

January 21, 2021

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VIA U.S. MAIL AND EMAIL TO PLANNING@CO.COOS.OR.US

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

**Re: Pacific Connector Gas Pipeline, LP Time Extension Request
Coos County Planning Department File No. EXT-20-005 (AP-20-001)
Applicant's Final Written Argument**

Dear Mr. Stamp:

This office represents Pacific Connector Gas Pipeline, LP ("PCGP"), the applicant requesting a one-year extension ("Extension Request") of the approval period for the Pacific Connector Gas Pipeline ("Pipeline") original alignment permit (County Order No. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01) ("Original Approval"), which the County has designated File No. EXT-20-005 and, as appealed, File No. AP-20-001. This letter constitutes PCGP's final written argument for the Extension Request. Please consider this letter, together with PCGP's application materials and first open record submittal dated January 7, 2021 (County Exhibit 30), before preparing your recommended order for this matter.

1. Executive Summary.

For the following reasons, the Hearings Officer should enter a recommended order that the County Board of Commissioners deny the appeal and affirm the Planning Director's decision to approve the Extension Request:

- PCGP is not responsible for the "reasons" that prevented PCGP from "beginning or continuing development" during the most recent approval period.
- The criteria applicable to the underlying permit have not changed.

- The County has applied the correct (2019) version of CCZLDO 5.2.600.
- There is no basis to deny the Extension Request based upon the alleged “cloud” on land caused by the approved but not yet implemented permit.
- Potential impacts associated with the Pipeline are not relevant to any approval criteria that apply to the Extension Request.
- The Goals do not directly apply to the Extension Request.
- Speculation that PCGP will be unable to implement the permit within a 12-month extension period is not a basis to deny the Extension Request.
- The County should deny Rogue Climate’s request to reopen the record because attempts to challenge the County’s adoption of Ordinance 19-12-011PL are misplaced in this proceeding.
- The County correctly noticed this matter.

2. Arguments.

A. **PCGP is not responsible for the “reasons” that prevented PCGP from “beginning or continuing development” during the most recent approval period.**

In order to approve a permit extension for non-residential development on farmland, the County must find, among other things, that the applicant has stated “reasons that prevented the applicant from beginning or continuing development within the approval period” and that the “applicant was not responsible for those reasons.” CCZLDO 5.2.600(2)a.iii., iv.

In the present case, PCGP was prevented from beginning or continuing development within the 12-month approval period because the Pipeline due to delays associated with federal permitting. The Pipeline is an interstate natural gas pipeline that requires pre-authorization by the Federal Energy Regulatory Commission (“FERC”). Until PCGP obtained the FERC certificate authorizing the Pipeline, PCGP could not begin

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construction or operation of the facilities in the County or elsewhere along the Pipeline route. After a lengthy review process dating back to 2018, FERC issued a certificate of public convenience and necessity for the Pipeline on March 19, 2020. *See Applicant Exhibit 8*, included with January 7, 2021 first open record period submittal. Therefore, PCGP could not legally begin or continue development of the Pipeline along the alignment that the Approval authorizes for nearly the entire extension period (which ended on April 2, 2020).

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 a FERC certificate 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, Applicant Exhibit 4 at 13. This is the beginning, and the end, of the “reasons” inquiry because, without the FERC approval, the project could not legally proceed, even if all permits were in hand and all other construction preparation had occurred. In other words, the absence of a FERC approval alone for 50 of the 52 weeks of the approval period is a sufficient “reason” that PCGP was unable to “begin and continue development within the approval period.”

Further, PCGP was not “responsible” for FERC’s delay in issuing the certificate. As noted, PCGP applied for the FERC certificate in 2018 and made reasonable efforts to obtain the permit. FERC is an independent third-party agency, and PCGP had no direct control over the timing of the FERC decision. For that matter, as stated on the record, FERC delayed its decision by 30 days due to late opposition from the State of Oregon.

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Although opponents contend that PCGP had not yet obtained (and in some cases did not have active applications pending for) state permits for the project, the Hearings Officer should find that this fact does not establish that PCGP is “responsible” for “reasons” that prevented PCGP from “beginning or continuing development” within the approval period for three reasons. First, as explained above, PCGP did not secure its FERC certificate until two weeks remained in the approval period, so the absence of the FERC certificate alone was a sufficient “reason” alone for not being able to implement the Original Approval.

Second, during the approval period, PCGP pursued a legally permissible federal alternative to obtaining most state permits after the Oregon Department of Land Conservation and Development (“DLCD”) objected to the project’s Coastal Zone Management Act consistency certification on February 19, 2020. Specifically, on March 19, 2020, PCGP filed a Notice of Appeal to initiate proceedings at the United States Department of Commerce to override the objection by DLCD to the Coastal Zone Management Act consistency certification for the Pipeline. See Applicant Exhibit 9. PCGP’s action was permitted pursuant to 15 CFR Part 930, Subpart H. *Id.* PCGP’s notice of appeal was pending as of the close of the extension period (April 2, 2020), and it is still pending today. *Id.* Because this process was not resolved within the extension period, PCGP was unable to plan its next steps and take further action to implement the Original Approval either by obtaining additional state permits or by relying on a federal determination that they are not required.

Third, opponents’ contention conveniently overlooks the extreme complexity of implementing the Original Approval, which it is well-known is not a stand-alone project. Rather, the Pipeline crosses four counties and at least one city, and it is also associated with, and contingent upon, approval of the Jordan Cove Energy Project, which itself has project components in three different local jurisdictions. PCGP and its sister company Jordan Cove Energy Project L.P. spent considerable time and effort during the 12-month approval period (April 2019 - April 2020) requesting, obtaining, maintaining, extending, and defending the various local land use permits for the projects. See Applicant Exhibit 12, included with the January 7, 2021, first open record period submittal. The detailed summary of actions in the exhibit belies opponents’ attempt to frame PCGP as resting on its laurels or not committing sufficient resources toward implementing the Pipeline.

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It also underscores opponents' appeals of the approvals, which constitute further "reasons" for not yet implementing the project. Quite simply, the project is a unique and complex one, and PCGP is exercising reasonable efforts under the circumstances toward beginning and continuing development of the Pipeline.

Finally, some opponents such as Mr. Graybill erroneously emphasize PCGP's actions/inactions throughout the nearly 10-year life of the Original Approval. CCZLDO 5.2.600(2)a.iii. only requires consideration of actions taken or not taken within the "approval period." The most recent "approval period" for the Original Approval was only 12 months long (April 2019-April 2020). Accordingly, actions/inactions occurring before or after that time are not relevant to the analysis required by the CCZLDO.

The Hearings Officer should deny opponents' contentions on this issue.

B. The criteria applicable to the underlying permit have not changed.

In order to approve an extension of the Original Approval on resource land, the County must find that "applicable criteria for the original decision have not changed, unless otherwise permitted by the local government." CCZLDO 5.2.600(2)c. The Planning Director correctly determined in her decision that applicable criteria for the Original Approval have not changed.

For two reasons, the Hearings Officer should deny opponents' contention that changes in the County's natural hazards regulations in CCZLDO Section 4.11 *et seq.* constitute new approval criteria that would preclude an extension under CCZLDO 5.2.600(2)c. As noted above, the standard concerns changes to "applicable criteria for the original decision" (underline added). Assuming *arguendo* that the natural hazard regulations would even apply to the Pipeline, they would not alter the approval criteria applicable to the "original decision," i.e., the permits that PCGP obtained. Rather, they would require PCGP to obtain new permits altogether (e.g., floodplain development permit, geological hazard review, etc.). Thus, opponents appear to either misconstrue CCZLDO 5.2.600(2)c. or to improperly rewrite it to read "applicable criteria for the original use" (underline added). Either way, the Hearings Officer should deny opponents' contention.

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Second, as expressly provided in CCZLDO 5.2.600(4), the natural hazard regulations and other special considerations under the CCZLDO are not “criteria” at all but are siting standards. As such, even if the natural hazard regulations changed and assuming *arguendo* that they would even apply to the Pipeline, they are simply not relevant to determining compliance with CCZLDO 5.2.600(2)c., which, by its terms, is only concerned with changes to “criteria.”

The Hearings Officer should deny opponents’ contentions on these issues.

C. The County has applied the correct (2019) version of CCZLDO 5.2.600.

Pursuant to the “goal post” rule in ORS 215.427(3)(a), when a permit application is complete when filed (or within 180 days thereafter) and the county has an acknowledged comprehensive plan and land use regulations, approval or denial of the permit application must be based upon the standards and criteria that were applicable when the application was first submitted. In the present case, the Extension Request is a permit application that was complete when filed on March 27, 2020, and the County’s comprehensive plan and land use regulations are acknowledged. Accordingly, the County was required to apply the standards and criteria in effect on March 27, 2020, when deciding whether to approve or deny the Extension Request. These standards and criteria are set forth in CCZLDO 5.2.600, which was most recently amended by County Ordinance No. 19-12-011PL. The County Board of Commissioners adopted this ordinance, and it became effective on December 18, 2019. See Applicant Exhibit 11. The Planning Director’s decision applies these criteria. See Planning Director’s decision. Therefore, the County has complied with the “goal post” rule in the present case.

The Hearings Officer should deny opponents’ contention that the 2018 version of CCZLDO 5.2.600 continues to apply for two alternative reasons. First, Ordinance No. 19-12-011PL was adopted after the 2018 amendments and adopted new language for CCZLDO 5.2.600(1) and (2). See Applicant Exhibit 11 at 65-66. The Board stated that Ordinance No. 19-12-011PL amended the County Comprehensive Plan and its implementing ordinance, the CCZLDO. See Applicant Exhibit 11 at 1-2. The County Board intended for the language adopted in Ordinance No. 19-12-011PL to replace the previous version of these subsections because it is set forth in bold and italicized font. *Id.* Moreover, the fact that the entire subsections are bold and italicized indicate that

the Board replaced these subsections in their entirety. By contrast, when the Board was retaining some language from existing subsections, it would identify that language in plain font and then utilize strikethrough to show specific words being deleted and bold and italics to show language being added. *See generally* amendments to CCZLDO 5.2.600(3) in Ordinance No. 19-12-011PL, Applicant Exhibit 11 at 66-67. Because the Board did not identify any existing language from CCZLDO 5.2.600(1) and (2) in plain font in Ordinance No. 19-12-011PL, none of this language was retained. Thus, contrary to Ms. Eymann's contention, this is not an instance where the previous language was not repealed and thus would continue to apply. Instead, it is clear that it was repealed because it was not identified as plain text in the amendments adopted in Ordinance No. 19-12-011PL.

Second, and in the alternative, to the extent the 2018 version of CCZLDO 5.2.600 continues to apply, its criteria are satisfied in the present case. In all relevant ways, the same approval criteria apply to permit extensions under either the 2018 and 2019 versions of CCZLDO 5.2.600. *Compare* CCZLDO 5.2.600(2)a. (2019) with CCZLDO 5.2.600.1.a(2) (2018) (resource land) and CCZLDO 5.2.600(3)c. (2019) with CCZLDO 5.2.600.b(3) (non-resource land). Although opponents contend that a particular passage of CCZLDO 5.2.600 (2018) would require the County to find that PCGP does not have valid "reasons" for not commencing development, opponents are mistaken. The passage in question simply provides a non-exclusive list of "reasons" the County may consider to be valid grounds for an extension:

"Coos County has and will continue to accept reasons for which the applicant was not responsible as, but limited too [sic], financial hardship, death or owner, transfer of property, unable to complete conditions of approval and projects that require additional permits. The County's Ordinance does not control other permitting agency processes and the County shall only consider if the applicant has requested other permits as a valid reason and to show they are attempting to satisfy conditions of approval. This is a different standard 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."

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CCZLDO 5.2.600(2018). Because the list of “reasons” is non-exclusive, it is not mandatory in nature, and it does not require a County permit holder to apply for all other needed permits in order to demonstrate sufficient “reasons” to qualify for a permit extension. Ms. Eymann’s contentions to the contrary either misconstrue this provision or insert language that has been omitted from this section in contravention of ORS 174.010.

For either of these alternative reasons, the Hearings Officer should deny opponents’ contentions on this issue.

D. There is no basis to deny the Extension Request based upon the alleged “cloud” on land caused by the approved but not yet implemented permit.

A short segment of the Pipeline alignment approved by the County in the Original Approval was not included in the FERC-approved alignment for the Pipeline. Opponents contended that the landowners along this short segment are adversely affected by the cloud caused by the Original Approval when the apparent intent is that the Pipeline will not cross their properties. Some opponents even contended that the County should deny the Pipeline out of concern for these landowners. The Hearings Officer should deny this contention for the following reasons.

First, the Original Approval included a condition of approval (Condition 20) stating that the approval does not take effect as to any effected property until PCGP has acquired ownership of an easement 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. The condition has not been satisfied. Therefore, the Original Approval is not yet operative at least as to properties owned by owners who have not yet consented to the Pipeline. Under these circumstances, the Original Approval cannot reasonably be construed to adversely affect any properties.

Second, even if the Original Approval were adversely affecting any properties, opponents do not identify any applicable approval criterion that would require, or even permit, the County to deny the Extension Request on this basis.

For these reasons, the Hearings Officer should deny opponents' contentions on this issue.

E. Potential impacts associated with the Pipeline are not relevant to any approval criteria that apply to the Extension Request.

Some of the opponents' contentions challenge alleged impacts from the Pipeline such as contaminants, odors, leaks, and noise. But the County considered these impacts—and determined they were either not issues or were mitigated—when granting the Original Approval in 2011. The Extension Request is not an opportunity to re-apply the underlying permit criteria or to re-examine the merits of the Original Approval. Rather, it is limited to a review for compliance with the permit extension criteria in CCZLDO 5.2.600. None of the permit extension criteria in CCZLDO 5.2.600 call for—or even allow—consideration of the impacts of the Pipeline use. Thus, opponents' attempt to challenge Pipeline impacts is an impermissible collateral attack on the Original Approval, which became final in 2011. Therefore, the Hearings Officer should deny the opponents' contentions on these issues.

F. The Goals do not directly apply to the Extension Request.

Appellants contend that the County “is engaged in a pattern and practice of violating Goal 1.” Moro Rebuttal Open Record Period Submittal at 2. The Hearings Officer should deny this contention for either of two alternative reasons. First, to the extent the contention is directed at the County's processing of the Extension Request, it provides no basis for relief. As LUBA has recently stated, Goal 1 does not apply to permit proceedings:

“Goal 1 does not apply to a proceeding on a permit and an allegation of a violation of Goal 1 accordingly provides no basis for reversal or remand of a decision on a permit.”

Oregon Shores Conservation Coalition v. City of North Bend, __ Or LUBA __ (LUBA No. 2019-118, July 17, 2020) (slip op at 38). *See also Byrd v. Stringer*, 295 Or 311, 316-317, 666 P2d 1332 (1983) (where a local government has an acknowledged comprehensive plan and land use regulations, the Goals do not directly apply as approval criteria to

development proposals in that jurisdiction). In the present case, the County's comprehensive plan and land use regulations are acknowledged, and the Extension Request is an application for a permit. As a result, the Goals do not dictate any approval criteria applicable to the Extension Request.

Alternatively, to the extent this contention is directed at the process the County followed in adopting Ordinance No. 19-12-011PL, the contention is misplaced in the present case, which does not concern the adoption of that ordinance. Any concerns with the adoption of Ordinance No. 19-12-011PL should have been raised in an appeal of that ordinance.

For either of these reasons, appellants' contention that the County's process has violated Goal 1 lacks merit.

G. Speculation that PCGP will be unable to implement the permit within a 12-month extension period is not a basis to deny the Extension Request.

The provisions of CCZLDO 5.2.600 look backward and not forward. That is, the relevant consideration under this code section, by its plain terms, is what actions has the permit holder taken, or not taken, during the term of the permit. CCZLDO 5.2.600 does not require the County to make a determination whether it will be feasible for the permit holder to implement the permit within any future extension period. Therefore, speculation by opponents that PCGP will be unable to implement the permit within any future extension period is not a basis to approve or deny the Extension Request. The issue is simply not relevant.

H. The County should deny Rogue Climate's request to reopen the record because attempts to challenge the County's adoption of Ordinance 19-12-011PL are misplaced in this proceeding.

Rogue Climate requested that the Hearings Officer re-open the record to allow submittal of Planning Commission materials and meeting minutes from County File No. AM-19-006, the proceeding that culminated in the adoption of Ordinance No. 19-12-011PL, into the record. The Hearings Officer should deny this request because Rogue Climate is not planning to submit the information for a permissible purpose, i.e., to

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show whether the Extension Request meets or does not applicable extension criteria. Rather, Rogue Climate intends to submit the information to show alleged errors in the process the County followed in adopting Ordinance No. 19-12-011PL. That ordinance is a final and unappealed decision of the County made in a separate proceeding. As such, the ordinance is binding and applicable. Any attempt in the present case to challenge the process the County followed in adopting Ordinance No. 19-12-011PL is an impermissible collateral attack on that decision. Moreover, even assuming *arguendo* that the County erred in its adoption of the ordinance, it would not as a matter of law provide a basis for the County to not apply the ordinance since it is final and binding. The Hearings Officer should deny Rogue Climate's request.

I. The County correctly noticed this matter.

For the reasons stated in Attachment B to County Exhibit 28, the County correctly noticed this proceeding in accordance with the CCZLDO and Oregon law. Moreover, no one has raised an express objection to the County's notice. Therefore, there is no basis to conclude that the County has committed a procedural error that prejudiced anyone's substantial rights to prepare and present their case or to a full and fair hearing in this matter.

3. Conclusion.

Based upon these arguments and the additional evidence and argument in the whole record, the Hearings Officer should enter an order recommending that the County Board of Commissioners approve the Extension Request.

I have asked County Planning staff to place a copy of this submittal into the official record for this file and to place a copy before you. Thank you for your careful review of this information.

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Very truly yours,

A handwritten signature in blue ink, appearing to read 'SJK', with a stylized flourish at the end.

Seth J. King

cc: Jill Rolfe (via email)
Steve Pfeiffer (via email)
Nikesh Patel (via email)
Client (via email)