision in *McCaffree*.

To put the matter simply, the Board of Commissioners stated in 2010 that the direction of gas flow in the Pipeline is irrelevant under the applicable land use approval standards for the Pipeline. Condition 25 was included only because Pacific Connector agreed to it at the time, not because it was necessary to ensure compliance with an approval standard. When Pacific Connector requested that Condition 25 be modified, the Board of Commissioners agreed to modify the condition. That decision was made in February 2014, more than a month before Pacific Connector filed the application at issue in this proceeding, requesting an extension of the prior land use approval for the Pipeline. Pacific Connector, in other words, sought extension of an existing land use approval for which the direction of gas flow has been determined to be irrelevant.

Ms. McCaffree nonetheless argues that the association of the Pipeline with an LNG export terminal is somehow a "change" requiring a new application. To the extent her argument is based on the April 2012 decision by the Federal Energy Regulatory Commission (FERC) to vacate its December 17, 2009 order approving a certificate of public convenience and necessity for the Pipeline, she ignores the prior findings by the Board of Commissioners. The Board expressly stated in 2010 that the direction of gas flow does not matter from the perspective of the land use standards applied by Coos County and that the issue of "need" for a natural gas pipeline is to be decided exclusively by FERC. FERC's determination to withdraw a certificate of public convenience and necessity pending a new *federal* process does not affect the legal underpinnings of the Board's prior approval for the Pipeline. It also does not affect the ability of the County to enforce conditions of approval that were tied to FERC's prior conditions. *See* Applicant's Rebuttal dated July 25, 2014, at 11-12.

To the extent Ms. McCaffree's argument is based on a contention that the Pipeline, if associated with an export terminal, is no longer a permitted use in one or more zones, it is too late to raise that argument. It is well understood that a city cannot deny a land use application based on (1) issues that were conclusively resolved in a prior discretionary land use decision, or (2) issues that could have been but were not raised and resolved in an earlier proceeding.

Safeway, Inc. City of North Bend, 47 Or LUBA 489, 500 (2004); *Northwest Aggregate v. City of Scappoose*, 34 Or LUBA 498, 510-11 (1998).[4] The time to present that argument was when Pacific Connector submitted its application to modify Condition 25.

Whether the argument is framed in terms of the Pipeline no longer being a "utility facility necessary for public service" permitted in the EFU zone, or framed as an argument that the "new distribution line" is not allowed in the Forest zone[5] (*see* McCaffree Surrebuttal, at p.3), the result is the same: the decision by the Board of Commissioners to modify Condition 25 – which preceded the application in this case – removed any argument whatsoever that the Pipeline is only a "permitted" or "conditional" use if associated with an LNG import terminal.[6] Ms. McCaffree cannot use this proceeding to re-argue the case for an "import only" restriction in the Coos County land use approval – a restriction that was removed before Pacific Connector applied for a two-year extension of the original approval.

Ms. McCaffree also argues that the "import versus export" distinction is relevant to remedies available under the CCZLDO, but her citations to CCZLDO 1.3.200, 1.3.300 and 1.3.800 provide no support to her argument. Ms. McCaffree also asserts that the current application involves a "change in use" or an approval based on "false information." It does not. Pacific Connector seeks to extend its prior Coos County land use approval for a pipeline to transport natural gas. That use has not changed. She identifies no "false information or data," let alone any such information that is or was relevant to the decisions previously rendered by the Board of Commissioners with respect to the Pipeline.

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[4] The basic rules associated with "separate decisions/collateral attack" are as set forth in cases such as *Dalton v. Polk County*, 61 Or LUBA 27, 38 (2009) (appeal of replacement dwelling permit does not allow challenge of prior partition decision); *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 296, *aff'd*, 195 Or App 763, 100 P3d 218 (2004) (appeal of final subdivision plat does not allow challenge of earlier decision modifying tentative plan condition); *Shoemaker v. Tillamook County*, 46 Or LUBA 433 (2004) (appeal of 2003 parking deck permit does not allow petitioner to challenge the 2001 dwelling permit); *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000) (appeal of final plat cannot reach issues decided in preliminary plat decision); *Sahagain v. Columbia County*, 27 Or LUBA 341 (1994) (in an appeal to LUBA from one local government decision, petitioners may not collaterally attack an earlier, separate local government decision.); *Headley v. Jackson County*, 19 Or LUBA 109, 115 (1990) (same).

[5] Indeed, Ms. McCaffree attempted to raise the "new distribution line" issue at LUBA. LUBA noted that she failed to preserve the issue by raising it in the local proceeding. *McCaffree*, slip op. at 9. LUBA also addressed and rejected the same argument on the merits:

> There is nothing in the text of OAR 660-006-0025(4)(q) that suggests that LCDC was concerned with the direction that gas (or oil or geothermal resources for that matter) flows when in the pipeline, or that LCDC intended to allow or prohibit lines that carry gas, oil, geothermal, telephone, [or] fiber optic cable depending on the identity of the end user or the direction that the resources flow when in the lines.

Id. at 10.

[6] Testimony and a submittal by John Clarke at the July 11, 2014 hearing goes to this same issue. Mr. Clarke submitted the text of regulations from the federal Pipeline and Hazardous Materials Safety Administration (PHMSA), as well as Oregon Public Utility Commission rules adopting the PHMSA rules by reference. Mr. Clarke's testimony appeared to be directed at demonstrating that the Pipeline is a "transmission" line rather than a "new distribution line" in the Forest zone. However, this argument was rejected by the County Board of Commissioners, and the County's decision was affirmed by LUBA in *McCaffree*.

Moreover, Ms. McCaffree misreads CCZLDO 1.3.200. That provision relates to issuance of permits or verification letters for "a building, structure, or lot that does not conform to the requirements of this Ordinance," i.e., existing non-conforming uses or non-conforming development. The proposed pipeline has not been constructed and therefore could not be either a non-conforming use or a non-conforming development. *See* CCZLDO 3.4.100 (establishing basis for alterations to lawful existing non-conforming uses and structures).

CCZLDO 1.3.300 allows for revocation of a permit by the Planning Director "if it is determined that the application included false information, or if the standards or conditions governing the approval have not been met or maintained …." Again, Ms. McCaffree does not identify any "false information"; rather she asserts that circumstances have changed since the original approval because the pipeline will not serve an LNG import terminal. Yet the approval has been lawfully amended to remove the "import only" requirement in Condition 25. This is not an opportunity for Ms. McCaffree to collaterally attack that decision.

Finally, CCZLDO 1.3.800 relates to violations of the Coos County Zoning and Land Development Ordinance. In 2012, the Board of Commissioners approved the Pipeline on remand from LUBA. The County's 2012 "remand decision" was lawfully amended just months ago to change the wording of Condition 25. Ms. McCaffree does not explain how the prior approval can now be a "violation" of the very Ordinance under which the decision was made. That is the very essence of an attack that is both collateral and void of substance.

In summary, the approval of the Pipeline by the Board of Commissioners was not based on the direction of gas flow, as made clear both by the 2010 Decision and the approved amendment of Condition 25. It also was not based on a finding of "need" for the Pipeline. In fact, the Board made it clear that the determination of "need" isn't a Coos County issue at all. Rather, it belongs exclusively to FERC. The fact that the Pipeline is now associated with an LNG export terminal therefore is not a "change" relevant to the approval standards for the pipeline and cannot trigger a requirement for a new application.

B. Tsunami and Earthquake Risk Were Considered in the 2010 Decision and Are Considered Prior to Construction

The Board's findings adopted in support of the County's 2010 decision include a section titled "Potential for Mega-disasters (Tsunamis, Earthquakes, etc.)." Final Decision and Order No. 10-08-045PL, Ex. A at 22-26. Exhibit 5. In that section of the findings, the Board noted that "the risk of a tsunami has been studied and planned for," and that "no harm is anticipated to occur to the pipe as a result of a design tsunami event." *Id.* at 22-23. However, Ms. McCaffree argues that there is new information with regard to both tsunamis and Cascadia Subduction Zone earthquakes, and that the new information is of such significance that it should require the filing of a new conditional use application for the Pipeline.

The hearings officer was initially of the opinion that new factual information pertaining to tsunamis and Cascadia Subduction Zone earthquakes might constitute a change in "circumstances sufficient to cause a new conditional use application to be sought for the same use." However, upon reading the submittals by the parties, the hearings officer was convinced that the new facts do not affect the validity of the assumptions underlying the County's findings from 2010. The Board concurs with the hearings officer's assessment.

The applicant correctly points out that there are at least two potential problems with Ms. McCaffree's argument. First, the applicant argues that Ms. McCaffree does not explain how the "new evidence" is relevant to approval standards for the Pipeline. In the initial case, HBCU 10-01, the Board simply assumed, for purposes of analysis, that the issue of landslides, tsunamis, and earthquakes did in fact relate to some of the approval standards applicable in the case. The Board stated: "Since there are any number of Code criteria under which this concern could potentially be relevant, and because the conclusion is the same no matter the specific criterion at issue, the issue is addressed here." 2010 Decision at 36.

However, in this case, the only "standards" that Ms. McCaffree identifies are Statewide Planning Goal 7 and ORS 455.446 to 455.449. She does not explain why a Statewide Planning Goal would be applicable to a quasi-judicial land use application in a county with an acknowledged comprehensive plan and land use ordinances. Planning Department staff indicated at the July 11, 2014 public hearing that the "new studies" have not been adopted by Coos County as part of its Goal 7 program. Goal 7 does not appear to provide a nexus to an approval standard.

Ms. McCaffree's citation to ORS 455.446 to 455.449 also provides no nexus to approval standards. Even if those statutory provisions apply to the Pipeline, they relate to state building code requirements rather than local land use standards. As the applicant notes, ORS Chapter 455 is titled: "Building Code." Building codes are a separate issue from land use approvals, and building code requirements do not, and cannot, drive land use approvals. In fact, the opposite is true: zoning ordinances determine what types of uses and structures can be constructed at any given location, and building codes inform the landowner to what minimum standard those allowed structures can be built. For example, ORS 455.447 authorizes the Oregon Department of Consumer and Business Affairs, after consultation with the Seismic Safety Policy Advisory Commission and DOGAMI, to adopt rules to amend the state building code to establish requirements regarding seismic geologic hazards for certain types of facilities; it also requires developers of such facilities to consult with DOGAMI on mitigation methods if the facility is in an identified tsunami inundation zone. It is *not* implemented through the local government's comprehensive plan and land use ordinances.

While opponents have not identified how evidence related to the potential for mega-disasters (Tsunamis, Earthquakes, etc) relates to approval criteria, the Board continues to assume that there are multiple approval standards for which a discussion of these issues may be relevant. As an obvious example, CCZLDO §4.8.400 contains a standard that requires the applicant to prove that "the proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands." With regard to the relationship between pipelines and forestry operations, it is at least arguable that pipelines could force foresters to change their forest practices in response to potential concerns over pipeline fires. Based on the record created in 2010, the County ultimately found such concerns to be overstated, but it was nonetheless a proper topic of analysis under this criterion. For this reason, the Board does not fault Ms. McCaffree for failing to link the issue of earthquakes to specific approval criteria.

However, the applicant raises a second issue that cannot be so easily overlooked. Ms. McCaffree does not demonstrate how the purported new information would alter or undermine the findings adopted in 2010. She states that "new tsunami inundation mapping was released by

the Department of Oregon Geology and Mineral Industries on February 12, 2012." *See* McCaffree Written Testimony at 21. She also notes that Oregon State University has issued "a new report entitled, '13-Year Cascadia Study Complete – And Earthquake Risk Looms Large.'" McCaffree Written Testimony at 21.

As indicated in the 2010 Decision, the applicant's geotechnical engineers "studied the potential effect of a 'design tsunami event,' which is apparently a 565 year return period," an event that would produce a "predicted three feet of temporary scouring." 2010 Decision at 22-23. In other words, this is not a situation in which the applicant assumed that there would not be a tsunami. To the contrary, the applicant *assumed* that the Pipeline would be in an area impacted by a major tsunami. The Board found, however, that "tsunamis are not much of an issue considering the pipe will be a thicker grade of steel and it will be buried in 5-8 feet of sediment and encased in four inches of concrete." 2010 Decision at 22.

The OSU study, documented by a press release of less than 3 pages (*see* McCaffree letter dated July 11, 2014, Ex. 10) also does not undermine the findings from 2010. As described in the press release, the study indicates that the southern Oregon coast may be most vulnerable to a Cascadia Subduction Zone earthquake (and tsunami event) "based on recurrence frequency." In other words, the study appears to focus on the likelihood that such an earthquake will occur over any given period of time. Again, this was not a case in which the applicant dismissed such an earthquake as an improbable event. To the contrary, the applicant's analysis, as discussed in the 2010 findings, assumed that a major event (a 565 year return period event) would occur during the life of the project. Given the assumption that such a "mega-quake" *would* occur during the life of the project, the Board's 2010 findings are unaffected by a study showing that a quake is even more likely than previously believed.

Ms. McCaffree's surrebuttal dated August 1, 2014 includes, as Exhibit A, a press release regarding a study of earthquake risk, which states, "The highest risk places have a 2 percent chance of experiencing 'very intense shaking' over a 50-year lifespan ...." This is not a change that undermines any assumptions or analysis underlying the original approval because Pacific Connector already assumed that the Pipeline would face the type of seismic and tsunami event that occurs only once in 565 years. Again, the applicant did not assume a "mega-quake" event is improbable and will not occur; rather, the applicant's experts examined what would happen if a rare seismic event *did* occur during the lifetime of the Pipeline. Nothing in Ms. McCaffree's submittals demonstrates that the applicant failed to assess that risk.

In her surrebuttal dated August 1, 2014 Ms. McCaffree also asserts that "the current proposed pipeline would no longer be underground on the North Spit but some 40+ feet in the air, subjecting it to earthquake and tsunami hazards." McCaffree Surrebuttal at 1. She references Exhibit E of her rebuttal submittal, which includes three cross-sections of the access and utility corridor for the LNG terminal – located between the South Dunes Power Plant and gas conditioning facility to the east and the LNG terminal to the west. This relates to the terminal, and is beyond the scope of this proceeding. But even assuming those cross-sections are part of the Pipeline rather than within the scope of the approvals for the Jordan Cove Energy Project, they do not show the Pipeline hanging 40+ feet in midair. Rather, the three cross-sections show the Pipeline buried adjacent to a roadway (Section B-B), secured to a pad along a roadway (Section C-C), and secured to a pad along a roadway that is elevated less than 10 feet. Again, even assuming for purposes of argument that this is a "change" from the application

reviewed by the hearings officer and Board of Commissioners in 2010 and on remand in 2011-2012, Ms. McCaffree does not identify any land use approval standard to which the change is relevant. As already stated, ORS 455.446 to 455.449 point to review of seismic risks under building code, not the CCZLDO.

In any event, the current application is simply for an extension of the prior land use approvals for the Pipeline. The fact that there may now be somewhat different plans before FERC, including the alternate Brunschmid and Stock Slough alignments, does not bar extending the land use approval for the original alignment as approved in 2012. As the Board of Commissioners recognized in the 2010 Decision, FERC will decide the route of the Pipeline. The contents of the record before FERC at any particular moment do not constitute a substantial change in land use approval standards or factual circumstances that prevent the County from extending the prior approval.

C. National Environmental Policy Act ("NEPA") Requirements are Beyond the Scope of this Application.

In its initial approval of the Pipeline in 2010, the Board rejected arguments by opponents who "believed that [the land use approval] process should be put on hold until other regulatory processes are fully completed." 2010 Decision at 143. Ms. McCaffree again takes issue with the concurrent processing of local land use approvals and FERC approvals, and argues that the County should not make any land use decisions while the completion of the federal Environmental Impact Statement (EIS) is still pending. *See* McCaffree letter dated July 11, 2014, at 5-6. Ms. McCaffree, however, fails to identify any *local* land use approval standard that requires the completion of an EIS. This is not surprising because the EIS is a requirement under *federal* law, the National Environmental Policy Act. 42 U.S.C. § 4321 *et. seq.*; 40 C.F.R. § 1502.5.

As the Board previously noted:

> [T]his approval is not very useful to the applicant if it cannot obtain all of the other required authorizations. It makes sense that the applicant seeks to complete the various applications concurrently, given the length of time it takes to complete each process. In any event, FERC will not issue a Notice to Proceed until all of its conditions are satisfied. Accordingly, the Board adopts a condition of approval to ensure that no construction occurs until the Notice to Proceed is issued.

2010 Decision at 143.

In subsequent proceedings related to the amendment of Condition 25, opponents again attempted to raise NEPA as an issue, but the County found these arguments to be "misdirected" because NEPA-related issues were "simply not within the scope" of that proceeding. Condition 25 Decision at 5. In the Brunschmid Decision, the County rejected identical arguments offered by Ms. McCaffree. In the current proceeding, Ms. McCaffree's arguments related to NEPA remain misdirected, and she offers no new arguments to compel reconsideration of this issue.

FERC compliance with its responsibilities under the NEPA is simply beyond the scope of this local land use proceeding and has no bearing on its outcome.[7]

NEPA was signed into law on January 1, 1970. Congress enacted NEPA to establish a process for reviewing actions carried out by the federal government for environmental concerns. NEPA imposes certain obligations on the federal government, but not state or local governments. See 42 U.S.C. § 4331(b). The Act establishes national environmental policy and goals for the protection, maintenance, and enhancement of the environment and provides a process for implementing these goals within the federal agencies. NEPA does not generally apply to state or local actions, but rather applies to the decisions of federal agencies, as "major federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added).

A requirement of NEPA is that all agencies of the federal government prepare an environmental impact statement ("EIS") when they undertake or fund "major federal actions" that significantly affect the quality of the human environment, but once again the obligation is on a federal agency and not on a local or state government. 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. § 1501.4 (the Council on Environmental Quality's NEPA regulations also explicitly reference that a federal agency is the responsible party for completing an EIS, "[i]n determining whether to prepare an environmental impact statement the Federal agency shall ... .") (emphasis added).

The courts have also found that "NEPA does not regulate the conduct of private parties or state or local governments. NEPA requires the federal government to issue an environmental impact statement before taking any action 'significantly affecting the quality of the human environment.' 42 U.S.C. § 4332(2)(C). Since NEPA requires only action by the government, no private party can comply with NEPA. It is for that reason that in a lawsuit to compel compliance with NEPA, no one but the federal government can be a defendant." *Forest Guardians v. Bureau of Land Management,* 188 F.R.D. 389, 393 (D.N.M. 1999).

NEPA also establishes the Council on Environmental Quality ("CEQ"). As the Federal agency tasked with implementing NEPA, the CEQ promulgated regulations in 1978 implementing NEPA. *See* 40 CFR Parts 1500-15081. These regulations are binding on all federal agencies. The regulations address the procedural provisions of NEPA and the administration of the NEPA process, including preparation of EISs.

Among the rules adopted by the CEQ is 40 CFR §1506.1, which is entitled "Limitations on actions during NEPA process." This section provides as follows:

> *(a) Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:*
>
> *(1) Have an adverse environmental impact; or*
>
> *(2) Limit the choice of reasonable alternatives.*

[7] The Board finds Ms. McCaffree's vague references to state and federal regulation by the Oregon Public Utilities Commission and U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration to be similarly misplaced in this local land use proceeding. *See* McCaffree Written Testimony, at 6.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

The Coos County land use approvals have no effect on the FERC process, as they do not "limit the choice of reasonable alternatives" being considered by the EIS. If, as part of the NEPA process, FERC ends up choosing a different route as the preferred alternative, then the applicant simply has to go back to the drawing board and re-apply for new land use permits. As a case in point, we have seen that take place here: FERC apparently did not like a portion of the applicant's preferred route, and, as a result, the applicant came back before the County seeking new land use approvals for the Blue Ridge alternative route.

Contrary to the position taken by opponents in previous cases, there do seem to be legitimate reasons why an applicant would seek land use approvals either before seeking FERC approval or via concurrent processes. If the County were to find that land use approval was not forthcoming, then FERC would need to take that into consideration to some extent. *See* 40 CFR

1506(2)(d).[8] However, the reverse is not necessarily true – land use approval does not limit FERC's evaluation in any way.

The County is required to process a permit within 150 days of when it is deemed complete. ORS 215.427. There is nothing in the county plan or implementing ordinances or in any other document which makes either NEPA or the Environmental Impact Statement ("EIS") a "plan" provision or other approval criterion for this application. *See Seto v. Tri-Met*, 21 Or LUBA 185, 202 (1991), *aff'd*, 311 Or 456 (1995); *Standard Ins. Co. v. Washington County*, 16 Or LUBA 717 (1988), *aff'd*, 93 Or. App. 78 (1998), *pet for review withdrawn*, 307 Or 326 (1989). The hearings officer has indicated that his own independent research revealed nothing which would either require or allow the County to put a local land use process on hold pending NEPA review by FERC. In the absence of any contrary legal authority offered by opponents, the Board accepts the hearings officer's characterization of this issue.

In short, the NEPA process and the state-mandated, County-implemented land use process are operating on separate tracks, and appear to have little, if any, intersection. LUBA has held that in cases where a NEPA process must be undertaken in conjunction with a local land use process, the NEPA process need not precede the land use process. *Standard Ins. Co.*, 16 Or LUBA at 724. In *Standard Ins. Co.*, LUBA recognized that even after an EIS is prepared, that local comprehensive plans are "subject to future change." *Id.* LUBA acknowledged the possibility that the adoption of a plan amendment or a series of amendments might result in the need to prepare a supplementary EIS. *Id.* (citing *Comm. for Nuclear Responsibility v. Seaborg*, 463 F. 2d 783, (D.C. Cir. 1971)). Nonetheless, LUBA noted that "there is no requirement that a new EIS precede such plan amendments."

Finally, it is worth noting that under NEPA regulations, until a decision is made and an agency issues a record of decision, no action can be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives. The NEPA process is to be implemented at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delay later in the process and to avoid potential conflicts. 40 CFR 1501.2. In this case, FERC will not issue a "Notice to Proceed" until all of its conditions are satisfied. The Board adopts a condition of approval to ensure that no construction occurs until the Notice to Proceed is issued.

It should also be reasonably clear to all involved that County land use approval of the proposed route should not be viewed by FERC as any sort of endorsement by the County Board of Commissioners. In this regard, Pacific Connector should not attempt to use land use approvals as ammunition in the FERC approval process. At best, County land use approval of the pipeline route simply means that, as conditioned, the proposed route does not violate land use standards and criteria.

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[8] 40 CFR 1506(2)(d) provides:

> To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

D. FERC's Act of Vacating its 2009 Order Approving the Pipeline As an Import Facility Is Not Relevant to These Proceedings.

On December 17, 2009, FERC issued an order approving a certificate of public convenience and necessity for the Pacific Connector Gas Pipeline. 129 FERC ¶ 61,234. Appendix B of that Order, attached to the applicant's July 25, 2014 submittal as "Attachment E," sets forth environmental conditions for that approval. Several of those conditions were incorporated by reference into the conditions of approval for the Board's Final Decision and Order No. 10-08-045PL; the conditions approved by the Board also reference a section of the Final Environmental Impact Statement (FEIS) as well as the applicant's Erosion Control and Revegetation Plan (ECRP).

The opponents take note of the fact that FERC vacated its Order approving the certificate of public convenience and necessity for the Pacific Connector Gas Pipeline in 2012. Ms. McCaffree argues that FERC's decision to vacate its December 17, 2009 Order creates a situation where the Coos County's conditions of approval can no longer reference conditions in that order, or documents included in that FERC record (such as the FEIS and ECRP).

As the applicant correctly notes, the question presented here is not whether those conditions and documents from the prior FERC record remain enforceable by FERC. Rather, they are incorporated into the County's conditions of approval, and the question is whether the content of the condition can be determined. As evidenced by Attachment E to the applicant's July 25, 2014 submittal, the prior FERC conditions have not vanished – they are readily accessible, as are the other documents that were part of that FERC record. As long as the County can determine the content of conditions or documents incorporated by reference in the County's conditions of approval, it can enforce those conditions. FERC's decision to vacate the 2009 Order does not constitute a change of circumstances necessitating a new conditional use application because the meaning of the County's conditions of approval can still be discerned and those conditions can be enforced by the County.

E. CBEMP Policies 5 and 5a Do Not Apply.

Ms. McCaffree argues that "[t]here has been no finding of 'need' and 'consistency' that supports this change of direction of the flow of gas in the pipeline." McCaffree letter dated July 11, 2014, at 7. Ms. McCaffree misunderstands the nature of the current proceeding regarding an extension of time for an existing Conditional Use Permit. The amendment of Condition 25 has already been approved, and this is not the forum in which to appeal that prior decision. To the extent that the Natural Gas Act and related federal regulations require the Pipeline to meet a "public need" or "public interest" standard, this is an issue within FERC's sole jurisdiction and therefore not relevant to this proceeding.

Ms. McCaffree seeks to CMEMP Policy 5 as a nexus to a public need requirement. Ms. McCaffree cites CBEMP Policy 5(l)(b), which requires that an applicant who is proposing dredging and fill operations in an estuary to show that "a need (*i.e.*, a substantial public benefit) is demonstrated," and that "the use or alteration does not unreasonably interfere with public trust rights."

However, CBEMP Policy 5 and 5a are inapplicable to the Pipeline application. In the County's 2010 Decision, the Board determined that, in the absence of an applicable local land use approval standard, "'need' is simply not an approval criterion for this decision," rejecting arguments from opponents, including Ms. McCaffree, who had "asserted the belief that eminent domain should not be used unless there is a local 'need' for the project." 2010 Decision at 144. Further, the County found that "since the pipeline is expected to transport natural gas in interstate commerce, any local zoning ordinance requiring the pipeline to serve a 'need' by local customers, rather than the concerns of interstate commerce, is a clear violation of the Commerce Clause." *Id.*

Ms. McCaffre concedes that a low intensity pipeline (such as is proposed here) is allowed in the Estuary zoning districts, but argues that "that does not mean that the digging of a trench or an HDD would also be allowed." McCaffree letter dated July 11, 2014, at 7. Instead, she argues that "essentially allowing a pipeline structure in these zones could mean you just placed the pipeline on top of the tidal muds and/or shorelands." *Id.* (emphasis removed). While the Board understands the concept behind Ms. McCaffree's argument, it is not supported by any language in the Ordinance. To the contrary, CBEMP Policy #2 allows "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation." Moreover, it simply makes no sense to suggest that utilities which are typically buried beneath the ground should be only allowed across the surface of estuaries. If anything, that result would tend to be the polar opposite of what Policy 5 is trying to achieve. A pipeline set forth above the ground would have a plethora of additional impacts that are not present with a buried pipeline. As just one example, an above ground pipeline would limit opportunities for other uses, such as boating. For these reasons, the Board rejects Ms. McCaffree's argument.

Although Ms. McCaffree does not cite to Statewide Planning Goal 16, the Ordinance language in CBEMP Policy 5(I)(b) that she references has its origins in that Goal. Under the Section of the Goal entitled "Implementation Requirements," the following is provided:

> *2. Dredging and/or filling shall be allowed only:*
> *a. If required for navigation or other water-dependent uses that require an estuarine location or if specifically allowed by the applicable management unit requirements of this goal; and,*
> *b. If a need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights; and*
> *c. If no feasible alternative upland locations exist; and,*
> *d. If adverse impacts are minimized.*

Coos County's Zoning Ordinance defines the terms "dredging" and "fill" as follows:

> *DREDGING: The removal of sediment or other material from a stream, river, estuary or other aquatic area: (1) Maintenance Dredging refers to dredging necessary to maintain functional depths in maintained channels, or adjacent to existing docks and related facilities; (2) New Dredging refers to deepening either an existing authorized navigation channel or deepening a natural channel, or to create a marina or other dock facilities, or to*

obtain fill for the North Bend Airport runway extension project; (3) Dredging to Maintain Dikes and Tidegates refers to dredging necessary to provide material for existing dikes and tidegates; (4) Minor dredging refers to small amounts of removal as necessary, for instance, for a boat ramp. Minor dredging may exceed 50 cubic yards, and therefore require a permit.

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

The applicant is not proposing "new dredging" because it is not proposing to deepen the channel of Haynes Inlet. In fact, it is not at all clear that the applicant is dredging at all, since that definition requires the "removal of sediment or other material from the estuary." The applicant is not proposing to remove any sediment from the water. Nonetheless, to the extent that the applicant's activities constitute dredging within the meaning of the code, the type of dredging will be "incidental dredging necessary for installation" of a pipeline. *See* Statewide Planning Goal 16. In this regard, CBEMP Policy 2, entitled "General Schedule of Permitted Uses and General Use Priorities." provides as follows:

MANAGEMENT UNIT: NATURAL

B. Uses and Activities listed below MAY be allowed in Natural Management Units when it is established that such are consistent with the resource capabilities of the area and the purpose of the management units (LCDC Goal #16) (pursuant to "Linkage" and "Goal Exception" findings in this Plan) but also subject to special conditions and other policies set forth elsewhere in this Plan.

* * * * *

9. Pipelines, cables and utility crossings, including incidental dredging necessary for their installation.

Thus, incidental dredging for pipeline installation is permitted in the 11-NA and 13-NA zones, if the applicant can demonstrate that pipelines are consistent with: (1) the resource capabilities of the area, and (2) the purpose of the management units. This two-part test mirrors the requirement set forth in Statewide Planning Goal 16.

CBEMP Policy #4 provides the test for determining whether that two-part test is met:

> *a determination of consistency with resource capability and the purpose of the management unit shall be based on the following:*
>
> *i. a description of resources identified in the plan inventory;*
>
> *ii. an evaluation of impacts on those resources by the proposed use (see Impact Assessment procedure, below);*
>
> *iii. a determination of whether the proposed use or activity is consistent with the resource capabilities of the area, or that the resources of the area are able to assimilate the use and activity and their effects and continue to function in a manner to protect significant wildlife habitats, natural biological productivity, and values for scientific research and education.*[9] (Underlined emphasis added.

CBEMP Policy #2 implements Statewide Planning Goal 16 and provides a general schedule of permitted uses and general use priorities in the aquatic areas of the estuary. The policy divides the aquatic areas into the three management units described in Goal 16, namely those of Natural, Conservation and Development. Each management unit, at Section B., describes the uses and activities that may be allowed, subject to different required findings, in each of the separate management units. As Ms. McCaffree notes, the list of uses for the Natural management unit in Section B of Policy #2 includes "temporary alterations." However, that list also includes "pipelines, cables, and utility crossings, including incidental dredging necessary for their installation," which more closely describes the Pipeline project. The fact that the applicable use category already contemplates incidental dredging activities associated with the installation of "pipelines" indicates that any temporary impacts associated with the use are already contemplated as part of the allowed "pipeline" use designation. Under such circumstances, it would be redundant for the county to separately consider "temporary alterations" associated with the Pipeline. Therefore, the Board continues to find that the Pipeline does not include any "temporary alterations."

Second, the Statewide Planning Goals define what constitutes a "temporary alteration," as follows:

> **TEMPORARY ALTERATION.** Dredging, filling, or another estuarine alteration occurring over a specified short period of time which is needed to facilitate a use allowed by an acknowledged plan. Temporary alterations may not be for more than three years and the affected area must be restored to its previous condition. Temporary alterations include: (1) alterations necessary for federally authorized navigation projects (e.g., access to dredged material disposal sites by barge or pipeline and staging areas or dredging for jetting maintenance), (2) alterations to establish

[9] The underlined portion of CBEMP Policy 4, quoted above, is a word-for-word copy of the standard set forth in the GOAL 16 rule, as amended on Oct. 11, 1984 by LCDC.

mitigation sites, alterations for bridge construction or repair and for drilling or other exploratory operations, and (3) minor structures (such as blinds) necessary for research and educational observation.

The PCGP project does not fall within any of the listed categories.

Third, the pipeline use, including incidental dredging necessary for its installation, is also allowed in both the Conservation and Development management units "without special assessment of the resource capabilities of the area." Because of the specific definition of pipeline, with incidental dredging necessary for its installation, is a more specific use category than that of "temporary alternations," the pipeline use is not deemed to be a temporary alteration which would, as such, require compliance with Policy #5a. Accordingly, the Board continues to finds that CBEMP Policy #5a is inapplicable. Ms. McCaffree has offered no plausible reason for the County to reconsider this prior determination in this limited extension request proceeding.

Similarly, the "need" standard in OAR 345-026-0005 is inapplicable to interstate natural gas pipelines subject to FERC jurisdiction. That regulation was promulgated by the Oregon Energy Facility Siting Council ("EFSC"). It expressly applies only when EFSC is determining whether to issue a "site certificate" for certain non-generating facilities, including natural gas pipelines. *See* OAR 345-023-0005 ("To issue a site certificate for a facility described in sections (1) through (3), the Council must find that the applicant has demonstrated the need for the facility"). The applicant, however, is not seeking a site certificate from EFSC. Thus, OAR 345-023-0005 is not applicable in the current proceeding. Moreover, a natural gas pipeline under FERC jurisdiction, including the Pipeline, is by statute exempt from the requirement to obtain a site certificate from EFSC. *See* ORS 469.320(2)(b) ("A site certificate is not required for ... [c]onstruction or expansion of any interstate natural gas pipeline or associated underground natural gas storage facility authorized by and subject to the continuing regulation of the Federal Energy Regulatory Commission or successor agency"). There is, in other words, no plausible basis for concluding that this extension application is subject to EFSC's "need" standard for non-generating facilities.

On page 10 of her letter dated July 11, 2014, Ms. McCaffree presents an excerpt from the LUBA oral argument in the *McCaffree v. Coos County* case. In the provided dialogue between a LUBA administrative law judge and the applicant's attorney, the attorney for Pacific Connector appears to concede that a change from import to export would require a different analysis when addressing the "public need" question. However, there is insufficient amount of dialogue presented to understand the context of the conversation between the LUBA ALJ and the attorney. The dialogue does not make apparent what criteria they are referring to. For all we can tell, the conversation may be related to the FERC proceeding. Regardless, the Board continues to stand by its prior evaluation and approval of the analysis contained on pages 7 to 15 of the hearings officer's recommendation in HBCU 13-02 under the heading "Limits of the Police Power, A Lawful Condition Must Promote the Health, Safety, Morals, or General Welfare of the Community in Order to Be Constitutional," which is hereby incorporated by reference. In those findings, the hearings officer concludes that Pipeline that has previously received cannot be denied simply on account of the fact that the applicants proposed a change in the direction of the gas. The hearings officer's findings and recommendation in HBCU 13-02

were adopted by the Board and incorporated as the Board's decision. Coos County Final Decision and Order, No. 14-01-006PL (Feb. 4, 2014). While the police power is broad, there would be no public health, safety, morals, or general welfare nexus that would allow the local government to deny a previously approved use on zoning grounds, when there is no physical change in the structure.

F. The County Has Previously Determined that the Pipeline is a "Distribution Line," Not a "Transmission Line" under the DLCD Administrative Rules Implementing Statewide Planning Goal 4.

The 2010 Decision permitted the Pipeline in the Forest zone as a "new distribution line" under the applicable Goal 4 regulations and local zoning. OAR 660-006-0025(4)(q); CCZLDO 4.8.300(F). 2010 Decision at 80–87. The issue was again raised in the proceedings regarding the amendment of Condition 25, with the County finding that the term "distribution line" as used in the applicable Goal 4 regulations was not mutually exclusive of the term "transmission line" as used in ORS 215.276. Instead, the County concluded that the proposed Pipeline, regardless of the direction of gas flowing within it, "constitutes a 'distribution line' as that term is used in OAR 660-006-0025(4)(q), and also that it constitutes a gas 'transmission line' as that term is used in 215.276(1)(c).

On appeal, LUBA found that Ms. McCaffree had not preserved her arguments related to this "distribution line" issue, but also provided alternative reasoning clearly rejecting her contentions on the merits. LUBA's analysis of this issue is conclusive: "The definition of 'transmission line' for purposes of the Exclusive Farm Use statute is inapposite for purposes of determining whether, under the Goal 4 rule that regulates uses in the Forest zone, the pipeline is a 'new distribution line.'" *McCaffree*, __ Or LUBA at __ (slip op. at 10). After review of the text, context, and legislative history, LUBA concluded that "for purposes of conditional uses that are allowed in the Forest zone, all *non-electrical* lines with rights-of-way of up to fifty feet in width are classified as 'new distribution lines.'" *Id.*

Ms. McCaffree's reliance on inapplicable definitions from unrelated federal regulations is misplaced,[10] and her attempt to raise this issue again is rejected. In any event, the County's analysis of this issue and LUBA's analysis in *McCaffree v. Coos County* are determinative of this issue.

G. The County Has Previously Determined that the Pipeline is a "Public Service Structure" as Defined by CCZLDO 2.1.200, and is Permitted in the EFU zone as a "Utility Facility Necessary for Public Service."

On page 11 of her letter dated July 11, 2014, Ms. McCaffree argues that the pipeline use to export natural gas is not a "utility" or a "public service structure. Ms. McCaffree argues that the pipeline cannot be a "public service structure" because it would not be a "structure" as defined in the CCZLDO. However, she ignores the fact that the relevant definition of "utilities" specifically includes "gas lines," and identifies them as "public service structures."[11]

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[10] *See* McCaffree letter dated July 11, 2014, at 13 (citing 49 C.F.R. § 192.3).

[11] CCZLDO 2.1.200:

The County has previously determined that a pipeline used to import natural gas is a "public service structure" as defined in CCZLDO 2.1.200, and is permitted in the EFU zone as a "utility facility necessary for public service." 2010 Decision at 108–12. While gas lines arguably do not qualify as "structures" under the Ordinance's current definition,[12] the County previously addressed any potential confusion arising from the inconsistent definitions of "structure" and "utilities." In the 2010 Decision, the Board analyzed the issue extensively and concluded that, as a result of 2009 amendments to the definition of the term "structure," the "Ordinance contains internal inconsistencies between the formal definition of the term 'structure' and the usage of that term throughout the Ordinance." 2010 Decision at 111. Resolving these inconsistencies based on the clear inclusion of "gas lines" within the definition of "utilities," the Board ultimately found the interstate gas pipeline to be a "utility." *Id.* at 111–12.

Interstate natural gas pipelines are recognized under state land use laws as being a 'utility facility' for purposes of rural zoning in EFU zones. *See* ORS 215.276. Because of this fact, the County cannot conclude that 'interstate natural gas pipelines and associated facilities' are not a 'utility,' notwithstanding any quirks in the zoning Ordinance's definition of 'utility.' To do so would be contrary to the legislative intent behind ORS 215.275.

Ms. McCaffree's attempt to raise this issue once again is a collateral attack on this prior decision. While it might be possible for the Board of Commissioners to deny an extension of a conditional use permit on the grounds that it believes it previously interpreted the law incorrectly, the Board does not see any flaws in its previous holdings. In fact, the Board believes that Ms. McCaffree's analysis on this issue is flawed and would likely be overturned on appeal if adopted by the Board.

H. The Pipeline's Compliance with Applicable CBEMP Policies Has Previously Been Determined;

a. The Applicant Has Previously Demonstrated Compliance with CBEMP Policy 14.

The County comprehensively addressed compliance with CBEMP Policy 14 in the 2010 Decision. *See* 2010 Decision, at 123–26. In that decision, the County found that "[t]his plan policy is met," determining that the Pipeline, "as a necessary component of the approved industrial and port facilities use (the LNG terminal), and/or as a Policy #14 'other use,' being the low-intensity utility use identified in the CBEMP zoning districts, satisfies a need that cannot be accommodated on uplands or shorelands in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use." *Id.* at 126. Ms. McCaffree identifies no changes that would affect this analysis.

b. CBEMP Policy 11 Does Not Apply.

UTILITIES: Public service structures which fall into two categories:

1. Low-intensity facilities consisting of communication facilities (including power and telephone lines), sewer, water and gas lines, and
2. High-intensity facilities, which consist of storm water and treated waste water outfalls (including industrial waste water).

[12] CCZLDO 2.1.200 ("STRUCTURE: Walled and roofed building including a gas or liquid storage tank that is principally above ground.").

As the applicant has explained previously, not all CBEMP Policies are applicable to all activities in all CBEMP zoning districts. Instead, CCZLDO 4.5.150 describes how to identify which policies are applicable in which zoning districts. Ms. McCaffree, however, identifies CBEMP policies without explaining how or why such policies apply to the Pipeline. For example, she argues that CBEMP Policy 11 requires the County to receive a determination from various other agencies prior to permit issuance. *See* McCaffree letter dated July 11, 2014, at 14. Yet, Policy 11 is not applicable in any of the zoning districts crossed by the Pipeline (6-WD, 7-D, 8-WD, 8-CA, 11-NA, 11-RS, 13-NA, 18-RS, 19-D,19B-DA, 20-RS, 21-RS, 21-CA, 36-UW).

In any event, Ms. McCaffree reads more into Policy 11 than the text permits. Policy 11 is, like many of the other CBEMP policies, a legislative directive to the County requiring coordination with state and federal agencies, rather than applicable review criteria for land use applications such as the current application by Pacific Connector. Policy 11 does not preclude the County from issuing any permits until all other such approvals have been received, as such a requirement would conflict with the statutory requirement that the County process a permit within 150 days of when it is deemed complete. ORS 215.427.

Regardless, the conditions of approval require the applicant to obtain all necessary state and federal permits prior to construction, thereby providing sufficient evidence that the authority of these agencies over their respective permitting programs will be respected and the permitting efforts will be "coordinated." *See* 2010 Decision, Staff Proposed Condition of Approval #14 ("All necessary federal, state and local permits must be obtained prior to commencement of construction, including any required NPDES 1200-c permits. . . .").

c. CBEMP Policy 4 Does Not Apply.

On page 14 of her letter dated July 11, 2014, at 14, Ms. McCaffree argues that CBEMP Policy 4 requires coordination with various state agencies prior to County sign off on permits. However, CBEMP Policy 4a is similarly inapplicable to a "low-intensity utility facility" such as the Pipeline in any of the CBEMP zoning districts traversed by the Pipeline. Ms. McCaffree's out-of-context recital of the language of Policy 4a, which addresses "Fill in Conservation and Natural Estuarine Management Units," is irrelevant to this proceeding. Policy 4a applies to aquaculture activities involving dredge and fill in the 8-CA, 11-NA, 13-NA, 19B-DA, 21-CA, and 36-UW zones crossed by the Pipeline. However, low-intensity utilities in each of those zones, such as the Pipeline, are subject only to general conditions which do not include Policy 4a. *See* CCZLDO 4.5.376; 4.5.406; 4.5.426; 4.5.541; 4.5.601; 4.5.691. Thus, Policy 4a does not apply to the Pipeline.

Ms. McCaffree identifies no substantial change in land use patterns or the Ordinance which would mandate consideration of the applicability of any of the CBEMP policies to the Pipeline as part of the proceedings for this extension request.

d. The County Has Previously Determined CBEMP Policy 50 to be Inapplicable to the Pipeline.

On page 11 of her letter dated July 11, 2014, Ms. McCaffree attempts to explain why Plan Policy 50 applies to this case. However, the County has previously rejected arguments suggesting that CBEMP Policy 50 was applicable to the Pipeline. In response to "comments suggesting that a gas pipeline should be considered a 'high-intensity' utility facility"

inapplicable for rural parcels, the County determined that "[t]he Ordinance resolves the issue in a manner that is unambiguous and conclusive against [that] argument. Given the recognition that gas lines are a 'low-intensity' facility,' Plan Policy 50 does not assist the opponents in any way." 2010 Decision, at 138. Ms. McCaffree has identified no changes in land use patterns or zoning that would alter the County's prior conclusion that "[t]his plan policy is met." *Id.*

I. Routine Changes to Oregon Coastal Management Program Do Not Create Circumstances that Warrant a New Application Process.

In her letter dated July 11, 2014, Ms. McCaffree argues that a "Notice of Federal Concurrence for Routine Program changes to the Oregon Coastal Management Program" ("OCMP") was issued on March 14, 2014, and that this notice includes some undisclosed changes to the Coos County Comprehensive Plan. Ms. McCaffree concedes that she does not know if these proposed changes will have any impact on the pipelines, but recommends that the extension be denied so that the County may evaluate the issue.

The OCMP implements the federal Coastal Zone Management Act ("CZMA").[13] The CZMA was enacted in 1972 and was designed to foster the development of state programs for "the effective management, beneficial use, protection, and development of the coastal zone."[14] If a state wishes to participate, it submits its program to protect the water and land resources of the coastal zone – its "coastal management program" ("CMP") – to the U.S. Department of Commerce for approval. States are not required to participate; unlike other federal regulatory programs, including the Clean Water Act and the Clean Air Act, the federal government does not administer a coastal zone program if a state elects not to participate.

The CZMA offers a succinct explanation of the effect of an approved CMP, the process for state review of an applicant's certification of consistency with the "enforceable policies" of the CMP, and the process and standard for review by the Secretary of Commerce:

> After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification.

[13] 16 U.S.C. § 1451 et seq.
[14] *Id.* § 1451(a).

> If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.[15]

"Enforceable policies" for purposes of the CZMA consistency determination are those portions of the CMP "which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."[16]

Oregon's Department of Land Conservation and Development ("DLCD") is in the process of updating Oregon's Coastal Management Program. As one part of that update process, DLCD submitted to the federal Office of Ocean and Coastal Resources Management ("OCRM") the current substantive provisions of the Coos County Comprehensive Plan and CCZLDO that DLCD requested be incorporated into Oregon's Coastal Management Program. OCRM concurred with that incorporation on February 8, 2014. *See* Exhibit 11 attached to McCaffree Letter dated July 11, 2014.

As the applicant correctly points out, all that this "routine change" to Oregon's Coastal Management Program did was to incorporate the County's *current* substantive land use provisions as part of the CMP. That is clear from OCRM's February 18, 2014 letter to DLCD: "Thank you for the Department of Land Conservation and Development's (DLCD) October 1, 2013 request to incorporate *current versions* of the Coos County Comprehensive Plan (which includes the Coos Bay Estuary Management Plan and the Coquille River Estuary Management Plan), and the Coos County Zoning and Land Development Ordinance, into the Oregon Coastal Management Program." *See* Exhibit 11 attached to McCaffree Letter dated July 11, 2014 (emphasis added). The applicant provided DLCD's listing of the relevant Coos County provisions as submitted to OCRM. *See* Attachment A to Marten Law letter dated July 25, 2014. Coos County did not amend, revoke or supplement any of its land use standards applicable to the Pipeline. Rather, DLCD simply provided the federal government with updated information about the provisions of the County's comprehensive plan and land use standards that are incorporated in the Oregon CMP for purposes of making consistency determinations under the CZMA. That does not alter the standards applied by you or the Board of Commissioners in land use proceedings for the Pipeline. In short, Ms. McCaffree's claim that "there are obviously

[15] *Id.* § 1456(c)(3)(A).
[16] *Id.* § 1453(6a); *see also* 15 C.F.R. § 930.11(h).

changes that have occurred" is incorrect. The routine changes in the State's CMP are not changes in the pipeline or in the local land use standards applicable to the Pipeline.

J. Changes to FEMA Floodplain Mapping Do Not Constitute a Circumstance Which Warrants a New CUP Application.

The Board of Commissioners adopted, as part of the 2010 Decision , the following "pre-construction" condition of approval:

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

Under CCZLDO 4.6.230(4) as then in effect, "other development" had to be reviewed and authorized by the Planning Department prior to construction. Authorization could not be issued unless a licensed engineer certified that the proposed development would not:

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

b. result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.

This flood hazard review, as described in the CCZLDO, occurs prior to construction. It was not part of the land use review in the 2010 Decision or Final Decision and Order No. 12-03-018PL (Mar. 13, 2012) (the "2012 Decision").

Ms. McCaffree cites "amendments to the CCZLDO having to do with Floodplain Overlay boundaries and Plan Policy 5.11" as a basis for denying the requested extension of those prior approvals for the Pipeline. *See* McCaffree letter dated July 11, 2014, at 23. Although she asserts that "the new FEMA boundaries will directly impact the pipeline and the proposed route," she does not explain how such changes are relevant to the land use approval standards for the Pipeline. She submitted into the record of this proceeding a copy of Final Decision and Ordinance 14-02-001PL, but omitted Attachment A to that Ordinance, which shows the specific changes adopted by the Board.

The applicant submitted a complete copy of Ordinance 14-02-001PL as Attachment B to their Surrebuttal. Nothing in the ordinance alters any finding made by the Board in 2010 and 2012. Critically, the provisions addressing "other development" have been moved to CCZLDO 4.6.217(4), but are identical to the prior version of the Ordinance quoted above, and are still addressed by the Planning Department prior to construction. The changes clarify that the special flood hazard area is based on March 17, 2014 Flood Insurance Rate Map ("FIRM"). CCZLDO 4.6.207(1). Condition 15 of the 2010 decision, however, is not tied to any particular version of the FIRM. The applicant does not vest into any particular FIRM map, nor does it vest into certain editions of the building code or SDC ordinances. Therefore, Condition 15 remains adequate to ensure that, prior to construction, the applicant must meet the standards for "other construction" for portions of the Pipeline within the special flood hazard area of Coos County. The Board's adoption of revised Floodplain Overlay provisions does not constitute

either a "substantial change in the land use pattern of the area" or "other circumstances sufficient to cause a new conditional use application to be sought."

In her surrebuttal dated August 1, 2014, Ms. McCaffree speculates as to how new flood hazard mapping might affect the Pipeline. *See* McCaffree Surrebuttal at p.1. However, the Board of Commissioners did not rely on the FEMA flood hazard boundaries for its findings of compliance with any approval standards in 2010 or on remand in 2012. With Condition 15 in place, the County has assurance that Pacific Connector must address FEMA's mapped flood hazard areas prior to construction. Alterations in those maps are accommodated within the current approval; a new application is unnecessary.

K. Pipeline Alignment

Ms. McCaffree further argues that Pacific Connector has changed the alignment of the pipeline by way of her reference to Exhibits 17 and 18 on page 24 of her July 11, 2014 letter. The simple response is that this application merely seeks to extend the Coos County approval of the original pipeline route. The final decision and order did not include a condition to build the approved alignment. Any potential alternate alignments from the FERC record are irrelevant and do not constitute any change in the County's zoning ordinance or land use patterns in the surrounding area.

L. Potential Impacts to Oysters Were Addressed in the 2010 and 2012 Decisions and by the Oyster Mitigation Plan

Two letters from Ms. Lili Clausen, Clausen Oysters, express concerns regarding access to oyster beds, construction-related suspended sediment impacts, and potential alternative routes. *See* Exhibit 1 (letter from L. Clausen to Coos County Planning Department dated June 28, 2014), Exhibit 3 (Undated submittal from Lili Clauson asking various questions of the County), and Exhibit 7 (letter from L. Clausen to Coos County Planning Department dated July 21, 2014). Ms. Clausen has previously expressed similar concerns in a prior letter dated May 13, 2010, which was specifically considered by the County in its original decision approving the Pipeline. 2010 Decision, at 74–77. The applicant directly addressed issues raised by Ms. Clausen through a letter report prepared by Robert Ellis, Ph.D., of Ellis Ecological Services. That report described the measures taken by the applicant to avoid and mitigate impacts to oyster beds, providing substantial evidence that any impacts on commercial oyster beds in Haynes Inlet (and other natural resources) caused by the Pipeline would be "temporary and de minimis." *Id.* at 74–77, 80.

Various opponents appealed the original 2010 land use approval to LUBA. LUBA remanded the 2010 Decision for further analysis of potential impacts to native Olympia oysters. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162, LUBA No. 2010-086 (March 29, 2011). On remand, the County conducted a land use proceeding in which an extensive record pertaining to native Olympia oysters was developed. After extensive consideration of potential impacts to such native oysters, the County concluded that "the applicant has met its burden of proof to demonstrate that the proposed pipeline construction will reduce any potential harm to the Olympia Oyster population in Haynes Inlet to such a degree that there is at most a de-minimis or insignificant impact on the oyster resources that the aquatic zoning districts 11-NA and 13A-NA require to be protected." 2012 Decision at 68. As part of the remand proceedings,

the applicant has developed an Oyster Mitigation Plan and has agreed to not only relocate Olympia oysters from the Pipeline route, but also to create additional new habitat within the pipeline right of way "that will result in a significant *increase* in the numbers of Olympia oysters in Haynes Inlet." *Id.* at 29; *see also* 2012 Decision, Condition of Approval, Conditions on Remand No. 1 ("The applicant shall comply with the terms and conditions of the applicant's proposed Olympia oyster mitigation plan prepared by Bob Ellis of Ellis Ecological Services, Inc. dated October 7, 2011 (the 'Mitigation Plan'). . . ."

In her July 21, 2014 letter, Ms. Clausen states that "I did not like the tone used in telling me, at the meeting, that the whole oyster issue was settled. We the commercial oyster growers, do expect our concerns to be addressed." However, in his recommendation, the hearings officer indicated that he was "taken aback" by the lack of situational awareness evident in the Clausen Oysters' oral presentation. Neither Ms. Clausen's written nor oral testimony indicates that she or Clausen Oysters had participated in the "remand" proceedings in which oyster issued were extensively discussed and debated, and the hearings officer did not recall Ms. Clausen's or her company's participation in those proceedings. The hearings officer characterized Ms. Clausen's testimony as seeming "unprepared" and consisting merely of a recitation of a "laundry list" of questions regarding the case. Hearings Officer Recommendation, at 38-39.

The County has previously found that the applicant has demonstrated that it will not have a significant impact on oysters in Haynes Inlet, either commercially farmed or wild native oysters. The Board finds that nothing in Ms. Clausen's letters or oral testimony identifies a substantial change in land use patterns, the zoning Ordinance, or the Pipeline that would justify revisiting these prior determinations.

M. The Record Demonstrates the County Commissioners Were Not Biased in Their Decision-Making and Did Not Have Any Impermissible *Ex Parte* Contacts

At the beginning of the Board's deliberations on September 30, 2014, Chair Cribbins asked Commissioners whether they needed to declare any conflicts and bias. All, including the Chair, answered "no." All three commissioners also indicated that they did not need to abstain from participating in the hearing.

The Chair then asked: "Does anyone present today wish to challenge any member of the Board of Commissioners from participating in today's hearing?" The only response was from Jody McCaffree:

> McCAFFREE: You're saying that you don't have a bias when you support the project and ran your campaign on that?
>
> CRIBBINS: Who are you addressing, Ms. McCaffree?
>
> McCAFFREE: Both you and Mr. Sweet.
>
> CRIBBINS: I would challenge you to show where I've ever run my campaign on that. Thank you.
>
> SWEET: I don't think I have a bias.

McCAFFREE: You've openly supported this project though. And that is a bias. Right?

Ms. McCaffree also alleged that Commissioner Sweet had met with representatives of the Jordan Cove project:

McCAFFREE: And you've never met with the applicant privately or in meetings where you've not included opponents of the project? You were seen at the airport meeting with them. That's why I'm questioning you. But you never gave us the opportunity to meet with you.

LEGAL COUNSEL: Was it directly related to this appeal?

McCAFFREE: I have no idea. I wasn't at the meeting.

SWEET: Who was at that meeting?

McCAFFREE: You met with Jordan Cove's representatives, Michael Henricks and, um, Ray [inaudible].

SWEET: Yes, I met with them. It was pretty much social in nature. I don't recall any conversation relating to the pipeline.

CRIBBINS: I have never discussed this appeal with either party.

SWEET: I certainly have not discussed the appeal.

We understand Ms. McCaffree to have raised two allegations: (1) she alleged that Commissioner Cribbins and Commissioner Sweet had supported "this project" in campaigning for office; and (2) she alleged that Commissioner Sweet had been seen meeting with two representatives of the Jordan Cove Energy Project at "the airport." As these allegations involve different factual and legal issues, we address them separately.

With respect to the first allegation, Ms. McCaffree presented no documentation to her claim of bias: no news articles, campaign materials, transcripts of speeches, or other evidence that either Commissioner Cribbins or Commissioner Sweet had campaigned for office based on a promise to support the Pipeline generally or any application specifically. Indeed, Commissioner Cribbins specifically challenged Ms. McCaffree to "show where I've ever run my campaign" on support for the project, and Ms. McCaffree did not respond.

Consideration of this appeal by the Board of Commissioners is "quasi-judicial" in nature. Parties to quasi-judicial proceedings are "entitled to ... a tribunal which is impartial in the matter ...." *Fasano v. Bd. of Cnty. Comm'rs of Wash. Cty.*, 264 Or 574, 588, 507 P.2d 23, 30 (1975).

In the context of land use hearings, however, a Commissioner is "impartial" if he or she is able to render a decision based on the merits of the case. As the Land Use Board of Appeals (LUBA) has put it, local decision makers in quasi-judicial land use proceedings are not expected to be free of bias; rather, they are expected to put whatever positive or negative biases

they may have aside, and render a decision based on the merits. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

We note that the LUBA recently provided an extensive analysis of Oregon law on the question of bias, as it applies to disqualifying members of a county Board of Commissioners from participation in an adjudicatory land use proceeding. *Oregon Pipeline Company, LLC v. Clatsop County*, __ Or LUBA __ (LUBA No. 2013-106, June 27, 2014). Several principles are evident from LUBA's discussion:

- There is a "high bar" for disqualification of a county commissioner for bias because county commissioners, unlike judges, cannot be replaced if they recuse themselves. County commissioners, moreover, are not expected to be "neutral," given that they are elected because of their political predisposition.

- Campaign statements of support or opposition for specific land use actions are not by themselves "sufficient basis for questioning [commissioners'] representations ... that they could decide the matter impartially." *Oregon Pipeline Company* (slip. op. at 30).

As LUBA noted, the Oregon Supreme Court has spoken to how the threshold for recusals differs between judges and county commissioners:

> "[County commissioners] are politically elected to positions that do not separate legislative from executive and judicial power on the state or federal model; characteristically they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure."

1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 82-83, 742 P2d 39 (1987).

The "actual bias" necessary to disqualify a county commissioner must be demonstrated in a "clear and unmistakable manner." *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001).

In this case, it is clear from the proceedings on September 30 that Commissioners Cribbins and Sweet did not have any direct stake in the outcome of the proceeding:

> LEGAL COUNSEL: I can read the definition of conflicts of interest to see if they apply. Do you have any direct or substantial financial interest in this?
>
> SWEET: No.
>
> LEGAL COUNSEL: Any private benefit?
>
> SWEET: No.

CRIBBINS: Just to be clear, I do not have a financial interest nor a direct interest or benefit.

There is, moreover, no "clear and unmistakable" evidence of "actual bias." At most, there is a general allegation that Commissioners Cribbins and Sweet indicated support for "the project" during their campaigns. Commissioner Cribbins denied the allegation, and no evidence to the contrary was provided by Ms. McCaffree. Ms. McCaffree's general reference to "the project" also undermines any allegation of bias. It is impossible to tell whether her allegation relates to the Pipeline, to the Jordan Cove Energy Project (i.e., the LNG terminal) or to a specific application. The only relevant question with respect to bias in this proceeding is whether each commissioner is capable of rendering a fair judgment on *this appeal*. Each commissioner stated that they could, and there is no "clear and unmistakable" evidence to the contrary.

Ms. McCaffree's second allegation – that Commissioner Sweet met privately with representatives of the Jordan Cove Energy Project – appears to be more an allegation of *ex parte* contacts than of bias. We note that Jordan Cove Energy Project is not the applicant in this case, or even a party. In any event, there is no prohibition on an individual commissioner meeting or conversing with persons – even parties – who may take an interest in matters that come before the Board of Commissioners.

Commissioner Sweet indicated that his airport meeting was "pretty much social in nature," that he didn't remember "any conversation relating to the pipeline," and that he had not discussed the appeal involved in this case. Based on Commissioner Sweet's representations and the absence of any evidence to the contrary, we find that the meeting did not involve any *ex parte* communication with respect to this appeal. To the extent that Commissioner Sweet's meeting with representatives of the Jordan Cove Energy Project might be construed as evidence of bias, we reject that conclusion. Again, there is no legal prohibition on a county commissioner meeting individually with representatives of a major project proposed in the county. The fact that such a meeting took place does not come close to providing "clear and unmistakable" evidence that Commissioner Sweet is incapable of rendering a fair judgment in this appeal.

III. CONCLUSION.

For all of the above stated reasons, and after consideration of the applicable law and all argument and evidence in the record, the Board of Commissioners approves a one year extension to Order No. 12-03-018PL.

NOTICE OF LAND USE DECISION BY THE COOS COUNTY PLANNING DIRECTOR

Coos County Planning
225 N. Adams St.
Coquille, OR 97423
http://www.co.coos.or.us/
Phone: 541-396-7770
Fax: 541-396-1022

Date of this Decision: April 11, 2016

File Number: ACU-16-013

Applicant: Richard Allan, Marten Law representing Pacific Connector Gas Pipeline, LP

Property Information:

Map Number	Acreage	Landowner	Zoning
25-13-00-200	191.58	Oregon International Port of Coos Bay	6-WD
25-13-04-101	4.76	Fort Chicago Holdings II U.S. LLC	6-WD
25-13-04-300	228.88	Roseburg Forest Products	6-WD
25-13-04-400	16.25	Fort Chicago Holdings II U.S. LLC	6-WD
25-13-04-100	97.11	Fort Chicago Holdings II U.S. LLC	6-WD, IND, 7-D
25-13-03-200	69.17	Fort Chicago Holdings II U.S. LLC	7-D, 8-WD, 8-CA
25-13-04-500	48	Oregon International Port of Coos Bay	8-CA, 13A-NA, 11-NA, 11-RS
24-13-36B-700	6.85	Donald & Carol Thompson	11-RS, RR-2, F
24-13-36B-1101	2.25	Hal & Donna Blomquist	RR-2, F
24-13-36B-1100	79.43	Weyerhaeuser Company	F
24-13-36B-100	36.01	Hal & Donna Blomquist	F
24-13-36-100	400	Weyerhaeuser Company	F
24-13-36-200	80	Weyerhaeuser Company	F
25-13-01-100	443.19	Weyerhaeuser Company	F
25-13-01D-200	32.57	Jason & Christine Snelgrove	F
25-13-01D-100	41.03	Gary E. Smith Trust	EFU, F
25-12-06C-100	83.19	Fort Chicago Holdings II U.S. LLC	EFU, F
25-12-06C-601	45.58	Lone Rock Timber Investments I, LLC	F
25-12-07-500	47.42	Lone Rock Timber Investments I, LLC	F
25-12-07-400	78.80	Lone Rock Timber Investments I, LLC	F
25-12-07-1300	71.74	Lone Rock Timber Investments I, LLC	F
25-12-07-1301	8.26	Lone Rock Timber Investments I, LLC	F
25-112-07-1301A02		U.S. A. Federal Aviation Administration	F
25-12-07-2400	40	Steven Sweet	F
25-12-18-300	40	Steven Sweet	F
25-12-18-200	77.14	Steven Sweet	F, EFU
25-12-17-300	2.10	Steven Sweet	EFU
25-12-17-400	12.05	Monte Rutherford	EFU
25-12-17-600	16	Jackie Shaw ETAL	EFU
25-12-17-700	5.47	William Edwards	EFU
25-12-17-900	40	Lone Rock Timber Investments I, LLC	F, EFU
25-12-17-1000	240	Weyerhaeuser Company	F
25-12-20-100	440	Weyerhaeuser Company	F
25-12-29-1100	99.61, 2.25	Donald Fisher 2012 Delaware Trust	F, EFU
25-12-30-501	32.24	Marjorie Brunschmid ETAL	EFU, 18-RS
25-12-30-600	12.04	Gregory Demers	18-RS

25-12-30D-1501	7.71	Agri Pacific Resources, INC	18-RS
25-12-30D-508	3.83	Kay Kronsteiner	18-RS
25-12-30-700	78.78	City of North Bend	19-D
25-12-31-100	107.59	City of North Bend	19-D
25-12-32B-300	17.60	City of North Bend	19-D, 19B-DA, 20-CA
25-12-32B-600	2.60	Fred Messerle & Sons, INC	20-RS
25-12-32-100	126.85	Fred Messerle & Sons, INC	20-RS, EFU
25-12-32-400	60	Fred Messerle & Sons, INC	EFU, F
26-12-05-200	242.89	Fred Messerle & Sons, INC	F
25-12-32-300	102.30	Louis McCarthy ETAL	F
26-12-05-300	23.66	Solomon Joint Living Trust	F
26-12-08B-100	16.09	Michael & Debra Prugh	F, RR-2
26-12-08-900	2.10	Jeffrey Hill	RR-5
26-12-08-1000	2.64	Jeffrey & Gidgette Hill	RR-5
26-12-08-1100	34.06	Alvin & Lou Ann Rode	RR-5, EFU, F
26-12-08-500	17.32	Mark & Melody Sheldon	RR-5
26-12-08B-1400	10.45	Larry & Shirley Wheeker	F
26-12-08-1102	22.91	Jeffrey & Gidgette Hill	F
26-12-08B-1500	15.75	Michael Mcginnis	F
26-12-08-1601	10.63	Gunnell Family Trust	F
26-12-08-1700	25.72	Curtis & Melissa Pallin	F, 21-RS
26-12-07-700	196.18	Fred Messerle & Sons, INC	21-CA, 21-RS, F
26-12-18A-100	77.24	Wright Loving Trust	F
26-12-18A-200	10.01	Paul & Eura Washburn	RR-5
26-12-18A-201	4.08	David & Emily McGriff	RR-5
26-12-18B-1900	2.91	James & Archina Davenport	RR-5
26-12-18B-1700	25.07	Nova & Ellen Lovell	F
26-12-18C-103	57.27	John & Mary Muencrath Trust 12-22-11	F
26-12-18C-300	4.8	Edgar Maeyens Jr	RR-5
26-12-18C-200	38.78	Roseburg Resources Co.	F
26-12-19-200	38.66	Roseburg Resources Co.	F
26-12-19-300	315.54	Roseburg Resources Co.	F
26-12-30-100	43.57	Victor & Arianne Elam	F
26-12-30-600	3.5	Robert Scoville	RR-5
26-12-30-100	40	Jimmie & Carolyn Ketchum	F
26-12-30A-500	70.99	Lone Rock Timber Investments I, LLC	F
26-12-30-1200	75.46	Menasha Forest Products Corporation	F
26-12-30-1400	77.69	Fred Messerle & Sons, INC	F
26-12-31A-100	34.48	Ronald & Molly Foord	F
26-12-32-400	39.68	Fred Messerle & Sons, INC	F
26-12-32-500	161.13	Dee Willis	EFU,F
26-12-31-700	120	Pacific West Timber Company (Oregon) LL	F
26-12-31-900	30	Anna & Daniel Fox	F
27-12-06-100	141.68	Lone Rock Timber Investments I, LLC	F
27-12-06-200	10.06	Steven & Carole Stalcup	F
27-12-06-300	470.98	Menasha Forest Products Corporation	F

27-12-05-100	475.68	USA (CBWRGL)	F
27-12-00-1700	160	Roseburg Resources Co.	F
27-12-00-1600	9.55	Pacificorp	F
27-12-00-1500	470.45	Menasha Forest Products Corporation	F
27-12-00-2500	400	USA (CBWRGL)	F
27-12-00-2400	638.62	Coos County Sheep Co.	F, EFU
27-12-00-2300	637.56	USA (CBWRGL)	F
27-12-22-100	640	Coos County Sheep Co.	F
27-12-23-200	320	USA (CBWRGL)	F
27-12-23-100	183.31	Coos County Sheep Co.	EFU, F
27-12-23-300	117.98	Lucky T LLC	F
27-12-24C-1500	11.10	John & Kara Breuer	F
27-12-24C-1600	10.99	Virgil & Carol Williams	RR-5
27-12-24C-1200	3.63	Mary Metcalf	RR-5
27-12-24C-1700	11	Virgil & Carol Williams	EFU
27-12-25-200	64.10	Charles & Johanna Yates	EFU
27-12-24C1800	11.26	Rodney Dalton	EFU
27-12-24C-2100	10.01	Ted L. Fife Family Trust	EFU
27-12-25-201	11.80	Donald & Shirley Fisher	F
27-12-25-203	47.28	Walter & Wendy Hazen	F
27-12-25-100	155.19	USA (CBWRGL)	F
27-11-00-1500	601.60	Menasha Forest Products Corporation	F
27-11-00-1400	643.31	USA (CBWRGL)	F
27-11-00-1700	629.56	USA (CBWRGL)	F
27-11-32-1000	80	Pacific West Timber Company (Oregon) LL	F
27-11-32-800	269.90	Menasha Forest Products Corporation	F
27-11-32-1300	66.56	Menasha Forest Products Corporation	F
28-11-05-100	340.26	USA (CBWRGL)	F
28-11-05-200	45.99	Windlinx Family Trust	F
28-11-04-600	470.04	Moore Mill & Lumber Co.	F
28-11-04-800	40	Menasha Forest Products Corporation	F
28-11-00-400	640, 240	USA (CBWRGL)	F
28-11-10-1000	80	Pacific West Timber Company (Oregon) LL	F
28-11-10-900	189.67	Lone Rock Timber Investments I, LLC	F
28-11-10-901	1.05	Dora Cemetery Assn.	F
28-11-10-1300	57.25	Cynthia Garrett	F, EFU
28-11-10-1400	128.15	Laird Timberlands, LLC	EFU
28-11-15-100	7.31	Laird Timberlands, LLC	EFU, F
28-11-00-500	280	Moore Mill & Lumber Co.	EFU, F
28-11-00-700	200	Plum Creek Timberlands, L.P.	F
28-11-13-900	437.52	USA (CBWRGL)	F
28-11-24-100	639.76	Keystone Forest Investments, LLC.	F
28-11-00-1900	40	Roseburg Resources Co.	F
28-10-00-3500	34.93	Roseburg Resources Co.	F
28-10-00-3400	503.57	USA (CBWRGL)	F
28-10-00-3600	79.54	Lone Rock Timber Investments I, LLC	F
28-10-00-3300	160	FIA Timber Partners II, L.P.	F

28-10-00-3800	160	FIA Timber Partners II, L.P.	F
28-10-00-4100	480	USA (CBWRGL)	F
28-10-00-4200	440	USA (O& C)	F
28-10-00-4600	280	USA (CBWRGL)	F
28-10-00-4500	160	Lone Rock Timberland Co.	F
28-10-00-5000	320	Tri-W Group Limited Partnership	F
28-10-00-4900	160	Plum Creek Timberlands, L.P.	F
28-10-00-4800	160	Tri-W Group Limited Partnership	F
28-10-00-5600	160	USA (CBWRGL)	F
28-10-00-5500	160	Tri-W Group Limited Partnership	F
28-10-00-5200	160	Tri-W Group Limited Partnership	F
28-09-00-3500	670.72	USA (CBWRGL)	F
28-09-00-300	656.61	Plum Creek Timberlands, L.P	F
29-09-00-200	623.72	USA (CBWRGL)	F
29-09-00-500	160	Lone Rock Timberland Co.	F
29-09-00-600	598.18	Plum Creek Timberlands, L.P	F
29-09-00-700	640	USA (CBWRGL)	F
25-13-04-300	228.88	Roseburg Forest Products Co.	CBEMP
25-13-03-200	69.17	Fort Chicago Holdings II U.S., LLC	IND, CBEMP
28-12-07C-101	17.54	Ron Lafranchi	Q-IND
28-12-07C-1000	17.24	Ron Lafranchi	CREMP, CREMP IND
28-12-07C-900	9.34	LBA Contract Cutting, INC	CREMP, CREMP IND
28-12-18B-1500	8.29	LBA Contract Cutting, INC	CREMP, CREMP IND
27-12-26D-1200	18.85	Spencer & Truly Yates	EFU
28-13-01DB-300	5.56, .54	City of Coquille	City
28-13-01DB-309	10.31	City of Coquille	City
28-13-01DB-310	6.59	City of Coquille	City
25-13-35-400	94.76	Georgia- Pacific Wood Products Northwest	CBEMP
25-13-36-1000	39.18	Georgia- Pacific Wood Products Northwest	CBEMP

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

Notice to mortgagee, lien holder, vendor or seller: ORS Chapter 215 requires that if you receive this notice, it must be forwarded to the purchaser.

The purpose of this notice is to inform you about the proposal and decision, where you may receive more information, and the requirements if you wish to appeal the decision by the Director to the Coos County Hearings Body. Any person who is adversely affected or aggrieved or who is entitled to written notice may appeal the decision by filing a written appeal in the manner and within the time period as provided below pursuant to Coos County Zoning and Land Development Ordinance (CCZLDO) Article 5.8. If you are mailing any documents to the Coos County Planning Department the address is 250 N. Baxter,

Coquille OR 97423. Mailing of this notice to you precludes an appeal directly to the Land Use Board of Appeals.

PROPOSAL: Request for Planning Director Approval for an extension of a conditional use to site natural gas pipeline as provided by Coos County Zoning and Land Development Ordinance (CCZLDO) § 5.2.600 Expiration and Extension of Conditional Uses.

The application, staff report and any conditions can be found at the following link: http://www.co.coos.or.us/Departments/Planning/PlanningDepartment-Applications2016.aspx . The application and all documents and evidence contained in the record, including the staff report and the applicable criteria, are available for inspection, at no cost, in the Planning Department located at 225 North Adams Street, Coquille, Oregon. Copies may be purchased at a cost of 50 cents per page. The decision is based on the application submittal and information on record. The name of the Coos County Planning Department representative to contact Jill Rolfe, Planning Director and the telephone number where more information can be obtained is **(541) 396-7770.**

This decision will become final at 5 P.M. on April 26, 2016 unless before this time a completed **APPLICATION FOR AN APPEAL OF A PLANNING DIRECTOR DECISION** form is submitted to and received by the Coos County Planning Department.

Failure of an issue to be raised in a hearing, in person or in writing, or failure to provide statements of evidence sufficient to afford the Approval Authority an opportunity to respond to the issue precludes raising the issue in an appeal to the Land Use Board of Appeals.

Prepared /Authorized by: _____ **Date:** April 11, 2016
Jill Rolfe, Planning Director

EXHIBITS

Exhibit A: Conditions of Approval
Exhibit B: Vicinity Map

The Exhibits below are mailed to the Applicant only. Copies are available upon request or at the following website: http://www.co.coos.or.us/Departments/Planning/PlanningDepartment-Applications2016.aspx or by visiting the Planning Department at 225 N. Baxter, Coquille OR 97423. If you have any questions please contact staff at (541) 396-7770.

Exhibit C: Staff Report
Exhibit D: Comments received (There were no comments received on this application)

EXHIBIT "A"
CONDITIONS OF APPROVAL

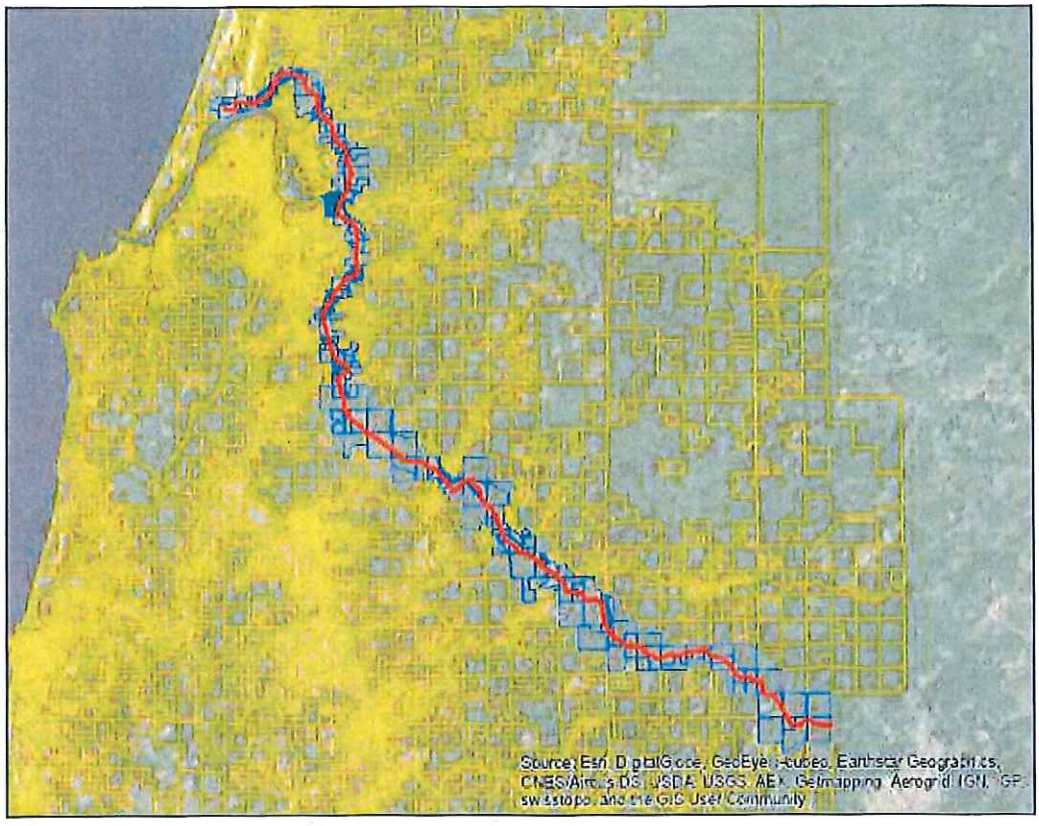
1. All conditions of approval that were placed on File No. HBCU-10-01, Final Order No. 10-01-045PL as amended on remand, File No. REM-11-01, Final Order 12-03-018PL remain in effect and as modified by File No. HBCU-13-02, Final Order No. 14-01-006PL.
2. This application approval grants a one year extension to the approval. Therefore, this conditional use will expired on April 2, 2017 unless another extension is submitted prior to the expiration date.

EXHIBIT "B"
VICINITY MAP

COOS COUNTY PLANNING DEPARTMENT

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

File:	ACU-16-013
Applicant:	Pacific Connector Gas Pipeline, LP/ Marten Law
Date:	March 25, 2016
Location:	See Below
Proposal:	Administrative Conditional Use: Extension of Previous Decision



File Number: ACU-16-013

EXHIBIT "C"
Staff Report

File Number: ACU-16-013

Applicant: Richard Allan, Marten Law representing Pacific Connector Gas Pipeline, LP

Property Information:

Map Number	Acreage	Landowner	Zoning
25-13-00-200	191.58	Oregon International Port of Coos Bay	6-WD
25-13-04-101	4.76	Fort Chicago Holdings II U.S. LLC	6-WD
25-13-04-300	228.88	Roseburg Forest Products	6-WD
25-13-04-400	16.25	Fort Chicago Holdings II U.S. LLC	6-WD
25-13-04-100	97.11	Fort Chicago Holdings II U.S. LLC	6-WD, IND, 7-D
25-13-03-200	69.17	Fort Chicago Holdings II U.S. LLC	7-D, 8-WD, 8-CA
25-13-04-500	48	Oregon International Port of Coos Bay	8-CA, 13A-NA, 11-NA, 11-RS
24-13-36B-700	6.85	Donald & Carol Thompson	11-RS, RR-2, F
24-13-36B-1101	2.25	Hal & Donna Blomquist	RR-2, F
24-13-36B-1100	79.43	Weyerhaeuser Company	F
24-13-36B-100	36.01	Hal & Donna Blomquist	F
24-13-36-100	400	Weyerhaeuser Company	F
24-13-36-200	80	Weyerhaeuser Company	F
25-13-01-100	443.19	Weyerhaeuser Company	F
25-13-01D-200	32.57	Jason & Christine Snelgrove	F
25-13-01D-100	41.03	Gary E. Smith Trust	EFU, F
25-12-06C-100	83.19	Fort Chicago Holdings II U.S. LLC	EFU, F
25-12-06C-601	45.58	Lone Rock Timber Investments I, LLC	F
25-12-07-500	47.42	Lone Rock Timber Investments I, LLC	F
25-12-07-400	78.80	Lone Rock Timber Investments I, LLC	F
25-12-07-1300	71.74	Lone Rock Timber Investments I, LLC	F
25-12-07-1301	8.26	Lone Rock Timber Investments I, LLC	F
25-112-07-1301A02		U.S. A. Federal Aviation Administration	F
25-12-07-2400	40	Steven Sweet	F
25-12-18-300	40	Steven Sweet	F
25-12-18-200	77.14	Steven Sweet	F, EFU
25-12-17-300	2.10	Steven Sweet	EFU
25-12-17-400	12.05	Monte Rutherford	EFU
25-12-17-600	16	Jackie Shaw ETAL	EFU
25-12-17-700	5.47	William Edwards	EFU
25-12-17-900	40	Lone Rock Timber Investments I, LLC	F, EFU
25-12-17-1000	240	Weyerhaeuser Company	F
25-12-20-100	440	Weyerhaeuser Company	F
25-12-29-1100	99.61, 2.25	Donald Fisher 2012 Delaware Trust	F, EFU
25-12-30-501	32.24	Marjorie Brunschmid ETAL	EFU, 18-RS

25-12-30-600	12.04	Gregory Demers	18-RS
25-12-30D-1501	7.71	Agri Pacific Resources, INC	18-RS
25-12-30D-508	3.83	Kay Kronsteiner	18-RS
25-12-30-700	78.78	City of North Bend	19-D
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25-12-32B-300	17.60	City of North Bend	19-D, 19B-DA, 20-CA
25-12-32B-600	2.60	Fred Messerle & Sons, INC	20-RS
25-12-32-100	126.85	Fred Messerle & Sons, INC	20-RS, EFU
25-12-32-400	60	Fred Messerle & Sons, INC	EFU, F
26-12-05-200	242.89	Fred Messerle & Sons, INC	F
25-12-32-300	102.30	Louis McCarthy ETAL	F
26-12-05-300	23.66	Solomon Joint Living Trust	F
26-12-08B-100	16.09	Michael & Debra Prugh	F, RR-2
26-12-08-900	2.10	Jeffrey Hill	RR-5
26-12-08-1000	2.64	Jeffrey & Gidgette Hill	RR-5
26-12-08-1100	34.06	Alvin & Lou Ann Rode	RR-5, EFU, F
26-12-08-500	17.32	Mark & Melody Sheldon	RR-5
26-12-08B-1400	10.45	Larry & Shirley Wheeker	F
26-12-08-1102	22.91	Jeffrey & Gidgette Hill	F
26-12-08B-1500	15.75	Michael Mcginnis	F
26-12-08-1601	10.63	Gunnell Family Trust	F
26-12-08-1700	25.72	Curtis & Melissa Pallin	F, 21-RS
26-12-07-700	196.18	Fred Messerle & Sons, INC	21-CA, 21-RS, F
26-12-18A-100	77.24	Wright Loving Trust	F
26-12-18A-200	10.01	Paul & Eura Washburn	RR-5
26-12-18A-201	4.08	David & Emily McGriff	RR-5
26-12-18B-1900	2.91	James & Archina Davenport	RR-5
26-12-18B-1700	25.07	Nova & Ellen Lovell	F
26-12-18C-103	57.27	John & Mary Muencrath Trust 12-22-11	F
26-12-18C-300	4.8	Edgar Maeyens Jr	RR-5
26-12-18C-200	38.78	Roseburg Resources Co.	F
26-12-19-200	38.66	Roseburg Resources Co.	F
26-12-19-300	315.54	Roseburg Resources Co.	F
26-12-30-100	43.57	Victor & Arianne Elam	F
26-12-30-600	3.5	Robert Scoville	RR-5
26-12-30-100	40	Jimmie & Carolyn Ketchum	F
26-12-30A-500	70.99	Lone Rock Timber Investments I, LLC	F
26-12-30-1200	75.46	Menasha Forest Products Corporation	F
26-12-30-1400	77.69	Fred Messerle & Sons, INC	F
26-12-31A-100	34.48	Ronald & Molly Foord	F
26-12-32-400	39.68	Fred Messerle & Sons, INC	F
26-12-32-500	161.13	Dee Willis	EFU,F
26-12-31-700	120	Pacific West Timber Company (Oregon) LL	F
26-12-31-900	30	Anna & Daniel Fox	F
27-12-06-100	141.68	Lone Rock Timber Investments I, LLC	F
27-12-06-200	10.06	Steven & Carole Stalcup	F

27-12-06-300	470.98	Menasha Forest Products Corporation	F
27-12-05-100	475.68	USA (CBWRGL)	F
27-12-00-1700	160	Roseburg Resources Co.	F
27-12-00-1600	9.55	Pacificorp	F
27-12-00-1500	470.45	Menasha Forest Products Corporation	F
27-12-00-2500	400	USA (CBWRGL)	F
27-12-00-2400	638.62	Coos County Sheep Co.	F, EFU
27-12-00-2300	637.56	USA (CBWRGL)	F
27-12-22-100	640	Coos County Sheep Co.	F
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27-12-23-100	183.31	Coos County Sheep Co.	EFU, F
27-12-23-300	117.98	Lucky T LLC	F
27-12-24C-1500	11.10	John & Kara Breuer	F
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27-12-24C-1200	3.63	Mary Metcalf	RR-5
27-12-24C-1700	11	Virgil & Carol Williams	EFU
27-12-25-200	64.10	Charles & Johanna Yates	EFU
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28-11-04-800	40	Menasha Forest Products Corporation	F
28-11-00-400	640, 240	USA (CBWRGL)	F
28-11-10-1000	80	Pacific West Timber Company (Oregon) LL	F
28-11-10-900	189.67	Lone Rock Timber Investments I, LLC	F
28-11-10-901	1.05	Dora Cemetery Assn.	F
28-11-10-1300	57.25	Cynthia Garrett	F, EFU
28-11-10-1400	128.15	Laird Timberlands, LLC	EFU
28-11-15-100	7.31	Laird Timberlands, LLC	EFU, F
28-11-00-500	280	Moore Mill & Lumber Co.	EFU, F
28-11-00-700	200	Plum Creek Timberlands, L.P.	F
28-11-13-900	437.52	USA (CBWRGL)	F
28-11-24-100	639.76	Keystone Forest Investments, LLC.	F
28-11-00-1900	40	Roseburg Resources Co.	F
28-10-00-3500	34.93	Roseburg Resources Co.	F
28-10-00-3400	503.57	USA (CBWRGL)	F
28-10-00-3600	79.54	Lone Rock Timber Investments I, LLC	F

28-10-00-3300	160	FIA Timber Partners II, L.P.	F
28-10-00-3800	160	FIA Timber Partners II, L.P.	F
28-10-00-4100	480	USA (CBWRGL)	F
28-10-00-4200	440	USA (O& C)	F
28-10-00-4600	280	USA (CBWRGL)	F
28-10-00-4500	160	Lone Rock Timberland Co.	F
28-10-00-5000	320	Tri-W Group Limited Partnership	F
28-10-00-4900	160	Plum Creek Timberlands, L.P.	F
28-10-00-4800	160	Tri-W Group Limited Partnership	F
28-10-00-5600	160	USA (CBWRGL)	F
28-10-00-5500	160	Tri-W Group Limited Partnership	F
28-10-00-5200	160	Tri-W Group Limited Partnership	F
28-09-00-3500	670.72	USA (CBWRGL)	F
28-09-00-300	656.61	Plum Creek Timberlands, L.P	F
29-09-00-200	623.72	USA (CBWRGL)	F
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28-12-07C-1000	17.24	Ron Lafranchi	CREMP, CREMP IND
28-12-07C-900	9.34	LBA Contract Cutting, INC	CREMP, CREMP IND
28-12-18B-1500	8.29	LBA Contract Cutting, INC	CREMP, CREMP IND
27-12-26D-1200	18.85	Spencer & Truly Yates	EFU
28-13-01DB-300	5.56, .54	City of Coquille	City
28-13-01DB-309	10.31	City of Coquille	City
28-13-01DB-310	6.59	City of Coquille	City
25-13-35-400	94.76	Georgia- Pacific Wood Products Northwest	CBEMP
25-13-36-1000	39.18	Georgia- Pacific Wood Products Northwest	CBEMP

Reviewing Staff: Jill Rolfe, Planning Director
Date of Report: April 10, 2016

I. PROPOSAL

Request for Planning Director Approval for an extension of a conditional use to site natural gas pipeline as provided by Coos County Zoning and Land Development Ordinance (CCZLDO) § 5.2.600 Expiration and Extension of Conditional Uses.

File Number: ACU-16-013

II. BACKGROUND INFORMATION

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.

Over the past several years, Pacific Connector has been pursuing the necessary approvals for the Pipeline. All necessary approvals have not been secured as of the date of this report.

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)

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 land use approvals 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 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.

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 hearings 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 (attached as Exhibit G). The Board of Commissioners' approval of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final.

III. APPROVAL CRITERIA & FINDINGS OF FACT

- **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 17, 2016, prior to the expiration date of April 2, 2016. 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 completed. The project cannot begin construction without a final decision from FERC as well as other permitting agencies as listed in the applicant's Exhibit D. 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 applicable 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 17, 2016, prior to the expiration date of April 2, 2016.

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

IV. DECISION:

The applicant has supplied written findings and evidence to support approval of this application. There may be some debate about the FERC decision but that is irrelevant to the criteria. There are conditions that apply to this use that can be found at Exhibit "A".

V. EXPIRATION AND EXTENSION OF CONDITIONAL USES

Time frames for conditional uses 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.*

This approval has been extended for one year unless the development, activity or use has been extended.

Table 1.4.1-1 lists the major federal, state, and local permits, approvals, and consultations identified for the Project.

TABLE 1.4.1-1

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.
	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 November 7, 2014, the FERC issued a DEIS.
Advisory Council on Historic Preservation (ACHP)	Section 106 of the National Historic Preservation Act (NHPA) 54 U.S.C. 306108 36 CFR 800	Opportunity to comment on the undertaking.	On October 26, 2010, the FERC notified the ACHP that the Project would result in adverse effects on historic properties. In November 19, 2010 letter to the FERC the ACHP declined to participate in the resolution of adverse effects. On August 30, 2011, the FERC submitted its Memorandum of Agreement (MOA) to the ACHP for the original LNG import and send out pipeline project (Docket Nos. CP07-441-000 and CP07-444-000). If the newly proposed LNG export and supply pipeline project (Docket Nos. CP13-483-000 and 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.
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. The Forest Service decision on concurrence with the ROW Grant is pending until after issuance of FEIS and preparation of a ROD.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Forest Service (cont.)	36 CFR 219.17	Amend Land and Resource Management Plans (LRMP).	On September 21, 2012, Forest Service and BLM issued a Supplemental NOI. FERC's November 2014 DEIS analyzed proposed Plan amendments. The Forest Service's Proposed Decision(s) on amendment of LRMPs are subject to Objection. A final Decision will follow consideration and resolution of any objections. The Forest Service has chosen to utilize the Protest Process of the BLM as its Objection Process for this Project.
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.	On February 24, 2015, the FERC submitted its biological assessment (BA) and essential fish habitat (EFH) assessment to the NMFS. On March 23 and July 10, 2015, NMFS requested additional information before accepting the FERC's BA and EFH Assessment. The NMFS will 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 Memorandum of Understanding (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 1.4.1-1

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. On November 14, 2014, COE issued a Notice to take public comments on Jordan Cove-Pacific Connector permit application. On March 20, 2015, COE provided comments to applicants, which the applicants responded to on June 9, 2015. Permit pending review of JPA.
	Section 408 of RHA	Approval of requests to alter COE civil works projects.	Determination pending submittal and review of additional information.
	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.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
COE (continued)	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 November 14, 2014, COE issued a Notice to take public comments on Jordan Cove-Pacific Connector's CWA Section 404 permit application. On March 20, 2015, the COE provided comments to applicants. Permit pending review of JPA.
	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.
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)	Land Use Agreement 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.	On February 11, 2015, the EPA commented on the DEIS.
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.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Coast Guard (continued)	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
	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 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. The BLM Decision on the ROW Grant will follow BLM and Forest Service Decisions on LRMP amendments and receipt of Letters of Concurrence from the Forest Service and Reclamation.
	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. FERC's November 2014 DEIS analyzed proposed Plan amendments. BLM's Proposed Decision(s) on amendments of RMPs are subject to Objection. A final Decision will follow consideration and resolution of any objections.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
USDOI Bureau of Reclamation	MLA 30 U.S.C. 181 et seq. 43 CFR 288.23(i)	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. Reclamation decision on ROW Grant is pending until after FERC issues FEIS.
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. On February 24, 2015, the FERC submitted its BA to FWS. On April 7 and May 12, 2015, FWS commented on the FERC's BA. 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.	On February 13, 2015, Jordan Cove and Pacific Connector submitted its draft Migratory Bird Conservation Plan to the FWS. Review pending.
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 potential hazardous fluid leakage sources. 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 Pacific Connector's Jordan Cove Meter Station proposed under Docket No. CP07-441-000. On November 1, 2008, the FAA issued a limited aeronautical review of the LNG tanks at the Jordan Cove terminal proposed in Docket No. CP07-444-000. In 2013, Jordan Cove submitted 36 7460-1 forms to FAA. On July 24, 2014, FAA issued 31 Determinations of No Hazard and 5 Notices of Presumed Hazards. 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.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
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 Consumer and Business Services – Building Code Division	ORS 455.446	Site-specific exemption approval under the state building code,	On April 14, 2014, Department agreed on the location for the Jordan Cove fire station (at the SORSC).
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 issued May 30, 2013. ODE did not submit a State Safety Report to the FERC within 30 days of the Notice of Application. On June 14, 2014, ODE entered into an MOU with Jordan Cove regarding LNG emergency preparedness at the export terminal. On February 12, 2015, ODE filed environmental comments as part of the State of Oregon's response to the FERC's November 214 DEIS. Safety inspections pending operation of facilities.
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 a Project Order, with an amended Project Order issued on October 14, 2013. On January 9, 2014, Jordan Cove submitted its preliminary Application for Site Certificate, which ODE determined to be complete on December 23, 2014. On December 29, 2014, Jordan Cove filed its final Application for Site Certificate. The ODE issued a Draft Proposed Order on the application on May 27, 2015.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
	OAR 345-21 & 22	Enforce Oregon's CO_2 Standards. Enforce Oregon's Retirement Bond Requirements.	On June 10, 2014, ODE entered into an 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. On February 25, 2015, Jordan Cove submitted ocean discharge findings related to NPDES Wastewater permit application, 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. In April 2015, ODEQ issued a draft Air Contaminate Discharge and Prevention of Significant Deterioration permit to Jordan Cove. In June 2015, Pacific Connector submitted its air quality permit application to ODEQ. Review pending.
	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. ODEQ issued a draft Air Contaminate Discharge and Prevention of Significant Deterioration permit to Jordan Cove. In June 2015, Pacific Connector submitted its air quality permit application to ODEQ Review pending.
	Hazardous Waste Activity ORS 466 OAR 340-102	Review plans for storage and management of hazardous waste	Review pending.
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 December 2014, Jordan Cove and Pacific Connector produced the latest revision of their Wildlife Habitat Mitigation Plan. ODFW review pending.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
ODFW (continued)	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. The ODFW guidance for salvage plans was also included in the December 2014 application submittal for the EFSC site certification. Review pending.
	Oregon Fish Passage Law ORS 509.-585 OAR 635-412-5 to 40	Review stream crossing plans for consistency with Oregon Fish Passage Law and screening criteria.	Pacific Connector submitted its Fish Passage Waiver Application and Fish Passage Plan for Road and Stream Crossings. ODFW requested that the application be restructured; therefore, Pacific Connector will re-submit the application per the ODFW criteria in late 2015. ODFW review pending.
	In-Water Blasting ORS 509-140, et al. OAR 635-425 to 50	Consider issuance of in-water blasting permits.	Pacific Connector submitted In-Water Blasting Permit Application. The ODFW requested that the application be restructured; therefore, Pacific Connector will re-submit the application per the ODFW criteria in late 2015. 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 in 2015.
Oregon Department of Geology and Mineral Industries (DOGAMI)	Building Code Section 1802.1 ORS 455.446	Review of structural designs in tsunami zones. Review of geotechnical investigations for geological hazards.	Review by DOGAMI is 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 LNG import proposal and sendout pipeline project in Docket Nos. CP07-441-000 and CP07-444-000. If the FERC authorizes the newly proposed LNG export proposal and supply pipeline project (in Docket Nos. V+CP13-483-000 and CP13-492-000) the MOA would be amended. SHPO review of future cultural resources investigations reports pending.

TABLE 1.4.1-1

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 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. On July 8, 2015, the ODLCD signed a stay agreement that delays their review to January 9, 2016.
Oregon Department of State Lands (ODSL)	Submerged and Submersible Land Easement OAR 141-122	Grant submerged land easements.	In 2010, Port applied for easement for eelgrass mitigation site, which is still pending. In July 2012, ODSL issued easement to Port for terminal access channel. On May 15, 2014, Pacific Connector submitted its easement application. ODSL review pending. In April 2015, ODSL determined the application to be incomplete until revised Land Use Compatibility Statements (LUCS) are submitted from Jackson and Klamath counties.
	Lease and Registrations OAR 141-082	Issue wharf registrations	On October 1, 2010, ODSL issued Wharf Registration for mooring dolphins. Jordan Cove anticipates applying for a Wharf Registration for the barge berth in May 2015.
	Sand and Gravel Lease/License OAR 141-014	Issue licenses or leases for removal of state-owned materials.	In 2010, Port submitted application that is still 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; however, in January 2015, ODSL determined the application to be incomplete until revised LUCS are submitted from Jackson and Klamath counties.
	Special Use Permits OSAR 141-125	Allow work within state-owned lands	Jordan Cove is preparing an application to work within tidally-influenced state-owned waters at the Kentuck Slough Mitigation Site.
	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.
Oregon Department of Transportation (ODOT)	Section 303(c) DOT Act 49 CFR 303 OAR 734-030(4) OAR 734-051-4020	Review and approve traffic management plans	On August 2, 2012, ODOT commented on Jordan Cove's Traffic Impact Analysis. On November 1, 2013, ODOT commented on Jordan Cove's August 19, 2013 Addendum. ODOT's review of Pacific Connector's Transportation Management Plans is pending.

TABLE 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
ODOT (continued)	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, and where utilities would cross over, under, or run parallel to ODOT ROWs.	Applications for ODOT Approach and Utility Permits to be submitted with enough advance notice (which could be up to 12 months or more depending on individual District requirements) prior to construction activities to ensure adequate time to review the specific proposals.
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 in late 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 LUCS under Statewide Planning Goals.	In December 2007, Coos County issued a Conditional Use Permit for the Jordan Cove LNG terminal. In January 2008, Coos County issued a Conditional Use Permit for Jordan Cove's access channel and marine slip. On August 21, 2009, Coos County adopted new Wetland Map for Jordan Cove's terminal in CBEMP Zoning District 6-WD, 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 1.4.1-1

Major Permits, Approvals, and Consultations for the JCE & PCGP Project

Agency	Authority/Regulation/ Permit	Agency Action	Initiation of Consultations and Permit Status
Coos County (continued)			On July 25, 2012, Coos County reissued an Administrative Conditional Use Permit for fill at the Jordan Cove terminal in CBEMP Zoning District 6-WD.and made an Administrative Interpretation for Zoning Districts 5-WD and 6-WD. On October 4, 2012, Coos County approved fill at the former mill site in CBEMP IND Zone and 7-D Zone, and vegetative shoreline stabilization in CBEMP 7-D. On April 18, 2015, Coos County approved Jordan Cove's request for a barge berth in CBEMP Zoning Districts 6-DA and 6-WD; fire station, road, and utility corridor within Zoning District 7-D; and a realignment of Jordan Cove Road in Zoning District 8-WD. 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. On November 14, 2013 Jordan Cove withdrew its application for design and site plan review for the South Dunes Power Plan due to the pending EFSC application.
	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 1.4.1-1

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 the Project would require county applications and review if it is not authorized by the FERC. 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 April 23, 2014, the City approved a conditional use permit to site housing at the NPWHC and variances to allow vehicle parking and drainage. This decision is being appealed to the LUBA.
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 a legislative text amendment to North Bend Shorelands Management Unit 48 to allow for a bridge at Jordan Cove's NPWHC.

1.4.1.1 Endangered Species Act

Section 7 of the ESA (16 U.S.C. 1531-1544), 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

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. 17-11-064PL

NOW BEFORE THE Board of Commissioners sitting for the transaction of County business on the 19th day of December, 2017, is the matter of the appeal of the Planning Director's May 18, 2017, 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 August 25, 2017. 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 September 22, 2017.

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners on October 20, 2017. 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 November 21, 2017. 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 December 5, 2017, for final approval.

On December 5, 2017, 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 two potential ex-parte communications and those present were allowed to challenge and rebut the substance of Commissioner Sweet's disclosure. The deliberation was then continued to December 19, 2017, for final adoption and signatures.

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 18, 2017, 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 "Exhibit A" and incorporated by reference herein.

ADOPTED this 19th day of December 2017.

BOARD OF COMMISSIONERS:

COMMISSIONER

Bobbi Brooks
RECORDING SECRETARY

absent
COMMISSIONER

APPROVED AS TO FORM:

COMMISSIONER

Office of Legal Counsel

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

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

FILE NO. AP 17-004 (APPEAL OF COUNTY FILE NO. EXT-17-005).

DECEMBER 19, 2017

EXHIBIT A

I. INTRODUCTION

A. NATURE OF THE LOCAL APPEAL

The appellant challenges the Planning Director's decision to allow the applicant Pacific Connector Gas Pipeline, LP, (hereinafter the "Applicant," "Pacific Connector," or "PCGP"), an additional one-year extension on its development approval, to April 2, 2018.

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) (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.

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).

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 Board 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. *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. *McCaffree v. Coos County*, 267 Or App 424, 341 P3d 252 (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 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, 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.

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 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's 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 PCGP'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," which means that PCGP can file again if it wishes to do so. *See* FERC Order dated March 11, 2016 at 21. On April 8, 2016, PCGP filed a request for a rehearing to FERC. FERC issued a denial of that request on December 9, 2016.

PCGP promptly filed a Request for Pre-Filing Approval on January 23, 2017. *See* Exhibit C to Perkins Coie's September 8, 2017 letter. FERC approved that request on February 10, 2017. *Id*

The Applicant's attorney submitted PCGP's fourth extension request on March 30, 2017 (County File No. EXT-17-005), prior to the expiration of the prior extension approval. A notice of decision approving the extension was mailed on May 18, 2017. An appeal was filed on June 2, 2017 which was within the appeal deadline. On August 25, 2017 the public hearing was held on this matter. Subsequent written testimony was received until September 15, 2017. The applicant's final argument was received on September 22, 2017. On October 20, 2017, the County Hearings Officer issued his recommended order that the Board approve the Applicant's request. On November 21, 2017 the Board of Commissioners held a public hearing to review the

Hearings Officer decision and deliberate on the matter. The Board of Commissioners made a tentative decision and instructed staff to draft the order and findings incorporating the Hearings Officers recommendation for final adoption. The Board generally accepts the Hearings Officer's recommendation and affirms the staff decision for the reasons explained below.

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. 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.

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

> Note: 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. <u>Pacific Connector's Compliance with the Applicable Standards for a CUP Extension Request on Farm and Forest Lands</u>

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) and OAR 660-033-0140(1) 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 criteria have not changed. (See discussion below).

C. <u>The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600(1)(b).</u>

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

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 written narrative and application specifically request an extension submitted by the Applicant on March 30, 2017 of the development approval period. CCZLDO § 5.2.600(1)(b)(i).

This criterion is met.

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

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 was set expire on April 2, 2017. On March 30, 2017, Pacific Connector applied for a fourth extension of the approval period. The March 30, 2017 extension application was thus timely submitted prior to the April 2, 2017 expiration of the extended CUP. CCZLDO § 5.2.600(1)(b)(ii).

This criterion is met.

PCGP 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 PCGP has stated reasons that prevented PCGP from beginning or continuing development within the approval period and PCGP is not responsible for the failure to commence development. CCZLDO § 5.2.600 (1)(b)(iii) & (iv).

These two provisions have generated quite a bit of testimony and discussion among the parties. While there are good arguments on both sides of the debate, PCGP ultimately has the better arguments, as discussed below.

As the Applicant explains, the Pipeline is an interstate natural gas pipeline that requires pre-authorization by FERC. Until PCGP obtains a FERC certificate authorizing the Pipeline, PCGP cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. FERC has not yet authorized the Pipeline. Therefore, PCGP cannot begin or continue development of the Pipeline along the alignment authorized by the approval.

The opponents argue that PCGP's failure to secure the necessary FERC authorizations was PCGP's own fault. *See, e.g.,* Letter from Jody McCaffree dated August 25, 2017. Ms. McCaffree points out that FERC denied PCGP's application and also denied PCGP's request for a rehearing. The opponents' argument is also articulated in letters by Mr. Wim de Vriend dated August 25, 2017 and Sept 8, 2017. Exhibits 6 and 9. For example, in his Sept 8, 2017 letter, Mr. de Vriend points out that PCGP's application was denied because PCGP failed to provide evidence of sufficient market demand, and because PCGP failed to secure voluntary right-of-way from a majority of landowners on the pipeline route.

The Board has reservations about the precedent that would be set by accepting the opponents' contention: The concern is that the opponents' detailed inquiry would only be used in this case, which essentially means that PCGP would be treated differently than other applicants.

In this regard, the Applicant 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 case, the County found that the lack of FERC approval meant PCGP could not begin or continue development of the project:

> "In this case, the applicant needs federal approval for the gas pipeline project, and the project cannot commence until those federal approvals are forthcoming. Even the primary opponent to the project, Ms. Jody McCaffree, admits the facts that caused the applicant to be unable to begin

> or continue development during the approval period, i.e., that [FERC] vacated the federal authorization to construct the pipeline."

See County Final Order No. 14-09-063PL, ACU-14-08/AP 14-02 in Exhibit 3 to the Application narrative at 9.

Likewise, in granting a previous extension of this Approval, the County Planning Director stated:

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

See Director's Decision for County File No. ACU-16-013 in Exhibit 2 to Application narrative on page 13. This 2016 decision was not appealed. While previous decisions are not likely going to be considered formal binding "precedent," the Board believes that it is important for the County to be consistent in how it applies its code from case to case. So how rigorous of a look that the County takes in attempting to assign fault for the failure of PCGP to obtain the FERC permits is an issue that could have consequences for future cases.

Arguably, the facts are different for this extension than the facts presented in previous extension requests. Unlike previous extensions, FERC has now issued both a denial and has rejected a rehearing request, and, as of the close of the evidentiary record in this case, there was no current application pending with FERC.

Perhaps the most vexing issue is whether the opponents are correct that PCGP is "responsible" for FERC not yet approving the Pipeline. 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 interprets the word "responsible" to be the same as "within the applicant's control." Stated another way, the question is whether the applicant is "at fault" for not exercising its permit rights in a timely manner. The aim of the criterion is to not reward applicants that do not actively pursue their development, while at the same time providing some measure of sympathy and assistance to applicants who are diligently trying to effectuate their permit but who run into unexpected problems that they are not in full control to correct or fix.

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;
- Procrasination.

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.

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

The opponents would have the Board delve deeply into FERC's administrative proceedings and assess PCGP'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. Both the Applicant and the opponents have apparently been deeply involved in the FERC process, but the Board has had no involvement with that process. The Board believes that the opponents are asking the County to get into too much detail about the reasons for the FERC denial.

FERC has specifically left the door open for PCGP to reapply, and it appears that the pre-filing process has been initiated. The Board sees no harm in leaving these County land use permits in place in the interim. As has been repeatedly pointed out, these permits are conditioned upon - and are worthless without – concurrent FERC approvals.

The Board finds the Applicant's following argument to be compelling:

> Quite simply, th[e] level of inquiry [demanded by the opponents] is absurd: It forces the Hearings Officer to engage in a practically futile exercise and one that greatly exceeds the scope of the extension criteria. It would be akin to asking the Hearings Officer to determine whether an applicant, who needed an extension because it could not obtain financing, was "responsible" for a lender denying the applicant's loan application. The Hearings Officer is neither qualified nor required to conduct this analysis. Thus, properly construed, in order to determine whether PCGP was "responsible" for circumstances that prevented permit implementation under CCZLDO §5.2.600.1.b.iv, the Hearings Officer was only required to verify whether PCGP had exercised

steps within its control to implement the Approval. As explained above, PCGP has taken those steps.

Thinking about how this level of analysis might affect future precedent, the argument from Applicant's counsel, Mr. King, is persuasive. He is correct that it would be asking too much for the County to analyze, as an example, exactly why bank financing was not forthcoming, or who was at fault if an HOA withholds ARC approvals. It is sufficient to conclude that bank financing involves discretionary decision making on the part of a third party who is not under the control of the applicant. If that process does not result in a favorable outcome for an applicant, he or she should not be found to be "responsible" for that failure, given that it was not a decision that was within their complete control.

Beyond that policy point, however, there are further reasons why the Applicant is correct. When construing the text of a provision, an appellate body is to give words their "plain, natural, and ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). The term "responsible" is not defined in the CCZLDO.

In such cases, Oregon courts rely, to the extent possible, on dictionaries contemporaneous with the enactment of the disputed words. Although the Supreme Court has stated that "no single dictionary is authoritative," *Davidson v. Oregon Government Ethics Com.*, 300 Or 415, 420, 712 P2d 87 (1985), Oregon courts have predominantly used *Webster's Third New International Dictionary* as the authority for determining the plain meaning of a term in an ordinance. The *Webster's Third New International Dictionary* (1993) defines the term "responsible" in a number of ways, including as "answerable as the primary cause, motive, or agent whether of evil or good." As the Applicant notes, "[T]his is the only plausible definition in this context because the issue under CCZLDO 5.2.600.1.b.iv is whether the applicant is at fault in not exercising its permit rights." The Board concurs with and utilizes the Applicant's definition of this term.

The Board finds that PCGP was not the "primary cause" of the circumstances causing PCGP to be unable to begin or continue development during the development approval period. First, PCGP cannot be "responsible" for the FERC denial because PCGP did not request or issue that denial. Stated another way, because PCGP was required to obtain a discretionary permit from another agency as a prerequisite to implementing the permit, PCGP necessarily was not in sole control, *i.e.*, was not the "primary cause," over whether or when FERC issued that permit.

Likewise, although FERC wanted additional evidence of "need," obtaining that evidence was also not within PCGP's control. For example, as FERC's order states, the existence of long-term precedent or service agreements with end users is "significant evidence of need or demand for a project." *See* FERC Order dated March 11, 2016 at 15. Further, the requirement to show this market "need" is reduced if an applicant can show that it has acquired all, or substantially all, of the right-of-way along the pipeline route. *See* FERC Order dated March 11, 2016 at 14-15. 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.

Further, PCGP cannot control if or when third parties will enter contracts with PCGP or whether third parties are unreasonable in their negotiations. Under these circumstances, PCGP is not the "primary cause" for not demonstrating a "need" for the Pipeline.

PCGP argues that it worked diligently and in good faith during the one-year approval period to obtain approval of required permits and otherwise implement the Approval. PCGP emphasizes that it has taken affirmative steps to pursue the applicable FERC permits and related move the project closer to fruition:

> During the applicable one-year approval period (April 2016-April 2017), PCGP took the following specific actions to implement the Approval:
>
> - Actively acquired voluntary easements with landowners by reaching agreements with both private landowners and commercial timber companies.
> - Performed civil and environmental surveys within the County to advance the design and routing of the Pipeline
> - Engaged specialist contractors to perform geotechnical investigations along the Pipeline route
> - Negotiated with potential end users for the transmission of natural gas that will be transported by the Pipeline

See letter from PCGP Project Director regarding implementation activities in Exhibit D to Perkins Coie's September 8, 2017 letter. This testimony appears to be largely unrefuted in the record.

Finally, PCGP argues that the delay in obtaining FERC approval of an alignment for the Pipeline has caused other agencies to also delay their review and decision on Pipeline-related permits. The Pipeline is a complex project that requires dozens of major federal, state, and local permits, approvals, and consultations needed before PCGP and the developer of the related Jordan Cove Energy Project can begin construction. *See* permit list in Exhibit 4 to the Application narrative. The County has previously accepted this explanation as a basis to find that a Pipeline-related time extension request satisfies this standard. *See* County Final Order No. 15-08-039PL, File No. AP-01-01, ACU15-07 in Exhibit 5 to the Application narrative at 11. Therefore, PCGP has identified reasons that prevented PCGP from commencing or continuing development within the approval period.

Opponents do not dispute that PCGP engaged in the implementing actions during the approval period. Instead, they note that, subsequent to PCGP filing the Application with the County, FERC denied PCGP's request for reconsideration of FERC's denial of the project certificate. Opponents further contend that PCGP was "responsible" for FERC's denial because PCGP did not meet its burden of proof before FERC.

In its final argument, PCGP states:

> Under opponents' theory that PCGP is the "responsible" party, if PCGP had simply presented additional evidence regarding public need for the project to FERC, FERC would have unquestionably approved the certificate request and would have done so before April 2, 2017. But it is entirely possible that, FERC would not have done so. Even if PCGP presented additional evidence of public need, another party—perhaps one of the opponents even—might have presented evidence that rebutted or undermined PCGP's evidence, causing delay or even denial. Alternatively, even if PCGP had presented additional evidence of public need, FERC might not have issued a decision until after December 10, 2016. A third plausible option is that FERC could have approved the certificate, but that approval could have been bound up in appeals or requests for reconsideration filed by opponents, which would have delayed PCGP's implementation. In short, there are simply too many potential variables and outcomes to declare PCGP the "responsible" party under the circumstances.

The Board agrees with this analysis. The opponents' argument places too high a burden of proof on the Applicant. Again, the Board believes that the County should be able to grant extensions so long as the reason for the delay in the project was caused by external factors that the Applicant does not have a complete ability to control. This should set a fairly low bar, and in general, the County should err on the side of granting extensions.

The opponents have not presented evidence that undermines PCGP's evidence that it was not the "primary cause" for the circumstances causing PCGP to be unable to begin or continue development during the approval period. Therefore, the Board denies opponents' contention on this issue. The Board find that the application satisfies CCZLDO 5.2.600.1.b.iii and iv.

These two criteria are met.

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.

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.[1]

[1] 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.

The opponents contend that the approval criteria for a Pipeline permit decision have changed because County Ordinance No. 15-05-005PL—which adopted amendments to the Coos County Comprehensive Plan (CCCP) pertaining to natural hazards—became effective in 2016. The Board does not agree for two reasons.

First, the ordinance in question did not take effect until July 30, 2017. Ordinance No. 15-05-005PL had an original effective date of July 30, 2016. On July 19, 2016, and 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 Board understands the term "defer" in this context to be the same as "delay" its implementation. The Board continued to defer the effective date of Ordinance No. 15-05-005PL in public meetings held on August 16, 2016, September 7, 2016, October 19, 2016, December 7, 2016, January 12, 2017, and March 15, 2017. *See generally* Board meeting minutes reflecting Board approval of extensions of the effective date of Ordinance No. 15-05-005PL, attached to County staff memo dated September 1, 2017. PCGP's extension application was deemed complete on or about March 31, 2017. Because the CCCP provisions at issue were not in effect on that date (or at any point during the one-year approval period at issue), they cannot be considered as changes to the "approval criteria."

The Applicant states as follows:

> Although opponents contend that the Board's actions to extend the effective date of Ordinance No. 15-05-005PL were ineffective because the Board failed to follow the correct procedures for amending an earlier land use decision, the Hearings Officer should deny this contention. Even accepting opponents' initial contention as correct—that the Board failed to follow the correct procedures for amending an earlier land use decision when it extended the effective date of Ordinance No. 15-05-005PL—opponents mischaracterize the consequence of the Board's error. To the extent the Board erred, it does not render the Board's action void on its face. Instead, because the Board's decisions to toll the effective date, according to opponents, were appealable land use decisions, they only become void if appealed and reversed or remanded by LUBA. Neither opponents nor any other party have appealed the Board's actions. Therefore, the Board's extension of the effective date of Ordinance No. 15-05-005PL was valid, and the CCCP natural hazard provisions did not take effect until July 30, 2017.

See Applicant's Final Argument, Exhibit 16 at p. 2. In other words, the Applicant is saying that even if the Board's Motions, which are memorialized in minutes, were procedurally and substantively flawed, these decisions constitute a final land use decision that must be appealed to LUBA.

The Board does not believe that the decision to delay the effective date of the Ordinance is a land use decision, for the reasons set forth in detail below. But the Board does agree with

the Applicant's broader point, which is that the decision would need to be appealed and determined to defective by a Court; it is not void on its face.

To constitute a statutory "land use decision," a number of prerequisites must be met. Among other things, the decision at issue must be "final." ORS 197.830(9); *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702, 705 (2000). The legislative intent behind the concept of finality is to ensure that local governments have the first opportunity to both preside over and reach a final determination on land use matters within their respective jurisdictions, before those decisions are reviewed by LUBA. The doctrine also serves as a method to achieve judicial efficiency, by making sure that issues are fully vetted at the local level.

The case law addressing the finality concept reveals three separate lines of cases, or prongs, of the doctrine:

(1) what local event or action triggers 'finality,"
(2) whether the decision is binding vs. advisory, and
(3) whether the decision is an interlocutory decision.

The first line of cases could be relevant here. These cases focus on *when* the decision is final at the local level. In other words, this aspect of the finality requirement concerns what specific event triggers the 21-day appeal clock to LUBA (*i.e.* whether that is the oral decision, the point where the decision is reduced to writing and signed, or when it is mailed to the parties, etc). *See generally Columbia River Television v. Multnomah County*, 299 Or 325, 331, 702 P2d 1065 (1985); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 750 (1988); *Gordon v. Clackamas County*, 10 Or LUBA 240, 247 (1984). Generally speaking, the point in time where the decision is reduced to writing and signed triggers the 21-day clock.[2] ORS 197.830(9).

LUBA has enacted an administrative rule that is aimed at this prong of the finality concept. OAR 661-010-0010(3) creates a default rule by defining the term "final decision" as follows:

> (3) "Final decision": A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.

[2] Previously, there had been a rule established by the Oregon Court of Appeals in *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986) stating that, under most circumstances, the time for appealing a local land use decision or limited land use decision was tolled from the time the decision was signed until the local body provided notice of the decision to the appealing party. However, in *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997) *rev, den.*, 326 Or 59 (1997), the court concluded that its earlier reading of ORS 197.830(8) was contrary to the language of the statute, and overruled *League of Women Voters*. Under the rule announced in *Wicks-Snodgrass*, the time for a petitioner to appeal a local land use decision to LUBA under ORS 197.830(8) begins to run from the date the local decision becomes final, and not from the date when the local government provides notice of that decision. *Wicks-Snodgrass*, 148 Or App at 223-24.

Thus, under the rule, the oral vote by a Board of Commissioners, is generally not the final decision because it is not reduced to writing. *Elton v. City of Tigard*, 1 Or LUBA 349 (1980); *Noble v. City of Fairview*, 27 Or LUBA 649, 650 n 2 (1994); *Shaffer v. City of Happy Valley*, 44 Or LUBA 536, 544 (2003) (city council action on appeal must be in writing). However, the minutes of that oral vote were memorialized in writing, and that writing could be a land use decision.

Despite the language of the rule set forth in OAR 661-010-0010(3), the Court of Appeals and LUBA have held that a signature is *only* an essential element for finality if another statute, rule or ordinance provides that the signature is necessary for that type of decision. For example, in *Weeks v. City of Tillamook*, 113 Or App 285, 832 P2d 1246 (1992), the Court of Appeals held that an oral decision by the city council, reflected in its minutes, was a final "land use decision" under the circumstances of that case. *Id.* at 289. The court explained that procedural defects in the decision do not mean that there is no land use decision subject to LUBA's jurisdiction; rather, such defects simply mean that "there is a potentially reversible land use decision, if the defects are assigned as error in the appeal." *See also Cascade Geographic Society v. Clackamas County*, 57 Or LUBA 270, 273 n5 (2008); *Beilke v. City of Tigard*, 51 Or LUBA 837 (2006); *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2002); *Cedar Mill Creek Corridor Committee v. Washington County*, 37 Or LUBA 1011 (2000) (A county decision, reflected in a "minute order," determining that a letter from a city transportation director satisfies a plan design element and a specific development's condition of approval is a land use decision subject to LUBA review.); *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193(2000); *North Park Annex Business Trust v. City of Independence*, 33 Or LUBA 695 (1997); *Urban Resources v. City of Portland*, 5 Or LUBA 299 (1982)(A distinction exists between no land use decision taken and a land use decision made that does not meet legal requirements. The former circumstance vests no jurisdiction in LUBA, the latter circumstances vests jurisdiction and may result in reversal or remand.); *Astoria Thunderbird, Inc. v. City of Astoria*, 13 Or LUBA 297 (1985) (Written minutes that reflect vote of the City Council and that bear the signature of both the city finance director and the secretary to the city council can be considered to be a land use decision.). *But See Sparks v. Polk County*, 34 Or LUBA 731 (1998) (when only one party has signed an intergovernmental agreement, it is not yet a final document for purposes of a LUBA appeal.).

In this case, the minutes of the Board Hearing of March 15, 2017 could constitute a final land use decision, assuming other prerequisites are met. At this meeting, a Motion was made to extend (or "keep in effect") the deferral of Ordinance 15-05-005PL "until the current language is adopted." The minutes are reduced to writing and signed by the Board Chair, Melissa Cribbins, with the words "Minutes Approved by" directly above her signature. There is no requirement that all three Board members must sign a land use decision, despite the fact that having all three signatures in Ordinances does seem to be the County's practice. Nonetheless, despite the general practice, the Coos County Code provides as follows:

> SECTION 01.01.010 MEETINGS OF THE BOARD OF COUNTY COMMISSIONERS
> The Board of Commissioners shall meet for the transaction of County business at such days and times as may be set by the Board. All agreements, contracts, real property

> transactions, legislative and quasi-judicial decisions and other formal documents will not be deemed final and binding on the County until reduced to writing, and formally approved and signed by the Board. For purposes of this section "signed by the Board" means signed by at least two (2) members of the Board or, after approval by the Board, signed by the Chairperson, or in the absence of the Chair, by the Vice Chairperson. Board actions other than those listed above will be deemed final upon approval by the Board.

In this case, the deferrals were memorialized in the minutes of the public meetings. The last deferral was set forth in minutes that were approved by the Board and signed by the Chair. Thus, the minutes might therefore constitute a statutory land use decision, if other requirements are met.

However, finality is not the only requirement that is required to meet the definition of a statutory land use decision. In order to constitute a statutory land use decision, the County's decision must also either apply or amend: (1) a provision contained in a local government's comprehensive plan, (2) land use regulation, or it must (3) apply a Statewide Planning Goal. ORS 197.015(11)(a)(A)(i)-(iv). LUBA has repeatedly stated that in order for a challenged decision to be a statutory "land use decision," it must "concern" itself with the application of the comprehensive plan provision or land use regulation, or a Goal. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). In determining whether a local government decision "concerns" the application of a comprehensive plan provision or a land use regulation, " * * * it is not sufficient that a decision may touch on some aspects of the comprehensive plan [or land use regulations], rather the comprehensive plan [or land use regulations] must contain provisions intended as standards or criteria for making the appealed decision. *Billington*, 299 Or at 475." *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260 (1987).[3] However, the decision does not necessarily have to permit the "use" or "development" of land. *Contrast Medford Assembly of God v. City of Medford*, 6 Or LUBA 68 (1982), *rev'd* 64 Or App 815 (1983), *aff'd* 297 Or 138 (1984). Rather, a local government decision which makes a binding interpretation of its regulations, but without amending or adopting regulation provisions or granting or denying a development application, is a "final" decision, even if other actions are required to give that decision practical effect. *Medford Assembly of God v. City of Medford*, 297 Or 138, 140, 681 P2d 790 (1984); *Hollywood Neigh. Assoc. v. City of Portland*, 21 Or LUBA 381, 384 (1991); *General Growth v. City of Salem*, 16 Or LUBA 447, 451-53 (1988).

In this case, the decision to delay the effective date of the Ordinance is not a decision that requires the County to apply or amend a provision contained in a local government's comprehensive plan, land use regulation, or apply a statewide planning goal. Therefore, the decision is not a land use decision.

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[3] *See also Knee Deep Cattle Co. v. Lane County*, 28 Or LUBA 288 (1994); *Fence v. Jackson County*, 135 Or App 574, 900 P2d 524 (1995) ("We agree with the county that the fact that a regulation is embodied in something called a land use ordinance does not convert it into a land use regulation, subject to LUBA's review, if the substance of the regulation clearly pertains to something other than land use.").

The Board generally disagrees with the substance of the analysis set forth on page 1-3 of Kathleen Eymann's letter dated September 13, 2017. Delaying the effective date of a Comprehensive Plan Amendment is not the same as substantively amending a comprehensive plan. Ms. Eymann is correct that substantive amendments to the comprehensive plan would require the County to undertake the procedures for a Post Acknowledgement Plan Amendment (PAPA). However, simply delaying the effective date of the Ordinance prior to its effective date can be accomplished by a motion made at a public hearing. There are no criteria for such a decision, and it is within the sole discretion of the Board to do so.

Nonetheless, even if the opponents' arguments had merit, they should have been either directed to LUBA in the form of a land use appeal or directed to a Circuit Court. The Applicant is correct when it states that the Board error does not render the Board's action void on its face. Instead, as the Applicant notes, the Board's decision to toll the effective date was either an appealable land use decision or a decision which could be appealed to the Circuit Court. Such action only becomes void if appealed and reversed or remanded by LUBA or by a Circuit Court. Neither such appeal has occurred.

E. <u>Even if the CCCP natural hazard provisions were in effect when PCGP submitted the Application, these provisions are not "approval criteria" for a Pipeline permit.</u>

Opponents contend that the "applicable criteria" for the CUP permit have changed. *See* Letter from Jody McCaffree dated Aug. 25, 2017. *See* Letter from Vim de Vriend dated Aug. 25, 2017. *See* Letter from Kathleen Eymann, Aug. 25, 2017.

For example, in her letter dated Aug. 25, 2017, Ms. Eymann argues that the comprehensive plan is binding law, and cites to *Baker v. City of Milwaukie* and some out of context quotes from the County's Hearings Officer. While Ms. Eymann is correct that the Comprehensive Plan is law, that fact does not end the pivotal inquiry. The more difficult question is whether any of the policies and directives set forth in the Comprehensive Plan constitute applicable "criteria" for the conditional use permit at issue.

We first look at the comprehensive plan policies that the opponents argue are new approval standards. But before doing so, a quick summary of applicable case law is in order. Determining whether any given Comprehensive Plan policy is an "applicable" criterion or approval standard can present vexing questions for practitioners, so a summary of the applicable law should be beneficial to the parties.

In some cases, the plan itself will provide a "roadmap" by expressly stating which, if any, of its policies are applicable approval standards for certain types of development. For example, if the comprehensive plan specifies that a particular plan policy is itself an implementing measure, LUBA will conclude that policy applies as an approval criterion for land use decisions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990). On the other hand, where the comprehensive plan emphasizes that plan policies are intended to *guide* development actions and decisions, and that the plan must be implemented through the local code to have effect, such plan policies are not approval standards for individual conditional use decisions. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991). Similarly, statements from introductory findings to a comprehensive plan

chapter are not plan policies or approval standards for land use decisions. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991). Comprehensive plan policies which the plan states are specifically implemented through particular sections of the local code do not constitute independent approval standards for land use actions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990). Where the county code explicitly requires that a nonfarm conditional use in an exclusive farm use zone "satisfy" applicable plan goals and policies, and the county plan provides that its goals and policies shall "direct future decisions on land use actions," the plan agriculture goals and policies are applicable to approval of the nonfarm conditional use. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

Often, however, no roadmap is provided. In those cases, the key is to look at the nature of the wording of the plan provision at issue. LUBA has often held that some plan policies in the comprehensive plan will constitute mandatory approval criteria applicable to individual land use decisions, depending on their context and how they are worded. *See Stephan v. Yamhill County*, 21 Or LUBA 19 (1991); *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990). For example, where a comprehensive plan provision is worded in mandatory language – such as when the word "shall" is used – and is applicable to the type of land use request being sought, then LUBA will find the standard to be a mandatory approval standard. *Compare Axon v. City of Lake Oswego*, 20 Or LUBA 108 (1990) ("Comp plan policy that states that "services shall be available or committed prior to approval of development" is a mandatory approval standard); *Friends of Hood River v. City of Hood River*, __ Or LUBA __ (LUBA No. 2012-050, March 13, 2013). Conversely, use of aspirational language such as "encourage" "promote," or statements to the effect that certain things are "desirable" will generally not be found to be mandatory approval standards. *Id.; Neuschwander v. City of Ashland*, 20 Or LUBA 144 (1990); *Citizens for Responsible Growth v. City of Seaside, 23 Or LUBA 100* (1992), *aff'd w/o op.* 114 Or App 233 (1993).

In some cases, an otherwise applicable plan policy will be fully implemented by the zoning code. Where the text of the comprehensive plan supports a conclusion that a city's land use regulations fully implement the comprehensive plan and displace the comprehensive plan entirely as a potential source of approval criteria, demonstrating that a permit application complies with the city's land use regulations is sufficient to establish consistency/compliance with the comprehensive plan. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 211-12 (1994); *Murphy v. City of Ashland*, 19 Or LUBA 182, 199 (1990); *Miller v. City of Ashland*, 17 Or LUBA 147, 169 (1988); *Durig v. Washington County*, 35 Or LUBA 196, 202 (1998) (explicit supporting language is required to establish that land use regulations entirely displace the comprehensive plan as a source of potentially applicable approval criteria for land use decisions). However, a local government errs by finding that its acknowledged zoning ordinance fully implements the acknowledged comprehensive plan, thus making it unnecessary to apply comprehensive plan provisions directly to an application for permit approval, where the acknowledged zoning ordinance specifically requires that the application for permit approval must demonstrate compliance with the acknowledged comprehensive plan and the county does not identify any zoning ordinance provisions that implement applicable comprehensive plan policies. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

The opponents argue that the Hazard Maps, including the Tsunami, Landslide, Wildfire, Liquefaction, and Earthquake maps adopted in Ord. 15-05-005PL are "in and of themselves" independent approval criterion. *See* Letter from Kathleen Eymann dated Sept. 13, 2017, at p. 5. However, standing alone, the maps accomplish nothing more than identifying land that is subject to an overlay zone. They do not establish criteria. It is only when they are paired with text that establishes criteria do the maps have operative effect.

Opponents identify two provisions that they contend are "approval criteria." The first of these two provisions reads as follows:

> ***"4. Coos County shall permit the construction of new structures in known areas potentially subject to Landslides only:***
>
> ***"i. If dwellings are otherwise allowed by this Comprehensive Plan; and***
>
> ***"ii. After the property owner or developer files with the Planning Department a report certified by a qualified geologist or civil engineer stipulating –***
>
> ***"a) his/her professional qualifications to perform foundation engineering and soils analyses***
>
> ***"b) that a dwelling can or cannot be safely constructed at the proposed site, and whether any special structural or siting measures should be imposed to safeguard the proposed building from unreasonable risk of damage to life or property."***

Exhibit A to Ordinance No. 15-05-0005PL at 2 (emphasis added). This provision shall be referred to as the "Landslide Provision." The second provision reads as follows:

> ***"Earthquakes and Tsunamis***
>
> ***"To protect life, minimize damage and facilitate rapid recovery form a local Cascadia Subduction earthquake and tsunami, the County will * * ***
>
> ***"iv. Consider potential land subsidence projections to plan for post Cascadia event earthquake and tsunami redevelopment.***
>
> ***"v. Require a tsunami hazard acknowledgment and disclosure statement for new development in tsunami hazard areas.***
>
> ***"vi. Identify and secure the use of appropriate land above a tsunami inundation zone for temporary housing, business and community functions post event."***

Exhibit A to Ordinance No. 15-05-005PL at 2-3. This provision shall be referred to as the "Tsunami Provision."

The text and context of these two provisions does not support opponents' contention that they are "approval criteria."

According to the introductory section of the CCCP regarding natural hazards, all of the CCCP natural hazard provisions require further implementation by land use regulations:

> "This strategy shall be implemented by enacting special protective measures through zoning and other implementing devices, designed to minimize risks to life and property."

Exhibit A to Ordinance 15-05-005PL at 1. This "roadmap" provision strongly suggests that these comprehensive plan policies are not intended to apply directly to permit decisions. No party argues that these provisions "apply" as an interim measure prior to the adoption of the implementing ordinances.

The plain text of the so-called "Landslide Provision" only applies to "dwellings" and "buildings." Although the initial clause refers to "new structures," the remainder of this provision is concerned with protecting "dwellings" and "buildings." For example, it requires a determination whether "dwellings" are allowed and whether "dwellings" can be safely constructed. If the policy was actually concerned with siting all structures, there would be no need to address "dwellings" in particular, especially if the "structure" has different siting or safe construction parameters than "dwellings" do.

As far as the record makes clear, the PCGP pipeline does not authorize construction of any dwellings or buildings. Various opponents note that the pipeline will involve some "structures." Specifically, two above-ground pipe valve structures are authorized by the approval. However, these pipe valve structures are not located in buildings. Although the record does not appear to address the issue, it is also highly unlikely that these values are located in "areas of known landslide hazards." After all, these valves are intended to be used to shut off gas if the pipe is compromised in any way. These structures need to be located in stable areas in order to accomplish their mission.

Kathleen Eymann and Jody McCaffree argue that these gas valves are "structures" because the Code definition of "structure" includes "a gas * * * storage tank that is principally above ground." The Board does not believe that a pipe value is a "storage tank" within the meaning of that definition. But even if it was a storage tank, it would not be a storage tank that is "principally above ground." But again, even if it's a "structure," it is not a dwelling, which is the primary focus of the landslide provision.

Turning to the "Tsunami Provision," it does appear that that at least one of these provisions is written in mandatory terms. This provision requires a tsunami hazard acknowledgment and disclosure statement for new "development" in tsunami hazard zones. No party contends that the pipe is not a development. The maps submitted by the opponents make clear that the pipelines traverses land located in the tsunami hazard zones. *See* Letter from Kathleen Eymann dated Sept. 13, 2017 at p. 6. However, as the Applicant points out, there is also no indication that this provision must be implemented at the time of CUP approval. This

directive could just as easily be implemented outside the land use context. For example, it could be applied at the time of issuance of building permits.

The Applicant is also correct that the CCCP natural hazard provisions are not approval criteria that would apply to the Application because the CCZLDO provides a "grandfather" clause that exempts the Pipeline from compliance with the CCCP natural hazard provisions. *See* CCZLDO 4.11.125 ("Hazard review shall not be considered applicable to any application that was deemed complete as of the date this ordinance became effective (July 31, 2017)." The Application for the extension was deemed complete on or about March 31, 2017. Thus, pursuant to CCZLDO 4.11.125, the Application is not subject to hazard review.

As a final note, Ms. MaCaffree continually raises the issue of NEPA compliance. In this case, she argues that the NEPA process must be completed before land use approvals can be issued. *See* McCaffree Letter dated Aug. 25, 2017 at p. 2. However, NEPA is not an approval standard for a land use case. Ms. McCaffree cites to certain quotes from NEPA, its implementing CFRs, and agency commentary set forth in the Federal Register, but these quotes are all taken out of context. For example, when these quotes refer to "the decision-making process," they are referring to a *federal* decision-making process. One quote even expressly states that the EIS "shall be by federal officials * * *." (Emphasis added). However, Ms. McCaffree is only partially correct when she states that "Coos County has clearly demonstrated that it views the EIS not as a critical part of the decision process." The EIS is not an approval standard. It could be submitted into a record of a land use proceeding and relied on for its evidentiary value. In fact, the county relied on the prior EIS to draw certain factual conclusions related to the original PCGP approvals back in 2010. However, it is simply legally wrong for Ms. McCraffree to argue that the County cannot issue land use permits for a project before that project undergoes an EIS process.

Having said that, the County land use approvals issued in this case are all contingent on FERC approval, which, in turn, is based on the results of the NEPA EIS process. The County land use approvals have absolutely no preclusive effect on the NEPA process, and are worthless to the extent they materially deviate from any final route approved by FERC.

In her letter dated September 8, 2017, Ms. McCaffree rhetorically asked 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?

The short answer is two-fold. First, FERC left the door open for PCGP to apply again. 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.).

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

This criterion is met.

The Applicant complies with the Two-year Extension Limitation.

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 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. As explained in the Applicant's narrative and as set forth in the CCZLDO and CBEMP, the pipeline is still listed as a conditional or permitted use in all of the CBEMP zones which it traverses, and the pipeline is still listed as a conditional or permitted use in rural residential zones.

This criterion is met.

The Applicant complies with the Two-year Extension Limitation.

CCZLDO § 5.2.600.2 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.

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).

This criterion is met.

F. Additional Issues.

The Board finds that additional issues raised during the local proceedings do not concern the limited approval criteria that apply to this request and thus do not provide a basis to approve, deny, or further condition the request.

For example, in their appeal statement, appellants contended in Issue B that Applicant is considering a different pipeline route and that this new route does not satisfy various criteria, including CCZLDO 4.11.435, ORS 455.447(4), and all provisions of the CBEMP. In Issue D of that statement, appellants expressed concern that approval of a time extension as requested by the Applicant could be perceived to permit Applicant's modified pipeline route. The Board denies the appellants' issues. The Board is unaware of any changes to the pipeline route involved in this request. Accordingly, approval of this request does not approve any modifications to the pipeline route, only to the time period within which Applicant has to initiate the original pipeline route. Likewise, because no modifications to the pipeline route are requested in this application, the Board takes no position as to whether any modifications would or would not comply with the criteria identified in Issues B and D in the appeal statement.

Other citizens objected to the impacts of the pipeline itself, including potential use of eminent domain and/or damage to private property rights. While the Board recognizes the importance of these concerns, they are not directed at the limited approval criteria applicable to this request. Therefore, the Board finds that these concerns are outside the scope of this proceeding and do not provide a basis to deny or further condition the request.

Further, while Ms. Williams testified at the public hearing that she could not determine how the pipeline would affect her since the route has not been selected, the Board reiterates that this proceeding concerns a time extension only and does not affect the route previously approved by the Board.

G. Procedural

a. Hearings Officer Objection

At the public hearing on August 25, 2017, the Hearings Officer declared that he had no prehearing ex-parte contacts or conflicts of interest relating to this case. He then provided a chance for anyone to challenge his ability to review this matter based on his disclosures. The Hearings Officer received a challenge stating that the Hearings Officer was paid by the Applicant.

The Board rejects this challenge because the Hearings Officer is not paid directly by the Applicant, and the manner of the Hearings Officer's compensation does not bring his objectivity into question. In cases where a Hearings Officer is hired to review a case, the actual cost is charged to an applicant by the Coos County Planning Department. This payment is not directly sent to the Hearings Officer from an applicant. Rather, a Hearings Officer is a contract employee of Coos County. As such, the Hearings Officer does not receive a financial benefit from the actual project approval of denial of an application.

The Hearings Officer also received a challenge alleging that the board as an unwritten clause requiring the Hearings Officer to approve any proposed projects. The Board rejects this challenge because there is no such clause and the Board is the final decision maker in this matter. The Board has the ability to accept, modify, or reject the decisions of the Hearings Officer. The Hearings Officer's role in the matter is limited to holding the public hearing and giving a legal opinion if the matter meets the applicable criteria. The Hearings Officer further stated that he did not have any direct contact with the Board and is not from the area. He had also never visited any of the properties in which the pipeline will cross for this case. He may have driven by a site through is travels, but never specifically to review the site for this case.

Ms. McCaffree also challenged the Hearings Officer, stating that she believed in past cases that the Hearings Officer favored attorney testimony over non-attorney testimony, and that evidenced bias on the part of the Hearings Officer. The Board rejects this objection because there is no evidence of an actual bias. Further, Ms. McCaffree's contention appears to relate to past cases, not the current case.

Finally, the Hearings Officer is not the decision maker in this matter. The Hearings Officer was appointed by the Board as described in ORS 215.406, and the Board is the final decision-maker. Ms. McCaffree has not explained how the Hearings Officer's alleged bias tainted the proceedings before, or the decision of, the Board. The Board denies the contention that the Hearings Officer was biased.

b. Board Objection

On November 21, 2017, the Board held deliberations on this matter in a public hearing. The testimony portion was closed but County Counsel asked the Board to disclose any conflicts or ex-parte contacts, and also asked if any Board member needed to abstain from participating in the matter. Each Board member stated they had no conflicts of interest or ex-parte contacts regarding the extension application or the appeal of the extension application. County Counsel

then asked if anyone present wished to challenge any member of the Board from participation in the proceeding.

Ms. McCaffree raised objections stating that Board members were biased and had received ex parte communications. She submitted a packet of information to support her claims. The packet consisted of seven exhibits. The Board denies Ms. McCaffree's contentions as follows:

i. McCaffree Exhibit A – Email from County Counsel

The Board denies Ms. McCaffree's contention that a 2011 email from an Assistant County Counsel to Ms. McCaffree demonstrates any procedural error by the County. The email requested that Ms. McCaffree refrain from further ex parte communications with Board members on a specific, then-pending application. The Board finds that the email was appropriate at the time given the pending nature of the application and Ms. McCaffree's repeated attempts to communicate with Board members on the substance of that application. The email is limited to that circumstance. The Board finds that the email did not affect Ms. McCaffree's ability to prepare and present her case in the current application proceeding, including presenting both oral and written testimony on the merits. Further, although Ms. McCaffree suggested at the November 21, 2017 Board meeting that Applicant was not held to a similar standard, she also admitted that she was not aware of any recent communications between Applicant and Board members. The Board denies Ms. McCaffree's contentions on this issue.

ii. McCaffree Exhibit B – Luncheon and Comments to Press

The Board denies Ms. McCaffree's contention that quotations from Board members in the press from 2014 demonstrate bias or prejudgment in favor of this application. The comments all pre-date the filing of this application and simply express generalized support for significant economic development projects such as the pipeline associated with this request; however, these comments do not constitute "statements, pledges or commitments" from any Board members that they have prejudged this land use application. Therefore, these statements do not demonstrate "actual bias" by any Board member.

Further, the Board denies Ms. McCaffree's contention that Board member attendance at a community luncheon where JCEP made a presentation about the project resulted in ex parte communications pertaining to this request. The luncheon occurred in 2014, long before Applicant submitted this application. Therefore, by definition, any communications that occurred between Applicant any Board members at this event are necessarily not ex parte as to this application. Additionally, the two Board members who attended the luncheon each disclosed their attendance at the event at the December 5, 2017 Board meeting. Commissioner Sweet disclosed that he attended two community meetings pertaining to the project for the purpose of keeping himself current on the project. He said that approximately 50 or more people attended the events. He said that attendance at the event would not affect his ability to review planning issues related to the project or to make decisions based upon applicable criteria. Commissioner Main disclosed that he attended a luncheon presentation at Bandon Dunes and

said no one affiliated with Applicant spoke with him individually and that the presentation was generalized in nature.

iii. McCaffree Exhibit C – Letter from Commissioner Sweet to FERC

The Board denies Ms. McCaffree's contention that the letter from Commissioner Sweet to FERC demonstrates actual bias. Ms. McCaffree raised this contention in her recent appeal to LUBA of the JCEP decision, and it was rejected. *Oregon Shores Conservation Coalition v. Coos County*, __ Or LUBA at __ (LUBA No. 2016-095, November 27, 2017) (slip op. at 36-37) ("We disagree with McCaffree that Chair Sweet's April 11, 2016 letter * * * demonstrate[s] that Chair Sweet was incapable of determining the merits of the land use application based on the evidence and arguments presented."). LUBA explained that Commissioner Sweet's statements "represent no more than general appreciation of the benefits of local economic development that is common among local government elected officials." *Id.* The Board adopts LUBA's reasoning in response to this issue.

iv. McCaffree Exhibit D – Public Statements by Commissioner Sweet

The Board denies Ms. McCaffree's contention that the public statements attributed to Commissioner Sweet at a January 2015 community meeting demonstrate actual bias. Ms. McCaffree raised this contention as to these specific statements in her recent appeal to LUBA of the JCEP decision, and it was rejected. *Oregon Shores Conservation Coalition*, __ Or LUBA at __ (slip op. at 36-37) ("We disagree with McCaffree that Chair Sweet's * * * public statements [] demonstrate that Chair Sweet was incapable of determining the merits of the land use application based on the evidence and arguments presented."). The Board adopts LUBA's reasoning in response to this issue.

v. McCaffree Exhibit E – Sheriff's Office Budget Request

For three reasons, the Board denies Ms. McCaffree's contention that this exhibit, which shows a budget request for the Sheriff's Office to conduct a major incident command system exercise that will be funded by JCEP, demonstrates that any Board member has "actual bias." 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, Ms. McCaffree has 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 she has 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, Ms. McCaffree has not demonstrated that any Board member demonstrated "actual bias" due to this funding.

vi. McCaffree Exhibit F – Press Reports of JCEP Funding for County Sheriff's Office

For three reasons, the Board denies Ms. McCaffree's 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, Ms. McCaffree has 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 she has 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, Ms. McCaffree has not demonstrated that any Board member demonstrated "actual bias" due to this funding.

vii. McCaffree Exhibit G – Agreement Between Applicant and County

The Board denies Ms. McCaffree's contention that the Board members were biased due to a 2007 agreement between Applicant and the County pursuant to which Applicant pays the County $25,000 a month. Ms. McCaffree has not adequately explained how the existence of this agreement would cause any Board members to prejudge the application (which is not related to the Agreement), and she has not identified any "statements, pledges or commitments" from any Board members that the existence of the Agreement has caused them to prejudge the application. Further, the Agreement does not require the Board to approve the application. Therefore, Ms. McCaffree has not demonstrated that any Board member demonstrated "actual bias" due to this agreement.

Finally, before taking final action to approve these findings, each Board member stated that he/she had not prejudged the application and that he/she 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. For these reasons, the Board finds that it has addressed the contentions that Board members were biased or received undisclosed ex parte communications pertaining to the project.

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 April 2, 2017 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, 2018. The Board affirms the Planning Director's May 18, 2017 decision granting the one (1) year CUP in County File No. HBCU-10-01 / REM-11-01, to April 2, 2018.

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Submittal 20190221-5053	02/20/2019 02/21/2019	CP17-494-000	Supplemental Information of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	51K	INFO
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Submittal 20190208-5074 Document Components	02/07/2019 02/08/2019	CP17-494-000 CP17-495-000	Annual Update to Organizational Conflict of Interest Form / Tetra Tech, Inc. under CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	109K	INFO
					FERC Generated PDF	119K	FILE
Submittal 20190208-5075 Document Components	02/07/2019 02/08/2019	CP17-494-000 CP17-495-000	Annual Update to Organizational Conflict of Interest Form / Tetra Tech, Inc. under CP17-494, et al. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF	337K	INFO
					FERC Generated PDF	376K	FILE
Submittal 20190206-0009	01/23/2019 02/06/2019	CP17-494-000	Tribal Board of Directors submits letter re the Ethnographic Studies for the Jordan Cove Energy Project et al under CP17-494. Availability: Public	Applicant Correspondence / General Correspondence	Image	48K	INFO
					FERC Generated PDF	24K	FILE
Submittal 20190206-5029	02/06/2019 02/06/2019	CP17-494-000	Response of Pacific Connector Gas Pipeline, LP to January 30 Information Request under CP17-494 Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	58K	INFO
					FERC Generated	8K	FILE

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Submittal 20190129-5085	01/29/2019 01/29/2019	CP17-494-000 CP17-495-000	Supplemental Information of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP - Docket Nos. CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	27K 8K	INFO FILE
Submittal 20190129-5158	01/29/2019 01/29/2019	CP17-494-000 CP17-495-000	Supplemental Information of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP under CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF PDF PDF FERC Generated PDF	27K 46736K 39218K 10K	INFO FILE
Submittal 20190110-5115 Document Components	01/10/2019 01/10/2019	CP17-494-000	Supplemental Information Filing of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	19K 24K	INFO FILE
Submittal 20190110-5116 Document Components	01/10/2019 01/10/2019	CP17-494-000	Supplemental Information Filing of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF PDF PDF PDF FERC Generated PDF	12529K 9638K 35644K 3583K 10K	INFO FILE
Submittal 20190108-5090	01/08/2019 01/08/2019	CP17-494-000 CP17-495-000	Response of Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P.to the Klamath Tribes? December 3, 2018 Letter under CP17-494.et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	2678K 2685K	INFO FILE
Submittal 20190104-5036	01/04/2019 01/04/2019	CP17-494-000	Supplemental Response to December 12, 2018 Data Request of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	19K 23K	INFO FILE
Submittal 20190102-5202	01/02/2019 01/02/2019	CP17-494-000	Supplemental Information of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	138K 8K	INFO FILE
Submittal 20181221-5133	12/21/2018 12/21/2018	CP17-494-000 CP17-495-000	Response Letter of Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians to Jordan Cove re Ethnographic Studies under CP17-494, et. al.. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	106K 8K	INFO FILE
Submittal 20181221-5378	12/21/2018 12/21/2018	CP17-494-000	Response to December 12, 2018 Data Request of Pacific Connector Gas Pipeline, LP under CP17-494.	Applicant Correspondence /	PDF	64K	INFO

			Availability: Public	Supplemental/Additional Information	FERC Generated PDF	8K	FILE
Submittal 20181220-5186	12/20/2018 12/20/2018	CP17-494-000 CP17-495-000	Supplemental Data Request from Oregon Department of Environmental Quality under CP17-494, et. al.. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	2313K 8K	INFO FILE
Submittal 20181219-5241	12/19/2018 12/19/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline and Jordan Cove Energy Project L.P. Supplement to Applicant Prepared Draft Biological Assessment under CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	246K 8K	INFO FILE
Submittal 20181213-5220	12/13/2018 12/13/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP - Response to 5-4-18 Information Request, Docket No. CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	4953K 4966K	INFO FILE
Submittal 20181204-5149	12/04/2018 12/04/2018	CP17-494-000 CP17-495-000	Request to Update Service Lists of Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP under CP17-494, et al.. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	27K 32K	INFO FILE
Submittal 20181108-5192	11/08/2018 11/08/2018	CP17-494-000	Supplemental Information filing of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	49824K 49998K	INFO FILE
Submittal 20181029-5009 Document Components	10/26/2018 10/29/2018	CP17-494-000 CP17-495-000	Supplemental Information of Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians under CP17-494, et. al.. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	2371K 2383K	INFO FILE
Submittal 20181025-5125	10/25/2018 10/25/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. - Agency Communications Update, Docket Nos. CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	118K 123K	INFO FILE
Submittal 20181025-5127	10/25/2018 10/25/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. - Tribal Communications Update, Docket Nos. CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	356K 373K	INFO FILE
Submittal 20181019-5131	10/19/2018 10/19/2018	CP17-494-000	Supplemental Information of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	91K 96K	INFO FILE
Submittal 20181017-5047	10/17/2018 10/17/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP - Verification to Data Request Response, Docket Nos. CP17-494. and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC	185K 188K	INFO FILE

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Submittal 20181015-5142	10/15/2018 10/15/2018	CP17-494-000 CP17-495-000	Letter to State of Oregon regarding Jordan Cove Meeting of Confederated Tribes of Coos, Lower Umpqua & Siulaw Indians under CP17-495, et. al.. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	305K 308K	INFO FILE
Submittal 20181012-5180 Document Components	10/12/2018 10/12/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request Availability: Public	Pleading/Motion / Answer/Response to a Pleading/Motion Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	52K 58K	INFO FILE
Submittal 20181012-5181 Document Components	10/12/2018 10/12/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	12977K 13270K	INFO FILE
Submittal 20181011-5056	10/11/2018 10/11/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. - Verification to Data Request Response, Docket Nos. CP17-494-000 and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	485K 488K	INFO FILE
Submittal 20181005-5154 Document Components	10/05/2018 10/05/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request under CP17-494, et al Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	1259K 1265K	INFO FILE
Submittal 20181005-5155 Document Components	10/05/2018 10/05/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request under CP17-494, et al Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF PDF FERC Generated PDF	26082K 28024K 54486K	INFO FILE
Submittal 20181005-5175 Document Components	10/05/2018 10/05/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Supplemental Information under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	8164K 8229K	INFO FILE
Submittal 20181005-5176 Document Components	10/05/2018 10/05/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Supplemental Information under CP17-494. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	850K 879K	INFO FILE
Submittal 20180928-5104	09/28/2018 09/28/2018	CP17-494-000 CP17-495-000	Follow-up Letter to July 2018 Meeting with FERC Staff of Coos, Lower Umpqua & Siulaw Indians under CP17-495, et. al.. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	441K 444K	INFO FILE
Submittal	09/28/2018	CP17-494-000	Supplemental Information / Oregon Department of Environmental Quality under CP17-495,	Applicant	PDF	543K	INFO

20180928-5174	09/28/2018	CP17-495-000	et. al., Withdraw/Resubmit Request for CWA Section 401 Water Quality Certification Availability: Public	Correspondence / Supplemental/Additional Information	☐ FERC Generated PDF 543K	FILE
Submittal 20180921-5124	09/21/2018 09/21/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP - Response to August 16, 2018 Klamath Tribes letter to U.S. Army Corps of Engineers, Docket Nos. CP17-494. and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	☐ PDF 972K ☐ FERC Generated PDF 975K	INFO FILE
Submittal 20180917-5000 Document Components	09/14/2018 09/17/2018	CP17-494-000 CP17-495-000	Applicant Prepared Draft Biological Assessment of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP Availability: Public	Applicant Correspondence / Supplemental/Additional Information	☐ PDF 350K ☐ PDF 17981K ☐ PDF 1077K ☐ PDF 405K ☐ PDF 20141K ☐ PDF 18724K ☐ PDF 879K ☐ PDF 1316K ☐ FERC Generated PDF 60141K	INFO FILE
Submittal 20180917-5001 Document Components	09/14/2018 09/17/2018	CP17-494-000 CP17-495-000	Applicant Prepared Draft Biological Assessment of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	☐ PDF 5904K ☐ PDF 37591K ☐ PDF 37989K ☐ PDF 38343K ☐ PDF 40541K ☐ PDF 39022K ☐ PDF 39022K ☐ PDF 40391K ☐ PDF 39082K ☐ PDF 39635K ☐ PDF 9327K More Files – See List.	INFO FILE
Submittal 20180913-5062	09/13/2018 09/13/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Response to May 4, 2018 Data Request under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	☐ PDF 194K ☐ FERC Generated PDF 198K	INFO FILE
Submittal	09/12/2018	CP17-494-000	Jordan Cove Energy Project L.P. and Pacific Gas Connector Gas Pipeline, LP Section 401	Applicant	☐ PDF 75K	INFO

20180912-5146	09/12/2018	CP17-495-000	Water Quality Package Supplemental Information Availability: Public	Correspondence / Supplemental/Additional Information			FILE
					PDF	26051K	
					PDF	25893K	
					PDF	27477K	
					PDF	21186K	
					PDF	34498K	
					PDF	29633K	
					PDF	37029K	
					PDF	15920K	
					PDF	40835K	
					PDF	41447K	
					More Files – See List.		
Submittal 20180831-5054	08/31/2018 08/31/2018	CP17-494-000 CP17-495-000	Supplemental Response of Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. to January 3 Data Request Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	24315K	INFO
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Submittal 20180831-5058	08/31/2018 08/31/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. Supplemental Information Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	34K	INFO
					FERC Generated PDF	37K	FILE
Submittal 20180820-5018	08/17/2018 08/20/2018	CP17-494-000	Supplemental Information of Alisa Acosta under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	190K	INFO
					FERC Generated PDF	191K	FILE
Submittal 20180713-5172	07/13/2018 07/13/2018	CP17-494-000 CP17-495-000	Response of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP to June 13, 2018 Data Request Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	524K	INFO
					PDF	13737K	FILE
					PDF	44976K	
					FERC Generated PDF	59522K	
Submittal 20180517-5059 Document Components	05/17/2018 05/17/2018	CP17-494-000 CP17-495-000	Supplemental Information / Updated OCI Statement by Tetra Tech, Inc. under CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF	99K	INFO
					FERC Generated PDF	107K	FILE
Submittal 20180517-5060 Document Components	05/17/2018 05/17/2018	CP17-494-000 CP17-495-000	Supplemental Information / Updated OCI Statement by Tetra Tech, Inc. under CP17-494, et al. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF	156K	INFO
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Submittal 20180409-5215 Document Components	04/09/2018 04/09/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Updated Landowner List Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 19K FERC Generated PDF 21K	INFO FILE
Submittal 20180409-5216 Document Components	04/09/2018 04/09/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Updated Landowner List Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	Excel 152K FERC Generated PDF 274K	INFO FILE
Submittal 20180329-5204	03/29/2018 03/29/2018	CP17-494-000 CP17-495-000	Section 401 Water Quality Package of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP in Docket Nos. CP17-494 and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 81K PDF 196K PDF 46430K PDF 47111K PDF 38605K PDF 46245K PDF 46672K PDF 47158K PDF 46975K PDF 46905K PDF 46862K More Files – See List.	INFO FILE
Submittal 20180323-5126 Document Components	03/23/2018 03/23/2018	CP17-494-000 CP17-495-000	Supplement to APBDA of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 27K PDF 3817K FERC Generated PDF 3946K	INFO FILE
Submittal 20180323-5127 Document Components	03/23/2018 03/23/2018	CP17-494-000 CP17-495-000	Supplement to APBDA of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF 680K PDF 23451K PDF 28687K PDF 42813K PDF 44177K PDF 41171K PDF 29014K PDF 29086K	INFO FILE

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