Hearings Body Staff Report

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:	Wednesday, November 25, 2020
File Number:	AP-20-001 (Appeal of EXT-20-005)
Applicants:	Pacific Connector Gas Pipeline, LP c/o Perkins Coie LLP, Attn: Seth King 1120 NW Couch Street, Tenth Floor Portland OR 97209
Appellants:	Kathy Dodds 613 Central Ave, Apt 2 Coos Bay OR 97420 Natalie Ranker 414 Simpson Ave North Bend OR 97459
Planning Staff:	If you have any questions regarding this matter please contact Jill Rolfe, Planning Director.
Review Type:	Appeal of an Application request for an Extension to a Conditional Use Permit
Decision:	This extension request is approved Based on the information provided by the applicant. The application has been extended to February 25, 2021

PROPERTY INFORMATION:

Account Number:	
Map Number:	
Property Owner:	See Map at Attachment A

REVIEW AND CONCLUSION OF REQUEST:

Proposal:	Request for Planning Director Approval for an extension of the expiration of a Conditional Use Application, File Numbers HBCU-10-01/REM-11-01 (County Order No. 12-03-018PL) approval pursuant to Coos County Zoning and Land Development Ordinance (CCZLDO) § 5.2.600 Expiration and Extension of Conditional Uses.
Original Application:	The original application was for an approval for Nonresidential Development that spanned multiple zoning districts.
Extension Request:	On March 27, 2020 the extension request was received by the Planning Department.
Applicable Statute:	The applicable statute and/or local land use regulation that granted the use has not been amended following the approval of the permit.
Reason for Additional Extensions:	The applicant stated the reason for the extension was for additional time to obtain necessary state and federal permits for the interstate natural gas pipeline that is the subject of this County approval. These state and federal permits are prerequisites to construction of the pipeline.

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

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

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

The subsequent applications were submitted:

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

- March 16, 2016 the applicant's attorney filed for an extension and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017.
- March 3, 2017 the applicant's attorney submitted a subsequent extension as the applicant (EXT-17-05) that was approved granting an extension to the effective time to April 2, 2018.
- March 30, 2018, prior to the expiration date (EXT-18-003) another extension was filed and staff issued an approval which was appealed (County File Nos. AP-18-002/EXT-18-003). A hearing was held and a recommendation was made to the Board of Commissioners. The Board of Commissioners reviewed the recommendation and made a final decision to approve the extension to April 2, 2019 Final Decision NO 18-11-073PL. Opponents appealed this decision to the Land Use Board of Appeals. The County staff received the LUBA decision on April 25, 2019 affirm the county's decision. The appellant filed an appeal of the LUBA decision to the Court of Appeals and on August 7, 2019 the Court of Appeals affirmed LUBA's decision without opinion, *Williams et v. Coos County*, 298 OR App 841 (2019).
- October 2, 2018, Coos County updated the zoning ordinance to incorporate extension language to follow OAR 660-033-0140 permit expiration dates for any permit that is subject to Farm and Forest Zones. The County was appealed on this text amendment. An appeal was filed to the Land Use Board of Appeals regarding the amendments. The Land Use Board of Appeals rendered a decision affirming the county's decision to amend the text of the CCZLDO, *McCaffree v. Coos County*, 2018-132. A subsequent appeal was filed with the Court of Appeals and the Court of Appeals affirmed LUBA's decision without opinion on September 11, 2019.
- March 28, 2019, A subsequent extension was received (EXT-19-004) extension request was received by the Coos County Planning Department via email followed by a hardcopy on March 29, 2019. The applicant requested decisions on extensions be processed as a land use decisions. The County decided in this situation that there may be discretion applied and; therefore, chooses to be conservative in their approach and provide a notice of decision and opportunity to appeal. An appeal was filed on this application on this application and final decision rendered approving the extension application on November 26, 2019. This was not further appealed.
- March 27, 2020, A subsequent extension request was received (EXT-20-001) on the appropriate form with correct fee. A notice of decision was not rendered on this matter until September 3, 2020; however, there was a mistake (the date of notice was missing) and a new notice was mailed and posted on September 24, 2020. The current appeal was filed timely and did include the correct fee.

APPELLANTS ARGUMENT:

- Appeals stated it is unclear if the application materials were received before the expiration of the permits and in the proper form.
- The County violated the acknowledged CCZLDO 5.2.600 and the rule it implements. The director misconstrued the applicable code provision and rule and interpreted the code provision inconsistently with the code provision it adopted with the State rule OAR 660-003-140 it implements.
- The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.

- The county erred in determining that the applicant was unable to begin development during the approval period for reasons for which the applicant was not responsible.
- The director's decisions misconstrue LUDO 5.2.600(2)&(3) and the record does not otherwise support a finding of compliance.
- There is insufficient evidence in the record to support the director's decision that the applicable criteria for the original decision has not changed.
- The extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation. The county is aware that the landowners have not consented to this application. The county is aware that the applicant may not and for some segments will not obtain federal approval to build the pipeline proposed, and does not intend to initiate development for years. The county is aware that the permit constitutes a cloud over the land owners ability to sell and fully use their property. The county must prevent further damage to the landowners by denying the extension and inviting the applicant to reapply when it knows what alignment FERC will approve.

The appellants further explanation of the issues: (Copied directly from submittal)

The county's decision states: "The applicant has provided a reason that prevented the applicant to continue development which was based on obtaining permits from other agencies. Therefore, the reason the development cannot continue is that it requires additional state and federal permitting to be completed. This is necessary to comply with the conditions of approval placed on the application by the County and to comply with federal law."

Yet the county knows that the applicant has no intent to obtain state permits. The county knows the applicant has admitted that it need not obtain state permits. The county may not approve an extension of a permit that is conditioned upon the applicant obtaining state permits when it has admitted and the evidence is that it will not seek the permits.

Said another way, the applicant has misrepresented that it is "obtaining permits" from other agencies, including state agencies. The applicant has not only not been diligent in "obtaining permits," it has unilaterally determined that it does not need them. So, PCGP is responsible for the delay.

The permits the applicant is "obtaining" will not cure the default because they will not be obtained within the "current" approval period. And, PCGP will also be unable to initiate any development within the extension period and, likely, for years to come, if at all, because it needs access to the land and that will be vigorously contested and is not likely to occur before February 25, or April 2, 2021.

To the extent the director interp1ets the provision differently, the director misconstrues the provision. It's aim is to require diligence in exercising permitting rights and not to allow the avoidance of the county's legitimate police and land use powers to regulate the uses of land by extending old decisions that may no longer be valid due to changes in legislation or other circumstances.

Applicable Coos County Zoning and Land Development Ordinance Sections:

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

(1) Permits 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 is valid for four years.

a. Extensions for Residential Development as provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3) shall be granted as follows:

i. First Extension - An extension of a permit for "residential development" as described in Subsection (1) above is valid for two (2) years.

1. The applicant shall submit an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions. Untimely extension requests will not be processed.

2. Upon the Planning Department receiving the applicable application and fee, staff shall verify that the application was received within the deadline and if so issue an extension.

3. An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.

ii. Additional Extensions - A county may approve no more than five additional one-year extensions of a permit if:

1. The applicant submits an application requesting the additional extension prior to the expiration of a previous extension;

2. The applicable residential development statute has not been amended following the approval of the permit; and

3. An applicable rule or land use regulation has not been amended following the issuance of the permit, unless allowed by the county, which may require that the applicant comply with the amended rule or land use regulation.

4. An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.

RESPONSE: A portion of this application request crosses agricultural and forest lands outside of an Urban Growth Boundary but this is not for residential development. Therefore, this criterion is not applicable to the request.

(2) Permits approved under ORS 215.416, except for a land division and permits described in Subsection (1)(a) of this section, for 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, are void two years from the date of the final decision if the development action is not initiated in that period.

a. Extensions for Non-Residential Development as described in Subsection (2) above may be granted if:

i. The applicant submits an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions.

ii. *The Planning Department receives the applicable application and fee, and staff verifies that it has been submitted within the deadline;*
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.*

b. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*
c. *Additional one-year extensions may be authorized where applicable criteria for the original decision have not changed, unless otherwise permitted by the local government.*

RESPONSE: According to Final Decision and Order No. 19-11-069PL (not appealed) the prior extension extended the approval date to April 2, 2020. The applicant submitted via email the application for extension on March 27, 2020 and made payment via credit card on March 25, 2020 *(see* the application at Attachment B). This is proof that the applicant submitted the application in proper form with the correct fee which addresses appellant's first issue.

The application request was for a non-residential use and a portion of the project crosses agricultural and forest lands. The applicant provided an application request on a County application prior to the final expiration. The fee was provided with the applications and Staff verified that the request was timely filed.

Staff made a finding that the applicant has provided a reason that prevented the applicant to continue development which was based on obtaining permits from other agencies. Therefore, the reason the development cannot continue is that it requires additional state and federal permitting to be completed. This is necessary to comply with the conditions of approval placed on the application by the County and to comply with federal law. The appellants seem to be arguing that the "county knows that the applicant has no intent to obtain state permits". The County has no such evidenced before them to make such a conclusion. Pacific Connector Gas Pipeline filed for Coastal Consistency (State Permits) and were denied but have filed an appeal that is pending through the Department of Commerce; *see* Attachment C regarding the notice of appeal. Furthermore, the appellants seem to speculating that the county can somehow make a finding that even if the appeal is granted that it should not be considered because the applicant could not begin the project by February or April of 2021. This argument does not seem developed enough for staff to completely respond to but maybe the appellant can elaborate in their testimony.

Extensions may be authorized where applicable criteria for the original decision have not changed that would require a denial of the application. Such criteria have not changed in this case. In order to provide the most transparency to the public of this high-profile project, the applicant has requested that this application be processed as a land use decision with notice and an opportunity for appeal. Although this additional process is not required by this section, the County has, as a courtesy, agreed to applicant's request. The appellants have argued there is no evidence to support the applicable criteria. There have been no changes to any of the language that permitted the pipeline. The ordinances have transitioned over the

year from text to tables but the relevant criteria have not changed. If the appellants would like to show staff where they think the relevant criteria has changed then staff is will review.

(3) On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:

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

b. All conditional uses for nonresidential development including overlays shall be valid for period of five (5) years from the date of final approval.

c. Extension Requests:

i. All conditional uses subject to an expiration date of five (5) years are eligible for extensions so long as the subject property has not been:

1. Reconfigured through a property line adjustment that reduces the size of the property or land division; or

2. Rezoned to another zoning district in which the use is no longer allowed.

d. Extensions shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.

e. There shall be no limit on the number of extensions that may be applied for and approved pursuant to this section.

f. An extension application shall be received prior the expiration date of the conditional use or the prior extension. See section 5.0.250 for calculation of time.

RESPONSE: The application request was for a non-residential use and a portion of the project crosses lands that are not zoned farm or forest. Conditional uses are valid for a period of five years and are eligible for extensions. The only standards related to extensions under this subsection are that the properties have not been reconfigured, divided or rezoned to a zoning that would prohibit the use. No such reconfiguration, division, or rezoning has occurred in this case. The extension was submitted on official form with the fee. There are no limits to the number of extensions and the extension was received prior to the expiration date. Therefore, there are no reasons not to grant the extension request as submitted.

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

RESPONSE: The application acknowledges this requirement. Therefore, the extension has been granted.

Other issues raised:

- The County violated the acknowledged CCZLDO 5.2.600 and the rule it implements. The director misconstrued the applicable code provision and rule and interpreted the code provision inconsistently with the code provision it adopted with the State rule OAR 660-003-140 it implements.

- The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.
- The director's decisions misconstrue LUDO 5.2.600(2)&(3) and the record does not otherwise support a finding of compliance.
- There is insufficient evidence in the record to support the director's decision that the applicable criteria for the original decision has not changed.
- The extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation. The county is aware that the landowners have not consented to this application. The county is aware that the applicant may not and for some segments will not obtain federal approval to build the pipeline proposed, and does not intend to initiate development for years. The county is aware that the permit constitutes a cloud over the land owners' ability to sell and fully use their property. The county must prevent further damage to the landowners by denying the extension and inviting the applicant to reapply when it knows what alignment FERC will approve.

RESPONSE: The appellants do not offer any argument to most of these statements to allow staff to respond. Some of these seem to be a repeat of prior arguments. However, given that the extension criteria was updated to coincide with the last legislative changes (2019 Session) to farm and forest dwellings there have been some modifications and some of the issues may be treated as new issues. Staff does believe if the appellants felt that the modifications were in conflict with any of the Oregon Administrate Rules (OAR) then the County Ordinance that adopted the provisions should have been appealed and should not be raised through an extension application. Furthermore, the appellant cites to OAR 660-003-140 but this seems to be a mistake. OAR 660 Division 3 is the procedures for review and approval of compliance acknowledgement request and staff can only make assumptions this is an attempt to argue the county failed to go through an acknowledgment process, which is a false statement.

The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.

Section 5.0.500 "Submission of any application for* a *land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency. Such revocation shall not be cause for refund of any previously submitted application fees."

In order for this to be a valid argument there has to be a pending application on the subject properties and the only portion that would be revoked would be the portion of the application found to be inconsistent, this provision does not revoke the entire application. The Appellants fails to explain how the decision made in December is inconsistent and to what extent it would be inconsistent with the pending extension.

The director's decisions misconstrue LUDO 5.2.600(2)&(3) and the record does not otherwise support a finding of compliance. This argument is not developed in a manor sufficient enough

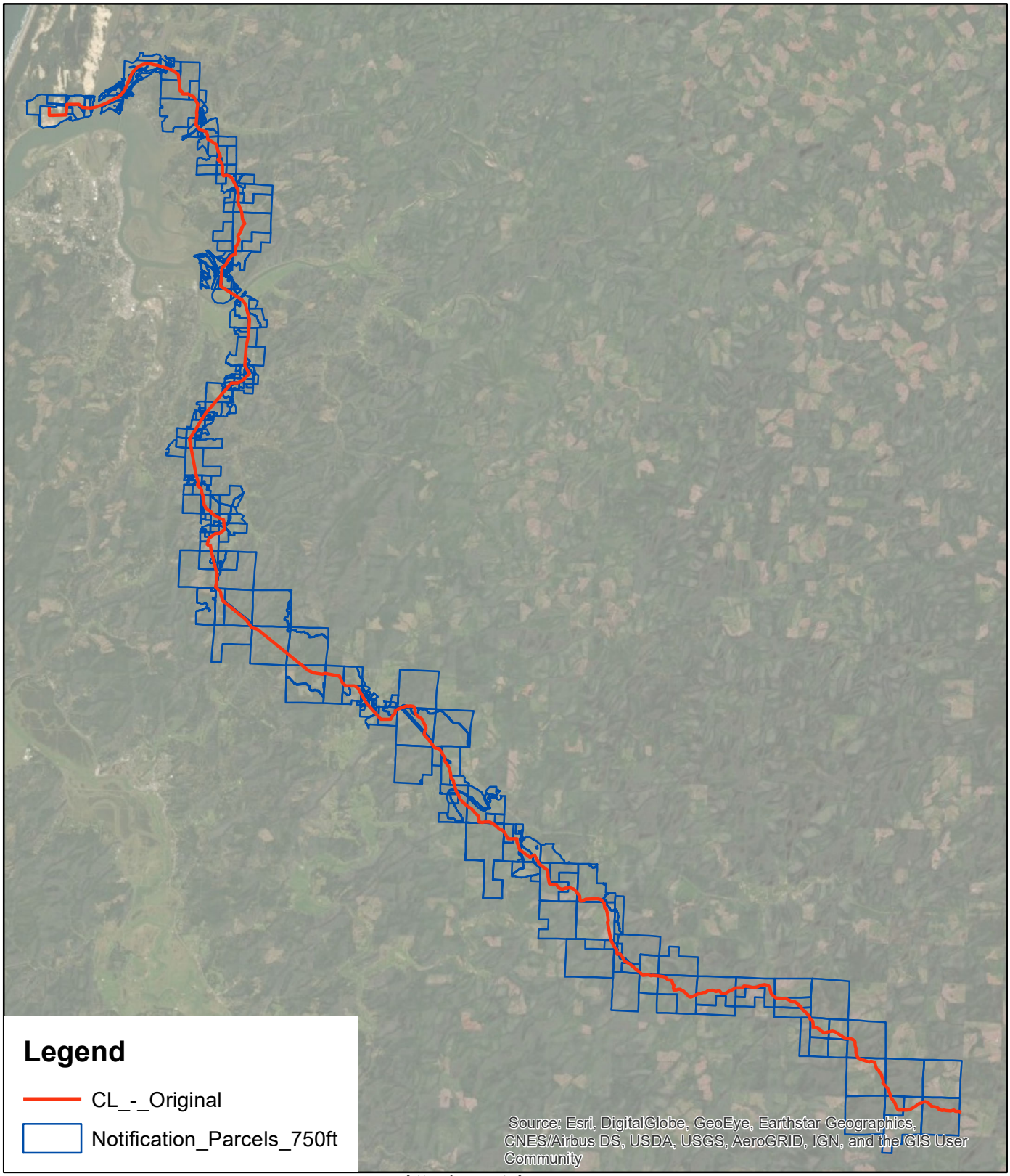
to allow staff to respond. Staff provided an explanation and cited to the application as evidenced to support the argument.

The last issue raised "extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation" was addressed in Final Decision and Order No. 19-11-069PL and unless there is a new argument this issue was addressed.

Attachments:
A – Map of Pipeline
B – Application
C – Federal Consistency Appeal by Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP
D – Appeal

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



Attachment A

PERKINSCOIE

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10th Floor
Portland, OR 97209-4128

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+1.503.727.2222
PerkinsCoie.com

March 27, 2020

Seth J. King
sking@perkinscoie.com
D. +1.503.727.2024
F. +1.503.346.2024

VIA EMAIL AND OVERNIGHT MAIL

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 Original Alignment (County Order No. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01)

Dear Jill:

This office represents Pacific Connector Gas Pipeline, LP, the applicant requesting a one-year extension of the approval period for the Pacific Connector Gas Pipeline original alignment (County Order No. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01). Enclosed with this letter please find the following materials:

- Completed Coos County "Extension of a Land Use Approval" application form
- Receipt for online payment of $600.00 application fee
- Narrative explaining how request satisfies all applicable approval criteria, with seven exhibits

We are hopeful that, upon receipt of these materials, the County will deem the application complete and proceed with reviewing 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)

EXTENSION OF A LAND USE APPROVAL

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

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

*Date Received:*_____ *Fee Received* _____ *Receipt #:* _____ *Received by:* _____

File # EXT - _____-_____ *Prior Application #* _____-_____-_____ *Expiration Date:* _____

Please be aware if the fees are not included with the application will not be processed. If payment is received on line a file number is required prior to submittal.

Please type or clearly print all of the requested information below. Please read all the criteria that apply as found on pages 2 and 3 of this application.

Applicant(s) (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

PROPERTY - If multiple properties are part of this review please check here [X] and attached a separate sheet with property information. See County File No. HBCU-10-01

Township: Range: Section: ¼ Section: 1/16 Section: Tax lot:

Tax Account Number(s): Zoning: Multple-see attached.

Please answer the following questions:

- How many extensions have been requested prior to this one? This is the seventh extension request.
- The original application request was for? Non-Residential Development or Use.
- Have you secured or applied for any other permits? Yes
  - I have obtained the following permits: [ ] DEQ [ ] Building [ ] DSL [ ] COE [X] Other Final EIS; Land Use Approvals in Coos County, Douglas County, Klamath County, and City of North Bend.
  - I have applied for the following but not received approval: [X] DEQ [ ] Building [X] DSL [X] COE [ ] Other _____
- Have you received approval for a rezone, land division or property line adjustment on this property after obtaining the land use approval that is subject of this extension request? No.
- Please explain the reasons that prevented you from beginning or continuing development within the approval period. (Attach additional pages if needed)

See attached.

Applicable Coos County Zoning and Land Development Ordinance Sections:

(1) SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

(2) Permits 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 is valid for four years.

- *a. Extensions for Residential Development as provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3) shall be granted as follows:*
  - *i. First Extension - An extension of a permit for "residential development" as described in Subsection (1) above is valid for two (2) years.*
    1. *The applicant shall submit an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions. Untimely extension requests will not be processed.*
    2. *Upon the Planning Department receiving the applicable application and fee, staff shall verify that the application was received within the deadline and if so issue an extension.*
    3. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*
  - *ii. Additional Extensions - A county may approve no more than five additional one-year extensions of a permit if:*
    1. *The applicant submits an application requesting the additional extension prior to the expiration of a previous extension;*
    2. *The applicable residential development statute has not been amended following the approval of the permit; and*
    3. *An applicable rule or land use regulation has not been amended following the issuance of the permit, unless allowed by the county, which may require that the applicant comply with the amended rule or land use regulation.*
    4. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*

(3) Permits approved under ORS 215.416, except for a land division and permits described in Subsection (1)(a) of this section, for 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, are void two years from the date of the final decision if the development action is not initiated in that period.

- *a. Extensions for Non-Residential Development as described in Subsection (2) above may be granted if:*
  - *i. The applicant submits an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions.*
  - *ii. The Planning Department receives the applicable application and fee, and staff verifies that it has been submitted within the deadline;*
  - *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.*
- *b. An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*
- *c. Additional one-year extensions may be authorized where applicable criteria for the original decision have not changed, unless otherwise permitted by the local government.*

(4) On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:

- *a. All conditional uses for residential development including overlays shall not expire once they have received approval.*
- *b. All conditional uses for nonresidential development including overlays shall be valid for period of five (5) years from the date of final approval.*
- *c. Extension Requests:*
  - *i. All conditional uses subject to an expiration date of five (5) years are eligible for extensions so long as the subject property has not been:*
    1. *Reconfigured through a property line adjustment that reduces the size of the property or land division; or*
    2. *Rezoned to another zoning district in which the use is no longer allowed.*
- *d. Extensions shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.*
- *e. There shall be no limit on the number of extensions that may be applied for and approved pursuant to this section.*
- *f. An extension application shall be received prior the expiration date of the conditional use or the prior extension. See section 5.0.250 for calculation of time.*

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

You must obtain a file number from Planning Staff prior to submitting a payment.

Step 3: Confirmation and Receipt

Result: Payment Authorized
Confirmation Number: 73091129

Your payment has been authorized successfully and payment will be processed.

Coos County Planning Department thanks you for your payment. For questions about your account, please call 541-396-7770 Thank you for using our bill payment services.

Please save or print a copy of this receipt for record keeping purposes.

My Bills

Administrative Land Use Applications payment of $600.00 on File Number EXT-20-005	$600.00

Subtotal:	$600.00
Convenience Fee:	$14.94
Total Payment:	**$614.94**

Customer Information

First Name:	Perkins
Last Name:	Coie
Address Line 1:	1120 NW Couch Street
Address Line 2:	Tenth Floor
City:	Portland
State:	Oregon
Zip Code:	97209
Phone Number:	503-727-2000
Email Address:	Rrapp@perkinscoie.com

Payment Information

Payment Date:	03/25/2020
Card Type:	Visa
Card Number:	**********3842

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. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01) to Authorize An Approximately 49.72-Mile Alignment for the Pacific Connector Gas Pipeline and Related Facilities in Various 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. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01) to authorize the original 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 September 8, 2010, the County Board of Commissioners ("Board") adopted and signed Order No. 10-08-045PL, File No. HBCU-10-01, approving Applicant's request for a conditional use permit to authorize development of the Pipeline and associated facilities extending approximately 49.72 miles from the Jordan Cove Energy Project marine terminal to the Douglas County line, subject to conditions. The decision was remanded by the Land Use Board of Appeals ("LUBA"). On March 13, 2012, the Board addressed and resolved two grounds for remand, and approved related findings in Order No. 12-03-018PL, File No. REM-11-01 ("Approval"). 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 April 2, 2012, after the County approved the Pipeline in Order No. 12-03-018PL, and the ensuing 21-day appeal expired with no appeal being filed. The County approved extensions of the Approval in 2014, 2015, 2016, 2017, 2018[1], and 2019 (County File Nos. ACU-14-08, ACU-15-07, ACU-16-013, EXT-17-005, EXT-18-003, and EXT-19-004/AP-19-004 respectively). A copy of the most recent extension decision for the Approval is included in Exhibit 2. The County's final decision was not appealed. The most recent extension expires on April 2, 2020.

The County has issued various other approvals for the Pipeline project, including previous extensions of the Approval and approvals and extensions for other alternate alignments (the Blue Ridge, Brunschmid/Stock Slough, and Early Works alignments). The Application only concerns the original alignment; the other alignments 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

*** * * ***

(2) Permits approved under ORS 215.416, except for a land division and permits described in Subsection (1)(a) of this rule, for 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, are 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 April 2, 2020. As further explained below, the County is authorized to extend the approval period if certain criteria are met, and the Application satisfies these criteria.

a. Extensions for Non-Residential Development as described in Subsection (2) above may be granted if:

[1] The 2018 County decision was appealed and was affirmed by LUBA, then affirmed without opinion by the Oregon Court of Appeals, and recently denied review by the Oregon Supreme Court. *Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd w/o op.*, 298 Or App 841 (2019), *rev. denied*, 366 Or 135 (2020).

i. The applicant submits an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions;

RESPONSE: The approval period for the Approval is scheduled to expire on April 2, 2020. The County will receive Applicant's request on March 27, 2020. The County should find that Applicant has submitted this request before the expiration of the approval period.

ii. The Planning Department receives the applicable application and fee, and staff verifies that it has been submitted within the deadline;

RESPONSE: With this submittal, Applicant has filed with the County a completed application form requesting an extension of the development approval period for the Approval. Applicant paid the $600.00 application fee on March 25, 2020, via credit card on the County website, and the receipt for that payment is enclosed with this Application. The Approval is scheduled to expire on April 2, 2020. The County will receive Applicant's request on March 27, 2020. Therefore, the County should find that Applicant's action satisfies this standard.

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.

RESPONSE: Applicant was prevented from beginning or continuing development within the 12-month approval period because the Pipeline did not obtain federal authorization to proceed until last week (March 19, 2020), near the very end of the County approval period. The Pipeline is an interstate natural gas pipeline that requires pre-authorization by the Federal Energy Regulatory Commission ("FERC"). Until Applicant obtained the FERC certificate authorizing the Pipeline, the Applicant could not begin 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 authorized the Pipeline and the related Jordan Cove Energy Project on March 19, 2020. *See* Exhibit 3. Therefore, Applicant could not legally begin or continue development of the Pipeline along the alignment that the Approval authorizes for nearly the entire extension period.

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 4 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-16-003, Exhibit 5 at 8.

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 6 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 17-004/EXT 17-005, Exhibit 7 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 7 at 10-15.

FERC's denial was *without prejudice*, and Applicant has reapplied for, and now obtained, that FERC authorization. Applicant was, therefore, prevented from beginning or continuing development during nearly the entire 12-month extension period for the Approval and was not responsible for the circumstances that prevented it from beginning and continuing such development. These approval criteria are satisfied.

b. An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.

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 on the Application before the County makes a final decision.

c. Additional one-year extensions may be authorized where applicable criteria for the decision have not changed, unless otherwise permitted by the local government.

RESPONSE: This request is Applicant's seventh 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. In the most recent extension of the Approval, the Board agreed with this conclusion and found that there has been no change in the applicable criteria. *See* Exhibit 2 at 18-20.

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

(3) On lands not zoned Exclusive Farm Use, Forest, and Forest Mixed Use:

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

b. All conditional uses for nonresidential development including overlays shall be valid five (5) years from the date of final approval.

RESPONSE: The Approval authorizes non-residential development. 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 April 2, 2020. As further explained below, the County is authorized to extend the approval period if certain criteria are met, and the Application satisfies these criteria.

c. Extension Requests:

i. All conditional uses subject to an expiration date of five (5) years are eligible for extensions so long as the property has not been:

1. Reconfigured through a property line adjustment that reduces the size of the property or land division; or

2. Rezoned to another zoning district in which the use is no longer allowed.

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 to another zoning district in which the use is no longer allowed since the date the County granted the Approval. Therefore, the Approval is eligible for an extension.

d. Extensions shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.

RESPONSE: Applicant has included a completed County extension application form with this request. Applicant previously paid the required $600.00 fee (see enclosed receipt). The County should find that the request meets the requirements of this provision.

e. There shall be no limit on the number of extensions that may be applied for and approved pursuant to this section.

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

f. An extension application shall be received prior to the expiration date of the conditional use or the prior extension. See section 5.0.250 for calculation of time.

RESPONSE: The County will receive the extension request on March 27, 2020, which is before the expiration of the Approval period. Therefore, the Application meets the requirements of this provision.

(4) Changes or amendments to areas subject to natural hazards[2] 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.

[2] 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.

Coos County Planning Department
Coos County Courthouse Annex, Coquille, Oregon 97423
Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille, Oregon

(541) 396-3121 Ext.210
FAX (541) 756-8630 / TDD (800) 735-2900

NOTICE OF ADOPTION

March 14, 2012

Re: Coos County Planning Department File No. REM-11-01
Application for Pacific Connector Gas Pipeline (Remand of HBCU-10-01)
County Final Decision and Order No. 12-03-018PL

On March 13, 2012, the Coos County Board of Commissioners adopted the above-referenced Final Decision and Order No. 12-03-018PL attached to this notice.

The adoption of this final decision and order can be appealed to the Land Use Board of Appeals (LUBA), pursuant to ORS 197.830 to 197.845, by filing a Notice of Intent to Appeal within 21 days of the date of the final decision and order. For more information on this process, contact LUBA by telephone at 503-373-1265, or in writing at 550 Capitol St. NE, Suite 235, Salem, Oregon 97301-2552.

If you have any questions pertaining to this notice or the adopted ordinance, please contact the Planning Department by telephone at (541) 396-3121 or 756-2020, extension 210, or visit the Planning Department at 225 North Adams Street, Coquille, Oregon, Monday through Friday, 8:00 AM - 5:00 PM (closed Noon - 1:00 PM).

COOS COUNTY PLANNING DEPARTMENT

Jill Rolfe, Administrative Planner

CERTIFICATE OF MAILING

I hereby certify that on March 14, 2012, I deposited the attached NOTICE OF ADOPTION into the U.S. mail, in an envelope with first class postage affixed thereto to the parties listed on the attached pages.

Dated: March 14, 2012

Jill Rolfe, Administrative Planner

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Keith Comstock	93543 Pleasant Valley Lane	Myrtle Pont OR 97458		
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Knute Nemeth	PO Box 5775	Charleston OR 97420		
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Lillie Clausen	93488 Promise LN	Coos Bay OR 97420		
Lucinda DiNovo	Bay Area Chamber of Commerce	145 Central Avenue	Coos Bay OR 97420	
Lydia Delqudo	555 Douglas SW	Bandon OR 97411		
Mark Chernaik	2355 Dale Ave	Eugene, OR 97408		
Mark Ingersoll, Vice Chairman	Confederated Tribes of Lower	Umpqua and Siuslaw Indians	1245 Fulton Ave	Coos Bay, OR 97420
Mark Sheldon	95204 Stock Slough LN	Coos Bay OR 97420		
Mark Whitlow	Perkins Coie LLP	1120 NW Couch St. 10th Floor	Portland OR 97209-4128	
Mary Geddry	340 N. Collier St.	Coquille OR 97423		
Mary Metcalf	58327 Fairview RD	Coquille OR 97423		
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Mr & Mrs Timothy Pearce	58746 Seven Devils Road	Bandon OR 97411		
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William McDonald	1991 Sherman Ave, Apt 313	North Bend OR 97459		
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REM-11-01 Decision Notice 3/14/12

Proof of Mailing

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Carol Fischer	PO Box 1985	Bandon OR 97411		
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Curt Clay	PO Box 822	Coos Bay OR 97420		
Dan Nickell	87184 Stewart Lane	Bandon OR 97411		
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Daniel Serres, FLOW	PO Box 2478	Grants Pass OR 97528		
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Don Wisely	97765 HWY 42	Coquille OR 97423		
Dustin Clarke, Coos County Sheep Co.	97148 Stian Smith Road	Coos Bay OR 97420		
Edge Environmental INC	ATTN: Carolyn Last	405 Urban Street, Suite 310	Lakewood CO 80228	
Elizabeth Matteson	732 Gerguson Lane	Days Creek OR 97420		
Francis Eatherington	886 Raven Lane	Rosebrug OR 97471		
Francis Quinn	425 Bandon Ave, SW	Bandon OR 97411		
Geno Landrum	63281 Clover DR	Coos Bay OR 97420		
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Harry & Holly Stamper	90692 Wilshire Lane	Charleston OR 97420		
Hilary Baker	58291 River Road	Coquille OR 97423		
Howard Crombie	Confederated Tribes of Lower	Umpqua and Siuslaw Indians	1245 Fulton Ave.	Coos Bay, OR 97420
Jake Robinson	94961 Stock Slough LN	Coos Bay OR 97420		
Jan Nakamoto Dilley	1223 Winsor Ave	North Bend OR 97459		
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Jaye Bell	62650 Fairveiw Road	Coquille OR 97423		
Jerry Phillips	1777 Kingwood	Coos Bay, OR 97420		
Joann Hansen	3420 Ash Street	North Bend, OR 97459		
Jody McCaffree	PO Box 1113	North Bend OR 97459		
Joe Serres, FLOW	PO Box 2478	Grants Pass OR 97528		
John B. Jones, III & Julie Jones	89056 Whiskey Run LN	Bandon OR 97411		

BEFORE THE BOARD OF COMMISSIONERS
OF THE COUNTY OF COOS, OREGON

In the Matter of LUBA Remand of Pacific Connector Gas Pipeline, L.P. REM-10-01 HBCU-10-01	))))	FINAL DECISION AND ORDER NO. 12-03-018PL

Whereas on September 8, 2010, the Coos County Board of Commissioners adopted Final Decision and Order No. 10-08-045PL, approving Pacific Connector's application in county file #HBCU-10-01 to develop 49.72 miles of interstate natural gas pipeline and associated facilities connecting the Jordan Cove LNG terminal to the pipeline segment in adjacent Douglas County.

Whereas the opponents appealed the County's decision to the Land Use Board of Appeals ("LUBA"). On March 29, 2010, LUBA remanded the decision for further consideration of two issues: (1) a procedural issue related to property owner consents under LDO 5.0.150; and (2) potential impacts to Olympia oysters in Haynes Inlet under the two applicable CBEMP Management Objectives.

Whereas Pacific Connector submitted a written request for a remand hearing on May 12, 2011. On June 7, 2011, the Board concluded that no additional evidence was required to address the issue regarding property owner consents. However, the Board determined that the Olympia oyster issue could not be fully resolved without an evidentiary hearing, and appointed a hearings officer to hold a *de novo* evidentiary hearing on remand, with the scope of the hearing limited to the second issue identified by LUBA regarding potential impacts on Olympia oysters.

Whereas Hearings Officer Andrew Stamp conducted a public hearing on September 21, 2011, and held the record open for additional evidence and argument until December 15, 2011. The hearings officer issued his decision on January 30, 2010, recommending that the Board approve the application on remand with conditions, and rejecting the opponents' arguments that the applicable CBEMP Management Objectives were not satisfied.

Whereas the County Planning Director provided the Board with a staff report dated February 15, 2012, which provides two substantive recommendations: (1) revised language for Condition of Approval #20 regarding property owner consents under LDO 5.0.150, as required by LUBA's opinion under Assignment of Error Two; and (2) proposed findings addressing a procedural issue identified by the hearings officer in his decision regarding authorization of witnesses to testify under LDO 5.7.300(4).

Whereas on March 13, 2012, the Board met to review the hearings officer's recommendation "on the record," without accepting additional evidence or argument from the parties, and to deliberate regarding: (1) whether to accept, reject, or modify the hearings officer's recommendation, and (2) whether to accept, reject, or modify the revised findings and conditions provided by staff.

WHEREAS, at the conclusion of the March 13, 2012 meeting the Board reached a decision to adopt the hearings officer's recommendation, with the modifications provided in the February 15, 2012 staff report regarding compliance with LDO 5.7.300(4). The Board finds that the applicant has addressed the remand issues and that all applicable approval criteria are met with the suggested new conditions of approval. The Board finds that staff's suggested revisions to Condition 20 address Assignment of Error Two. The Board hereby adopts the hearings officer's recommendation, as modified and attached as Attachment "A," as its own approval findings, along with the attached conditions of approval. All other findings and conditions of approval in Order No. 10-08-045PL adopted September 8, 2010, remain in full force and effect, except as modified herein.

ADOPTED this 13th day of March, 2012.

BOARD OF COMMISSIONERS

Fred R. Messerle
Commissioner

Cam Parry
Commissioner

Robert "Bob" Main
Commissioner

ATTEST:

Jill Ralfe
Recording Secretary

APPROVED AS TO FORM:

Office of County Counsel

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS ON REMAND FROM LUBA

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
COOS COUNTY, OREGON

FILE NO. REM-10-01

I. BACKGROUND

A. Summary of the Remand Process and Due Process Afforded to the Participants.

On September 8, 2010, the Coos County Board of Commissioners (Board) adopted Final Decision and Order No. 10-08-045PL, approving Pacific Connector's application in county file #HBCU-10-01 to develop 49.72 miles of interstate natural gas pipeline and associated facilities connecting the Jordan Cove LNG terminal to the pipeline segment in adjacent Douglas County. Opponents appealed the Board's decision to the Land Use Board of Appeals ("LUBA").

The opponents appealed the County's decision to LUBA. On March 29, 2010, LUBA remanded the decision for further consideration of two issues: (1) procedural issue related to property owner consents under LDO 5.0.150; and (2) potential impacts to Olympia oysters. *Citizens Against LNG vs. Coos County*, ___ Or LUBA ___ (LUBA No. 2010-086, March 29, 2011). Neither party appealed LUBA's decision any further, and therefore LUBA's decision is final and governs this remand proceeding.

Pacific Connector submitted its written request for a remand hearing on May 12, 2011. On June 7, 2011, the Board expressly concluded that no additional evidence was required to address the issue regarding property owner consents. However, the Board determined that the Olympia oyster issue could not be fully resolved without an evidentiary hearing. The Board voted on June 7, 2011 to appoint a hearings officer to hold a *de novo* evidentiary hearing on remand, with the scope of the hearing limited to the second issue identified by LUBA regarding Olympia oysters. The evidentiary hearing on remand is intended to determine: (1) if Olympia oysters currently exist in Haynes Inlet, and if so, (2) determine whether applicant is proposing construction methods, best-management practices, protection efforts, and mitigation techniques that will adequately "protect" Olympia oysters in Haynes Inlet from impacts caused by construction of the pipeline.

The hearings officer instructed the parties that all evidence and testimony in this proceeding must be directed toward the standards set forth in the Notice of Hearing, and must relate exclusively to potential impacts on Olympia oysters.

The review timeline for this application is as follows:

March 29, 2011	Decision remanded by LUBA
May 11, 2011	Applicant initiates remand process.
September 21, 2011	Public Hearing held.
October 10, 2011	First Open Record Period Closed (rebuttal testimony only).
October 17, 2011	Second Open Record Period Closed (for surrebuttal testimony only)

After the initial two rebuttal periods, both parties indicated that they wished to invoke ORS 173.763(6) and submit further rebuttal evidence.[1] For this reason, on October 24, 2011, the hearings officer conducted a conference call with the parties and worked out a schedule for the submission of additional evidence. That schedule was subsequently modified at the parties' request, and ultimately resulted in the following deadlines:

November 14, 2011	Third Open Record Period Closed (for surrebuttal testimony only)
November 28, 2011	Fourth Open Record Period Closed (for surrebuttal testimony only)
December 15, 2011	Applicant's Final Argument
January 30, 2012	Hearings Officer's Recommendation.

B. Why Did LUBA Remand the County's 2010 Decision?

To recap, LUBA remanded the case for two reasons. For easement of reference, the hearings officer will refer to these two issues as the "property ownership" issue, and the "Olympia oyster" issue.

The property ownership issue was procedural in nature, and came about because the code requires all property owners to physically sign the land use application. That code provision created unintended consequences when the use at issue is a linear feature that traverses many properties, as such as a pipeline. The hearings officer essentially created a plan to defer evaluation of whether the application had sufficient signatures to a later stage in the approval process. Although the hearings officer had pointed out that this process may require additional public input *if* the issue of property ownership in any particular case resulted in the exercise of discretion, the County (subsequent to the time the hearings officer's recommendation was issued) argued to LUBA that the property ownership verification process was going to be a strictly ministerial (non-discretionary) process. LUBA agreed with the opponents that such a process might involve discretion, and therefore, *may* require a public hearing. Overall, that aspect of the case is fairly inconsequential and requires no further discussion.

The other remand issue concerned native oysters. In the initial land use proceeding, the opponents had placed into the record an article concerning the recent re-emergence of native Olympia oysters in the Coos Bay area. Specifically, the opponents relied upon an article published in 2009 in the Journal of Shellfish Research by Dr. Groth and Dr. Rumrill, which documented the discovery of Olympia oysters in certain portions of Coos Bay, including Haynes Inlet. Although the hearings officer (and, hence, the Board) adopted detailed findings regarding the absence of impacts from pipeline construction to *commercial* oyster populations in Haynes Inlet, the hearings officer did not specifically address native Olympic oysters. This was an

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[1] LUBA has limited the applicability of ORS 197.763(2), (3), (6), and (8) to the first evidentiary hearing in the initial proceedings, not to proceedings on remand.[1] *Collins v. Klamath County*, 28 Or LUBA 553 (1995) (ORS 197.763(2)(3) and (8)); *Citizens for Responsible Growth v. City of Seaside*, 26 Or LUBA 458, 462 (1994) (ORS 197.763(6)). Nonetheless, LUBA has stated that if a local government considers new evidence on remand, all parties must be given an opportunity to respond to that new evidence. *DLCD v. Umatilla County*, 39 Or LUBA 715, 733 (2001). The hearings officer determined that the processes set forth in ORS 197.763 set forth sufficient due process protection to defeat any process-related attack at LUBA, and therefore followed the framework set forth in the statute for this case.

oversight on the hearings officer's part, who had considered oysters in a more generic fashion, as opposed to adopting "species-specific" analysis.

For this reasons, LUBA correctly held that the findings did not adequately consider potential impacts on this particular species of native oyster:

> Whether the county is obligated to address in its findings the specific issue of impacts on the Olympia oyster is a more difficult question. The 2009 article of course did not consider impacts of the pipeline on the Olympia oyster, and it may well be the case that the same measures and rationales Ellis relied upon to conclude that the pipeline would not significantly impact invertebrates in general and the commercial oyster beds apply equally to the Olympia oyster. However, we cannot tell from the findings and the record whether that is the case. The Ellis study assumed that no Olympia oysters were present in Haynes Inlet, something which is apparently no longer true. One of the specific measures suggested by Ellis was to route the pipeline away from the commercial oyster beds, presumably to reduce impacts to the non-native oysters that occupy the beds. That re-routing may take the pipeline directly through prime Olympia oyster habitat, for all we know. The Olympia oyster apparently depends upon the existence of a hard substrate. There may be no hard substrate on the pipeline route, or the dredging may not affect substrate, or the Olympia oyster may be no different in this regard from any other oyster or invertebrate, but again we do not know. Because the county's findings regarding protection of estuarine resources, including the adopted Ellis report, do not address these issues, which appear to be legitimate issues regarding compliance with applicable criteria, we agree with petitioners that remand is necessary for the county to adopt responsive findings addressing potential impacts on the Olympia oyster.

Citizens Against LNG, slip op 14-15. Thus, this proceeding is necessary to further consider whether the pipeline project will "protect" the existing population of native Olympia Oysters colonizing Haynes Inlet.

C. What Are the Key Issues on Remand?

The applicant's consultants had initially stated that they had not seen any Olympia oysters in the proposed pipeline right of way. As it turns out, additional investigation by the applicant confirmed that certain portions of the pipeline route is inhabited by Olympia oysters. Given that reality, there are ~~three~~ two fundamental questions before the hearings officer and the Board of Commissioners:

1. To what extent is Haynes Inlet populated by Olympia Oysters, and what factor(s) currently inhibit further increases in the population of these native oysters in Haynes Inlet?

Note: Because the parties submitted conflicting evidence on these two points, the Board is tasked with determining which party provided the better evidence regarding the number and location of Olympia oysters in Haynes Inlet.

2. Is there substantial evidence in the whole record to support a finding that the applicant's Oyster Protection Plan and Oyster Mitigation Plan will "protect" the resource productivity of existing Olympia oysters in Haynes Inlet?

Note: The question can be also framed in the following manner: Is there substantial evidence to support a finding that construction of the pipeline will not result in anything other than temporary, insignificant, and *de-minimus* impacts on the population of Olympia oysters due to causes such as loss of habitat / burial and/or loss of reproductive ability due to increased sedimentation?

This overarching question can be further expanded to include a set of more discrete questions:

2a. Will the applicant's "Protection Plan," which calls for the relocation of all oysters in the proposed pipeline right of way to a site a few hundred feet northwest of the right of way, "protect" the resource productivity of existing Olympia oysters?

2b. Will the applicant's "Mitigation Plan," which calls for the addition of 30 cubic yards of Pacific oyster shell to the mudflats (in the vicinity of MP 2.9-3.2), create additional hard substrate that will further enhance the recovery of Olympia oysters in Haynes Inlet?

2c. Will the dredging operations create sedimentation that will result in anything other than temporary, insignificant, and *de-minimis* impacts on the population of Olympia oysters in Haynes Inlet?

D. Scope of Review (Substantial Evidence)

1. Review of General Principles of Substantial Evidence

The outcome of this case turns on questions of substantial evidence; specifically, the question of which evidence the Board of Commissioners finds more credible and compelling. The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995). Stating the rule in the negative gives further insight into its meaning: "A finding lacks substantial evidence when the record contains credible evidence weighing overwhelmingly in favor of one finding and the agency finds another without giving a persuasive explanation." *Canvasser Services, Inc. v. Employment Dept.*, 163 Or App 270, 274, 987 P2d 652 (1999); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 752 P2d 312 (1988).

In a land use proceeding, the applicant has the burden of bringing forth substantial evidence in the whole record to demonstrate that all approval standards are met. When evidence

submitted by various parties conflicts, the County must review all of the evidence in the entire record to see if the undermining evidence outweighs the evidence on which the decision-maker seeks to rely on. *Younger v. City of Portland*, 305 Or 346, 357, 752 P2d 262 (1988).

The Board is allowed to draw inferences from the evidence presented by the parties. An inference has two parts: a primary fact and a logical deduction that arises from that primary fact. *See City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981). In many cases, the deduction may be obvious from common knowledge (such as a wet street indicating a recent rain event), but in other cases, the deduction may be less obvious. In the less obvious cases, the decision-maker should explain in the findings the basis for the deduction, so that a reviewing court can review the inference for substantial reason. *Id.*

As discussed in more detail below, the Board of Commissioners is afforded a great deal of authority to evaluate both the evidence presented by the parties, as well as the credibility of persons presenting that evidence. When faced with conflicting evidence, the decision maker is entitled to select which evidence to rely upon. That decision will not be second-guessed by LUBA or the courts, so long as it is evidence that a reasonable person would rely upon to support a conclusion. *See, e.g., Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258 (1995).[2]

If there is a complete absence of information on a particular point for which the applicant bears the burden of proof, the application must be denied. *Gray v. Clatsop County*, 18 Or. LUBA 561 (1989); *DLCD v. Curry County*, 33 Or LUBA 728 (1997)(local government must make appropriate findings based on substantive evidence, not an absence of findings, point a point that the applicant bears the burden of proof.). At the end of the day, however, the substantial evidence standard is a relatively low standard of proof. Courts consider the "substantial evidence" standard to be a less onerous standard than the "preponderance of the evidence" test and the "clear and convincing evidence" standards used in most civil lawsuits,

In this case, the hearings officer has determined that the applicant has provided the County with both expert and lay person testimony that a reasonable person could rely upon to reach the decision that the Oyster Protection Plan and Oyster Mitigation Plan will adequately protect Olympia oysters in Haynes Inlet. The only question is whether the opponents have provided rebuttal evidence that "so undermines" the applicant's testimony that a reasonable person would no longer rely on it in light of the opponent's testimony. *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff'd* 113 Or App 169, 831 P2d 77 (1992). The hearings officer does not

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[2] In reviewing the evidence, LUBA and the Courts may not substitute their judgment for that of the local decision maker. Rather, LUBA must consider and weigh all the evidence in the record to which it has been directed, and determine whether, based on that evidence, a reasonable person would have relied on that evidence to draw the conclusion the local government arrived at. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). *See also Whitaker v. Fair Dismissal Appeals Board*, 25 Or App 569, 550 P2d 455 (1976) (pointing out that review of whole record for substantial evidence does not authorize a reviewing court to substitute its judgment for that of the agency as to whether an examination of all the evidence justifies the agency's action).

believe that the opponent's evidence does so, but of course the Board is free to arrive at a different conclusion.

2. Expert testimony.

The substantial evidence questions faced in this case generally hinge on "expert" testimony. Expert testimony differs from lay person testimony because an expert is allowed to give his or "opinion" about whether a standard is met. LUBA has often stated that a local government may rely on the *opinion* of an expert in making a determination of whether a proposal satisfies an applicable standard. *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 236 (1990). Additionally, LUBA has also stated that an expert witness is generally not required to explain the basis for assumptions underlying the expert's evidence, nor is evidence supporting those assumptions required to be included in the record. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458, 465 (1994); *Miller v. City of Ashland*, 17 Or LUBA 147, 170 (1988); *Hillsboro Neigh. Dev. Comm. v. City of Hillsboro*, 15 Or LUBA 426, 432 (1987).

Nonetheless, the more that an expert does to back up his opinion with facts and evidence, the more weight that a reasonable person will typically give to that opinion. *Chance v. Alexander*, 255 Or 136, 465 P.2d 226 (1970); *ODOT v. Clackamas County*, 27 Or. LUBA 141 (1994) ("Of course, we recognize that if sufficient evidence undermining an expert's assumptions is submitted during the local proceedings, it may be unreasonable for the local decision maker to rely on that expert's conclusions. In such instances, the local government's decision has a better chance of withstanding a substantial evidence challenge made in an appeal to LUBA if the record includes an explanation of, or evidence supporting, the expert's assumptions.").

An expert's *failure* to back up opinions with facts and evidence can result in his or her opinion being rejected by a decision-maker. An expert's mere conclusion, without and supporting facts or analysis to back it up, may not constitute substantial evidence in all cases. *Liberty Northwest Ins. Corp v. Verner*, 139 Or App 165, 168-69, 911 P2d 271 (1996). Stated another way, the expert's opinion should generally have some sort of clear foundation in order to be relied upon by a decision-maker. *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988); ("[s]ubstantial evidence does not exist to support a conclusion if the only supporting evidence "consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based."); *Dickas v. City of Beaverton*, 17 Or LUBA 574, 580-85 (1989) (Finding of adequate school capacity not supported by substantial evidence where report by school district's expert was contradicted by other evidence). For example, in *Worchester v. City of Cannon Beach*, 10 Or LUBA 307 (1983) LUBA held that when an expert witness does not offer any supporting documentation and does not state how he arrived at his conclusions, and does not explain how he is qualified to make conclusions of a scientific nature, LUBA will not find the testimony to be convincing. *Id.* at 310.

It is also important to note that lay-person testimony can, under the right set of facts, undermine contradictory expert testimony. *See Johns v. City of Lincoln City*, 35 Or LUBA 421, 428 (1999); *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999). For example, local residents may often have a better understanding of local conditions and patterns, and can use such information to undermine factual assumptions in the expert's analysis.

3. "Battle of the Experts."

This case presents a classic "battle of the experts" situation: both parties have presented dueling expert testimony from scientists and other professionals. In a "battle of the experts" case, the decision-maker is tasked with the difficult decision of deciding which of two experts is presenting the more believable and substantial testimony. This involves a complex weighing process. There are no set rules for how conflicting evidence is to be weighed, and the question may boil down to which expert the decision-maker finds to be more believable. In *Westside Rock v. Clackamas County*, 51 Or. LUBA 264, 286-7 (2006), LUBA stated:

> Finally, we note that we agree with petitioner that in a case like this one, the testimony of experts is likely to be critical. Boards of county commissioners can understand most of the fundamental concepts that are in play here, even if they are not trained as engineers or geologists. * * *.
>
> But while a board of county commissioners (or the Land Use Board of Appeals for that matter) may be able to grasp these fundamental concepts, it takes experts to collect and analyze data and draw scientific and engineering conclusions from that data. In such cases it frequently will come down to which of the experts the decision maker finds more believable.

Some factors that *may* give a decision-maker reason to choose one expert's testimony over another include:

- Does one expert lack the correct qualifications to give an opinion on a particular topic? *Tipperman v. Union County,* 44 Or LUBA 98 (2003); *Westside Rock v. Clackamas County*, 51 Or. LUBA 264, 286-7 (2006).
- Are any of the expert's key factual or legal assumptions incorrect, or cast in doubt by other evidence in the record? *Wal-Mart Stores, Inc. v. City of Bend,* 52 Or. LUBA 261 (2006); *Ekis v. Linn County*, 19 Or LUBA 15 (1990).
- Is there solid "foundation" evidence which the expert relies on to draw his or her conclusion? (For example, a conclusion based on one "study" may, in some cases, not be a reliable as a conclusion based on many studies. Conversely, a conclusion based on one study may be more substantial than opposing conclusions based on many other conflicting studies, if there is something that distinguishes that lone study, such as newer, more refined sampling technique, etc.). *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 384, 752 P2d 271 (1988); *Bartels v. City of Portland*, 20 Or LUBA 303 (1990) ("[i]n view of the undisputed develop constraints present on this site, the largely unexplained expressions of confidence by [geologists] that the proposed residential development is feasible are not sufficient to comply with [the code.]").

- Does the expert fail to consider alternatives? *Wal-Mart Stores v. City of Hillsboro*, 46 Or LUBA 680 (2004).
- Are there internal inconsistencies in the expert's testimony? *Concerned Citizens of the Upper Rogue and Don Carroll v. Jackson County*, 33 Or LUBA 70 (1997).

Finally, a decision-maker may take into account some less tangible factors as well:

- How confident and decisive is the expert in his or her assessments? Does the testimony contain significant qualifying language? Vague, waffling, or hair-splitting testimony may lead a decision-maker to question the expert's conclusions.
- Does the expert come across as non-credible for any reason?
- Is the expert's opinion entitled to less weight because of the fact that he or she has a track record of being wrong in the past?
- Is the expert someone who is particularly renowned in his or her field?
- Is the expert's opinion entitled to less weight because he or she is being paid, or because he or she is clearly aligned with a certain political philosophy, particular industry, or advocacy group, etc. Note: just because an expert is being paid or is associated with a particular policy perspective or "camp" does not necessarily make their testimony inherently unreliable or unsubstantial. However, these types of intangible factors are things that a decision-maker may take note of when undertaking the process of weighing conflicting testimony.

The above-list is not intended to be exhaustive. Rather, it is a non-exclusive list of the types of consideration that a decision-maker might reasonably take into account when weighing expert testimony.

If the County determines that either parties' expert testimony was credible and sufficiently substantial to support a conclusion, then the choice of which expert evidence to believe is up to the County. *Tigard Sand and Gravel v. Clackamas County,* 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to on recons* 151 Or App 16, 949 P2d 1225 (1997); *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002); *Eugene Sand & Gravel v. Lane County*, 44 Or. LUBA 50 (2003).

4. The Opponent's Conundrum: Provide Direct Evidence of Non-Compliance, or Present Evidence Intended to Critique the Applicant's Evidence.

In its arguments to the hearings officer, the applicant repeatedly chastises the opponents for not coming up with much in the way of *direct* evidence of a failure to protect the oyster resource, but instead merely offering critiques of the applicant's evidence. The hearings officer does, in this opinion, express a certain degree of agreement with the applicant's sentiment in this regard. At the same time, the hearings officer recognizes that opponents often do not have the financial resources to commission their own independent studies. It is important to remember that the applicant has the burden of proof on issue of whether its construction will protect the

resource. The opponents' evidence should not be discounted, *in and of itself*, merely because it is a critique and not direct evidence of non-compliance.

In *Wal-Mart Stores, Inc. v. City of Bend,* 52 Or. LUBA 261 (2006), the hearings officer denied a conditional use permit for a Wal-Mart store. The hearings officer chose to believe the opponents' testimony over that provided by the applicant's experts. The applicant, Wal-Mart, appealed to LUBA, and argued that the opponents' testimony should have been discounted because it consisted solely of a critique of the Wal-Mart's evidence. LUBA rejected that argument, as follows:

> Neither do we agree with petitioner's suggestion that the opponents' experts' testimony should be discounted significantly because it is largely a critical review of the work that petitioner's experts have done rather than an original effort by those experts to predict how the expected traffic will affect transportation facilities. As we have already noted, that difference in approaches is largely a function of, and dictated by, the fact that the applicant has the burden of proof and the opponents do not.

LUBA concluded by stating:

> The critical issue for the local decision maker will generally be whether any expert or lay testimony offered by * * * opponents raises questions or issues that undermine or call into question the conclusions and supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts.

Id. at 276. Thus, although an opponent's direct evidence will often be much more persuasive than a mere critique, an effective critique can be enough to put an expert's evidence into question. *See, e.g., Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008), *aff'd w/o op.* 219 Or App 429, 182 P.3d 325 (2008).

5. Conclusion.

The hearings officer believes that the conclusions made herein would be affirmed if appealed. However, the Board of Commissioners does not have to accept the conclusions of the hearings officer. The Board has the authority to: (1) re-weigh the evidence, and (2) modify or overturn the hearings officer's conclusions. There are other conclusions that could be drawn from the evidence, as well as other plausible interpretations that could be adopted by the Board. As discussed above, the Board has fairly wide latitude under state law to draw its own conclusions about the evidence.

E. What are the Applicable Legal Standards?

On remand, there is only one core legal standard that the Board of Commissioners must apply. As a short-hand, the hearings officer will refer to this standard as the "protect" standard.

As relevant here, the "protect" standard is found in two places in the County's zoning code: the management objectives for the two aquatic zoning districts at issue: 11-NA and 13A-NA.

1. Overview of the Management Objective Standards: Aquatic Zoning Districts 11-NA and 13A-NA.

Under LUBA's remand order, the two applicable substantive standards are the management objectives for the aquatic zoning districts 11-NA and 13A-NA. Zoning district 11-NA is located on the east side of the Highway 101 Bridge, and consists primarily of intertidal mud flat areas. Zoning district 13A-NA is generally located on the west side of the bridge, and consists primarily of sub-tidal areas. The management objective for zoning district 11-NA is set forth at Coos County Zoning and Land Development Ordinance (LDO) 4.5.405, and provides, in relevant part:

> Management objective: This extensive intertidal/marsh district, which provides habitat for a wide variety of fish and wildlife species shall be managed to protect its resource productivity. (Emphasis added).

The management objective for zoning district 13A-NA is set forth at LDO 4.5.425, and provides, in relevant part:

> Management objective: This district shall be managed to allow the continuance of shallow-draft navigation while protecting the productivity and natural character of the aquatic area. (Emphasis added).

These two standards are nearly identical – 11-NA requires the county to "protect" resource productivity, and 13A-NA requires the county to "protect" the productivity and natural character of the aquatic area. Under LUBA's remand order, the County is required to consider potential impacts of the pipeline on the Olympia oyster, and to evaluate the extent to which the applicant's proposal will "protect" such oysters under the two objectives quoted above. Thus, the scope of this proceeding is narrow.

2. LUBA Case Law Interpreting the "Protect" Standard.

LUBA discussed what is required to "protect" aquatic resources in its final opinion remanding this case:

> Petitioners also argue that the obligation to 'protect' aquatic resources requires reducing harm to such a degree that there is at most a *de minimis* or insignificant impact on aquatic resources, including both commercial oyster beds and Olympia oysters, under the reasoning in *Columbia Riverkeeper v. Clatsop County*, ___ Or LUBA ___ (April 12, 2010), *aff'd* 238 Or App 439, 243 P3d 82 (2010), and that measures that simply reduce or mitigate impacts on estuarine resources are not sufficient to 'protect' those resources,

> for purposes of local comprehensive plan provisions that implement Statewide Planning Goal 16 (Estuarine Resources).
>
> Turning to the last argument first, intervenor argues that the county did not attempt to rely on measures that simply reduce or mitigate impacts, as was the case in *Columbia Riverkeeper*, but instead found, based on substantial evidence, that the impacts will be 'temporary and insignificant' and thus estuarine resources will be 'protected.' We agree with intervenor that the county did not misunderstand its obligation to 'protect' estuarine resources, and that findings that impacts will be 'temporary and insignificant' are focused on the correct legal standard for purposes of the comprehensive plan management district language that implements Goal 16.

Citizens Against LNG vs. Coos County, ___ Or LUBA ___ (LUBA No. 2010-086, March 29, 2011), slip op 13-14. Thus, LUBA concluded that Coos County's findings that impacts on Olympia oysters would be "temporary and insignificant" are sufficient to satisfy the "*de minimis*" standard of *Columbia Riverkeeper*.

The LUBA opinion in the *Columbia Riverkeeper* case is also instructive on the meaning of "protect" within the context of Goal 16. That case involved a proposed rezoning of 46 acres of submerged land from "Aquatic Conservation" to "Aquatic Development" in order to allow dredging of the river for a proposed LNG facility within the rezoned area. The submerged lands at issue would be permanently impacted by the proposal. The project proposed a new channel, turning basin and docking facility in a location identified as a "traditional fishing area" in the Columbia River. The county comprehensive plan included a requirement that traditional fishing areas "shall be protected when dredging, filling, pile driving or other potentially disruptive activities occur."

The county found that the resources could be adequately "protected" through use of very general minimization and mitigation measures designed to either reduce harm to general estuarine values or to attempt to reduce harm to the specified resources. One example of "protecting" the resource cited by the county was the fact that applicants designed the dredge footprint "to maximize efficient use of the current basin, minimize the amount of dredging and reduce impacts to fisheries, thereby reducing the area impacted and protecting the habitat as a whole." *Columbia Riverkeeper*, footnote 6. In other words, the applicant merely proposed to make the impacted area a little bit smaller.

LUBA noted that the word "protect" is defined in Goal 16 as "save or shield from loss, destruction, or injury or for future intended use," and that "the county's interpretation of the meaning of 'protect' appears to conclude that protection of specific resource can be accomplished through use of some measures that either reduce harm to general estuarine values or attempt to reduce harm to the specified resources." *Id.* at slip op 16. LUBA then discussed the meaning of the word "protect" within the context of Goal 16, and held:

> Thus, the development that is to be allowed by the disputed rezone is not consistent with the Goal definition of 'protect' unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a degree that there is at most a de- minimis or insignificant impact on the resources that those policies require to be protected."

Id. at slip op 18-19.

As discussed in more detail below, the applicant's proposal fits within the parameters of the type of measures described by LUBA that can "protect" resources within the meaning of Goal 16. Unlike the situation in *Columbia Riverkeeper*, where the proposal was just to *minimize* impacts on resources that would without question be permanently harmed by development, in the present case the evidence supports a finding that the Olympia oysters will - as a whole - not be impacted, either temporarily or permanently, by pipeline construction. Even the temporary impacts will be offset by the proposed mitigation plan, which will increase the population densities of Olympia oysters within Haynes Inlet.

In considering the question, the hearings officer notes that no party here argues that the "protect" standard is so strict that it absolutely precludes any individual oysters from being be killed or harmed (*i.e.* "taken."). The fact that the Code allows development of utilities, bridge crossings, and aquaculture in the 11-NA zone precludes such as strict interpretation. The standard allows some individuals to be "taken" so long as the overall level of harm to the population is *de minimis* or insignificant.

a. The Meaning of "*De minimis.*"

The hearings officer asked the parties to research Oregon case law to see if there is any useful guidance which would tend to give meaning to the phrase "*de minimis*." The hearings officer attempted some independent research on the issue as well. Neither the hearings officer or any other party was able to come up with any research that was particularly enlightening.

The phrase "*de minimis*" is defined as follows in Black's Law Dictionary, Sixth Edition:

> "De minimis non curat lex. The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles. Provision is made under certain criminal statutes for dismissing offenses which are "de minimis." *See, e.g.*, Model Penal Code §2.12."

The opponent's attorney, Ms. Corrine Sherton, cites to the Meriam Webster's On-Line Dictionary, which defines "*de minimis*" as "lacking significance or importance: so minor as to merit disregard. Along those same lines, the term "insignificance" is defined as "not worth considering, unimportant." Unfortunately, all of these are value-laden definitions that provide little in the way of concrete guidance.

Ms. Sherton has also points out that "temporary" impacts cannot be presumed, as a matter of law, to be "insignificant." *See Hashem v. City of Portland*, 34 Or LUBA 629, 632 (1998). While *Hashem* does say exactly that, the context in which the statement arises in that case makes it weak precedent for this case. Nonetheless, the hearings officer does agree, to a certain extent, with the general thrust of the argument. It is possible that a temporary impact on a resource could potentially be substantial. For example, a one-time release of toxic chemicals that kills a large quantity of oysters, would be substantial even though it only happens one time. To Ms. Sherton's point - excessive sedimentation could be the equivalent of a release of toxic chemicals in terms of its effects on the oyster population.

The applicant's attorney, Mr. Roger Alfred, states that "a detailed analysis of what constitutes "*de minimis* or insignificant impacts" is not necessary in this proceeding." According to the applicant:

> The applicant has provided substantial evidence to support a finding that there will be *no* negative impacts on Olympia oysters resulting from construction of the pipeline. The applicant's proposed relocation and mitigation plan will not merely *protect* existing oysters in Haynes Inlet, but will actually result in a significant increase in native oyster populations by expanding the amount of hard substrate habitat in the inlet.

In a letter dated October 10, 2011, Ms. Corrine Sherton agrees with Mr. Alfred that it is not important to parse out a precise definition of *de minimis*, but for diametrically opposed reasons. She believes that the evidence in the record leads to a clear finding of significant impact on the Olympia oysters and their habitat.

The hearings officer is not in agreement with the applicant that "that there will be *no* negative impacts on Olympia oysters resulting from construction of the pipeline." Certainly, it stands to reason that some of the Oysters proposed for relocation will be missed and ultimately killed. It is possible, though unlikely, that others may not survive transport and relocation. Finally, there may be some overall disruption with the rate of recovery of the oyster population, resulting from sedimentation and other effects. For this reason, the hearings officer believes that the concept of "*de minimis*" harm is highly relevant here. Thus, the hearings officer seeks to ensure that the applicant's plan is feasible and likely to "protect" the resource productivity of the Olympia oyster by demonstrating that the overall level of harm to the population is *de minimis* and insignificant.

II. LEGAL ANALYSIS

According to the applicant, there is a legitimate question as to whether the management objectives for both the 11-NA and 13A-NA zoning districts must be considered. Direct evidence provided by professional divers hired by the applicant indicates that there are *no* Olympia oysters, or suitable habitat, located within the pipeline right of way in the 13A-NA zoning district. However, there is evidence in the record of some Olympia oysters being located on the riprap along the southern edge of the Trans-Pacific Parkway, which is within the 13A-NA zoning district; therefore, the management objectives for both zoning districts should be applied.

A. Compliance with 11-NA Management Objective (Intertidal Mudflats East of Hwy 101).

The potentially applicable standards on which LUBA remanded are the management objectives for the 11-NA and 13A-NA aquatic zoning districts. The 11-NA zoning district is generally contiguous with the boundaries of Haynes Inlet, on the east side of the Highway 101 bridge, which is predominantly an intertidal mud flat area. The 13A-NA zoning district is located on the west side of the Highway 101 Bridge and to the south of Trans-Pacific Parkway, and includes more subtidal areas.

For purposes of this proceeding, the primary standard is the 11-NA management objective for Haynes Inlet. As noted in the Ellis Oyster Survey, Olympia oysters are typically most abundant in shallow subtidal areas but are also found on the lower elevation portions of subtidal flats. In Haynes Inlet, conditions appear to favor a portion of the intertidal mud flat habitat rather than subtidal habitat because no evidence of suitable substrate or Olympia oysters were found in the subtidal portion of the pipeline right of way. Figure 7 in the Ellis Oyster Survey depicts the grab sample locations in the subtidal areas of the 13A-NA zoning district, which did not reveal the presence of any Olympia oysters or the hard substrate that is required for their habitat.

1. Issues Related to the Density of Olympia Oysters Along the Pipeline Route.

a. Applicant's Initial Evidence on Remand: the "Ellis Oyster Survey."

In support of its application for approval by the Coos County Planning Department, PCGP submitted a report that was flawed with respect to how the proposed Pacific Connector Gas Pipeline might impact the Olympia oyster (*Ostrea lurida*) and the "resource productivity" of Haynes Inlet. Page 8 of the original 2010 report stated:

> "The only native oysters to Coos Bay are Olympia oysters * * *. However, they are not known to inhabit the Project Action Area (ODLCD, 1998)"

The applicants now concede that that the above statement is incorrect insomuch as it suggests that Olympia oysters are not present in the Project Action Area.[3]

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[3] Ms. McCaffree takes Dr. Ellis to task for this oversight, noting that Dr. Ellis and his team had previously opined that no Olympia oysters were found along the pipeline route. Ms. McCaffree challenges the credibility of Dr. Ellis based on a statement included in his March 2009 Wetland Mitigation Plan that no native oysters were observed on mudflat habitat or other habitat types along the pipeline route. This is addressed by Dr. Ellis in his letter dated October 17, 2011:

> "The prior statement that no Olympia oysters were observed on mudflat habitat or other habitat types along the pipeline route was included in our March 2009 Wetland Mitigation Plan, and was based on observations made during the eelgrass survey of the pipeline right of way . The eelgrass survey was conducted primarily from a boat when water depth was sufficiently low to allow observation of eelgrass on the substrate. The primary focus of the survey was to

In response to the LUBA remand, the applicant again hired Ellis Ecological Services to undertake a more specific survey of the 11-NA and 13A-NA zoning districts to identify the locations of any Olympia oysters in or around the proposed pipeline route.

The applicant's biologist, Bob Ellis of Ellis Ecological Services, undertook a survey of the intertidal portions of Haynes Inlet east of the Highway 101 bridge on June 28-30, 2011. Mr. Ellis and his two-person team spent two long days traversing, on foot, the entirety of the intertidal portions of the 250-foot right of way, using GPS units to map their tracks and the specific locations where they found Olympia oysters.

After completing the survey, Ellis Ecological produced a technical memorandum dated September 13, 2011 entitled "Pacific Connector Gas Pipeline: Olympia Oyster Survey," ("Ellis Oyster Survey"). Sections 1 and 2 of the Oyster Survey provide introductory and background information regarding Olympia oysters in general and their presence in the Coos Bay area. Section 3 of the Ellis Oyster Survey provides a detailed description of the survey methods and results, with Figure 8 illustrating specific locations within the 250-foot pipeline right of way where Olympia oysters were found. Section 4 provides an analysis regarding the potential impacts from pipeline construction on Olympia oysters. Section 4.1 provides proposed protection methods that will protect existing oysters from any adverse impacts, and will ensure the continued viability of Olympia oysters in Haynes Inlet.

The Ellis Oyster Survey provides the following direct evidence regarding the number and location of Olympia oysters within the pipeline right of way:

- The vast majority of the Haynes Inlet intertidal areas are mudflats with no hard substrate habitat that would support Olympia oysters.

- There are, generally speaking, only very low densities of Olympia oysters within the 0.3-mile section of the pipeline route between mileposts 2.9 and 3.2. Specifically, the surveyors found 79 Olympia oysters within the 0.3-mile segment and only 10 Olympia oysters in the remaining 2.1 miles. Oyster Survey, Figure 8.

> identify the location of eelgrass beds along the proposed pipeline crossing of Haynes Inlet. However, during the eelgrass survey no concentrations of substrate that would be suitable for Olympia oyster (*e.g.* Pacific oyster shells, large pieces of bark, rocks or gravel) and no Olympia oyster were observed. Observations made during the eelgrass survey provided the best available site-specific information at the time the previous testimony was submitted. The prior statement was accurate, because we observed no native oysters or their habitat in the mudflat areas during the eelgrass survey. Also, the statement is not inconsistent with our current survey because we encountered virtually no Olympia oyster or their habitat in the mudflat areas east of MP 3.2." Oct. 17 letter from Bob Ellis, page 2.

The applicant has provided direct and credible evidence regarding the amount and location of Olympia oysters in Haynes Inlet; meanwhile, the opponents have provided only estimates based largely on unsupported assumptions which are contradicted by their own evidence. The weight of the evidence strongly favors recognition that the applicant's Oyster Survey constitutes substantial evidence that can relied upon by the County.

their work and found that Ellis' crew had under-reported oyster densities in any significant manner.[5] This is particularly true since Ellis' prior reporting on the issue had been found to be inaccurate.

b. Discussion of Dr. Rumrill's Oyster Survey Relied on By the Opponents.

On June 29th and June 30th, 2011, a team led by Dr. Steven Rumrill, Research Program Coordinator, South Slough National Estuarine Research Reserve Estuarine and Coastal Science Laboratory in Charleston, Oregon undertook a survey of Olympia oysters at nine sites within Haynes Inlet. It does not appear that the Rumrill survey was undertaken for the specific purpose of rebutting the applicant's evidence. Rather, the Rumrill survey appears to have undertaken independent of the PCGP case, and seems to merely be aimed at confirming the presence and densities of Olympia Oysters at selected locations within Haynes Inlet. That fact gives the Rumrill survey a high degree of reliability as evidence, as far as it goes, but it severely limits its usefulness in answering the key questions presented in this case.

Dr. Rumrill and his team chose nine (9) locations in which to look for Olympia Oysters, The locations selected for their search seems to be based on ease of access to those locations. Four of the nine locations were on the riprap along the sides of the Highway 101 bridge and the Trans-Pacific Parkway (opponents' locations numbered 1-4). High populations of adult and juvenile Olympia oysters (up to 28 individuals per a ~10" by 10" square) were found in the rip-rap. Another four of the nine locations were on rocky shorelines. Patchy populations of adults and juveniles were found at these four other sites. At one site, a mudflat the opponents call "site number 9," Olympia oysters were not found. That site is the only location that is actually within the pipeline's right of way. Dr. Ellis and his team found one Olympia oyster in that general vicinity.

Thus, the overall conclusion of the 2011 Rumrill survey is that the Olympia oysters in Haynes Inlet show a clear preference for rip-rap, and, presumably, other large rocky outcroppings. This is consistent with the findings of the article by Kerstin Wasson entitled *Informing Olympia Oyster Restoration: Evaluation of Factors that Limit Populations in a California Estuary*, Wetlands, 4 May 2010, at p. 455, 457.

Inexplicably, the opponents did not commission a targeted survey that searched for oysters along the proposed pipeline's actual route. Rather, the opponents cite to the Rumrill survey and state:

> Abundant adults and juveniles were found at four of the nine sites, including one site (Site 3) that is directly in the path of the proposed route of the Pacific Connector Gas Pipeline. At this site, the density of Olympia oyster was 448 individuals per square meter.

[5] In this regard, this case differs from the typical land use case because opponents have equal access to the site. In most land use cases, opponents cannot gather evidence on the applicant's site without running the risk of being found guilty of criminal and/or civil trespass.

at those locations. However, the hearings officer specifically rejects any effort to estimate the total population of Olympia oysters in Haynes Inlet or in the pipeline route based off of the 2011 Rumrill Survey, the 2006 survey, or any other survey. It seems rather obvious that locations that feature similar habitat to that identified in the Rumrill survey will potentially have similar densities of oysters, all other environmental factors being equal. However, estimates of oyster densities on rip-rap or rocky shorelines says little about the population densities of oysters living in the mudflats or in the sandy subtidal areas of Haynes Inlet.

If the opponents really wanted to credibly challenge the Ellis Oyster Survey, it was incumbent upon them to conduct a survey of their own *along the pipeline route*. At the very least, the opponents should have spot-checked the Ellis Oyster Survey. Any evidence of underreporting in the Ellis study would have been highly damning evidence. However, the opponents never generated such direct evidence. At the hearing, the hearings officer went out of his way to indicate the need for such evidence, and gave both parties enough time to develop this sort of evidence.

The opponents' failure to present direct evidence about the density of Olympia oysters in the proposed pipeline route severely undermines their approach to this case. The opponents seek to use the Rumrill survey as evidence of overall population densities, but that would only work if the habitat along the route were both (1) fairly uniform, and (2) similar to the areas in the Rumrill study where oysters were found. The hearings officer is reminded about the old joke about the guy who looked for his keys at night in an area where the light was plentiful, even though he knew he lost his keys in a different location.[8] A similar analogy occurs here: the opponents point to high populations of Olympia Oysters in the rip-rap next to the causeway, and yet seem to have been unwilling or unable to look for Olympia oysters along the actual pipeline route.

Jody McCaffree states that the hearings officer should believe the opponent's experts over PCGP's "hired gun" experts: "It would seem more reasonable and reliable to have the word of an Olympia Oyster expert over someone who is paid by the very industry wanting to do to the development, particularly since it would be in the best interest of the Pacific Connector Gas Pipeline to find that there were no Olympia oysters or very few that would have to be dealt with." *See* McCaffree letter dated Oct. 10, 2011.

In the abstract, the hearings officer is sympathetic with the sentiment set forth in Ms. McCaffree's statement quoted above. After all, it can be expected that all experts hired by

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[8]The joke goes as follows:

> A drunk was crawling about on the sidewalk under a lamppost at night.
> A police officer came up to him and inquired, "What are you doing?"
> The drunk replied, "I'm looking for my car keys."
> The officer looked around in the lamplight, then asked the drunk, "I don't see any car keys. Are you sure you lost them here?"
> The drunk replied, "No, I lost them over there", and pointed to an area of the sidewalk deep in shadow.
> The policeman then asked, "Well, if you lost them over there, why are you looking over here?"
> The drunk looked at him and said, "Because the light is better over here."

advocates to a land use proceeding are going to present evidence in a light favorable to their clients, at least to the extent that they can credibly do so. However, the hearings officer must make a decision based on the evidence in the record, while keeping in mind that the applicant bears the burden of proof. In this case, there are only two pieces of direct evidence that provide information about the presence of Olympia oysters along the pipeline route: the Ellis Oyster Survey and the portion of the 2011 Rumrill study addressing "Site 9." There has been no "Olympia Oyster expert" that has actually walked the proposed right of way. None of the opponent's "critique evidence" sufficiently undermines the direct evidence set forth in either of the two surveys mentioned above. As Dr. Ellis correctly notes, "it is interesting that * * * the opponents prefer to criticize the methodology of the [Ellis] survey and challenge its results, rather than simply conducting their own survey of the pipeline right of way." *See* Ellis letter dated Oct. 17, 2011. Moreover, while it seems true that Dr. Rumrill is very credible expert on Olympia oysters, he specifically does not provide his "word" (opinion) regarding the presence of Olympia oysters along the pipeline route.

Again, had the opponents actually provided evidence that proved that the PCGP scientists had actually missed significant quantities of oysters in their survey, then the Ellis Oyster Survey would not constitute substantial evidence. However, merely providing evidence that oysters are abundant in the nearby rip-rap and rocky shoreline, combined with evidence that Olympia oysters are hard to visually locate and identify on the mudflats, is not sufficient to undermine the Ellis Oyster Survey to the point where it can be said that a reasonable person would not rely on the Ellis Oyster Survey to support a conclusion regarding the rough number of oysters in the pipeline right of way. The applicant has met its burden of proof to demonstrate that the amount of oysters in the actual pipeline route is so low as to be insignificant to the overall productivity of the resource.

To some extent, the Rumrill survey actually supports the applicant's case. First, the fact that the Rumrill survey found no Olympia oysters in the single mudflat location they surveyed supports a finding that the mudflat areas do not typically provide hard substrate habitat, and therefore do not contain significant numbers of Olympia oysters. Indeed, the fact that the Ellis Oyster Survey actually found an oyster in that same general location lends further credibility to the Ellis Survey.

Second, the presence of relatively large number of adult Olympia oysters in the rip-rap, indicates that these mature oysters will be able provide an ample supply of larvae to populate the Pacific oyster shells that will be deposited over the pipeline route by PCGP after the construction is complete. The hearings officer finds, in this regard, that it is the lack of hard substrate that is the primary factor that is inhibiting the expansion of Olympia oyster habitat in Haynes Inlet. *See* Groth & Rumrill (2009), at p. 57 ("Our field observations indicate that the availability of suitable substrate is likely a key limiting factor that hinders further recovery [of Olympia oysters] in Coos Bay."); Chernaik Leteter dated Oct. 10, 2011, at p. 7 (Quoting USACE study). There is no evidence of other limiting factors, such as predation by snails or flatworms, competition from other space occupants, water pollution, or disease. *See Factors Preventing the Recovery of Historically Overexploited Shellfish Species Ostrea Lurida*, (Trimble 2009). In this regard, the oft-repeated real estate adage "built it, and they will come," seems to be particularly instructive: if the goal is to increase the density of Olympia oysters in Haynes Inlet, the solution is more hard substrate. *See* Groth email dated Nov. 10, 2011. *Compare* Wasson, *Informing Olympia Oyster*

Restoration: Evaluation of Factors that Limit Populations in a California Estuary, Wetlands, 4 May 2010, at p. 457 (noting that the *presence* of hard substrates in a California estuary did not guarantee the presence of oysters, the *absence* of hard substrate in the same estuary did guarantee the absence of oysters).

2. Issues Related to the Applicant's Oyster Protection/Relocation Plan (11CA Zone)

a. Relocation of Olympia Oysters who Currently Live in the Pipeline's Proposed Right of Way

In order to avoid impacts from pipeline construction, the applicant is proposing to protect the Olympia oysters by collecting all live oysters within the 250-foot wide pipeline right of way and relocating them by hand to adjacent mud flat areas to the northwest of the pipeline route. Because Olympia oysters typically attach themselves to hard substrate such as rocks, shells, and metal, the applicant's proposal essentially involves moving all of the hard substrate in the route which harbor oysters.

The applicant's three-person team found 89 Olympia Oysters along the pipeline route over a two-day period (not including the 1400 s.f. "hotspot" caused by the man-made introduction of hard substrate in the form of discarded Pacific oyster shells). At the hearings, Dr. Ellis estimated the number of oysters that would need to be relocated as a "bucketful." Even if Dr. Ellis's team found only 10% to 25% of the Olympia oysters in the right of way, it still seems feasible for a larger team to capture most, if not all, of the oysters in one or two days.

i. The Applicant Can Feasibly Train a Team to Locate Oysters.

The opponents do not believe that the applicant's relocation plan is feasible. The opponents argue that Dr. Ellis and his team of workers will miss too many oysters during the removal process, because they may have an insufficient level of training in locating and identifying oysters. The hearings officer agrees that it would be inappropriate to use untrained day laborers to conduct this task. However, with a reasonable amount of training and supervision, a team of college undergraduate or graduate-level biology students or other similar personnel could easily master the task. In the case of the Glenbrook Nickel site, the oyster removal was conducted by personnel from ODFW and the South Slough National Estuarine Reserve (SSNERR). It is not clear from the record whether these personnel had any specialized training in oyster location / identification.

The opponents take great pains to explain that oysters can be hard to detect and identify. In a letter dated October 8, 2011, Dr. Danielle Zacherl points out that "[o]ysters are notoriously morphologically plastic, difficult to identify, and in the case of the species of the genus *Ostrea*, cryptic in appearance." She further states that Olympic oysters have additional features that make them hard to spot, including: small size, heavily fouled shells, muddy habitat, and their preference for the underside of hard substrates. Dr. Chernaik uses Dr. Zacherl's statement to cast doubt on Bob Ellis' team's ability to locate oysters.

Dr. Ellis responds to in his letter dated October 17, 2011, where he acknowledges that it could be difficult to locate and identify Olympia oysters in Dr. Zacherl's study sites in Newport Bay, California. The Newport Bay site varied between 48% and 85% hard substrates. *Compare* photograph of Newport Bay, CA site, Figure 1 of Ellis Letter dated Oct, 17, 2011. However, Dr. Ellis notes that "this is a much different situation than Haynes Inlet, which is essentially a vast mudflat that contains little or no rocks, shells or other substrates, as illustrated in Figures 2 through 5." Dr. Ellis's argument seems intuitively correct to the hearings officer.

Dr. Zacherl rebuts Dr. Ellis's comments with the following discussion excerpted from her letter dated November 14, 2011:

> If the conditions are as the expert of PCGP contends ("essentially a vast mudflat that contains little or no rocks, shells, or other substrates"), then significant training would be even more essential for finding and identifying Olympia oysters in Haynes Inlet. The visual profiles of Olympia oysters can be more difficult to discern in mudflats , where individuals can be partially submerged, or otherwise obscured by the muddy floor of the intertidal zone, than in areas with large amounts of hard substrate . When we survey for oysters, the easiest locations to survey are those containing hard substrate, particularly vertically oriented substrate where mud deposition is much reduced. (Emphasis in Original)

See Zacherl Letterdated Nov. 14, 2011, at p.2. This last statement lacks credibility, in part because Dr. Zacherl has not visited Haynes Inlet and is not familiar with the conditions at that site. All of the previous testimony from both parties' experts was universally consistent in stating that the oysters generally *required* hard substrate to settle on and grow, and were only rarely found lying directly on the mud. *See e.g.,* Wasson, *Informing Olympia Oyster Restoration: Evaluation of Factors that Limit Populations in a California Estuary*, Wetlands, 4 May 2010, at p. 457 (noting that the *presence* of hard substrates in a California estuary did not guarantee the presence of oysters, the *absence* of hard substrate did guarantee the absence of oysters). Hard substrate, whether it is rocks, shells, or scrap metal, is particularly easy to spot on the mudflats in Haynes Inlet, in part because of color differences, but also because the water traveling around the objects creates long indentations in the sand and mud that are easy to spot.

Dr. Zacherl's comment, quoted above, seems to imply that Olympia oysters can routinely grow *without* the presence of hard substrate. If this is indeed the correct interpretation of the above quoted language, then the conclusion is rejected as being inconsistent with all of the other expert testimony in the record, including the Wasson article cited above. If, on the other hand, the suggestion is that both the oyster itself as well as the hard substrate to which it is attached can be concealed by the mud, that suggestion is contradicted by the photographic evidence in the record. In particular, the photographs included with the Ellis Oyster Survey seem to provide convincing evidence that the Olympic Oysters in Haynes Inlet are relatively easy to spot on the mudflat.

In this regard, Dr. Ellis's ultimate point on this issue is well-taken: even if the Olympic oyster it itself hard to identify, the hard substrate that it lives on is certainly not hard to identify.

Indeed, the photos included in the Ellis letter Dated Oct. 17, 2011 depict a large flat expanse of mud with no rocks or other obvious hard substrate. *See Id.* at Figure 2-5. In layman's terms, the primary job of the Ellis team in conducting its survey was to look for anything sticking out of the mud and turn it over. As more scientifically stated by Dr. Ellis, "the surveyors examined both the upper and lower sides of all hard substrates that were encountered, and hard substrates were exceedingly rare." Oct. 17 letter from Bob Ellis, page 4.

If Dr. Chernaik, Dr. Zacherl, Dr. Trimble, or any of the other experts had taken the time to physically photograph an example of one of these hard-to-spot oysters on the mudflat, then the hearings officer's opinion might be different. However, all the hearings officer can base his opinion on is the evidence in the record. In this case, the two PhD-level scientists who actually walked the same portion of right of way (*i.e.* site 9), did not find any significant quantities of Olympia oysters. The hearings officer is not prepared to find that a California biologist with no known experience in Haynes Inlet is somehow better at finding these oysters than the two Oregon biologists with specific experience in Haynes Inlet (*i.e.* Dr. Rumrill and Dr. Ellis).

In conclusion on this issue, the hearings officer finds the opponents' concerns about "hard to find" oysters is somewhat overblown. The hearings officer finds that the credibility of the opponent's argument is lessened due to the fact that none of the opponent's experts actually traversed the actual right of way in question. While Dr. Rumrill's team did search site 9, they found no oysters at that location. It's one thing to say that oysters in a rocky intertidal area in Southern California are difficult to survey, but that does not lead to the conclusion that oysters on an Oregon mudflat lacking hard substrate are difficult to spot. As Dr. Trimble notes, "locations are different." *See* Trimble letter dated October 5, 2011, at p. 2.

Dr. Chernaik's attempt to discredit the Ellis survey team is further hampered by the fact that, at site 9, the Rumrill survey found no Olympia oysters, whereas the Ellis team located and identified several Olympia oysters on two Pacific oyster shells. *See* Ellis letter dated Nov. 23 2011, at p. 2.

The hearings officer also finds that it is feasible for the applicant to train a team of workers to identify and collect all of the oysters along the pipeline right of way between milepost 4.1 and 2.8, and then relocate those oysters to the proposed relocation site. If nothing else, the team can be trained to pick up all hard substrate which might support Olympia oysters. Granted, it is going to take more than a three-person team to do a thorough job. The hearings officer would anticipate that a 10-15 person team is needed if the job is going to get done correctly in one or two sets of negative tides.

ii. The Relocation Plan is Feasible.

The next issue concerns the issue of whether the relocation area is a suitable environment for the survival of the displaced Olympia oysters. The Ellis Oyster Survey notes that the mud flats to the northwest of the pipeline, on the east side of Highway 101 are a good area for relocation due to the similarity to the right of way site:

> [The relocation site] is indistinguishable in terms of habitat from those areas within the right of way, and were observed by EES staff to contain

> Olympia oysters in densities at least as high as those within the right of way. Therefore, the proposed relocation area provides habitat that is known to support a population of Olympia oysters and is a viable relocation area. The occurrence of Olympia oysters in this area suggests that oysters relocated from the construction zone would have a high probability of survival.

Ellis Oyster Survey, at p. 21. A proposed relocation area is shown in the shaded area of Figure 19 in the Oyster Survey. That area is in close proximity to existing Olympia oyster colonies inhabiting the Highway 101 riprap area.

Dr. Chernaik contends that the area proposed for relocation is at a higher elevation than the oyster's current location in the right of way, which will preclude their survival. Opponents cite to alleged discrepancies in the elevations shown on figures provided by Coast & Harbor Engineering and Ellis Ecological.

Again, the opponents seem to grasping at straws with this testimony, which undermines their credibility. First, and most fundamentally, there is direct evidence in the Mitigation Plan describing the on-site observations of Dr. Ellis's team regarding the relocation area:

> The mud flats that are adjacent to the northwest of the pipeline right of way, on the east side of Highway 101, are indistinguishable in terms of habitat from those areas within the right of way. These adjacent areas were observed by EES staff to contain Olympia oysters in densities at least as high as those within the right of way . Therefore, the proposed relocation area provides habitat that is known to support a population of Olympia oysters and is a viable relocation area. The occurrence of Olympia oysters in this area suggests that oysters relocated from the construction zone would have a high probability of survival.

Mitigation Plan, at p. 4. This evidence, based on direct observation, constitutes substantial evidence which is not sufficiently undermined by the opponents' conjecture about elevations based on various unrelated maps and figures in the record.

But perhaps even more importantly, Olympia oysters *are currently living in the relocation area.* Even Dr. Trimble admits that "[t]he most informative measure of local and historical conditions as they relate to *Ostrea lurida* is the presence / absence of adults." Trimble letter dated Oct. 53, 2011, p. 5. Dr. Trimble goes on to say that "[i]t is ecologically safe to say that locations containing oysters are different than locations that don't." *Id.* Thus, a reasonable person would find that the presence of live Olympia oysters is a very strong indicator that Olympia oysters can live in that area.

The hearings officer finds that Dr. Chernaik's arguments to the contrary lack credibility. His arguments are particularly weak given that neither Dr. Chernaik or any other person testifying on behalf of the opponents personally conducted a site visit of the proposed re-location area. After all, if Dr. Chernaik has not physically visited the relocation site, why would anyone

believe his opinion testimony concerning that site over that of Dr. Ellis, who specifically walked the relocation site? Were the relocation site somehow physically off limits to the opponent's experts, the hearings officer might be less critical of their failure to conduct a site visit. But when the site is open to the public, it seems inexcusable for the opponents' experts not to have physically traversed the right of way prior to opining on the density of oysters in that location.

Also, the fact that the elevation in the pipeline right of way is virtually identical to the elevation in the adjacent relocation area is photographically depicted in the aerial photo included in the letter from Dr. Ellis dated October 17, 2011. On page 13 of that letter (Figure 7), Dr. Ellis includes an aerial photo of Haynes Inlet during the early stages on an incoming tide. That aerial photo includes overlays showing the location of the pipeline route, existing Olympia oysters, and the proposed relocation area. The relative depth of the mudflat area is readily discernible because the deeper areas are darker and the higher areas are lighter. As shown on that photo, several Olympia oysters were found by the Ellis team at the far end of the pipeline route in areas that are significantly higher than the relocation area (and therefore not yet touched by water when the photo was taken). That fact directly contradicts the opponents' assertion that the relocation area is too high for Olympia oysters to survive. Dr. Ellis states:

> The edge of the incoming water is visible and extends beyond the relocation area and the area where Olympia oysters were found in the pipeline right of way . Note that both areas are under water at this early stage in the incoming tide, and that the relocation area appears to be slightly deeper than the adjacent pipeline right of way . Therefore, the photographic documentation is in agreement with our observations in the field. As discussed in the mitigation plan, oysters removed from the right of way would be placed toward the southern end of the relocation area, which is slightly lower in elevation than the northern end. However, the entire area within the relocation area presently supports adult Olympia oyster and would be suitable habitat for relocation of oysters from the right of way.

See Ellis Letter dated Oct. 17, 2011, at p. 12.

Dr. Chernaik's argument premised on one piece of data that is originally cited at page 11 of his October 10, 2011 submittal; however, the significance of this data as it relates to the proposed relocation plan is never explained:

> At three sites, more than half of the tiles at +0.3 m MLLW had lost 90% of their oysters by the time photographs were taken in October 2002. In any case, juvenile oysters fare poorly when exposed to air for even short periods of time ([out of water] 2-10% [of the time], Fig. 8), with survival dropping by half or more.

See Chernaik letter dated Oct. 10, 2011, at p. 11. These facts lead to the following conclusions: (1) 90% of half of the oysters located at a certain elevation died within some unidentified time

frame, and (2) survival of juvenile oysters drops by half or more when they are out of the water 2-10% of the time. However, as the applicant points out:

> [A]t no point does Dr. Chernaik attempt to explain how this applies to the relocation area, *e.g.*, would the oysters proposed for relocation be anywhere near the elevation cited in the study? Or would the oysters being relocated (which are likely not juveniles as in the study) *actually be* out of water between 2 and 10% of the time based on their new elevations? Based on the evidence provided, there is no way to know how or why the results of this study would actually apply to the applicant's proposal. Dr. Chernaik's entire argument is flawed because he fails to connect the dots between the cited study and the proposed relocation area. His entire line of evidence and argument fails to undermine the direct evidence submitted by Ellis Ecological on the issue of the viability of the relocation plan.

The hearings officer agrees with the applicant's analysis on this point.

Moving on, Dr. Chernaik's memorandum dated November 28, 2011 leads off with the following statement: "There is no evidence in the record that relocating oysters is a successful mitigation measure." The hearings officer disagrees.

There is substantial evidence in the record that relocating existing oysters will be successful. First, Dr. Chernaik previously pointed out that the Olympia oysters in Coos Bay were extinct until they were accidentally reintroduced in the 1950s as hitch-hikers during commercial transport of Pacific oysters from Willapa Bay. It stands to reason that transport from Willapa Bay would be more stressful to those oysters than a move of a few hundred feet.

Second, the evidence shows that the state of Oregon thinks re-introduction techniques can be successful, as the South Slough NERR has "re-introduced about 4,000,000 juvenile oysters to the Slough." *See* Native Shellfish Recovery, at p. 1. It stands to reason that the reintroduction techniques used by South Slough NERR cause more trauma to individual oysters than by simple moving adult oysters and their hard substrate a few hundred feet.

Even more important than the evidence discussed above, however, is the fact that native oysters are currently found at the relocation site. This evidence is sufficient to draw an inference that the relocation site is suitable Olympia oyster habitat. Furthermore, there is no evidence in the record that suggest that the oysters are too fragile to survive the short relocation process,[9] or that they will otherwise die in transport. There is also no evidence to suggest that oysters need to

[9] Dr. Trimble briefly mentions that "moving oysters (and other organisms) increases mortality; hundreds of millions of *Ostrea lurida* adults have been moved within and between estuaries since the 1850s * * * with the vast majority of events resulting in massive mortalities." *See* Trimble letter dated Oct. 5, 2011 at p. 3. The hearings officer does not find Dr. Trimble's comments to constitute substantial evidence to support a conclusion that oysters would not survive a move of a few hundred feet to similar habitat in Haynes Inlet. Dr. Trimble's comments are simply to vague and too unspecific to give a clear understanding of the context of the transportation-related mass mortalities he refers to. An expert's opinion does not constitute substantial evidence if the foundation for the opinion is not provided, or if it is contradicted by other facts in the record. *1000 Friends of Oregon v. LCDC*, 83 Or App at 286 .

be oriented in any particular way. Obviously, it would not be advisable to place an oyster "face down" or buried in the mud, but presumably Dr Ellis can train the relocation team on the proper way to orient the oysters in their new home, to the extent there is a "proper" way. Indeed, Dr Ellis has testified that "oysters will be picked up by hand, and placed "in the same orientation within the substrate as they had in their original location." Mitigation Plan at 4. Additional evidence includes:

- There are undoubtedly no more than a few bucketfuls of oysters that require relocation.
- The contour map recently provided by Dr. Ellis shows that, at most, there is an approximate 1.5-foot difference in the elevation of the relocation area, and less than a foot difference in the area where most of the oysters would be placed. Nov. 23 letter from Bob Ellis, page 3 (Figure 1).
- The relocation area is directly adjacent to the oysters' existing location, and is "indistinguishable habitat" where there are currently Olympia oysters in densities at least as high as those within the right of way . Mitigation Plan at 4.
- As stated by Dr. Ellis, "the occurrence of adult oysters in the proposed relocation zone indicates that an appropriate microclimate is present" and relocated oysters would therefore have a high probability of survival. Oct. 17 letter from Bob Ellis, page 11; *Id.*.
- Rex Miller testimony: "In my opinion, based on my experience with growing native Olympia oysters in the Coos Bay area, any oysters that exist along the pipeline route can be easily protected by relocating them to nearby portions of Haynes Inlet." Sept. 9 letter from Rex Miller, page 2.

In addition to Rex Miller's project, the record contains evidence regarding two other successful oyster restoration projects that have recently occurred in Coos Bay: the Glenbrook Nickel site and the Isthmus Slough bridge. These projects provide evidence that native Olympia oysters can thrive in Coos Bay under restoration plans that are properly designed and managed.

Dr. Chernaik relies heavily on a statement from Dr. Alan Trimble in support of his argument that oysters cannot possibly survive relocation; however, Dr. Chernaik has quoted very selectively from Dr. Trimble's response. Dr. Chernaik has repeatedly quoted the following portion of Dr. Trimble's letter:

> While it is trivial to suggest that moving existing oysters from locations where they currently exist to locations where they don't is sufficient to preserve them, this isn't a fact based on solid evidence.

See Chernaik letter dated Oct. 10, 2011, at p. 10. However, as noted by Dr. Ellis in his response, the applicant's proposal is *not* to relocate Olympia oysters *to a place where they do not exist*; rather, the proposal is to move them to a nearby location that is currently inhabited by adult and juvenile Olympia oysters. As discussed earlier, Dr. Trimble does cite to two studies conducted in 1892 and 1896 for the proposition that transportation of oysters increases their mortality, but does nothing to explain the context of those studies or explain why the facts in this case are

similar. Dr. Trimble's letter does not constitute substantial evidence to support the conclusion that the relocation plan is not feasible, because an adequate foundation for Dr. Trimble's comments and opinion has not been provided.

The opponents also attempt to argue that, by the time construction of the pipeline commences in 2014, there will be substantially more Olympia oysters than currently exist. However, as explained by Dr. Ellis, there is no firm evidentiary basis for opponents' assertion that there will be an exponential increase in the number of Olympia oysters in the mudflat in that timeframe. Dr. Chernaik's assertions are based on the fact that a 2006 survey revealed many more oysters than were found in a 1996 survey. However, the primary impediment to oyster population increases in the right of way portion of Haynes Inlet, as the applicant correctly points out, is that there is very little hard substrate habitat in the mudflats. Thus, as explained by Dr. Ellis, even if there were an increase in the numbers of Olympia oysters in the next two years, any such increase would be limited to existing substrates: "In other words, there would simply be larger clumps of oysters on the existing substrates," which would not result in much more effort to relocate. *See* Ellis letter dated Oct. 17, 2011, at p. 11.

Finally, it is worth noting that even if the applicant's protection / relocation plan were to completely fail, it does not appear that the overall resource productivity of the oysters in Haynes Inlet would suffer. With the exception of the one 1400 s.f. hot spot, the applicant has identified only 89 oysters in the pipeline right of way. Even if those 89 oysters were killed, that would be inconsequential to the overall population of Olympia oysters in Haynes Inlet. Given that predators such as sea otters, sharks, rays, crabs, native snails (small whelks and moon snails) could predate 89 oysters in a few days, it does not seem like the loss of 89 oysters (or even a few thousand oysters, for that matter) would be significant.

3. The Applicant's Oyster Mitigation Plan.

a. The Applicant's Plan is Feasible.

At the time of the public hearing, the applicant initially proposed an "Oyster Protection Plan," which was intended to meet, but not exceed, the requirements of the applicable management objective requirements by *protecting* the existing Olympia oysters within the pipeline right of way . The applicant proposed to simply relocate every single Olympia oyster within the pipeline right of way to similar habitat adjacent to the construction area, which is also currently populated with Olympia oysters. Because the relocated oysters would be protected from the direct impacts of construction, and because the evidence from Coast & Harbor Engineering indicates a lack of impacts from sedimentation, the applicant's original relocation plan would have been sufficient to "protect" the resource under applicable standards.

However, after the public hearing the applicant decided to go beyond "protecting" the resource. Rather, the applicant decided to make an attempt to assist in the overall recovery of the Olympia oyster. During the public hearing, the hearings officer asked a significant question of the opponents' primary witness, Mark Chernaik. The hearings officer asked Dr. Chernaik if the opponents would support the pipeline application if the applicant could provide additional habitat that would hypothetically triple or quadruple the amount of Olympia oysters in Haynes Inlet. The hearings officer was primarily interested in assessing the credibility of the witness,

and was trying to solicit a response that would indicate whether Dr. Chernaik's focus was on protecting oysters or simply stopping the PCGP project. Although Dr. Chernaik protested the premise behind the question, he ultimately agreed that if the applicant could provide habitat that would ensure such a population increase, that he would, in theory, support the application.

The applicant took note of Dr. Chernaik's response, and in light of other suggestions from the hearings officer, the applicant submitted a revised plan dated October 7, 2011, which is entitled Olympia Oyster Mitigation Plan (the "Mitigation Plan"). The Mitigation Plan goes beyond the protection of existing Olympia oysters and their habitat by providing mitigation in the form of new additional habitat within the pipeline right of way that will result in a significant *increase* in the numbers of Olympia oysters in Haynes Inlet. Specifically, in addition to relocating existing oysters prior to pipeline construction, the Mitigation Plan calls for the placement of 30 cubic yards of Pacific oyster shell in the area of existing oyster colonization between MP 2.9 to 3.4. Mitigation Plan, at p. 4. The proposed placement of new hard substrate for recruitment of oyster larvae would necessarily occur *after* pipeline construction is complete.

The hearings officer finds that there is substantial evidence in the record to support the conclusion that the applicant's Mitigation Plan will, at a minimum, "protect" the resource productivity of Olympia oysters in Haynes Inlet.

b. Responses to arguments raised by opponents regarding the mitigation component of the Mitigation Plan.

The opponents have raised numerous arguments challenging the likelihood of success of the mitigation component of the plan. None of the evidence submitted by the opponents on this topic is sufficient to compel a conclusion that the applicant's testimony would not be relied upon by a reasonable person.

i. "Recruitment sink"

Dr. Chernaik argues that placing Pacific oyster shells in the pipeline right of way to provide new habitat could result in a "recruitment sink" that actually harms Olympia oyster recovery efforts. *See* Chernaik letters dated October 10 and Oct 17, 2011, (discussing Trimble letter dated Oct. 5, 2011.). Dr. Chernaik first suggests that evidence shows that Olympia Oysters growing on Pacific oyster shells are less vital than if those Olympic oysters were instead to grow on Olympia oyster shells. He states that "there are several reasons for these observations one being greater competition from 'fouling organisms' that preferentially cover Pacific Oyster shells." *See* Chernaik letter dated Oct. 10, 2011. However, the photos of the oysters in the Ellis Oyster Survey do not appear to have any attached "fouling organisms" that would impede the growth of Olympic oysters. Without any direct evidence indicating that fouling organisms are an issue in Haynes Inlet, the hearings officer is inclined to discount the significance of this issue. Again, the only direct evidence in the record is that there is a colony of Olympia oysters colonizing discarded Pacific oyster shells at MP 2.9. That evidence strongly suggests that the habitat is good for the continued survival of the Olympia oyster at this particular location.

The remainder of Dr. Chernaik's "recruitment sink" argument is based on data from an out-of-state study (Willapa Bay, WA) which concluded that native oyster larvae were attracted

to Pacific oyster shells in the higher elevation intertidal areas, rather than lower subtidal areas where theire survival rates were higher. *See* Chernaik letter dated Oct. 10, 2011, at p. 12. Dr. Chernaik attempts to rely on this study to argue that the applicant's proposed placement of Pacific oyster shells as new habitat could similarly "fool" juvenile oysters to settle in poor habitat where they are ultimately less likely to survive. *Id.*

As the applicant notes, Dr. Chernaik loses credibility when he contradicts himself via the "recruitment sink" argument. For example, Dr. Chernaik originally claimed that (a) there are an estimated 1.5 million Olympia oysters *along the pipeline route*, and (b) Olympia oysters can expect "exponential" population growth in Haynes Inlet in the next three years. In direct contrast to that argument,[10] his "recruitment sink" argument is based on a completely different premise: that the intertidal portions of Haynes Inlet are actually *poor* habitat for Olympia oysters as compared to other nearby habitat in the rip-rap and rocky outcroppings found in sites 1-8 because they are too high in elevation. He argues that placing more Pacific oyster shells in the mud-flat area will basically lure native oyster larvae to that location where they will ultimately experience a pre-mature death due to being frozen, or being out of the water too long, etc.

If that were indeed the case, then the hearings officer questions why the County would even be undertaking this entire exercise. Taking the recruitment sink argument to its logical conclusion, the applicant would presumably help protect the Olympia oysters by destroying all of the hard substrate in that portion of the pipeline route. Indeed, this entire hearings officer recommendation goes into great detail on the various issues raised in this case based on a core assumption to the contrary: that the pipeline route traverses good (or at least potentially good) Olympia oyster habitat from approximately milepost 4.1 to milepost 2.8. That core assumption is based entirely on the presence of a relatively small quantity of Olympia oysters found within the pipeline route. If the hearings officer were to buy in to the "recruitment sink" argument in tandem with Mr. Chernaik's 1.5 million oyster population estimate, then the logical conclusion would be that the death of a few thousand oysters out of a potential population of millions in Haynes Inlet is a *de minimis* loss, and that the pipeline ideally should destroy the marginal oyster habitat in its route in order to prevent further recruitment sinks on the mud-flats. The hearings offer does not accept the premise behind this argument. For this reason, the hearings officer firmly rejects the entire "recruitment sink" argument.

The "recruitment sink" issue is more thoroughly repudiated by Dr. Ellis in his October 17, 2011 letter at pages 13-14. Also, the November 10, 2011 email message from Scott Groth of ODFW explains that "all uses of [Pacific oyster] shell to attract [Olympia oyster] larvae in Coos Bay have been successful, numerous projects show this." The hearings officer adopts the discussion concerning recruitments sinks and Pacific oyster shells contained in those two sources as additional findings, and incorporates those discussions herein by reference.

To close on this issue, it appears, based on the evidence in the record, that the only real "recruitment sink" occurring in Haynes Inlet is the commercial culturing and harvesting of

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[10] Lawyers are, of course, allowed to make what are seemingly contradictory *legal* arguments "in the alternative." Scientists are not afforded that same luxury. When a scientist makes contradictory *fact-based* arguments, he or she simply loses their credibility.

Pacific oysters, particularly to the extent that live Pacific oysters are actually present and growing in the Inlet during the Olympic oyster's spawning season. *See, e.g.* Chernaik letter dated Sept. 21, 2011, at p. 11; Trimble, *Factors Preventing the Recovery of a Historically Overexploited Shellfish Species, Ostrea Lurida Carpenter1864.* Journal of Shellfish Research, Vol 28, No. 1 (2009), at p. 105 (identifying commercial harvest of Pacific oyster as a recruitment sink). When these commercial oysters are harvested, any native oysters that have selected the harvested oyster as a host will necessarily be killed. Based on the studies conducted in Willapa Bay, it appears that commercial oyster farming is much more harmful to the recovery of native oyster stocks than the construction of a gas pipeline. In comparison, the placement of Pacific oyster shells (or any other suitable hard substrate) in the right of way portion of the Haynes Inlet mudflats will surely result in viable colonies of Olympia oysters.

ii. Placement of Pacific Oyster Shells.

Dr. Chernaik contends that "there is no evidence in the record that evenly distributing 30 cubic yards of Pacific oyster shell over 15 acres of recently disturbed sediment would be a successful mitigation measure." See Chernaik Letter dated Nov. 28, 2011, at p. 2. Dr. Chernaik contends, in part, that the proposed distribution is not sufficiently deep to provide locations on the underside of the new substrate for Olympia oysters to attach. Dr. Chernaik is incorrect.

Most notably, the fact that Dr. Ellis and his team found a 1,400 s.f. bed of live Olympia oysters at milepost 2.9 which had colonized a pile of discarded Pacific oyster shells is proof that Olympia oyster larvae in Haynes Inlet will use discarded Pacific oyster shells as recruitment sites.

In addition, there is evidence in the form of the November 10, 2011 email message from Scott Groth stating that, based on Mr. Groth's review of the proposed Mitigation Plan (including the expressly stated proposal to spread 30 cubic yards of shells over 15 acres), that plan will "certainly achieve" an increase in the density of native oysters at the project site. Curiously, Dr. Chernaik does not attempt to explain his failure to recognize Mr. Groth's unequivocal statement as evidence, despite the fact that he directly quotes this same portion of the email from Mr. Groth later in his argument.

Moreover, the hearings officer has read Dr. Chernaik's rebuttal dated Nov 28, 2011, as well as the exhibits accompanying that submittal, and finds that none of the information presented therein alters the hearings officer's conclusions in any way.

Dr Zarchel's research conducted in Newport Bay, California, does indicate that Olympic oysters survive at a higher rate if they can attach to the underside of hard substrate. *See* Zercherl comments quoted on page 3 of Dr. Chernaik's November 28, 2001 letter. The applicant seems to concede this fact. However, that fact does not mean that Olympia oysters will not attach to the tops of hard substrate. The best evidence in the record as to whether Olympic oysters will attach and grow on discarded Pacific oyster shells comes the Ellis Oyster Survey. As mentioned above, the Ellis Oyster survey found a 1400 s.f. hot spot of Olympia oyster attached to discarded Pacific oyster shells. There is no evidence to suggest that the 1400 s.f. pile of discarded shells at MP 2.9 created high degrees of vertical habitat. Based on the fact that those Pacific oyster shells were discarded at random, there does not appear to have been any effort made to maximize the

made to maximize the potential for larval recruitment. Moreover, too much "vertical" habitat at this location might simply result in oysters that are out of the water for longer durations, which Dr. Chernaik admits will result in increased mortality rates.

The opponents also assert that the Pacific oyster shells will sink in the sediment above the pipeline. This argument is highly speculative and is not supported by any substantial evidence. In a letter dated November 3, 2011, Pacific Connector Project Manager Randy Miller rebuts the opponents' testimony:

> The trench will be excavated into unconsolidated sandy sediments washed into Haynes Inlet from the various streams that deposit their sediment-laden runoff into the Inlet. Following laying of the pipeline into the trench, the trench will be backfilled by excavation equipment that picks up the spoil mound material and places it back into the trench. The backfill technique includes the use of the excavator bucket to put compaction pressure on the material to assure that the pipe is completely covered and the trench backfilled in a stable condition. This backfilling technique will result in trench materials placed in a more compacted state than that existing prior to excavation.
>
> Ms. McCaffree's suggestion that Pacific oyster shells will sink in the mud is nothing more than imaginative speculation based on unrelated testimony. At the prior public hearing, Lili Claussen stated that the Haynes Inlet mudflats are like "quicksand" that are difficult to walk in. This is a true statement – it is difficult for a person to walk on the mudflats without special shoes like the ones worn by Bob Ellis and his team when they conducted their oyster survey. Based solely on this prior statement, Ms. McCaffree now suggests that Pacific oyster shells would also sink in the mud in the same manner as people. One does not need to be a physicist to understand that just because a 160-pound person might sink above their ankles in mudflats does not mean that a two-ounce oyster shell would also sink. Further, the present existence of significant numbers of Pacific oyster shells on the bed of Haynes Inlet indicates that Ms. McCaffree's alleged concerns are without basis.
>
> "Further, even if there were an evidentiary basis for Ms. McCaffree's suggestion that the backfilled area will become so unstable that even an oyster would sink (which is incorrect as addressed above), it should be noted that the backfilled trench area will only occupy between 22 and 30 feet of width within the entire pipeline right of way where Pacific oyster shells are proposed to be distributed as habitat.

See Miller letter dated Nov. 3, 2011, at pp. 1-2. Mr. Miller's discussion constitutes substantial evidence to support the conclusion that the replacement shell habitat will not sink into the mud of Haynes Inlet.

In their final November 28 submittal, Dr. Chernaik offers detailed suggestions in order to ensure that the Mitigation Plan will be a success. In response, the applicant proposes a series of conditions of approval incorporating these suggestions, in order to ensure the successful implementation of the Mitigation Plan. These proposed conditions address the new issues raised by Dr. Chernaik and incorporates the suggestions raised in the related Groth & Rumrill memorandum dated November 28, 2011.

PROPOSED CONDITION OF APPROVAL

No. ___. The applicant shall comply with the terms and conditions of the applicant's proposed Olympia oyster mitigation plan prepared by Bob Ellis of Ellis Ecological Services, Inc. dated October 7, 2011 (the "Mitigation Plan"), as supplemented and modified by the following mitigation measures:

a) The applicant's compliance with the Mitigation Plan will be administered through permits pursuant to the Clean Water Act Section 404 by the Army Corps of Engineers (Corps), pursuant to Section 401 of the Clean Water Act by the Oregon Department of Environmental Quality (DEQ), and pursuant to Oregon's Removal-Fill Law (ORS 196.795-990) by the Oregon Department of State Lands (DSL). These permitting agencies will be provided with copies of the Mitigation Plan, as modified by this condition, and approval of the permits issued by the Corps, DEQ and DSL may, as appropriate, incorporate the terms of the Mitigation Plan.

b) As part of the state permitting process for the pipeline discussed in subsection (a) above, the applicant shall consult with ODFW on the specific details regarding how best to accomplish the actual placement of Pacific oyster shells addressed in Section 4.2.1 of the Mitigation Plan in order to ensure success of the project, including ideal depth and breadth of coverage of new hard substrate, specific methods for dispersal (*e.g.*, bagged vs. loose), and best locations for placement of substrate within the pipeline right of way .

c) Unless modified under the direction of ODFW during the consultation described above, the applicant will establish appropriate baseline conditions for the Olympia oyster mitigation effort in Haynes Inlet using the following guidelines for a before-after control impact study design in order to ensure that any impacts to Olympia oysters are insignificant or *de minimis*:

i. The "Before" conditions shall be determined by field surveys of the distribution, abundance, status, and condition of existing

Olympia oysters: (a) within the "Impact Area," *i.e.*, the 250-foot pipeline right of way within the intertidal portion of Haynes Inlet; and (b) within an appropriate "Control Area" in another portion of Coos Bay that will not experience any influence from construction of the pipeline. The precise location of the Control Area will be selected in consultation with ODFW.

ii. The surveys of the Control and Impact Areas shall be conducted immediately prior to construction of the pipeline (Before), and repeated annually over a period of five years following construction of the pipeline (After) to encompass the lifespan of individual Olympia oysters.

c) Monitoring of the "Relocation Area" shall be undertaken as described in Section 4.3 of the Mitigation Plan.

Adoption of this condition of approval addresses all of the issues discussed in paragraphs numbered 2 through 6 of the memorandum from Steve Rumrill and Scott Groth that is attached to Dr. Chernaik's November 28, 2011 submittal regarding creation of the best possible habitat for Olympia oysters in the applicant's mitigation area.

This condition of approval also recognizes that the applicant is required, under existing conditions of approval from the county's original decision, to obtain all necessary state and federal permits for removal and fill in Haynes Inlet necessary to construct the pipeline. Under that condition, all such approvals must be obtained prior to commencing construction of the pipeline. That condition was not challenged by opponents in the LUBA appeal. The condition set forth above recognizes that the applicant's proposed Mitigation Plan will need to be incorporated into those state and federal permitting requirements, and also expressly requires the applicant to consult with ODFW on some of the finer details of the plan regarding methods for placing new hard substrate and background monitoring.

For the reasons addressed above, there is substantial evidence in the record to support a finding that, in conjunction with the applicant's Protection Plan, the Oyster Mitigation Plan will "protect" existing Olympia oysters in Haynes Inlet. The opponents have not provided evidence that undermines the evidence such that it would not be relied upon by a reasonable person in making a decision.

4. History of Previous Oyster Relocation Efforts.

There is substantial evidence in the record to support a finding that several Olympia oyster restoration projects similar to the applicant's proposal have been successful in Coos Bay. The applicant submitted direct evidence on this issue in the form of: (1) a memorandum from Scott Groth, a Shellfish Biologist with the Oregon Department of Fish and Wildlife dated August 10, 2010, regarding "Coos Bay native oyster restoration project updates" ("ODFW Memo"); (2) a letter from Rex Miller dated September 9, ~~2001~~ 2011; (3) a short DVD prepared by Rex Miller that describes the success of his Olympia oyster restoration project in Isthmus Slough; and (4)

email exchanges with Scott Groth of ODFW regarding Mr. Groth's review of the proposed Mitigation Plan and his comments regarding the likely success of the final plan.

As explained in the Oyster Survey, and in the ODFW Memo at least three similar Olympia oyster relocation and protection efforts have been completed to date: (1) the Glenbrook Nickel site, (2) Rex Miller's property, and (3) the reconstruction of the Isthmus Slough bridge.

a. Glenbrook Nickel Project

The ODFW Memo includes a detailed description of the work that has been done at the Glenbrook Nickel site regarding restoration of Olympia oyster habitat. The ODFW Memo states that the project "has been tremendously successful and an excellent learning experience that will guide future native oyster restoration efforts in Coos Bay." ODFW Memo at 2.

b. The Rex Miller Restoration Project

The applicant also submitted the testimony of Mr. Rex Miller, who undertook a successful Olympia oyster restoration project on his own property near Isthmus Slough.

Mr. Miller's restoration project is summarized in correspondence to the hearings officer from Rex Miller, ("Miller Letter"), and also in a video prepared by Mr. Miller on a DVD entitled "Isthmus Slough Oysters: Living on the Edge." It involved the placement of approximately 20 cubic yards of Pacific oyster shells on his tideland areas in Isthmus Slough. Mr. Miller also placed hard substrate (structures he calls "gabions") in the water. These gabions consist of large chain link bags of Pacific oyster shells with Olympia oysters attached, for the purpose of "pollinating" the area with Olympia oyster larvae. As described in his letter, and shown in the pictures included on his DVD, Mr. Miller's project has been successful:

> "As shown on the DVD, my efforts have resulted in a healthy new colony of Olympia oysters in Isthmus Slough. This project has been very successful, even though there is a relatively high amount of silt in the Isthmus Slough area (as compared to Haynes Inlet). I have reviewed the Oyster survey and proposal prepared by Bob Ellis of Ellis Ecological regarding the relocation of Olympia oysters from the proposed pipeline route. In my opinion, a project in the Haynes Inlet area like the one being proposed by Bob Ellis would also be very successful.
>
> "The Haynes Inlet area is actually a better location for native oysters than Isthmus Slough because the tideland areas are sandier, with less mud and silt. One of the potential problems for oysters is freshwater arising out of heavy rain events. I believe that would be less of a problem in Haynes Inlet because the area is more of a channelized mudflat area, and the freshwater would be able to flow through the area faster than in Isthmus Slough. Finally, as shown on my DVD and in the Ellis survey, there is already a very healthy colony of Olympia oysters inhabiting the rip rap along the eastern edge of the highway, which will provide a good seed crop of larvae

> that will 'pollinate' the area adjacent to the pipeline after completion of construction.
>
> In my opinion, based on my experience with growing native Olympia oysters in the Coos Bay area, any oysters that exist along the pipeline route can be easily protected by relocating them to nearby portions of Haynes Inlet. If substrate along the pipeline route is replaced, I believe the applicant's proposed efforts will not only completely protect the existing oysters but will also result in an increase in the further colonization of Olympia oysters in the *area adjacent to the proposed pipeline.*

See Rex Miller letter dated Sept. 7, 2011, at pp. 1-2. The hearings officer finds the Miller letter and DVD constitutes substantial evidence. In fact, it is some of the most compelling evidence in the entire file. As an initial matter, the Miller site appears in the video to a very muddy site. Mr. Miller's DVD includes photos and video of Pacific oyster shell habitat for Olympia oysters at Mr. Miller's site, clearly showing that many of the shells are covered in mud and silt. Mr. Miller is seen in the video washing mud off of his oyster bundles. Nonetheless, despite these less-than-ideal conditions, Mr. Miller has experienced success in his efforts to propagate Olympia oyster colonies on his submerged lands.

The opponents have made no attempt to rebut or otherwise challenge any of the testimony provided by Mr. Miller regarding the likelihood of success of the applicant's proposal. This photographic and video evidence, which has not been challenged by the opponents, directly contradicts the expert testimony that even the slightest amount of silt (*i.e.*, 50 microns) on a Pacific oyster shell will prohibit Olympia oyster larvae from attaching.

After reviewing the Miller DVD, it seems clear that Haynes Inlet provides more likely habitat for Olympia oysters than the Isthmus slough area, and would be an excellent location for a project designed to protect and restore native oysters and their habitat in the general vicinity of the pipeline alignment.

c. Use of Methods Similar to those Proposed by the Applicant Have Been Found to be Successful in these Three Previous Efforts.

The methods proposed by the applicant in the Mitigation Plan are largely modeled after the methods and success of the Glenbrook Nickel project, which also involved the collection and relocation of existing Olympia oysters, and the distribution of Pacific oyster shells for habitat enhancement. As described in more detail below, Dr. Ellis provided a draft of the proposed Mitigation Plan to Scott Groth for his review and comment, and incorporated Mr. Groth's suggestions into a revised plan.

Finally, prior to finalizing the Mitigation Plan, Dr. Ellis forwarded a draft of the plan to Scott Groth of ODFW for his review and comment. Mr. Groth's email response dated October 6, 2011 is included in the record as Exhibit 6 to the applicant's October 10, 2011 submittal. In that response, Mr. Groth states his professional opinion that "the plan looks very good" and that "I would expect positive results." Mr. Groth goes on to state a number of questions and

suggestions for Dr. Ellis, and those suggestions were largely incorporated into the final version of the Mitigation Plan.

After finalizing the Mitigation Plan and reviewing some of the challenges being raised by the opponents, Dr. Ellis sent an email inquiry to Mr. Groth asking for his opinion regarding certain aspects of the Mitigation Plan and opponents' attempts to challenge the success of the Glenbrook Nickel project. Mr. Groth sent an email response on November 10, 2011, which is attached to the applicant's November 14, 2011 submittal, and states:

> "If the goal of your project is to increase the density of native oysters at the site, the mitigation plan (for native oysters) you presented will certainly achieve that. Every Olympia oyster habitat restoration project I am aware of includes the addition of hard substratum (e.g., Crassostea gigas shell), as Ostrea lurida are known to prefer hard substrates. All uses of C. gigas shell to attract O. lurida larvae in Coos Bay have been successful, numerous projects show this.
>
> "In the Glenbrook nickel project, the relocated oysters were in fact outside of the surveyed area. Therefore the preliminary results of that project show significant increases in population after 2 years when the baseline population was completely removed. This was easily related to the increased availability of appropriate settlement substrate via the restoration (mitigation) effort."

This message from Mr. Groth states his professional belief that the proposed Mitigation Plan will "certainly achieve" an increase in the density of native oysters at the site. It also notes that the Glenbrook Nickel project showed "significant increases in population after 2 years" due to increased availability of new substrate at the site. These statements from Mr. Groth of ODFW constitute substantial evidence to support a finding that the applicant's Mitigation Plan will result in increased density of Olympia oysters, and that it is appropriate to rely upon the success of the Glenbrook Nickel project as evidence regarding the likely success of the applicant's proposal.

On October 10, 2011 the applicant submitted a letter dated September 9, 2011 from Nancy Pustis, the Western Region Manager for the Oregon Department of State Lands (DSL), which provides the basis for a finding that it is feasible for the applicant to obtain the short-term access agreement that would be necessary to relocate the existing Olympia oysters onto adjacent state-owned tidelands. This is the method typically used by DSL to allow access for mitigation projects that require the addition of new habitat (*e.g.*, eelgrass) on state-owned submerged and submersible land. The opponents have not raised any issues questioning the applicant's ability to obtain necessary state approvals to relocate oysters onto state lands.

The applicant will also be required to obtain many state and federal environmental permits in order to construct the pipeline, all of which are identified as conditions of approval attached to the county's prior approval of the pipeline. As described in more detail below, the applicant is proposing a new condition of approval that would require coordination with ODFW in the specific details regarding the placement of Pacific oyster shells in the mitigation area, and would involve incorporating the applicant's Mitigation Plan into the DSL permitting process.

B. Compliance with 13A-NA Management Objective (Subtidal Sandy-Bottomed Areas West of Hwy 101).

1. Ellis Oyster Survey of the Subtidal zone

Dr. Ellis and his team searched for Olympia oyster in the subtidal portion of the pipeline right of way located to the west of the Highway 101 bridge, between Milepost 2.8 and 1.8. Dr. Ellis's team took a series of approximately 38 sediment grab samples in this subtidal area. Those grab samples were evenly spaced across the right of way approximately every tenth of a mile. These grab samples revealed no evidence of Olympia oysters or the hard substrate that is necessary for Olympia oyster habitat. Ellis Oyster Survey, Figures 7, 18. The applicant's key finding is as follows:

> Grab sampling of substrate along the pipeline route in subtidal areas (Figure 7) recovered no evidence of Olympia oysters or their preferred substrate habitat. As reported by Coast and Harbor (2011) the bottom velocity in some subtidal areas of the pipeline route is quite high (up to 3.0 feet per second) during maximum tidal exchange. Consequently, the substrates in this area are generally coarse sand, grading to finer sand at the west end of the right of way . Under the Highway 101bridge, sediments appear to be dense sands; so dense that the sampler was only able to partially penetrate the surface layer. Most samples from this area were empty, with a few containing medium sand. Likewise, elsewhere along the pipeline route, samples consisted of sand with only rare shell fragments. The only soft sediments were found near MP 1.9. Figure 8 illustrates a typical sediment sample from subtidal areas of the pipeline route. No Olympia oysters, or Olympia oyster shells were recovered in the grab samples.

Ellis Oyster Study, at p. 19.

The opponents presented no direct evidence concerning the presence or absence of Olympia oysters in the portion of the Project Action Area that traverses the subtidal zone between mileposts 2.8 and 1.7. However, at the public hearing, the opponents complained that the grab sample approach could conceivably have missed some oysters or viable habitat. Dr. Chernaik repeats these arguments in his letter dated October 10, 2011. He enlists the opinion of Dr. Alan Trimble, who concludes that using 38 grab samples is not "continuous or exhaustive" and, as a result, individuals could have been missed.

The hearings officer finds that negative results from 38 grab samples, conducted at representative points along the pipeline right of way, provides a sufficient evidentiary basis to draw an inference that no significant levels of Olympia oysters reside in the subtidal portion of the right of way. While it is true that the grab samples could very well have missed an individual oyster or two (or more), it is reasonably clear from the grab samples that there are no large or

significant quantities of native oysters in the subtidal areas. The destruction of minor amounts of individual oysters does not prevent a finding that the pipeline use does not "protect[ ] the productivity and natural character of the aquatic area."

Even so, the applicant decided not leave opportunity for doubt, and hired professional divers to survey the entire length of right of way's subtidal area. The results of the two-day underwater survey are documented in the report from Dale Foster and Bob Ellis dated October 7, 2011 ("Diver Survey"). That survey notes that the entire subtidal portion of the pipeline right of way is composed entirely of sand and includes no Olympia oysters, and virtually no hard substrate habitat: "the divers described the area as an underwater desert with very little evidence of benthic invertebrate life." Diver Survey, page 2. The diver survey constitutes substantial evidence that confirms that the pipeline's construction activities in that area will "protect[ ] the productivity and natural character of the aquatic area" as it relates to oysters.

The opponents criticize the Diver survey for two reasons. *See* Chernaik Letter dated October 1417, 2011, at p. 3-4. First, the opponents argue that the divers might not have been trained sufficiently to recognize oysters under water. Second, the opponents argue that the Diver survey was not comprehensive enough because the divers could only see a portion of the 250 foot right of way.

If the standard were "clear and convincing" evidence, or "evidence beyond a reasonable doubt," then perhaps the opponents' points *might* have merit. However, the standard is "substantial evidence," which is a relatively low standard of proof. Substantial evidence is evidence that a reasonable person could rely on to draw a conclusion, after considering all countervailing evidence in the record. In employing this standard, the decision-maker is allowed to draw inferences from the evidence. Considering the results of the grab samples and diver survey in tandem, the hearings officer believes that a reasonable person could draw an inference and conclude that no significant quantity of oysters (or oyster habitat) exists in the subtidal portion of the proposed right of way. Had the opponents brought forth evidence that the terrain and habitat were highly variable in that portion of the right of way, or have provided evidence of actual oysters living in the subtidal portion of right of way , then they might have been successful in undermining the applicant's evidence. However, the best the opponents can do is provide evidence that oysters have been found in other portions of the subtidal lands in Coos Bay. Based on this record, the opponents' efforts to cast doubt on the applicant's evidence simply fail.

Despite the diver's direct evidence to the contrary, opponents continued to argue that the pipeline right of way could contain over a million Olympia oysters. *See* Oct. 17 memo from Mark Chernaik, page 8. The hearings officer finds that the opponent's expert testimony on this particular point is not convincing, and does not create sufficient doubt to cause the hearings officer to believe that the applicant's evidence regarding the absence of oysters or oyster habitat in the subtidal zone is not substantial.

C. Sedimentation (Joint Discussion of Both 11-NA-~~11~~ and 13A-NA Management Districts.

1. There is Substantial Evidence to Support a Finding that Construction of the Pipeline will not Result in Significant Impacts on Olympia Oysters Due to Sedimentation.

There appears to be agreement among the parties that there are two potential ways that Olympia oysters could be harmed as a result of pipeline construction: (1) direct impacts on oysters within the pipeline route due to pipeline construction, and (2) impacts from sedimentation resulting from pipeline construction. The first item is addressed above via the applicant's Protection Plan, which will protect all of the oysters within the pipeline route by relocating them to an area that will not be impacted by construction, and by the Mitigation Plan, which will provide additional habitat in the form of new hard substrate within the pipeline right of way after construction of the pipeline. The second item concerns the effect of sedimentation.

To be frank, this is the most difficult aspect of the case, because the evidence is the most difficult to decipher.

The opponent's chief scientist, Dr. Mark Chernaik, estimates that the hard substrate in Haynes Inlet would be covered by "a few millimeters of sediment." *See* Chernaik Letter dated Sept. 14, 2011, at p. 9. He asserts that such sedimentation could settle on hard surfaces and last for "several seasons." Even though he provides little to support his opinion, it does seem intuitive, at first glance, that he could be correct.

Conversely, the applicant relies primarily on a study by Vladimir Shepsis, Ph.D., P.E., and his company, Coast & Harbor Engineering ("CHE"),[11] to support findings that construction of the pipeline will not result in turbidity or sedimentation that will cause harm to existing Olympia oysters or impact their ability to reproduce.[12] The study is highly technical, and difficult for a layperson to understand.

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[11] As stated in his letter dated October 10, 2011, Vladimir Shepsis is a Coastal Engineer with 39 years of experience in coastal engineering project. He is a principal with Coast and Harbor Engineering ("CHE"). Mr. Shepsis's specialty is in the field of coastal hydrodynamics and sediment transport.

[12] Dr. Shepsis makes one statement that the opponents latch onto, in an effort to undermine his work. Dr. Shepsis discussed the scope of his analysis as follows:

> I am not a biologist and I cannot provide any specific conclusions regarding impacts of sedimentation on oysters. My analysis is limited to the question of whether the effect of flow velocities resulting from pipeline construction will cause an increase in suspended sediment concentration and deposition in Haynes Inlet.

See Shepsis letter dated October 10, 2011. The hearings officer interprets this statement to mean that Dr. Shepsis's analysis is not intended to evaluate how well oysters can survive the effects of sedimentation. Rather, Dr. Shepsis focuses his analysis on whether there will be a detectable increase in sedimentation as a result of the pipeline

Dr. Shepsis made a particularly impressive, high-tech, Powerpoint™ presentation at the September 21, 2011 public hearing. As some of the opponents correctly noted afterwards, it is easy to get dazzled by the "wow factor" of the special effects associated with Dr. Shepsis's presentation, and lose sight of the core concepts that are being addressed. *See, e.g,* Jan Dilley letter from dated October 10, 2011. In reviewing these materials, the hearings officer has made every effort to focus on the core of the argument to make sure it meets the substantial evidence standard.

Dr. Shepsis and CHE were originally hired to assist the LNG terminal applicant, Jordan Cove Energy Project (JCEP), in responding to information required by Oregon DEQ regarding potential sedimentation impacts that would result from construction of the JCEP terminal, dredging the access channel, and constructing the pipeline. In response to the DEQ request, CHE undertook a detailed sediment transport modeling analysis for much of Coos Bay, and produced a two-volume Technical Report to DEQ dated December 1, 2010 summarizing the results of that analysis. According to the applicant, those two volumes provided much of the background modeling that was relied upon by Dr. Shepsis in his presentation at the public hearing, and the two-volume report is included in the record as Exhibit 3 to applicant's October 17, 2011 submittal.

Prior to the public hearing, opponents raised concerns regarding potential impacts on Olympia oysters that due to increased sedimentation generated by pipeline construction. In order to respond to these concerns at the hearing, the applicant asked Dr. Shepsis to undertake a specific sediment transport analysis that was focused on potential impacts from construction of the pipeline within Haynes Inlet and specific locations where Olympia oysters had been identified by the applicant and the opponents. Dr. Shepsis completed this analysis and summarized his methods and conclusions in a detailed presentation at the public hearing on September 21, 2011. That presentation is included in the record in both video and hard copy format.

The methodology and results of Dr. Shepsis' study are summarized in his letter dated October 10, 2011. The analysis is based on a three-dimensional hydrodynamic model that shows the hourly flow velocities and directions for all of Coos Bay, and specifically, Haynes Inlet. The data supporting the model was calibrated against tides measured by NOAA at the Charleston Tide Station and actual currents recorded near the proposed LNG terminal in 2005 via Acoustic Doppler Profiler.

The analysis undertaken by Dr. Shepsis resulted in a qualitative study showing: (1) existing tidal and current flow velocities in and out of Haynes Inlet, and (2) the extent to which constructing the pipeline would result in any *increase* in suspended sediment concentration and sediment deposition in Haynes Inlet. As shown on slide #22 of the Shepsis Powerpoint™ presentation, his study considered potential impacts from stockpile placement in two locations that would be the most likely to result in sedimentation impacts. The first is located at

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construction. This statement does not provide much fodder for criticism. Other evidence in the record, including the Rex Miller video, provides substantial evidence supporting the conclusion that Olympia oysters will survive and multiply in relatively muddy environments.

approximately milepost 3.2, close to where Dr. Ellis found the highest concentration of Olympia oysters. The second is located at approximately milepost 2,8, close to the Highway 101 bridge where tidal flow velocities are highest and close to locations where Olympia oysters were identified on the rip rap and shorelines (see slide #30).

The results regarding the first location are shown on power point slides #24 through #28, and on the animation file on the CD submitted by the applicant that is titled "Haynes.avi." The tidal flow animation in that file shows no change in sedimentation levels that is visible to the naked eye. However, a closer review of the data shows that during two time periods of less than 15 minutes, at approximately hours 27.75 and 52.5, there is an increase in suspended sediment that is very limited in scope, and is only present in the immediate area of the base of the pipeline trench. This is shown by the red areas on slide #27. Thus, the only area potentially affected by sediment in this area is the immediate vicinity of the stockpile itself, and the small volume of increased turbidity will remain in that area and will not be detected in any other portion of Haynes Inlet.

The results regarding the second location are shown on power point slides #30 through #34, and on the animation file on the CD that is titled "Oyster.avi." The animation in that file shows very brief increases in suspended sediment, primarily during the outgoing tide, coinciding with the time of highest flow velocities. Timing of turbidity spikes corresponding with tidal velocities for four specific locations where oysters have been identified is shown on slides #31-#34.

As the applicant points out, there are four significant points regarding the increases in turbidity shown on the "Oyster.avi" animation file:

(1) the time period for the increase is very short, *i.e.*, less than 15 minutes per day;

(2) that short time period coincides with the period of highest velocity of water flowing west, and *out* of the intertidal area where virtually all of the Olympia oysters are located;

(3) although the areas of turbidity are larger than in the first study area (where they are miniscule), they are still very limited in scope and are located primarily in a small area immediately to the west of the stockpile; and

(4) as explained by Dr. Shepsis, the corresponding high velocity during this period of turbidity will ensure that sediments would not be able to settle on the hard substrate shorelines where Olympia oysters are present in that area.

The overall results of the study are summarized in the October 10, 2011 letter from Dr. Shepsis, which concludes:

> Based on the results of our detailed three-dimensional modeling, my conclusion is that pipeline construction will not result in any detectable increase of suspended sediment concentration and deposition in Haynes Inlet. Overall, our modeling indicates that changes in suspended sediment concentration during construction

> of the pipeline will be negligible compared to existing conditions in Haynes Inlet. Although there may be very temporary and localized increases in suspended sediment concentration due to high velocities in the area of the bridge, the sediment would not be able to deposit on the identified oyster locations.

See Shepsis letter dated Oct. 10, 2011, at p.4. The hearings officer finds that the expert testimony of Dr. Shepsis constitutes substantial evidence on which the County may rely to reach a conclusion that pipeline construction will not result in increases in sedimentation that will negatively impact Olympia oysters.

The only remaining question is whether the opponents have submitted evidence or argument that "so undermines" the testimony of Dr. Shepsis and the data provided by CHE that it is no longer evidence a reasonable person would rely upon. The remainder of this section provides responses to specific arguments raised by the opponents in challenging Dr. Shepsis's testimony and the CHE data.

2. The Opponents' Evidence Intended to Underline Dr. Shepsis's Testimony Does Not Accomplish Its Goal.

Sadly, the opponents have provided no actual modeling of their own regarding how much sedimentation they believe will be caused by construction of the pipeline. As the opponents point out, this is a bit of a "David and Goliath" fight, and it seems apparent that the opponents do not have the resources to provide their own study. Unfortunately, this is a common dilemma in land use proceedings.

Rather, the opponents attempt to critique Dr. Shepsis's work, hoping that the County will find sufficient flaws to warrant a denial based on a failure to meet the burden of proof. This is a risky approach in an administrative proceeding, because the substantial evidence standard is a very low standard. The opponents would have ultimately been better served by providing substantial evidence, in the form of modeling, to support their position that the sedimentation will be significant and will necessarily result in harm to oysters. At the end of the day, it is apparent that the applicant has met its burden of proof to demonstrate that the effects on the Olympia oyster from sedimentation, if any, will be temporary and insignificant.

a. Chernaik materials dated October 10, 2011, Including Comments by Dr. Trimble dated Oct. 5, 2011.

The opponents challenge the studies and testimony provided by Dr. Shepsis and CHE by having them informally peer reviewed by Dr. Thomas Ravens, a hydrologist from the University of Alaska Specializing in hydrodynamics and sediment transportation. In his October 10, 2011 memorandum, Dr. Chernaik first argues that the CHE modeling results for sedimentation in Haynes Inlet are not "negligible" because (1) only 50 microns of sediment can impair attachment of oyster larvae, and (2) Mr. Shepsis's presentation shows spikes of sedimentation increase "lasting several hours."

i. 50 Microns of Sediment.

Dr. Chernaik's assertion regarding the "50 micron" figure is based on personal conversations with Dr. Alan Trimble. *See* Chernaik letter dated Oct. 10, 2011, at p. 8; Trimble letter dated Oct. 5, 2011, at p. 3. The opinion does not appear to be supported scientifically, and is directly contradicted by other evidence submitted by Dr. Chernaik. The 50 micron figure seems to be rather outlandish, as it a thickness that more or less approximates the width of human hair. A layer of sediment that thick would barely be visible to the human eye. Given the success that Rex Miller has experienced in waters that produce much higher rates of sedimentation, the hearings officer finds the 50 micron figure to either be wrong, or used out of context in this case.

But even if it is true, Dr. Shepsis's response to this argument is as follows:

> Dr. Chernaik does not attempt to explain the significance of the 50 micron figure as it relates to my presentation. Note that 50 microns is 0.05 mm. Dr. Chernaik provides an analysis of dredging-induced sedimentation in Newark Bay prepared by T. Lackey, et al. (Chernaik Exhibit 7), which shows accumulation of sediment in the most unfavorable conditions at a maximum of only 0.03 mm or 30 microns. Based on actual conditions in Haynes Inlet, as discussed in my presentation and in responses below, my conclusion is that the maximum theoretical deposition in the Haynes Inlet area would be at a much lower detectable level than 30 microns.

See Shepsis letter dated Oct. 17, 2011, at p.4. The opponents never rebut Dr. Shepsis' response.

ii. Spikes of Sedimentation Concentration Lasting Several Hours.

Dr. Chernaik also states that Dr. Shepsis' analysis reveals "spikes of concentration lasting several hours." Dr. Shepsis responds as follows:

> As explained in my presentation at the public hearing, spikes of sediment concentration coincide with highest flow velocities. Durations of high velocities exceed the durations of suspended sediment spikes, which results in no deposition of sediment in these areas. I do not understand why Dr. Chernaik believes that my presentation shows spikes of sedimentation "lasting several hours." Slides 31-34 of my presentation show only one sedimentation spike of any theoretical significance, which was at the opponents' site 4 (slide 31). Slide 31 shows one spike lasting less than 15 minutes during every 24-hour tide cycle.

See Shepsis letter dated Oct. 17, 2011, at p.4. Given that Dr. Chernaik is a biologist and Dr. Shepsis is an engineer, the hearings officer's tendency would be to defer to Dr. Shepsis on

engineering issues such as this, particularly since Dr. Chernaik has been demonstrably wrong on various other issues in this case.

iii. Source Terms.

Next, Dr. Chernaik argues that the County should not rely on the testimony of Dr. Shepsis as evidence, because the modeling results are unsubstantiated insomuch as the study does not identify "source terms" regarding specific rates of expected sediment release. *See* Chernaik letter dated October 10, 2011, at p. 14. Dr. Chernaik submits an article regarding sedimentation impacts from a dredging project on winter flounder habitat in Newark Bay, and points out that it includes certain "source term" data that is missing from Dr. Shepsis's analysis. In his October 17, 2011 submittal, Dr. Chernaik raises the same "source terms" issue again, this time relying on comments provided by Dr. Thomas Ravens. *See also* Chernaik letter dated October 17, 2011, at p. 1, Raven Letter dated October 14, 2011, at p. 2-3. [13]

In his letter dated October 14, 2011, Dr. Ravens states:

> Sediment transport modeling of dredging operations should generally include a sediment production term that accounts for the introduction of suspended sediment into the water column. Data such as that cited [in the Newark Bay study] – showing the mass rate of sediment introduction due to clam shell dredging – should be used to assess the sediment transport impacts of dredging operations. However, a close reading of the statement provided by Vladimar Shepsis indicates that such an accounting of the particle generation of the dredging operation was not undertaken.

See Ravens letter dated Oct. 14, 2011, at p. 3. Stated in lay person terms, the hearings officer understanding Dr. Ravens to be finding fault with Dr. Shepsis's analysis because it fails to define a value representing how much sediment enters into the water column when the crane's bucket scoops mud out of the pipeline trench.

In his letter dated October 17, 2011, Dr. Shepsis responds to Dr. Ravens by explaining the differences between his studies and the Newark Bay Study, as well as by explaining the absence of "source terms" from his study:

> The analysis provided in the Lackey study of the Newark Bay project is very different from our study because that involved a project where dredged materials would be permanently removed from the bay by a clamshell dredge. In that type of project,

[13] The letter from Dr. Ravens stating his qualifications includes what the applicants see as a "significant admission" that only "*some* of the work that I have done *tangentially* addressed sediment transport impacts of dredging." Oct. 14 letter from Dr. Ravens, page 1. The applicant states that "[t]his does not exactly provide a ringing endorsement regarding Dr. Ravens's qualifications for review of this project." It is noteworthy that none of Dr. Ravens's scholarly articles appear to involve sediment transport impacts from dredging. Unfortunately Dr. Ravens did not appear before the hearings officer to offer testimony, so questions regarding his credibility and qualifications must be based on his resume and comments alone.

> potential turbidity is measured based on the impact of the dredging bucket on the bottom and amounts of sediment that come out of the bucket during ascent and descent. Those are the 'source terms' referenced and measured in Table 1 of the Lackey study. In contrast, the current project involves trenching and placement of a stockpile mound adjacent to the trench prior to placement of the material back in the trench. As explained in my letter dated October 10, 2011, turbidity arising from placement of dredged material in the mound and impacts from tidal currents on the mound will be significantly higher than impacts from dredging the same material. Therefore our analysis considers the 'worst case scenario' of sedimentation in the form of impacts of hydrodynamic flow on trenched material, but the different type of 'source terms' from the Lackey study regarding rates of sediment dispersal during dredging and removal are not part of our analysis. Instead, the computer model that we prepared provides the rate of release of sediment from the trenched stockpile material. The model allows constant erosion and re-suspension of trenched material in the water column instead of period releases of this sediment from the bucket. (Emphasis added).

See Shepsis letter dated Oct. 17, 2011, at p. 5. In essence, Dr. Shepsis states that the "source terms" for the crane's bucket do not matter in this case because, unlike a typical dredging operation where sediments are removed from the water, the dredge spoils in this case will be placed temporarily on the floor of the estuary. Dr. Shepsis notes that that much more sedimentation will occur from both the placement of dredged material in the mound as well as the corresponding impacts from tidal currents as it laps up against the mound and dislodges sediment from the pile.

Both Dr. Raven and Dr. Chernaik fail to reply to Dr. Shepsis's explanation set forth above regarding why this particular project did not require the same "source term" inputs as the Newark Bay dredging project.

iv. Actions Which Cause the Most Sedimentation.

To a certain degree, it seems that Dr. Shepsis and Dr. Ravens are talking past each other. One particular exchange between Dr. Shepsis and Dr. Ravens illustrates this problem. On page 2 of his Oct. 10, 2011 letter, Dr. Shepsis states:

> "Results from our analysis on this project and many other projects indicate that turbidity during placement of dredged material on an open (non-confined) bottom of a water body and storing this material under impact from current velocities is significantly higher than that during the digging of the same material."

Dr. Ravens responds as follows:

> "Although his statement is ambiguous, Vladamir Shepsis implies that more particles are generated **following** placement of dredged materials than during the dredging and placement process. If this is true, it is not common knowledge amongst sediment transport specialists." (Endnote omitted, Emphasis in original).

See Ravens Letter dated Oct. 14, 2011. Reading these two passages side by side, it is apparent that Dr. Ravens misreads and misquotes Dr. Shepsis. In his various materials, Dr. Shepsis identities four different periods of potential turbidity releases:

A = turbidity generated when the crane's bucket "digs the material" (*i.e.* removes mud from the trench and lifts it into the air)
B = turbidity generated when the crane's bucket places / deposits the removed mud on an open (non-confined) bottom of a water body (i.e. when the crane bucket opens and releases mud onto the storage pile).
C = turbidity generated from "storing this material under impact from current velocities" (i.e. when tidal currents lap up against the mud mound).
D = turbidity generated when the crane's bucket fills the trench back in.

In the quote set forth above, Dr. Shepsis is saying: B + C > A. However, Dr. Ravens states that Dr. Shepsis is wrong to assume that C > B + A. (Note that Dr. Ravens refers to A + B as the "dreging and placement process."). Therefore, it is clear that Dr. Ravens either did not understand what Dr. Shepsis was saying, or Dr. Ravens purposefully misquotes Dr. Shepsis. Either way, it is a misreading that is fatal to Dr. Ravens' credibility in this case.

"Substantial evidence" in the land use context is "evidence a reasonable person would rely upon in making a decision." It is a relatively low standard, as mentioned above. In this case, Dr. Shepsis's analysis constitutes substantial evidence, in part because he responds to Dr, Raven's testimony in a manner that does not seem to be unreasonable, at least to a lay person, and because Dr. Shepsis comes across as having greater expertise and greater credibility.

b. Dr. Raven's Letter dated October 14, 2011.

In his letter dated October 14, 2011, Dr. Ravens suggests that the CHE analysis is also faulty because: (1) it does not provide data regarding particle size of sediments; (2) it focuses on turbidity increases resulting from tidal flow effects on stockpiled material, but not from dredging; and (3) Dr. Shepsis's conclusion that any suspended sediments will not result in detectable accumulations in Haynes Inlet is not credible.

i. Grain Size.

The applicant responds to issue 1 as noting that specific data regarding sediment grain size is provided in Volume 1 of the CHE Technical Report at Section 5.2, and is discussed in more detail below.

ii. Impacts Related to Turbidity Caused by the Crane's Bucket.

With regard to issue 2, the applicant notes that Dr. Shepsis and CHE have explained the basis for their methodology concerning conducting turbidity modeling based on impacts on the stockpiled materials. The applicant cites to Volume 2 of the CHE Technical Report, at Section 10.1:

> "10.1 Methodology
>
> "The objective of analysis and modeling conducted in this section is to determine the potential impact of pipeline construction through Haynes Inlet on increases in turbidity (suspended sediments) at the area of interest. The location of the pipeline and area of interest for investigation of potential impact were defined in CHE (2010b) and are shown in Figure 10-1.
>
> "There will be three elements of dredging operations during pipeline construction that may generate turbidity in the water column:
>
> "1. Dredging (excavation) of the pipeline trench.
>
> "2. Placing (dumping) dredged material adjacent to the pipeline trench for temporary stockpiling.
>
> "3. Replacing material back into the pipeline trench following pipeline construction.
>
> "In order to address the worst case scenario of maximum turbidity and highest likelihood of impact, analysis and modeling of turbidity were conducted for the dredged material placement (dumping) adjacent to the pipeline trench. Results from the analysis and modeling suggest that turbidity during placement of dredged material on the open (non-confined) bottom is significantly higher than that during dredging of the same material. Similarly, re-placement of dredged material in the pipeline trench will create smaller amounts of turbidity because the material is more confined within the trench."

This methodology was adopted by CHE based on its modeling results for this particular project in Haynes Inlet, which involves not just dredging but also stockpiling and replacement of dredged material. According to the applicant: "this is a scientifically accepted methodology that has been accepted by DEQ for purposes of its review of potential water quality impacts from this project in Haynes Inlet."

The applicant further notes that Dr. Ravens admits that he has only "tangentially" reviewed dredging projects in "some" of his work, and it appears that he has *no* experience regarding this type of pipeline project involving not only dredging but also stockpiling and

replacement of material. For this reason, the applicant surmises that it is not surprising that Dr. Ravens is not familiar with the methodology. Under these circumstances, the hearings officer accepts the more specific expert testimony and conclusions of Dr. Shepsis and CHE regarding the appropriateness of their "worst case scenario" methodology for purposes of this particular project.

Further, even if the County looks past the "worst case scenario" methodology to also consider what the potential effects on turbidity could be from dredging and replacement of material in the pipeline trench, the evidence in the record from CHE and Dr. Shepsis support a finding that even if all three activities are considered, there would be no negative impacts from sedimentation on Olympia oysters. The analysis and reports prepared by CHE and Dr. Shepsis conclude that (1) turbidity resulting from tidal flows on stockpiled materials would not result in *any* detectable increase of sedimentation in Haynes Inlet, and (2) turbidity resulting from tidal flows on stockpiled materials would be "significantly higher" than that resulting from dredging or re-placement of the same material. CHE Technical Report Section 10.1, quoted above. Therefore, it is reasonable to conclude that if the activity causing "significantly higher" amounts of turbidity will result in no detectable sedimentation, then the activities that would cause significantly lower amounts of turbidity will also cause no increases in sedimentation in the area.

iii. Suspended Sediments Will Not Likely Result in Detectable Accumulations in Haynes Inlet.

The applicant responds to the third issue raised by Dr. Ravens by noting that Dr. Shepsis concluded that any suspended sediment caused by pipeline construction will disperse and not result in detectable accumulations of sedimentation in Haynes Inlet. Dr. Ravens states that this conclusion is "not credible." However, Dr. Ravens provides no analysis or explanation other than to say that "small concentration of particles can lead to significant deposition over time." See Ravens letter dated Oct. 14, 2011, at p. 3. A review of the specific results of Dr. Shepsis's study reveal that his conclusion is both credible and well-documented in his letter dated October 10, 2011.

The Shepsis study analyzed two potential stockpile locations, one at approximately milepost 3.2 and the other at approximately milepost 2.8. The modeling results for the milepost 3.2 location show a small volume of increased turbidity that is extremely limited in location to the immediate vicinity of the stockpile itself, and also limited to two time periods of less than 15 minutes per day. Therefore, it is certainly reasonable for Dr. Shepsis to conclude, as stated in his letter to the hearings officer, that any sediments in this area "will essentially remain in the immediate stockpile area and will not spread to the rest of Haynes Inlet." *See* Shepsis letter dated Oct. 10, 2011, at p. 3.

The second study area, located at milepost 2.8, is subject to much higher tidal velocities, and is therefore the more critical of the two sample locations. The modeling results in that location show very short increases in turbidity (less than 15 minutes per day) that coincide exactly with the highest outgoing tides. Therefore, to the extent there will be a very brief increase in suspended sediment in that area, such sediment would be immediately dispersed with the extremely fast-moving tidal currents of up to 4 feet per second and, essentially flushed out and under the Highway 101 bridge into an area where there is no documented evidence of

Olympia oysters. Therefore, Dr. Shepsis reasonably, and credibly, concluded his letter to the hearings officer as follows:

> 3. Conclusion
>
> Based on the results of our detailed three-dimensional modeling, my conclusion is that pipeline construction will not result in any detectable increase of suspended sediment concentration and deposition in Haynes Inlet. Overall, our modeling indicates that changes in suspended sediment concentration during construction of the pipeline will be negligible compared to existing conditions in Haynes Inlet. Although there may be very temporary and localized increases in suspended sediment concentration due to high velocities in the area of the bridge, the sediment would not be able to deposit on the identified oyster locations.

See Shepsis letter dated Oct. 10, 2011, at p. 4. The only evidence that Dr. Ravens presents on this subject is his statement that "small concentration of particles can lead to significant deposition over time." However, the timeframes associated with construction of the pipeline and the existence of stockpiled material in Haynes Inlet are relatively short for each segment of construction. As explained in the CHE Technical Reports, the total duration of trenching operations (excavation, placement of pipeline and trench refill) for each 800-foot pipeline reach is approximately seven days. CHE Technical Report, Volume 2 page 17, Section 11.1. As described in that report: "Considering the above, the objective of this analysis is narrowed to determining the possible dispersion of sediment and turbidity resulting from a stockpile of dredged (excavated) material along the pipeline route during seven days of construction." *Id.*

Thus, while Dr. Ravens is correct that even tiny concentrations of particles can result in significant deposition over significant periods of time, Dr. Ravens has not provided any evidence to suggest that the small amounts of turbidity referenced in Dr. Chernaik's study could actually result in significant deposition given that their duration is less than 15 minutes per day, and the stockpiled material will only be located in the water for an estimated seven days.

c. Chernaik Materials dated November 17, 2011.

There are three sediment-related issues raised in the opponents' November 17, 2011 submittal.

i. Newark Bay, NY Study.

As an initial matter, there is continued discussion regarding the details of the Newark Bay project and how it compares to the applicant's project. However, as the applicant's attorney Roger Alfred notes, this "back-and-forth between the two doctors regarding the Newark Bay project has gone beyond its significance to this proceeding." As discussed above, that study was originally provided by Dr. Chernaik solely to provide an example of the type of "source terms" that he believed should have been included in Dr. Shepsis's work. The debate regarding

comparisons of the amounts of sediment likely to be generated by that project versus the Haynes Inlet project is not particularly relevant to the issues at hand.

Moreover, in this particular exchange, Dr. Shepsis clearly gets the better of Dr. Chernaik. The Newark Bay study involved dredging, rather than trenching and stockpiling, and the dredging operation would produce much higher amounts of sediment because the dredging bucket pulls sediment out of the bottom of the bay and all the way through a 30-40 foot water column. On the other hand, this project involves the temporary removal of material from the bottom of the inlet, in water that is no more than 8 feet deep, and the temporary placement of that material in a stockpile right next to the dredged area.

ii. "Unvalidated" Sediment Transport Model Regarding Background Levels of Turbidity.

The report prepared by Dr. Ravens titled "Limitations of the Haynes Inlet sediment transport study" dated November 13, 2011 challenges two aspects of the Technical Report prepared by CHE that provides the background data for this study. Specifically, Dr. Ravens states that the CHE analysis is faulty because: (1) it relies upon an "unvalidated" sediment transport model regarding background levels of turbidity; and (2) it incorrectly relies upon an assumption of uniform sediment size despite data showing that sediments are smaller than assumed.

The two issues raised by Dr. Ravens are discussed by Dr. Shepsis in his letter dated November 23, 2011. First, Dr. Shepsis explains that the CHE sediment transport model is being used for qualitative purposes only, and does not apply the type of absolute quantitative values that would require the modeling results to be validated or calibrated against measurements of background turbidity from the subject site. In other words, the CHE analysis compares a model of background levels of turbidity against what would be generated by project construction, and reports the extent to which there will be an increase, decrease, or no change in turbidity resulting from construction. The applicant states that: "[i]n this type of qualitative analysis it is an accepted scientific practice to rely upon modeled background data that has not been independently verified at the site, because the point of the study is only to establish the extent project conditions will result in an increase over existing conditions; therefore, knowing the actual quantitative amount of background turbidity is not essential." Dr. Shepsis further states:

> I have clearly stated from the beginning of the project (see Technical Report entitled Jordan Cove Energy Project and Pacific Connector Gas Pipeline - Volume 1, Page 40) and have repeated several times in Volume 2 of the same technical report, that the model used for sediment transport and related parameters as turbidity, sediment concentration, etc..., has not been validated or calibrated for this study and that the modeling results for sediment transport and related parameters are used qualitatively for comparative analysis only. This means that the analysis is performed in terms of "relative to existing conditions." No quantitative absolute values are considered for this analysis. The study provides results of potential impact from the project

> construction in respect to existing conditions (background conditions). The increase, decrease, or no-change of sediment concentration, turbidity etc... in respect to the modeled background conditions has been provided as output of this study. This approach, use of a non-validated model in qualitative mode, is typical in the industry and has been previously used in many credible studies.
>
> Further, the argument used in Dr. Ravens' example is flawed because I did not perform the analysis in quantitative terms. In Dr. Ravens' example, the wrong assumption is to consider my results as absolute values. For example, if the modeled background concentration was even five times larger than the actual background concentration (as Dr. Ravens supposes in his example), then also the modeled post-project concentration would be five times larger than the actual post-project concentration. Therefore, the relative comparison between background and post-project would remain the same in nature as in the model. Regardless of what the actual background conditions are in nature, my results provide an increase, decrease, or no-change of the modeled parameter (turbidity, sediment concentration, etc...) for modeled post-project conditions in respect to modeled background conditions.

See Shepsis letter dated Nov. 23, 2011, at p. 2. Dr. Ravens does not respond to this testimony. The hearings officer finds Dr. Shepsis' analysis to be more credible and further finds that it constitutes substantial evidence that is not undermined by Dr. Raven's testimony to the contrary.

iii. Grain Size.

Next, regarding the allegations concerning improper assumptions of sediment size, Dr. Ravens argues that Dr. Shepsis' analysis is flawed because he assumes a single uniform grain size in his model (.27 mm), which is a typical size for a fine grain of sand. According to Dr. Ravens, the model should have used grain sizes that approximate silt and clay as well (i.e. grain sizes in the range of .10 mm and .05 mm). Dr. Ravens attributes two problems with this error: (1) "the calculation of background turbidity distribution at the study site would be inaccurate," and (2) the modeling of dredging-derived turbidity would be inaccurate. *See* Ravens letter dated Nov. 13, 2011, at p. 5-6.

The hearings officer notes that of the three representative grain sizes that Dr. Ravens places at issue. Of those three, the .10 mm grains are most likely to result in higher turbidity, according to his calculations. *See* Table 1 of Ravens letter, at p. 5. Table 1 shows .10 mm silt grains having an "average suspended sediment concentration" of 3000 mg/ltr, which is much higher than the sand sized-gains (10 mg/ltr), or the smallest silt sized grains (200 mg/ltr.). The hearings officer understand that the .05mm grains produce less turbidity than the .10 grains because the .05mm sized grains are "cohesive" in nature, which means that inter-particle forces start to dictate the resistance to motion, as opposed to mere gravitational forces. *Id.* at p. 5.

Nonetheless, Dr. Ravens conclusions do not seem to hinge specifically on the .10 mm sediments. Rather, Dr. Ravens' point is simply that finer grained silts and clay sediment will disburse farther than sand:

> The time a given dredging turbidity plume is suspended can be estimated based on the ratio of depth over the fall velocity. The fall velocity for .27 mm and .05 mm sediments is about 30 mm/sec and 2 mm/sec respectively. Consequently, the finer sediment would be suspended for about 15 times as long and would be dispersed over 15 times the distance.

Id. at p. 6. Essentially, Dr. Ravens point is that sand falls through water much faster than silt, which means that silt stays in suspension longer than sand, and, as such, has more time to get carried away in the tides than will the sand.

Dr. Shepsis responds that Dr. Chernaik and Dr. Ravens are factually wrong to assume that the CHE Technical Report only uses one grain size (*i.e.* the larger .27 mm grain size). The CHE Technical Report states that numerical modeling of sediment transport was conducted with two sediment sizes, 0.27 mm grain diameter (sand) and 0.05 mm grain diameter (silt), which the report says is representative of the typical sediment sizes present in Coos Bay including Haynes Inlet. *See, e.g.*, CHE Technical Report at p. 41. Dr. Shepsis states:

> These two sediment sizes are representative of the typical sediment sizes present in Coos Bay including Haynes Inlet, as it results from the study conducted by GeoEngineers (August 2010), referenced by Dr. Ravens. I was aware of the fact that the sediment size distribution in Coos Bay including Haynes Inlet was spatially variable, ranging from silt to sand. The modeling results presented in Section 10.1 of the Technical Report entitled Jordan Cove Energy Project and Pacific Connector Gas Pipeline - Volume 2 (quoted by Dr. Ravens) were conducted with 0.27 mm grain diameter because this is the type of sediment present in the majority of the study area. Dr. Ravens' statement that '*However, the sediment characterization study conducted by GeoEngineers (August 2010) indicates that the sediments are significantly finer than this in large portions of the study area*' is not supported by the GeoEngineers study of August 2010. According to the GeoEngineers study, the only section where the percentage of silt (50.4%) is comparable to the percentage of sand (48.4%) is section DMMU-1 (and not DWWU-1, as erroneously quoted by Dr. Ravens). This section is located in the north part of Haynes Inlet, far from the oyster relocation area. The other two sections (DMMU-2 and DMMU-3) have 67.0% and 86.2% of sand and only 33.0% and 13.1% of silt, respectively.
>
> I have shown in the paragraph above that the use of 0.27 mm sand is a reasonable assumption for our study and not a '*wrong grain*

> *size*' as Dr. Ravens commented. Nevertheless, I want to reiterate that Dr. Ravens is again reasoning in absolute terms ('... *the calculation of the background turbidity distribution at the study site would be inaccurate if the wrong grain size is assumed...*'), while my analysis was performed in terms of 'relative to existing conditions.' My study was a qualitative/comparative analysis. My modeling results are produced as "concentration in excess of ambient concentration.
>
> Again, the 0.27 mm grain size used in my modeling efforts is a reasonable sediment size, given the information in the Geo-Engineers study. Furthermore, not only did I use a reasonable grain size for analysis of sedimentation, but using a larger grain diameter (0.27 mm versus 0.05 mm) is conservative in terms of potential impact to oyster beds. Dr. Ravens should have known and should have educated Dr. Chernaik that larger sediment particles may deposit in close vicinity of the source of suspension and is more indicative factor for sedimentation of oyster beds.

See Shepsis letter dated Nov. 23, 2011, at p. 3. Thus, Dr. Shepsis states that the portions of the Haynes Inlet that have the most sand (as opposed to silt) are also the areas that have the highest flow velocities. Obviously, that is not a coincidence: the smaller sediment will not settle in high-velocity environments. The areas of low flow velocities will likely create less far-reaching turbidity, even though the percentage of silt is higher, due to the fact that the tides have less energy in those locations. Conversely, in areas where the flow velocities are the highest, the fact that the majority of the sediment is sand limits the distance that such sediments will travel. Dr. Shepsis seems to be of the opinion that the larger particles are the most dangerous in terms of potential impact to oysters for the simple fact that will deposit in close vicinity to the dredging location, and, therefore, will create thicker layers of sediment.

Although this issue presents somewhat of a close call due to its technical nature, the hearings officer finds Dr. Shepsis' analysis to be more credible and further finds that it constitutes substantial evidence that is not undermined by Dr. Raven's testimony to the contrary. Three issues factor into this conclusion. First, although Dr. Ravens criticizes Dr. Shepsis's study, he never really addresses the ultimate issue, which is to say that he never concludes that the dredging operations will fail to "protect" the oysters. Second, He never really accounts for, or weights in on, the use of best management practices such as silt curtains, etc. Third, the hearings officer does not believe that Dr. Ravens has done enough to make the case that the fine sediment (.05mm) will harm the oyster beds. As discussed elsewhere, Dr. Ravens does state that "small concentration of particles can lead to significant deposition over time," but he makes no effort to quantify what he means by "small quantities" or explain how much time he is referring to. In short, his statements and analysis are simply to vague and too perfunctory to cause a reasonable person to disregard Dr. Shepsis' analysis.

2. Even with some sedimentation, there will be only "temporary and insignificant" impacts on Olympia oysters.

The applicant argues that "the sedimentation issue is a red herring, because the opponents have greatly overstated the potential impacts of sedimentation from this project on Olympia oysters." The applicant points out that "the bucketful of Olympia oysters that will be relocated by the applicant are, generally speaking, already attached to hard substrate." There is substantial evidence in the record that (a) adult oysters can tolerate relatively high amounts of sedimentation (several millimeters), (b) Olympia oysters prefer to locate on the undersides of hard substrate, where sedimentation is not as much of an issue, and (c) the post-construction mitigation being proposed by the applicant will be successful, and obviously will not be impacted by sedimentation from the project, since it occurs after pipeline construction is complete.

Therefore, even if the opponents were somehow correct that Dr. Shepsis has underestimated the amount of sedimentation, that would not require the conclusion that there will be anything more than temporary or insignificant impacts on Olympia oysters. This is particularly true, given the applicant's proposal to provide post-construction mitigation in the form of new Olympia oyster habitat. Turbidity resulting from the project must be monitored as part of DEQ requirements. The hearings officer recommends a condition of approval requiring the use of turbidity curtains if monitored levels of turbidity exceed threshold levels mandated by DEQ,.

The opponents attempt to cast doubt on the Shepsis /CHE analysis by having the study informally peer reviewed by Dr. Zarcherl and Dr. Ravens. The opponents also rely on data from a sedimentation study for a dredging project in Newark Bay.

There is evidence in the record to support the conclusion that Olympia oysters can survive some amount of sedimentation. For example, there is evidence in the record, in the form of the opponents' own statements, the testimony of Dr. Ellis, and the video submitted by Rex Miller, that sedimentation is not necessarily going to harm Olympia oysters (particularly adult Olympia oysters) or their ability to reproduce. First, the opponents themselves submitted the following statement from a 2005 Corps of Engineers study:

> Although a thin layer (several mm) of sediments may not be fatal to adult oysters, it may affect reproduction. Because larval oysters require hard substrata for settlement, the presence of even a few millimeters of sediment covering an oyster reef may inhibit larval recruitment.

See Chernaik letter dated Oct. 10, 2011, at p. 8. Thus, opponents admit that several millimeters of sediment is not necessarily fatal to adult oysters, and that the real threat from sedimentation is on reproduction. However, even regarding reproduction, the above-quoted statement suggests that a millimeter or two of sediment is not going to "inhibit larval recruitement" on hard substrate. Thus, the opponents' later assertion that even 50 microns of sediment will prevent attachment of larvae is contradicted by their own evidence (one millimeter is a thousand microns, so 50 microns = 0.05 mm).

The Olympia oysters to be *relocated* under the Mitigation Plan are, by definition, adults that are already attached to hard substrates. Therefore, the evidence submitted by opponents indicates that those oysters can survive under "several millimeters" of sediment.[14] Also, as discussed below, Dr. Zacherl's restoration project in Newport Bay shows significant increases in Olympia oyster density in six months where Pacific oyster shell was placed, *in spite of an average mud deposition of 0.8 mm (800 microns) on the shells.*

This is also consistent with the oysters shown in the DVD submitted by Rex Miller (at approximately 6:50 through 9:15), which are covered in relatively thick layers of mud. According to Mr. Miller, those oysters are "doing pretty well" and are even continuing to reproduce.

Based on this evidence, the hearings officer finds that even some amount of sedimentation will not impact the oysters being relocated by the applicant, or other existing adult Olympia oysters in Haynes Inlet. This is particularly true regarding the Olympia oysters in the areas near the bridge where high tidal flow velocities will prohibit accumulation of sediment.

Meanwhile, the mitigation being proposed by the applicant will be specifically designed in consultation with ODFW to attract larval settlement of Olympia oysters (see proposed condition of approval above), and will obviously occur *after* construction. Therefore, there will be *no* sedimentation impacts from pipeline construction on the ability of larvae to attach on the new hard substrate that will be provided by the applicant. As a result, the hearings officer finds that some sedimentation will not result in impacts to adult oysters, and larval attachment in the mitigation area will not be impacted because that will occur post-construction.

The opponents submitted arguments that a sediment covering of less than 50 microns (1/500th of an inch) is enough to impair the attachment of Olympia oyster larvae to hard substrate. Oct. 10 memo from Mark Chernaik, page 7. However, this figure is not based on any scientific study, it is merely based on a personal estimate provided by a biologist, Dr. Ravens, recruited by the opponents (*Id.* at 8). This evidence is directly contradicted by the 2005 Corps of Engineers study quoted above. Moreover, Dr. Ellis provided data to the contrary from Dr. Zacherl's project in Newport Bay, which is actually based on a scientific study. As stated by Dr. Ellis:

> "Dr. Chernaik fails to mention that Olympia oyster spat have a strong preference for the undersides of hard substrates (Sawyer, 2011), which would be unaffected by sedimentation. Zacherl et al., (2011) found that six months after placement of Pacific oyster shell in Newport Bay, Olympia oyster density was up to 20-30 times greater than the control (where no Pacific oyster shell had been placed) in spite of an average mud deposition on that shell of 0.8 mm. The results of this study have not been published, but a presentation was given at the 2011 Headwaters to Ocean

[14] Dr. Shepsis included an estimate that any sedimentation resulting from the pipeline construction in Haynes Inlet would be "a much lower detectable level than 30 microns." Oct. 17 letter from Dr. Shepsis, page 4.

Conference, and this presentation (Zacherl, et al., 2011) is included as attachment A."

See Ellis letter dated Oct. 17~~th~~ 2011, at p. 10. Thus, Dr. Zacherl's own study found that Olympia oysters were thriving and reproducing despite an *average* sediment coverage of 0.8 mm. By way of contrast with the opponents' 50 micron figure, 0.8 mm is 800 microns. Dr. Zacherl admits that oyster larvae prefer attaching to the underside of hard substrate, and therefore relatively high levels of sedimentation cover on the topside of a shell is "less of an overall impediment" for the attachment of Olympia oyster larvae. *See* Chernaik letter dated Nov. 14, 2011, at p. 4.

The opponents' only substantive response is that the applicant's mitigation plan would distribute shells too diffusely for there to be any available undersides on which larvae can attach. *Id.* However, this misses the obvious fact that the applicant's proposed mitigation will occur *after* construction of the pipeline – when construction-related sediment will no longer be an issue. Moreover, it also ignores the fact that discarded Pacific oyster shells have been successfully colonized by Olympia oysters in Haynes Inlet.

Regardless, based on comments of this nature submitted by the opponents regarding a need for deeper dispersal of Pacific oyster shell to provide available "underside" for attachment, the applicant is proposing the condition of approval set forth above that requires the applicant to consult with ODFW regarding the best methods for and location of shell dispersal in order to ensure successful colonization, including greater depths of shells and placing thick groups in "bags" as documented in the Zacherl study. The hearings officer find~~ings~~ this proposed condition to be reasonable and likely to be effective. The hearings officer is satisfied that the applicant can work with the appropriate agencies to determine the best distribution of shells to maximize the recruitment / settlement of oyster larvae.

3. Discussion of Miscellaneous Arguments Associated with the Sedimentation Issue.

a. Reliance on 2005 data.

Jody McCaffree and other opponents challenge CHE's reliance on tidal flow data from June 2005, arguing that the data should have considered the months of October through February when construction of the pipeline will occur. Dr. Shepsis rebuts this assertion in his letter dated October 17, 2011. He states that tide fluctuations (*i.e.*, differences between highest and lowest tides) during the modeling period from June 18, 2005 through July 18, 2005 are similar to fluctuations during the month of October. Also, the maximum tide amplitudes for June are relatively high (11.12 feet), and are virtually the same or less for the months of October through February, with the exception of November which is only 0.2 feet higher. Therefore, as explained by Dr. Shepsis in his October 17, 2011 letter, tidal flow velocities during construction months would be lower or insignificantly higher than what is predicted in the model. Given this discussion, the hearings officer finds that the use of June 2005 data does not make the Shepsis analysis less "substantial."

b. Impact of Pipeline Trenching and Stockpiling on Flow Velocity.

Ms. McCaffree argues that the CHE analysis did not consider what the impact of the construction activities (*i.e.*, trenching and stockpiling) would be on flow velocities in Haynes Inlet. Dr. Shepsis responds in his letter dated October 17, 2011 by pointing out that the modeling does include consideration of trenched and stockpiled material on flow velocities, and the resulting turbidity analysis is therefore based on velocities that will occur upon trenching and stockpiling. Thus, the hearings officer finds that this concern does not ~~made~~ make the Shepsis analysis less "substantial."

c. Consideration of Proposed Port channel and LNG terminal.

Ms. McCaffree contends that the CHE analysis should have included (a) potential effects from the Port's proposal to deepen and widen the Coos Bay Channel, and (b) impacts from removal of material required to construct the new slip for the LNG terminal. Dr. Shepsis argues in his letter dated October 17, 2011 that the Port's proposal was not considered as part of the CHE analysis because it is, as of that date, just a speculative project that may or may not actually occur. Also, Dr. Shepsis further points out that the two-volume Technical Report prepared by CHE provides a detailed analysis of flow velocities related to dredging for the LNG terminal, and shows that construction of the terminal and dredging the access channel would not alter tidal flow velocities in the area of Haynes Inlet.

The hearings officer finds that, with regard to this very technical issue, that Dr. Shepsis's second response to this issue seems reasonable and constitutes substantial evidence. Again, it would be much more effective for the opponents to have brought forth evidence tending to show that the deepening of the Coos Bay channel would in fact alter tidal flow velocities in the area of Haynes Inlet.

d. Timing of Construction During Oyster Spawning Season.

One of the more significant and potentially meritorious issues in this case was raised by Dr. Chernaik in his oral presentation at the Sept. 21, 2011 hearing. This argument is essentially repeated in his October 10, 2011 memorandum. Therein, Dr. Chernaik cites a Master's thesis published by a graduate student with the Oregon Institute of Marine Biology (K. Sawyer 2011) which determined that the "settlement" season for Olympia oyster larvae begins in earnest in September, peaks in October and lasts until early December. This study conflicts with other studies from the Puget Sound, cited by the applicant, which concluded that settling begins in the first week of September and lasts until the second week of October. *See* Ellis Oyster Survey, at p. 4. Dr. Chernaik summarized Ms. Sawyer's results are summarized below.

> "Table 4 indicates that the maximum numbers of Olympia oyster settlers were counted on October 5, 2010 for almost all substratum types; this can be seen in the graph of total settlers per treatment (Figure 12) which illustrates the average density of settlers for all treatments on each collection date. Settlement varies significantly among the 20 collection dates with increased settlement from

September- November and a distinct settlement peak in October."[15]

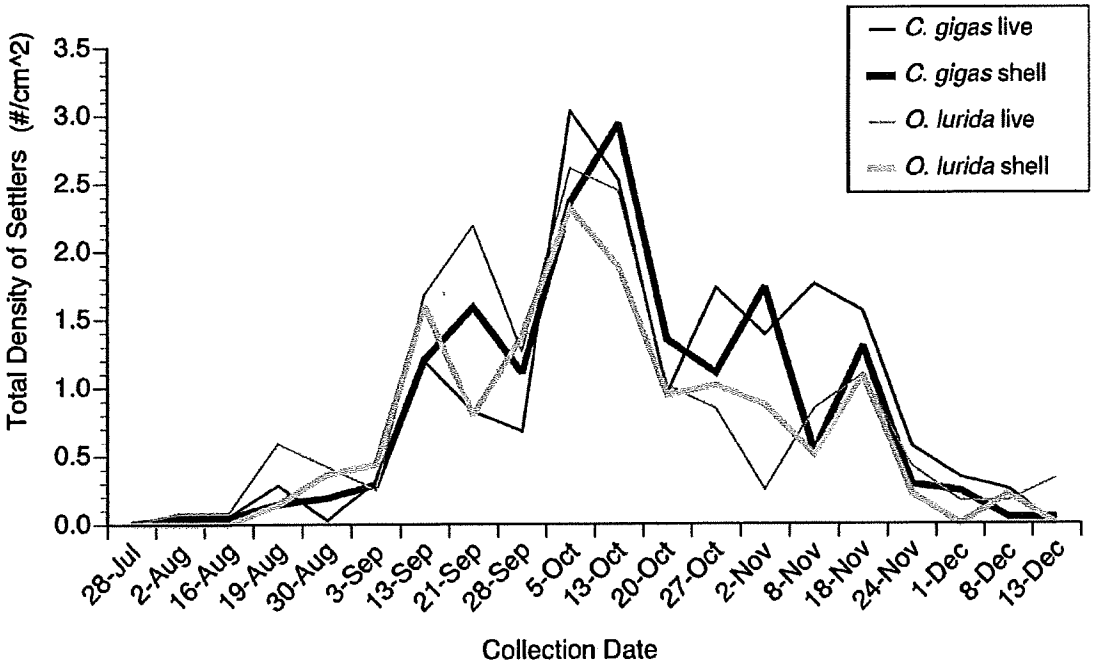

Figure 12. Total densities of Olympia oyster settlement (#/cm2) on each substratum throughout the season Settlement on all four substratum types follows the same temporal pattern.

Dr. Chernaik concludes as follows:

> The significance of these results is certain: not only would conditions placed on the construction of the Pacific Connector Gas Pipeline fail to protect Olympia oysters in Coos Bay, the timing of in-water work, beginning on October 1, would maximize the harm dredging activities in Haynes Inlet would have on the reproduction of Olympia oysters.

As a result, Dr. Chernaik contends that in order to protect Olympia oysters, pipeline construction should not be allowed to begin until the spawning season ends in early December.

Dr. Ellis rebuts Dr. Chernaik's argument in a letter dated October 17, 2011, which explains as follows:

> [Dr. Chernaik] contends that since the ODFW work period for Coos Bay is from October 1 to February 15 that suspended sediment generated during pipeline construction would occur at the

[15] Sawyer, K. (2011) " Timing of Settlement and Substrate Selection by Larvae of the Olympia Oyster (Ostrea lurida) in Coos Bay, Oregon." MsC Thesis, University of Oregon – Oregon Institute of Marine Biology, Charleston, OR. 53 pp.

most sensitive period for the larval oysters and cause widespread detrimental effects on Olympia oyster recruitment. This issue was addressed in our rebuttal testimony and is briefly summarized as follows:

"1. Results of detailed 3-dimensional water velocity and sediment modeling indicate that dispersion of fine sediments will be spatially limited to the immediate vicinity of the trenching, stockpiling and backfilling areas of activity.

"2. If fine sediments were to settle on hard substrates nearby to the construction area, it would be a very thin layer on the surface of the hard substrates and would not preclude larvae from attaching on the unaffected underside of hard substrates, which is their preferred location.

"3. Placement of Pacific oyster shells in the right of way as mitigation for direct impacts to Olympia oyster habitat (i.e., MP 2.9 to 3.2) will occur post-construction and therefore, will not be subject to any construction-related sedimentation."

See Ellis letter dated Oct. 17, 2011, at p.10. Dr. Steve Rumrill weighs in on this issue in his letter dated November 28, 2011. His letter is notable by its matter-of-fact tone and a general lack of advocacy for either party.[16] Dr. Rumrill states:

> The data generated by [Ms. Saywer's] thesis work documented that Olympia oysters exhibited a distinct peak in larval settlement in October that was preceded by a smaller period of elevated larval settlement in August. The thesis work by Ms. Sawyer has excellent reliability and represents the best available science regarding the timing of larval settlement by Olympia oysters in Coos bay. From the perspective of the Olympia oysters, it is advisable to avoid activities that disrupt deposited sediments and/or increases in the load of suspended sediments in October because the suspended sediments may become deposited on the limited surfaces of suitable hard substrate (*i.e.* oyster shall, rock, cobble) and interfere with the settlement and attachment of the Olympia Oyster larvae.

[16] Dr. Rumrill has, surprisingly, not taken center stage in this proceeding, despite the fact that he likely has more expertise on Haynes Inlet Olympia Oysters than any of the other scientists. No doubt, he faced a concerted lobbying effort by both sides to solicit his testimony. Nonetheless, it is difficult to assess what to make of his overall lack of active participation in this process. Overall, the hearings officer believes that his lack of participation tends to favor the applicant, as it suggests a lack of concern on Dr. Rumrill's part.

See Rumrill letter at p. 6. The hearings officer assigns a high degree of credibility to the statements of Dr. Rumrill, due to his specific expertise with this particular bi-valve species. Nonetheless, it is unfortunate that Dr. Rumrill does not address the issues set forth in the Oct. 17, 2011 Ellis letter.

The hearings officer finds that that this is one of the more difficult issues in the case, and one that requires considerable thought and careful examination. The 2011 K. Sawyer study, viewed in light of Dr. Rumrill's endorsement, constitutes substantial evidence supporting the conclusion that pipeline construction could have negative effects on larval attachment if it results disrupted deposited sediments and/or increases in the load of suspended sediments in October. Since the Sawyer study is specific to Haynes Inlet, it carries with it substantial evidentiary weight. The only real weakness in the Sawyer evidence is that it only documents one season's worth of data (*i.e.* 2010). Since we know from the record that spawning is temperature dependent, and we know from common experience that 2010 was a cool summer throughout Oregon, one can draw an inference that 2010 may have been a late spawning season as compared to other years. That fact alone may account for the difference between Sawyer's results and the results of other studies from Puget Sound. Nonetheless, there is nothing to say that the year that pipeline construction takes place might not also be a late spawning season, and therefore the hearings officer is not dismissive of the Sawyer study on those grounds alone.

However, even if one assumes that the dredging activity will interfere, to some extent, with one spawning season, it does not follow that the construction activities result in management of the district that fails to "protect [the zoning district's] resource productivity." Under an unlikely worse-case scenario, the pipeline construction could - in theory - cause the complete failure of one spawning season in the portion of Haynes Inlet affected by siltation. Even that potential result, though unfortunate if it happened, would only set back the *recovery* of the Olympia oyster. It would not be expected have an effect on the adult Olympia oysters in the remaining portions of Haynes Inlet, nor would it reduce the overall population of Olympia oysters, given their long life spans.

The hearings officer finds it difficult to imagine a scenario where sedimentation from the construction activities will result in long-term or permanent siltation of Olympia oyster habitat. Given the effect of tidal activity in the bay and the high rainfall experienced in the Coos Bay area, there is sufficient hydraulic activity occurring in the Haynes Inlet to cause sediment to wash off of hard substrate. This is particularly true since the causeway creates a funneling effect that increases flow velocities in the southern portion of Haynes Inlet. Thus, under this worst-case scenario, the biggest effect on Olympia oysters would be a flat-lining of the population in a portion of the Haynes Inlet for one season. Such an effect would be temporary, and, in the hearings officer's estimation, insignificant to the overall population of Olympia oysters in Haynes Inlet.

Moreover, the applicant has already indicated that it would use turbidity curtains if needed to isolate in-water work zones and contain increased suspended sediment to a defined area. *See* Ellis Oyster Survey, §4.1.3 at p. 25. While these turbidity curtains are not likely

going to contain *all* sediment,[17] their effect would be substantial in limiting harm to Olympia oyster beds.

The hearings officer finds, in addition, that the "worst case scenario" set forth above is unlikely to occur. As an initial matter, Olympia oyster larvae will still be able to attach to the underside of hard substrate, even if the top and sides of such substrate are silted too heavily to allow for attachment. Moreover, even under the opponent's "October-peak" hypothesis, a significant number of oyster spat will have settled in the August and September time frame. It is assumed from the general discussion by the parties, that these early-settlers will not be affected by late season (October and later) siltation. Third, the applicant's statement that the "dispersion of fine sediments will be spatially limited to the immediate vicinity of the trenching, stockpiling and backfilling areas of activity," is reasonable and likely correct.

One final point warrants discussion. The applicant is already operating under a reduced work-window of 1 October to 15 February. Assuming that the applicant starts its in-water construction activities on October, it seems unlikely that the construction activities will have progressed far enough to reach the areas of oyster habitat (near the causeway, from Milepost 2.6 to MP 3.2.). Regardless from which direction construction begins, it will have to install at least one mile of pipe before reaching these critical areas. The applicant estimates that it can install 800 feet of pipe per week, which means that, at best, the applicant will only have traversed 3200 feet by the end of October. The high-density oyster beds near the causeway are fully a mile from either starting point within Haynes Inlet. Thus, given that schedule, it is unlikely that construction would reach the critical oyster habitat areas near the bridge until December at the earliest.

The hearings officer makes a number of recommendations:

1. It seems that the mitigation plan should be effectuated either in late-July or early August following the construction season. This would ensure that the oyster shells have been in the water only a short time prior to the time the larval oysters seek to attach to the shells.

2. Based on the potential for the larval settlement peak in October, PCGP should not be allowed to conduct dredging operations between Milepost 2.6 to MP 3.2. during the month of October.

These conditions will ensure that the potential harm is reduced to such a degree that there is at most a *de minimis* or insignificant impact on aquatic resources such as the Olympia oyster.

4. Discussion of Other Issues Raised by Opponents.

This section responds to issues raised by opponents that do not fit within the other sections set forth above.

[17] *See* discussion on Chernaik letter dated Sept. 14, 2011, at p. 13.

a. Alternative Routes.

In her letter dated October 10, 2011, Jody McCaffree invites the hearings officer to apply Plan Policy 14 in a manner to compel an alternative route. However, that issue was not raised to LUBA and therefore the issue is waived on remand. The local government is entitled to limit the scope of the remand proceedings to issues that were the basis of the remand. *Hearne v. Baker County*, 89 Or App 282, 748 P2d 1016, *rev denied*, 305 Or 578 (1988); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419 (1990), *aff'd*, 106 Or App 266, *rev denied*, 311 Or 349 (1991). Coos County did so in this case.

Even if the issue were not waived, Ms. McCaffree's argument is wrong on the merits. In this case, FERC decided that the route it approved was better than a host of alternative routes. The County is not in a position to second guess FERC on this issue. But even if it were, Plan Policy 14 was not written in a manner that makes it obvious that it applies to linear features such as a pipeline. The policy sets up a preference for using urban or urbanizable lands as well as exception lands prior to using lands subject to Policy 14. The Plan policy simply has no applicability to linear features such as pipelines that traverse multiple zoning districts.

In her letter dated October 17, 2011, Ms. McCaffree presents additional arguments in favor of an alternative route for the pipeline. The hearings officer finds that these arguments are beyond the scope of issues in this remand proceeding, and are waived.

b. Impacts Results from other Pipeline Projects.

Some of the opponents, including Mr. Robert Fischer, submit photos and articles related to negative environmental consequences from other pipeline construction projects in other states and countries. In Mr. Fischer's case, much of this evidence comes from what the hearings officer assumes is a newspaper or periodical ("The Courier Mail") and a website with the domain name of www.dredgingtoday.com.

There are three primary problems with this kind of anecdotal evidence. First, the persons submitting this evidence have not provided a foundation to support the reliability and credibility of the source, its political perspective, etc. Depending on the source, the information presented in such materials could be one-sided, misleading, taken out of context, or completely false.

Second, the articles themselves provide varying theories as to what is causing the negative effects on the environment, and do not conclusively fault the LNG-related construction. Third, even making the huge leap of faith that the negative facts stated in these articles are true, there is no evidence to suggest that the situations are sufficiently analogous to support the conclusion that the adverse effects happening in those cases will necessarily happen in this case.

Thus, while it is possible that newspaper articles and other reporting can constitute substantial evidence in some cases, the hearings officer finds that a reasonable decision-maker would not draw any conclusions concerning the PCGP case based on this evidence. While interesting, that is not evidence a reasonable person would rely upon to make a decision regarding potential impacts on Olympia oysters in the current project.

c. Scour.

Ms. McCaffree points out that in some cases, pipelines have been scoured out by big storm events. However, this issue is beyond the scope of ~~eth~~ the remand proceedings. Moreover, this pipeline is going to be encased on four feet of concrete, a feature which was apparently not present on the other pipelines she mentioned that were affected by scouring action.

d. Pipeline Companies Don't Keep Their Promises.

Ms. McCaffree states that "gas and oil companies are notorious for promising all sorts of things but * * * they do not always follow through with the things they promise." McCaffree Letter dated October 10, 2011. Ms. McCaffree is undoubtedly correct that things do not always go according to plan. However, the suggestion that land use applications should be denied because the applicant *may* not comply with conditions of approval is not well taken. As an initial matter, the success or failure of the project will, to some degree, depend on how aggressive the County is with regard to its enforcement of conditions. The hearings officer cannot assume that the applicant will not comply, or that the county's enforcement of problems will be ineffective. More importantly, the land use process is not intended to guarantee that things will go according to plan. The reality is that the land use process only ensures that there IS a plan, and that engineering solutions to potential problems have been devised and are feasible and likely to succeed. If the hearings officer believed that the applicant's plan was not feasible and likely to succeed, a recommendation for denial would have been forthcoming.

e. Sediments from New Carissa.

Ms. McCaffree notes that contaminates from the New Carissa may be re-suspended by the PCGP pipeline. McCaffree Letter dated October 10, 2011, at p. 3. This issue was not preserved sufficiently to be considered on remand. On the merits, the issue is speculative, in the absence of something more in the way of scientific evidence tending to substantiate the claim. *Palmer v. Lane County*, 29 Or LUBA 436 (1995) (unsupported statements are mere conclusions, and do not constitute evidence). Even if the contaminants exist in the sediments, there is no information regarding their concentration

f. Dredging of Coos Bay Navigation Channel.

In her letter dated October 17, 2011, Ms. McCaffree argues that there will be a need to dredge the Coos Bay navigation channel to accommodate the transit of LNG vessels in Coos Bay, and that such dredging should have been considered as part of the CHE modeling. Mr. Bob Braddock of JCEP addresses this issue in his letter dated October 30, 2011. Therein, Mr. Braddock explains that Ms. McCaffree has her facts wrong and there is no need for additional channel dredging to accommodate LNG tankers. The Braddock letter is attached as Exhibit 2 to the applicant's November 14, 2011 submittal.

The hearings officer finds that "the navigational channel within the Coos estuary is routinely dredged to maintain adequate depths for commercial shipping." Groth & Rumrill 2009. Given this fact, the hearings officer finds that the results of routine dredging activity would already be accounted for in the data sets used by CHE modeling. Even if the channel

needs to be deepened to accommodate LNG-related shipping, there is no evidence in the record that suggests that that deepening channel would invalidate Dr. Shepsis's model. To the extent that Ms. McCaffree is asking the hearings officer to draw an inference based on common sense, the hearings officer finds that the issue is ~~no~~ not so obvious that such a deduction necessarily flows from the stated proposition.

g. Compliance with CCZLDO 5.7.300(4)(B).

On page 5 of her letter dated October 10, 2011, Ms. McCaffree argues that the applicants have not complied with CCZLDO 5.7.300(4)(B), because "it does not appear the record contains proper authorizations for written and oral testimony by Randy Miller, Vladimir Shepsis or Robert Ellis on behalf of the Pacific Connector Gas Pipeline, L.P...." The provision at issue states:

> ***4. Representatives***
>
> ***A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses[18] for any party, but may not appear as a legal representative.***
>
> ***B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:***
>
> ***(1) Be written on the group, company, or organization's official letterhead;***
>
> ***(2) Name the person authorized to appear on behalf of the group, company or organization;***
>
> ***(3) Specify the scope of the authorization; and***
>
> ***(4) Contain the signature of a person with authority to grant the authorization.***

[18] CCZLDO 5.7.300(6) is entitled "Definitions," and provides:

> ***As used in this Article the following definitions shall apply:***
>
> ***A. "Party" means any person, organization or agency who has established standing under the provisions of this Article 5.8.***
>
> ***B. "Witness" means any person who appears and is heard at a hearing and is not a "party". A witness shall not be considered a "party" unless the Board of Commissioners determines that the person is a party in accordance with Article 5.8.***

LDO 5.7.300 Subsection (4) generally describes who may appear on behalf of parties and organizations in county land use proceedings and requires written evidence that certain individuals are authorized to testify on behalf of parties where such parties are not represented by an attorney. The purpose of this code provision is to ensure that persons who claim to be appearing on behalf of another individual, group, or company are actually authorized to speak on behalf of the individual, group or company.

i. Failure to Raise in LUBA Appeal

LUBA cases are very clear that, when a decision is back before the county on remand, opponents may not raise issues that "could have been raised, but were not raised" in the first LUBA appeal. *Wetherell v Douglas County*, 60 Or LUBA 131, 137 (2009) (citing *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992)). This issue could have been raised by the opponents in the prior proceedings before the hearings officer, where the applicant had even more employees and consultants who testified on its behalf, and could have been raised and resolved by LUBA. Because the opponents failed to raise this issue at the time when they could have done so, they have waived the issue and cannot raise it for the first time on remand. LUBA's Order on remand is very narrow, and limits the county's review to two narrow issues; those issues do not include authorization of the applicant's witnesses under LDO 5.7.300(4).

ii. Interpretation of Authorization Requirement

As stated above, the purpose of the authorization requirement in LDO 5.7.300(4) is to prevent situations where consultants or other individuals appear at the land use hearing and claim to be representing a group or company when they have no authority to do so. This provision was added to the LDO in 2006 after this situation occurred several times at county hearings.

This code provision is not intended to apply where, as in the present case, the applicant is not only represented by attorneys who coordinate the submittal of all testimony, but the applicant's representatives are also present at the hearing and provide direct oral testimony to the hearings officer. In other words, PCGP obviously consented to the individuals who were testifying on its behalf because those individuals were identified in PCGP's attorneys in their written materials and introduced by PCGP's attorneys at the outset of the hearing. Further, the senior management of PCGP was present at the hearing and PCGP's Project Manager and Staff Environmental Scientist Randy Miller was one of the individuals who provided testimony on behalf of the company at the hearing.

The interpretation being urged by the opponents is not the outcome intended by the county when this code provision was adopted. Clearly the individuals who appeared and testified on behalf of the applicant were authorized to do so, and the opponents have not attempted to explain how the failure to include the letters from the applicant has harmed their rights to a full and fair hearing.

An analysis of the language of LDO 5.7.300(4) reveals that the more plausible interpretation of that section is that, where a party to the proceeding is represented by an attorney,

that attorney may provide any necessary authorization regarding individuals who submit evidence on behalf of the represented party. LDO 5.7.300(4) provides, in relevant part:

4. Representatives

   A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.

   B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

      (1) Be written on the group, company, or organization's official letterhead;
      (2) Name the person authorized to appear on behalf of the group, company organization;
      (3) Specify the scope of the authorization; and
      (4) Contain the signature of a person with authority to grant the authorization.

First, section (A) expressly provides that a party may represent themselves or be represented by an attorney. In the present case, at the hearing the applicant both represented itself (via the testimony of Project Manager Randy Miller) and was also represented by attorneys (Mark Whitlow and Roger Alfred). One week prior to the hearing, the applicant's attorneys submitted a letter to the hearings office dated September 14, 2011 that identified certain individuals who would appear at the hearing on behalf of the applicant and also attached and summarized written testimony from those individuals. At the hearing, the attorneys also introduced each individual who would be providing direct oral testimony to the hearings officer.

As addressed above, because the project manager for PCGP was present at the hearing and provided direct testimony to the hearings officer, and because PCGP was represented by legal counsel at the hearing, there is no basis to challenge the authority of other witnesses who appeared at the hearing on behalf of the applicant. If someone without authority attempted to testify, obviously the attorneys or the project manager would have objected.

Nonetheless, to the extent that subsection (B) creates a requirement for written authorization under these circumstances, such written authorization was provided by the attorneys for the applicant in their correspondence dated September 14, 2011, October 10, 2011, October 17, 2011, November 14, 2011, and November 28, 2011. Those letters expressly identify the individuals who are authorized to present testimony on behalf of the applicant and describe the scope of their testimony.

III. CONCLUSION

For all the reasons set forth above, the hearings officer finds that the applicant has met its burden of proof to demonstrate that the proposed pipeline construction will reduce any potential harm to the Olympia Oyster population in Haynes Inlet to such a degree that there is at most a *de-minimis* or insignificant impact on the oyster resources that the management objectives for the aquatic zoning districts 11-NA and 13A-NA require to be protected.

PCGP REMAND – CONDITIONS OF APPROVAL

Property Owner Signatures amended Condition 20

No. 20. This approval shall not become effective as to any affected property in Coos County until the Applicant has acquired ownership of an easement or other interest in all properties necessary for construction of the pipeline, and/or obtains the signatures of all owners of the affected property consenting to the application for development of the pipeline in Coos County. Prior to this decision becoming effective, the County shall provide notice and opportunity for a hearing regarding compliance with this condition of approval and the property owner signature requirement. County staff shall make an Administrative Decision addressing compliance with this condition of approval and LDO 5.0.150, as applied in this decision, for all properties where the pipeline will be located. The County shall provide notice of the Administrative Decision as provided in LDO 5.0.900(B) and shall also provide such notice to all persons requesting notice. For purposes of this condition, the public hearing shall be subject to the procedures of LDO 5.8.200 with the Board of Commissioners serving as the Hearings Body

CONDITIONS ON REMAND

Oyster Mitigation Plan

No 1. The applicant shall comply with the terms and conditions of the applicant's proposed Olympia oyster mitigation plan prepared by Bob Ellis of Ellis Ecological Services, Inc. dated October 7, 2011 (the "Mitigation Plan"), as supplemented and modified by the following mitigation measures:

a) The applicant's compliance with the Mitigation Plan will be administered through permits pursuant to the Clean Water Act Section 404 by the Army Corps of Engineers (Corps), pursuant to Section 401 of the Clean Water Act by the Oregon Department of Environmental Quality (DEQ), and pursuant to Oregon's Removal-Fill Law (ORS 196.795-990) by the Oregon Department of State Lands (DSL). These permitting agencies will be provided with copies of the Mitigation Plan, as modified by this condition, and approval of the permits issued by the Corps, DEQ and DSL may, as appropriate, incorporate the terms of the Mitigation Plan.

b) As part of the state permitting process for the pipeline discussed in subsection (a) above, the applicant shall consult with ODFW and OIMB on the specific details regarding how best to accomplish the actual amount and placement of Pacific oyster shells addressed in Section 4.2.1 of the Mitigation Plan in order to ensure success of the

project, including ideal depth and breadth of coverage of new hard substrate, specific methods for dispersal (*e.g.*, bagged vs. loose), and best locations for placement of substrate within the pipeline right of way .

c) Unless modified under the direction of ODFW during the consultation described above, the applicant will establish appropriate baseline conditions for the Olympia oyster mitigation effort in Haynes Inlet using the following guidelines for a before-after control impact study design in order to ensure that any impacts to Olympia oysters are insignificant or *de minimis*:

   i. The "Before" conditions shall be determined by field surveys of the distribution, abundance, status, and condition of existing Olympia oysters: (a) within the "Impact Area," *i.e.*, the 250-foot pipeline right of way within the intertidal portion of Haynes Inlet; and (b) within an appropriate "Control Area" in another portion of Coos Bay that will not experience any influence from construction of the pipeline. The precise location of the Control Area will be selected in consultation with ODFW.

   ii. The surveys of the Control and Impact Areas shall be conducted immediately prior to construction of the pipeline (Before), and repeated annually over a period of five years following construction of the pipeline (After) to encompass the lifespan of individual Olympia oysters.

d) Monitoring of the "Relocation Area" shall be undertaken as described in Section 4.3 of the Mitigation Plan.

No. 2. In-Water Work Periods

(a) If the applicant's mitigation plan is approved by other regulatory agencies, the dispersal of Pacific oyster shells within the pipeline right of way will be effectuated either in late July or early August following the construction season.

(b) Based on the potential for the larval settlement peak in October, the applicant should not be allowed to conduct dredging operations between Milepost 2.6 to MP 3.2 during the month of October, unless otherwise modified or agreed to by the Oregon Department of Fish and Wildlife.

No. 3. Turbidity

The applicant must comply with all DEQ regulations and requirements regarding turbidity. The applicant shall employ turbidity curtains and/or other appropriate control measures to assure that turbidity does not exceed the levels specified in the applicant's DEQ water quality permit.

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 DODDS AND RANKER	)	FINAL DECISION AND ORDER NO. 19-11-069PL

NOW BEFORE THE Board of Commissioners sitting for the transaction of County business on the 26th day of November, 2019, is the matter of the appeal of the Planning Director's June 21, 2019, 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 appointed 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 September 30, 2019. At the conclusion of the hearing the record was closed.

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners on October 10, 2019. Staff presented some minor 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 15, 2019. 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 26, 2019, for final approval.

On November 15, 2019, the meeting on deliberation was opened to provide an additional opportunity to the Board of Commissioners to declare any potential ex-parte contacts or conflicts of interest. All Commissioners revealed potential ex-parte communications and those present were allowed to challenge and rebut the substance of the Commissioner'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 June 21, 2019, 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 26th day of November 2019.

BOARD OF COMMISSIONERS:

COMMISSIONER

COMMISSIONER

COMMISSIONER

RECORDING SECRETARY

APPROVED AS TO FORM:

Office of Legal Counsel

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 THE SIXTH EXTENSION REQUEST FOR COUNTY FILE NO. HBCU 10-01 / REM 11-01, AKA: THE "ORIGINAL ALIGNMENT") COOS COUNTY, OREGON

FILE NO. AP 19-004 (APPEALS OF COUNTY FILE NOS. EXT-19-04).

NOVEMBER 26, 2019

I. INTRODUCTION

The Board of Commissioners ("Board") has received and reviewed the record of proceedings and the Hearings Officer's Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners dated October 10, 2019 ("Recommended Order"). In this decision, the Board adopts the Recommended Order, as modified, denies the appeal, and approves the requested application.

A. Nature of the Local Appeal

The appellants appealed the Planning Director's decision to allow the applicant Pacific Connector Gas Pipeline, LP, (hereinafter "Applicant" or "Pacific Connector"), an additional one-year extension to implement its development approval for HBCU 10-01, Final Order 10-08-045PL, as amended on remand from LUBA, County File No. REM 11-01, Final Order 12-03-18 PL. The staff decision under appeal approves the permit for a sixth one-year extension. The staff decision for the file, which was assigned file No. EXT-19-04 is dated June 21, 2019. Staff assigned the file No. AP 19-004 to the appeal.

Previous one-year extensions are documented as follows:

- File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).
- File No. ACU 15-07/ AP-15-01, Final Ord. No. 15-08-039PL (Oct. 6, 2015).
- File No. ACU-16-013 (no appeal filed after staff decision)
- File No. EXT-17-005/ AP-17-004, Final Ord. No. 17-11-046PL (Dec. 19, 2017).
- File No. EXT 18-003 / AP-18-003, Final Order No. 18-11-073PL (Nov. 20, 2018).

B. Detailed Case History of the Pipeline

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 Pacific Connector's request for a Conditional Use Permit ("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"). *Citizens Against LNG, Inc v. Coos County*, 63 Or LUBA 162 (2011).

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 Board adopted the Hearings Officer's recommendation 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 December 5, 2013, Pacific Connector submitted an application requesting approval of another alternative segment of pipeline route, known as the "Blue Ridge Alternative Alignment." The Hearings Officer recommended approval of these route amendments and the Board accepted those recommendations on October 21, 2014. Final Decision and Order HBCU-13-06; Order No. 14-09-0062PL.

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 Approved, 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). The Hearings Officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. 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. File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).

On November 12, 2014, Jody McCaffree and John Clarke filed a Notice of Intent to Appeal the Board's decision to LUBA. Petitioners 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 Board 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 - addition 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 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 Pacific Connector's application for a Certificate. Nonetheless, on March 16, 2016, Pacific Connector filed for a third extension of the original pipeline alignment, which 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 Pacific Connector can 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 the first one-year extension request for the Brunschmid and Stock Slough alignments, (HBCU-13-04 /ACU- 16-003). No local appeal was filed.

On April 11, 2016, Staff approved the third one-year extension request for the original alignment (HBCU-10-01 / ACU-16-013). No local appeal was filed.

On December 28, 2016, Staff approved the first one-year extension request for the Blue Ridge alignment, (HBCU-13-06 /EXT 16-007). 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, Pacific Connector submitted a second extension request for the Brunschmid and Stock Slough alignments (County File No. EXT-17-002). The Planning Director approved this extension on May 21, 2017. The opponents did not file an appeal of the Planning Director's decision.

On March 30, 2017, Pacific Connector submitted a 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, which staff assigned file no. AP-17-004. The Hearings Officer recommended approval of the extension, and that recommendation was approved by the Board on December 19, 2017 (Final Decision and Order No. 17-11046PL). No further appeal ensued.

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.

On February 21, 2018, Pacific Connector submitted a third extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on

May 18, 2018 (HBCU-13-04 / EXT-18-001). The opponents filed a timely appeal of the Planning Director's decision. AP-18-001. The Board issued a final decision approving the extension Nov. 20, 2018 (No. 18-11-072PL). Opponents appealed to LUBA.

On or about March 20, 2018, Pacific Connector filed a fifth extension request of the original pipeline alignment. (EXT 18-003). The Planning Director approved this extension request on May 21, 2018, and followed that up with a corrected notice on May 24, 2018. Opponents filed a timely appeal, and the Board issued a final decision on Nov 20, 2018. AP-18-002. Opponents appealed to LUBA.

LUBA consolidated the two appeals (AP-18-001 and AP-18-002). On April 25, 2019, LUBA issued a Final Opinion and Order in which it rejected challenges to the Board's decision to grant additional extensions. *See Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019). Opponents filed a petition for reconsideration with the Court of Appeals, which the Court denied.

On October 18, 2018, the Board adopted certain legislative amendments to the CCZLDO, including CCZLDO 5.2.600, which governs time extensions of permits. *See* Ord. 18-09-009PL. Opponents appealed the Board's decision to LUBA, but both LUBA and the Court of Appeals denied opponents' contentions on appeal. *McCaffree v. Coos County*, __ Or LUBA ___ (LUBA No. 2018-132, June 6, 2019). *aff'd without opin.*, 299 Or App 521 (2019).

On or about March 28, 2019, Pacific Connector filed the current (sixth) extension request of the original pipeline alignment. (EXT 19-004). The Planning Director approved extension request on June 21, 2019. Opponents filed a timely appeal on July 1, 2019. AP-19-004. The Hearings Officer held a noticed public hearing, but the appellants did not attend and did not submit additional testimony in support of their appeal. At the public hearing, the Hearings Officer accepted testimony from Pacific Connector and various opponents of the project. The Hearings Officer closed the public hearing and the record.

C. Timeline of Events.

The timeline of key dates for this application is set forth below:

- Application Submitted — March 28, 2019
- Staff Decision — June 21, 2019
- Local Appeal filed — July 1, 2019
- Public hearing, record closed — Sept 30, 2019
- Hearings Officer Recommendation — October 10, 2019
- Board Deliberations — November 15, 2019

II. LEGAL ANALYSIS.

A. Appellants' "Objection" Has No Merit.

Appellants state that they "object to the numerous errors stated in the Planning Director's decision's 'background' statement because many statements are not true and they are not supported by substantial evidence." The Board finds that appellants' generalized statement is an insufficient way to preserve error in an appeal. If an appellant seeks to challenge specific findings of fact, the appellant has the obligation to identify those issues with sufficient specificity to enable review.

The appellants further state that "[a]ll of the issue[s]raised in the previous proceedings on the 2018 extensions are pending resolution on appeal and have not been resolved so they can be raised again, here." As stated above, opponents' appeals of the 2018 extensions failed at both LUBA and the Oregon Court of Appeals. Further, the Court of Appeals denied opponents' petition for reconsideration. Accordingly, all appeals that are available by right have been exhausted.

B. 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 were amended on October 2, 2018 (County File No. AM-18-005), and the current version is reproduced below.

New Version:
SECTION 5.2.600 EXPIRATION AND EXTENSION of Conditional Uses

1. ***Permit Expiration Dates for all Conditional Use Approvals and Extensions:***
    a. ***On lands zoned Exclusive Farm, Forest and Forest Mixed Use:***
        (1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.
        (2) A county may grant one extension period of up to 12 months if:
            (a) An applicant makes a written request for an extension of the development approval period;
            (b) The request is submitted to the county prior to the expiration of the approval period;
            (c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

(d) The county determines that the applicant was unable to begin or continue development during the approval period[1] for reasons for which the applicant was not responsible.

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

(3) Approval of an extension granted under this rule is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.
(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.
(5) (a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.
(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.
(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).
(7) There are no limit on the number of extensions that can be applied for unless this ordinance otherwise allows.

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

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

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

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

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

CCZLDO 5.2.600. 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.

The opponents contend that a previous version of CCZLDO 5.2.600 (*i.e.* the 2013 version of the extension criteria) apply to this case, as opposed to the current version. For example, in the appeal narrative, the appellants state that:

> "[a]ny changes to the provisions since 2010 or since 2013 are not applicable to the extension requests because the provisions in effect at the time of the application constitute the applicable goal posts for subsequent decisions related to the permits. The extension of the permits on non-resource lands has exceeded the applicable time limit of two years."

See Appeal Narrative at p. 2.

ORS 215.427(3) is known as the "goal post" statute. It states that the law that applies to a land use application is the law in effect on the date the application is filed:

> ***(3)(a) If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.***

Appellants are correct that the "goal post" statute applies to Pacific Connector's application, though it does not have the effect appellants contend that it does. The version of CCZLDO 5.2.600 in effect when Pacific Connector filed its application (March 29, 2019) was adopted in

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

2018. Pursuant to ORS 215.427(3), the 2018 version of CCZLDO 5.2.600 applies to the application. Although the appellants contend that ORS 215.427(3) locks in the extension criteria that govern any further extension request to an approved permit to those criteria that were in effect when the original permit application was first approved, the Board finds that this contention is not supported by any plausible reading of ORS 215.427(3), and LUBA has therefore correctly rejected appellants' contention. *See Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019).

ORS 215.427(3) is limited to locking in the "standards and criteria" that apply to the particular pending application. Nothing in ORS 215.428(3) requires a county to apply standards in effect at the time one development application is submitted to a distinct and subsequent development application. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991). In this case, the application for an extension is governed by different criteria than governed the initial approval decision, and the filing of the original application does not vest the criteria for an extension.

C. <u>Pacific Connector Has Established Compliance with the Applicable Standards for a Conditional Use Extension Request on Farm and Forest Zoned Lands.</u>

1. **<u>The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600.1.a.(2)(a).</u>**

CCZLDO §5.2.600.1.a.(2)(a) provides as follows:

> ***(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;***

The Board finds that Pacific Connector's application and attachments demonstrate compliance with the code requirements at CCZLDO §5.2.600.1.a.(2)(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. Pacific Connector submitted a written narrative and application, which specifically requests an extension, on March 28, 2019, which is within the development approval period.

This criterion is met.

2. **<u>Pacific Connector's request was submitted to the County prior to the expiration of the approval period. § 5.2.600.1.a.(2)(b).</u>**

CCZLDO § 5.2.600.1.a.(2)(b) provides as follows:

> ***(2) A county may grant one extension period of up to 12 months if:***
> *****
> ***(b) The request is submitted to the county prior to the expiration of the approval period;***

The approval period for the fifth extension expired on April 2, 2019, and it was incumbent upon Pacific Connector to submit an extension request prior to that date. Pacific Connector complied with this requirement by submitting the "Application for Extension" on March 28, 2019.

This criterion is met.

3. **Pacific Connector was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible. §5.2.600.1.a.(2)(c) & (d)**

CCZLDO §5.2.600.1.a.(2)(c) & (d) provides as follows:

> ***(2) A county may grant one extension period of up to 12 months if:***
> * * * * *
> ***(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[1] for reasons for which the applicant was not responsible.***
>
> ***Coos County has and will continue to accept reasons for which the applicant was not responsible as, but limited too, financial hardship, death or owner, transfer of property, unable to complete conditions of approval and projects that require additional permits. The County's Ordinance does not control other permitting agency processes and the County shall only consider if the applicant has requested other permits as a valid reason and to show they are attempting to satisfy conditions of approval. This is a different standard then actually showing compliance with conditions of approval. This also, does not account for other permits that may be required outside of the land use process.***

To approve this extension application, the Board must find that Pacific Connector has stated reasons that prevented it 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.a.(2)(c), (d).

In the recent appeal of two other pipeline extension decisions, LUBA affirmed (and quoted) the County's determination that applied a "reasonable efforts" test to determine whether

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

Pacific Connector was responsible for not yet obtaining permits from other agencies to allow development of the pipeline to proceed:

> 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.

Williams v. Coos County, __ Or LUBA __ (LUBA Nos. 2018-141/ 142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019). The Board finds that Pacific Connector has presented credible evidence to support that it has made reasonable efforts in this case. In support of this conclusion, the Board relies upon the following:

In its application narrative for the extension, Pacific Connector explains why it has not begun construction on this alignment:

> 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.

Continuing, Pacific Connector further states:

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, Exhibit 4 at 8.

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 (April 2018-April 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. Furthermore, due to delays in its review associated with the shutdown of the federal government, FERC has recently issued a revised schedule extending the deadline for completion of its environmental review and final order for the Jordan Cove Energy Project, which includes the Pipeline. *See* FERC Notice of Revised Schedule for the Environmental Review and the Final Order for the Jordan Cove Energy Project in Exhibit 8. The certificate request is still pending before FERC. *Id.* Applicant is not responsible for FERC's lengthy review process and delays of the same.
>
> 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.

The Board has reviewed the evidence in the record regarding the implementing steps taken in the past 12 months by Pacific Connector and agrees that such actions are sufficient to show that Pacific Connector is being diligent in pursuing its permits. The Board agrees with the above-quoted analysis from Pacific Connector and adopts it as findings for this case.

The appellants argue that "the applicant has not been diligent in pursuing a dispositive permit." The appellants note, correctly, that DEQ denied its DEQ permit application in part because it did not submit sufficient information to obtain the permit. However, the DEQ permit is an extremely complex permit, and even the letter of denial is 80+ pages long. DEQ did invite Pacific Connector to re-apply for the permit, so the DEQ denial is not dispositive of the project. Under these circumstances, it would be unjust to deny an extension to the County permit.

For the same reason, the Board also does not fault Pacific Connector for proposing "significant changes" to the pipeline route. If Pacific Connector did not propose significant changes along the way, the opponents would complain that Pacific Connector is not being responsive to their concerns. Obviously, in a project of this magnitude, there are going to be changes to the project as time goes on. Most of the proposed changes are done to be responsive to FERC and other agencies, which is exactly what is supposed to happen during a complex permitting project. The Board will not fault Pacific Connector for proposing changes midstream, and in fact, finds Pacific Connector's willingness to propose changes to be laudable. The opponents' views on this point seem extreme, unworkable, and unjust.

The appeal narrative argues that the fact that Pacific Connector's preferred alignment proposed in the current FERC application is different than the alignment approved by Coos County disproves Pacific Connector's claim that the delay in the FERC proceedings is actually holding up implementation of the County permit. *See* Appellant's Narrative, at p. 4. This argument was raised and rejected by the Board in the local proceedings that resulted in previous extensions and is a "collateral attack" on the previous extension approvals. Moreover, LUBA affirmed the Board's previous determination on appeal:

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

Williams, __ Or LUBA at ___ (slip op. at 10).

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 Board can tell, the argument is intended to relate to CCZLDO 5.2.600.1.a.(2)(c) and (d) 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 Pacific Connector 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.

The appellants are also wrong to the extent that they contend that "pursuing additional [required] permits" does not provide valid grounds for granting an extension. They contend that Pacific Connector is required to start "actual construction" in order to be eligible for a permit extension. The argument is not well-developed and is difficult to follow. However, this argument does not assist the appellants. To be granted an extension, Pacific Connector need only show that "reasons" exist why "development" did not occur. Even assuming the appellants are correct that "development" is the same as "construction / ground breaking" (an issue the Board does not decide), the inability to obtain permits despite reasonable efforts would be a reason to grant an extension despite not breaking ground, unless Pacific Connector is somehow foreclosed as a matter of law from obtaining those needed permits.

4. <u>The Board's Decision at Issue Will Constitute a Land Use Decision.</u>

CCZLDO § 5.2.600.1.a.(3) provides as follows:

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

Notwithstanding the language in this subsection, at Pacific Connector's request, the County has processed this request pursuant to the City's Type II procedures. The Board finds that the Type II process has provided for greater public notice and opportunity for public comment (including an appeal hearing and Board-level decision) than would have occurred if the County followed the process under this subsection. Further, the Board finds that the County's

land use decision is a final land use decision, and appeal of that decision will be as determined by Oregon law, not this code section.

5. <u>The Criteria Governing the Pipeline Permit Have Not Changed.</u>

CCZLDO § 5.2.600.1.a.(4) provides as follows:

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

This request is Pacific Connector's sixth request for an extension of the original approval. As a result, the County must find that, for that portion of the alignment located on resource land, "applicable criteria for the decision have not changed." CCZLDO 5.2.600.1.a.(4). The time period that the Board will consider consists of the time period that the last permit extension was in place: April 2, 2018 to April 2, 2019. Legislative Amendments that occurred prior to April 2, 2018 are not relevant to this sixth extension request.

In their appeal narrative, the opponents argue that the following are "criteria" that have "changed."

- 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.
- CCZLDO 5.11.100 to .5.11.300 (Geologic Hazards).Comprehensive Plan Vol 1, Part 1, §5.11 & Part 2, §3.9 Natural Hazard Maps, amended by County File AM-15-03 and County File AM-15-04 (Ord. 15-05-005PL, dated July 30, 2015, which had a delayed effective date of July 30, 2016 and was again delayed until July 30, 2017).[1]
- CCZLDO 5.0.175(1), amended by County File AM 14-11 (Ord. 14-09-012PL dated January 20, 2015, effective April 20, 2015).
- Amendments adopted in AM-18-005.

See Appeal Narrative at p. 2. With regard to the first three bulleted points, these issues are all a collateral attack on previous extension decisions and cannot be re-raised here. With regard to "AM-18-005," the appellants do not explain what decision they are referring to, and therefore the issue is not developed sufficiently to allow a response. To the extent that they are referring to the legislative amendments adopted by Ord. 18-09-009PL, that Ordinance is 208 pages long and it is unclear which provisions in that Ordinance would be new approval standards for a pipeline in the EFU zone. The Board can simply not respond to the concern because it is insufficiently developed. Nonetheless, staff testified at the hearing that no approval standards for pipelines were amended in 2018.

[1] 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.

In a 2017 permit extension decision, the Board 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. LUBA and the Court of Appeals affirmed the Board's analysis on this point. *Williams*, __ Or LUBA at ___ (slip op. at 11-13), *aff'd* 298 Or App 841 (2019). In the present case, opponents have not provided a sufficient legal basis for the Board to find that LUBA and the Court of Appeals erred. Therefore, pursuant to CCZLDO 4.11.125(7), the natural hazard provisions are not "applicable approval criteria" that have changed.

As noted above, the appellants cite to requirements for geologic assessments, including new reporting requirements, which were adopted in July of 2015 and which were delayed until 2017. *See* 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 Pacific Connector 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. LUBA and the Court of Appeals affirmed the Board's analysis on this point. *Williams*, __ Or LUBA at ___ (slip op. at 13-15), *aff'd* 298 Or App 841 (2019). In the present case, opponents have not provided a sufficient legal basis for the Board to find that LUBA and the Court of Appeals erred. Therefore, as presented, appellants' contention provides no basis for determining that these new requirements are changes in the law that would constitute approval standards for a pipeline permit.

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 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 *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd without opin.,* 298 Or App 841 (2019), LUBA rejected appellants' argument on this point. LUBA stated as follows:

> LDO 5.0.175 took effect in 2015. LDO 5.0.175(1) provides that for an application for a permit "[a] transportation agency, utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 may submit an application to the Planning Department for a permit or zoning authorization required for a project without landowner consent otherwise required by this ordinance." Differently, LDO 5.0.150(1) provides that an application for a permit "shall include the signature of all owners of the property." Petitioners argue that LDO 5.0.175 is a new "approval criteri[on]" within the meaning of LDO 5.2.600.1(c), and that it applies to the 2010 CUP and the 2013 CUP.
>
> The board of commissioners adopted findings that LDO 5.0.175 is not an "approval criteri[on]" but rather is an application submittal requirement. The board of commissioners also adopted alternative findings that even if LDO 5.0.175 is an "approval criterion," it is not "applicable" to the 2010 CUP and the 2013 CUP, because it is an optional provision that allows certain entities to choose to apply for a permit without landowner consent. Petitioners argue that in its decision approving the 2010 CUP, the county concluded that LDO 5.0.150 is an "approval criterion," and accordingly, the county must also conclude that LDO 5.0.175 is an approval criterion, and not merely a submittal requirement.
>
> As intervenor points out, petitioners' argument does not address the board of commissioners' alternative finding that, even if LDO 5.0.175 could constitute an "approval criterion," it is not an "applicable" approval criterion within the meaning of LDO 5.2.600.1(c) because it merely provides an alternative, optional pathway for certain entities to apply for a permit. We agree with intervenor that absent any challenge to that finding, petitioners' argument provides no basis for reversal or remand.

In the present case, appellants have not established that CCZLDO 5.0.175 is an "applicable" criterion or presented any other contentions that would allow the Board to reach a different conclusion than LUBA did. Therefore, the appellants' contentions provide no basis for denial of another extension.

6. The Extension Does Not Seek Approval of Residential Development.

CCZLDO 5.2.600.1.a.(5) & (6) provide as follows:

> ***(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).***

The original approval did not authorize any residential development on agricultural or forest land outside of an urban growth boundary. The Board finds that these provisions are not applicable.

7. The Code Allowed for Multiple Extensions.

CCZLDO 5.2.600.1.a.(7) provides as follows:

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

This provision provides express authority for the County to grant multiple extensions of the original approval. This is the sixth one-year extension, with previous extensions being granted in 2014, 2015, 2016, 2017, and 2018.

D. <u>Pacific Connector Has Established Compliance with the Applicable Standards for a Conditional Use Extension Request on Non-Farm and Non-Forest Zoned Lands.</u>

CCZLDO 5.2.600.1.b. provides as follows:

> ***b. On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:***
> ***(1) All conditional uses for residential development including overlays shall not expire once they have received approval.***
> ***(2) All conditional uses for non residential development including overlays shall be valid for period of four (4) years from the date of final approval.***
> ***(3) Extension Requests:***
> ***a. For all conditional uses subject to an expiration date of four (4) years are eligible for extensions so long as the property has not been:***
> ***i. Reconfigured through a property line adjustment or land division; and***
> ***ii. Rezoned to another zoning district.***
> ***(4) An extension shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.***
> ***(5) An extension shall be received prior the expiration date of the conditional use or the prior extension.***

Pacific Connector 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.

The original 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 original approval. Therefore, the original approval is eligible for an extension.

Pacific Connector has included a completed and signed County extension application form and the required application fee with this request. The County received the extension request on March 28, 2019, which was before the expiration of the approval period. Therefore, the application meets the requirements of this provision.

The appellants argue that "the county erred in giving the applicant additional CUP extensions on non-resource lands for four years." Not only does the amendment not apply, even if it did, these permits are not eligible for a four-year extension because they were "subject to an expiration date of four years." *See* Appeal Narrative at p. 2. Moreover, the Board finds that the appellants' contention is exceedingly difficult to follow and is not adequately developed for review.

To the extent that the appellants are arguing that the previous "2 year" time period applies with only one possible two-year extension available (for a total of four years), that argument is rejected. The code allowed for additional extensions to be submitted. In any event, even if the challenge were valid it has long since been waived; this is the sixth extension and the issue could have been raised beginning in 2016.

E. <u>CCZLDO 5.2.600(2) Provides No Reason for Denial.</u>

CCZLDO 5.2.600(2)(2018) reads as follows:

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

In the appeal narrative, the appellants contend that the County lacks the authority to apply this section:

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

> "[A]pplication of CCZLDO 5.2.600(2)(as amended in 2018) is beyond of the scope of the County's authority. As understood[,] it is an attempt to avoid the application of the hazard-related criteria that are applicable if the application was filed today and would have been applicable at the time the CUP application was filed. The county may not legislate around the rule's prohibition of extensions when the applicable criteria has changed.

The Board finds that this contention is conclusory in nature and appears to reflect a policy disagreement, as opposed to making an argument based on applicable law. Appellants make no attempt to support the argument in any manner or to explain that "rule" to which they refer. The issue is simply not raised with sufficient specificity to give fair notice of the nature of the problem. For this reason alone, the Board denies appellants' contention on this issue.

Nonetheless, to the extent the Board understands the issue, it appears to be similar to an argument raised and rejected by LUBA in *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019). The proper time for appealing the new language set forth in CCZLDO 5.2.600(2)(2018) was at the time of adoption. In fact, Ms. McCaffree did appeal these amendments to LUBA; however, she did not raise this issue and also did not prevail on appeal. *McCaffree v. Coos County,* __ Or LUBA __ (LUBA No. 2018-132, June 6, 2019). Any current attempt to declare CCZLDO 5.2.600(2) (2018) inconsistent with state law is a collateral attack on the legislative enactment and is waived.

This criterion is met.

F. <u>Other Issues Raised by Opponents.</u>

1. Right of Condemnation: Alleged Violation of CCZLDO 5.0.150(1) and CCZLDO 5.0.175(1).

The appellants argue that the county is violating CCZLDO 5.0.150(1) & 5.0.175(1) because the applicant no longer has the right of condemnation pursuant to ORS Chapter 35. The opponents base their argument on the fact that Pacific Connector's right of condemnation stems from federal law and is premised on the acquisition of a Certificate. They argue that since Pacific Connector lost its certificate, it may no longer file land use applications.

As previously noted, CCZLDO 5.0.150(1) and CCZLDO §5.0.175 are not approval criteria for a permit extension. *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019).

As noted, Pacific Connector has applied for a Certificate 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, Pacific Connector is not precluded as a matter of law from obtaining FERC permits. Although FERC denied the previous application, it did so for reasons that can be remedied by obtaining foreign or

domestic contracts for the purchase of natural gas. The County's original approval for the pipeline matter is conditioned to require Pacific Connector to obtain landowner signatures. Pacific Connector must obtain a Certificate in order to effectuate that condition. Granting this extension does not modify or eliminate that condition. As a result, the consent issue will be resolved before the original approval, as extended, is implemented.

Moreover, whatever the merits of this argument, this issue could have been raised in any of the five other land use applications that resulted in permit extensions. The issue is not jurisdictional, and therefore the issue can be, and has been, waived. For these reasons, the Board does not agree with the opponent's understanding of CCZLDO 5.0.150 or CCZLDO 5.0.175. Having said that, it remains the fact that the County permits cannot be acted upon unless and until FERC issues a Certificate.

2. CCZLDO Section 5.0.500 Does Not Apply.

On page 1 of the Appeal Narrative, appellants contend that the County violated CCZLDO 5.0.500, which provides as follows:

> ***SECTION 5.0.500 INCONSISTENT APPLICATIONS:***
>
> ***Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency. Such revocation shall not be cause for refund of any previously submitted application fees.***

Th appellants contend that CCZLDO 5.0.500 is violated because the County failed to deem the original permit automatically revoked because a different alignment was submitted to FERC. However, any application submitted to FERC is not an "application for a land use" within the meaning of this provision. Moreover, the decision for which this extension is being sought is no longer "pending," so CCZLDO 5.0.500 does not apply to this case.

3. The Appellants' "Takings" Argument Lacks Merit.

In the appeal narrative, the opponents argue that the "extensions continue to impose a taking on property of the landowners along the alignment through inverse condemnation." *See* Appeal narrative at p. 3. The Board addressed this issue in previous extension decisions and the answer has not changed since then. This argument does not relate to an approval standard for an extension, and therefore provides no basis for a denial of the extension.

4. Contention that Original Alignment Became Void in 2015 because the Extension Request was Untimely.

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 public hearing, 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.

The appellants now seek to revisit the decision to grant the second extension, because they argue that the application was filed three days late (i.e. on March 16, 2016 instead of the deadline they assume to apply: March 13, 2016). *See* Appeal Narrative, at p 2. However, the premise of the contention, which is that the permit expired on March 13, 2015, appears to be incorrect. The contention is based upon the fact that the Board signed the "Oyster Remand" decision on March 12, 2012. However, CCZLDO §5.0.250 delays the effective date of the decision until after the 21-day appeal period to LUBA has run:

> ***SECTION 5.0.250 TIMETABLE FOR FINAL DECISIONS (ORS 215.427):***
>
> ******
>
> ***4. Time periods specified in this Section shall be computed by excluding the first day and including the last day. If the last day is a Saturday, Sunday, legal holiday or any day on which the County is not open for business, the time deadline is the next working day. [OAR 661-010-0075]***
>
> ***5. The period for expiration of a permit begins when the appeal period for the final decision approving the permit has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.***

For this reason, the appellants are wrong when they assert that the extension needed to be filed on, or prior to, March 13, 2015. The correct "deadline" date was April 2, 2015, and the applicant complied with this requirement by submitting on March 16, 2015.

In addition to being wrong on the merits, any argument directed at the second extension is a collateral attack on Final Decision No. 15-08-039PL. It is simply too late to revisit that decision here. The appellants seek to avoid the collateral attack doctrine by stating that the decision became "null and void." Although the appellants do not develop the argument, the Board understands this contention to be that a decision that is "null and void" can be attacked at any time. Appellants cites only to the definition of "land use decision" and states that "the rule that CCZLDO implements uses the same term so there is no authority for the Director to interpret the term differently." Appeal Narrative at p. 5. The appellants' contention is difficult to follow. In any event, in this case the appeal narrative is not drafted in a sufficiently coherent manner to enable review. The Board will not conduct extensive independent research to develop the argument on the appellant's behalf.

5. Allegations of *Ex Parte* Communications and Bias

At the November 15, 2019 Board deliberation hearing, Board members were provided an opportunity to disclose any *ex parte* contacts as described in ORS 215.422 and 197.835(12), conflicts of interest as described in ORS 244.120, and any actual bias regarding the application. *1000 Friends of Oregon v. Wasco County Court,* 304 Or 76, 747 P2d 39 (1987). Board members made disclosures, including Commissioner Sweet disclosing his attendance at a 2014 civic luncheon at which elements of the broader JCEP and Pacific Connector project were discussed.

Natalie Ranker and Jody McCaffree contended that Commissioners were 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 and AP-18-18-002 November 20, 2018). Opponents then raised these issues on appeal to 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, 76 Or LUBA 346, 369-370 (2017). 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, 76 Or LUBA at 370-71. 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 Pacific Connector and County: The Board denies the contention that the Board members were biased due to a 2007 agreement between Pacific Connector and the County pursuant to which Pacific Connector 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 Pacific Connector. 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 application 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, as noted above, the Board finds 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 Pacific Connector and Board Members: The Board denies Ms. McCaffree's contention that Board members were biased due to their attendance at private meetings with Pacific Connector. 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 Pacific Connector 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).

Ms. Ranker echoed many of the circumstances identified by Ms. McCaffree, but she did not offer any additional evidence or legal authority to support these allegations.

Finally, before taking final action to approve these findings, each of the Board members 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 denies the bias and *ex parte* challenges in this case.

No other challenges were made, and Board members participated in the deliberations and the decision.

III. CONCLUSION.

To summarize this case, 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 sets of standards for granting an extension. For granting an extension on ***resource lands***, Pacific Connector must, among other things, show it was unable to begin construction for reasons out of its control. The Board finds that, despite Pacific Connector's diligent pursuit of the federal approvals required, those approvals have not yet been secured, and thus Pacific Connector was unable to commence its development proposal before the expiration date for reasons beyond Pacific Connector's control.

For granting an extension on ***non-resource lands***, CCZLDO 5.2.600 requires that Pacific Connector show, among other things, that the proposed use is still listed as a conditional use in the relevant non-resource zones under the current zoning regulations, that the subject property has not been reconfigured through a property line adjustment or land division, and that the subject property has not been rezoned. For the reasons explained in this decision, the Board finds that the application meets these criteria 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 one-year extension of the original approval. Accordingly, the Board denies the appeal and affirms the Planning Director's June 21, 2019 decision granting the one-year time extension in County File No. HBCU 10-01 / REM 11-01 to April 2, 2020 (EXT-19-004).

Adopted this 26th day of November, 2019.

Pembina Pipeline Corporation's Jordan Cove LNG Project Receives Federal Approval

Thu, 19 Mar 2020

CALGARY, March 19, 2020 /CNW/ - Pembina Pipeline Corporation ("Pembina" or the "Company") is pleased to announce receipt of a certificate of approval from the U.S. Federal Energy Regulatory Commission ("FERC") for Pembina's proposed Jordan Cove liquified natural gas ("LNG") terminal and Pacific Connector Gas Pipeline (together known as "Jordan Cove" or "the Project"). Jordan Cove is the first ever U.S. West Coast natural gas export facility to be approved by FERC. This federal approval is a significant milestone for the Project and for Pembina.

Pembina acquired Jordan Cove in late 2017 and has since been working toward obtaining extensive local, state and federal regulatory approvals. The Project includes a 229-mile pipeline, that would traverse four counties in Southern Oregon, and an LNG export terminal in Coos Bay, Oregon. Natural gas for Jordan Cove would be sourced at the Malin Hub, creating a new outlet for natural gas from areas such as the Rockies

Basin. The Project represents a significant opportunity to bring tremendous economic benefits to the State of Oregon and Western Colorado and make a substantial contribution to addressing global climate change by replacing coal in Asia.

The bi-partisan FERC is currently comprised of three appointed Commissioners and serves as the federal agency responsible for reviewing proposals to build interstate natural gas pipelines, natural gas storage projects, and LNG terminals. The FERC's approval of the Project is the result of comprehensive environmental, safety and security reviews involving input from both federal and state agencies, Tribes, landowners and many other stakeholders.

Today's affirmative decision from the FERC represents the most significant step forward for Jordan Cove since Pembina acquired the Project. "We appreciate FERC's science-based approach to their review. The approval emphasizes yet again that Jordan Cove is environmentally responsible and is a project that should be permitted given a prudent regulatory and legal process was undertaken," said Harry Andersen, Pembina's Senior Vice President and Chief Legal Officer. "The FERC's decision is due in no small part to our many supporters who have turned out time and time again to voice their support for Jordan Cove and to show that the Project is in the public interest, including in Southern Oregon and the Rockies Basin," added Mr. Andersen.

This decision is one of many significant steps forward for Jordan Cove in recent months. In addition to this federal approval, Jordan Cove recently received approval on all 14 local jurisdiction county and city applications and permits. Also, the Company has signed voluntary easement agreements that constitute 77 percent of the privately-owned portion of the proposed pipeline route, which will allow the pipeline to cross beneath these properties.

About Pembina

Calgary-based Pembina Pipeline Corporation is a leading transportation and midstream service provider that has been serving North America's energy industry for 65 years. Pembina owns an integrated system of pipelines that transport various

hydrocarbon liquids and natural gas products produced primarily in western Canada. The Company also owns gas gathering and processing facilities; an oil and natural gas liquids infrastructure and logistics business; is growing an export terminals business; and is currently developing a petrochemical facility to convert propane into polypropylene. Pembina's integrated assets and commercial operations along the majority of the hydrocarbon value chain allow it to offer a full spectrum of midstream and marketing services to the energy sector. Pembina is committed to identifying additional opportunities to connect hydrocarbon production to new demand locations through the development of infrastructure that would extend Pembina's service offering even further along the hydrocarbon value chain. These new developments will contribute to ensuring that hydrocarbons produced in the Western Canadian Sedimentary Basin and the other basins where Pembina operates can reach the highest value markets throughout the world.

Purpose of Pembina:

To be the leader in delivering integrated infrastructure solutions connecting global markets;

- **Customers** choose us first for reliable and value-added services;
- **Investors** receive sustainable industry-leading total returns;
- **Employees** say we are the 'employer of choice' and value our safe, respectful, collaborative and fair work culture; and
- **Communities** welcome us and recognize the net positive impact of our social and environmental commitment.

Pembina is structured into three Divisions: Pipelines Division, Facilities Division and Marketing & New Ventures Division.

Pembina's common shares trade on the Toronto and New York stock exchanges under PPL and PBA, respectively. For more information, visit www.pembina.com (https://c212.net/c/link/?t=0&l=en&o=2756406-1&h=3847844698&u=http%3A%2F%2Fwww.pembina.com%2F&a=www.pembina.com).

Forward-Looking Information and Statements

This news release contains certain forward-looking statements and information (collectively, "forward-looking statements") within the meaning of the "safe harbor" provisions of applicable securities legislation that are based on Pembina's current expectations, estimates, projections and assumptions in light of its experience and its perception of historical trends. In some cases, forward-looking statements can be identified by terminology such as "intend", "will", "shall", and similar expressions suggesting future events or future performance.

In particular, this news release contains forward-looking statements relating to the potential economic and climate change benefits of the Project. These forward-looking statements are based on certain assumptions that Pembina has made in respect thereof as at the date of this news release, including: prevailing commodity prices, margins and exchange rates, that Pembina's businesses will continue to achieve sustainable financial results and that future results of operations will be consistent with past performance and management expectations in relation thereto, the availability and sources of capital, operating costs, ongoing utilization and future expansions, the ability to reach required commercial agreements, and the ability to obtain required regulatory approvals. These forward-looking statements are not guarantees of future performance and are subject to a number of known and unknown risks and uncertainties, including, but not limited to: non-performance of agreements in accordance with their terms; the impact of competitive entities and pricing; reliance on key industry partners, alliances and agreements; the strength and operations of the oil and natural gas production industry and related commodity prices; the continuation or completion of third-party projects; regulatory environment and inability to obtain required regulatory approvals; tax laws and treatment; fluctuations in operating

results; the ability of Pembina to raise sufficient capital to complete future projects and satisfy future commitments; construction delays; labour and material shortages; and certain other risks detailed from time to time in Pembina's public disclosure documents including, among other things, those detailed under the heading "Risk Factors" in Pembina's management's discussion and analysis and annual information form for the year ended December 31, 2019, which can be found at ***www.sedar.com*** (https://c212.net/c/link/?t=0&l=en&o=2756406-1&h=3596043757&u=http%3A%2F%2Fwww.sedar.com%2F&a=www.sedar.com) *and with the U.S. Securities and Exchange Commission at* ***www.sec.gov*** *(http://www.sec.gov) and available on Pembina's website at* ***www.pembina.com*** *(http://www.pembina.com).*

Accordingly, readers are cautioned that events or circumstances could cause results to differ materially from those predicted, forecasted or projected. Such forward-looking statements are expressly qualified by the above statements. Pembina does not undertake any obligation to publicly update or revise any forward-looking statements or information contained herein, except as required by applicable laws.

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BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

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

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

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

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

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

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

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

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

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

ADOPTED this 21st day of October 2014.

BOARD OF COMMISSIONERS

COMMISSIONER | COMMISSIONER | COMMISSIONER

ATTEST: Bobbi Brooks

Recording Secretary

APPROVED AS TO FORM:

Office of Legal Counsel

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

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

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

EXHIBIT A

EXHIBIT A

I. Summary of Proposal and Process

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

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

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

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

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

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

Thus, this application concerns two rather narrow questions:

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

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

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

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

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[15] *Id.* § 1456(c)(3)(A).
[16] *Id.* § 1453(6a); *see also* 15 C.F.R. § 930.11(h).

changes that have occurred" is incorrect. The routine changes in the State's CMP are not changes in the pipeline or in the local land use standards applicable to the Pipeline.

J. Changes to FEMA Floodplain Mapping Do Not Constitute a Circumstance Which Warrants a New CUP Application.

The Board of Commissioners adopted, as part of the 2010 Decision , the following "pre-construction" condition of approval:

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

Under CCZLDO 4.6.230(4) as then in effect, "other development" had to be reviewed and authorized by the Planning Department prior to construction. Authorization could not be issued unless a licensed engineer certified that the proposed development would not:

a. result in any increase in flood levels during the occurrence of the base flood discharge in the development will occur within a designated floodway; or,

b. result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.

This flood hazard review, as described in the CCZLDO, occurs prior to construction. It was not part of the land use review in the 2010 Decision or Final Decision and Order No. 12-03-018PL (Mar. 13, 2012) (the "2012 Decision").

Ms. McCaffree cites "amendments to the CCZLDO having to do with Floodplain Overlay boundaries and Plan Policy 5.11" as a basis for denying the requested extension of those prior approvals for the Pipeline. *See* McCaffree letter dated July 11, 2014, at 23. Although she asserts that "the new FEMA boundaries will directly impact the pipeline and the proposed route," she does not explain how such changes are relevant to the land use approval standards for the Pipeline. She submitted into the record of this proceeding a copy of Final Decision and Ordinance 14-02-001PL, but omitted Attachment A to that Ordinance, which shows the specific changes adopted by the Board.

The applicant submitted a complete copy of Ordinance 14-02-001PL as Attachment B to their Surrebuttal. Nothing in the ordinance alters any finding made by the Board in 2010 and 2012. Critically, the provisions addressing "other development" have been moved to CCZLDO 4.6.217(4), but are identical to the prior version of the Ordinance quoted above, and are still addressed by the Planning Department prior to construction. The changes clarify that the special flood hazard area is based on March 17, 2014 Flood Insurance Rate Map ("FIRM"). CCZLDO 4.6.207(1). Condition 15 of the 2010 decision, however, is not tied to any particular version of the FIRM. The applicant does not vest into any particular FIRM map, nor does it vest into certain editions of the building code or SDC ordinances. Therefore, Condition 15 remains adequate to ensure that, prior to construction, the applicant must meet the standards for "other construction" for portions of the Pipeline within the special flood hazard area of Coos County. The Board's adoption of revised Floodplain Overlay provisions does not constitute

either a "substantial change in the land use pattern of the area" or "other circumstances sufficient to cause a new conditional use application to be sought."

In her surrebuttal dated August 1, 2014, Ms. McCaffree speculates as to how new flood hazard mapping might affect the Pipeline. *See* McCaffree Surrebuttal at p.1. However, the Board of Commissioners did not rely on the FEMA flood hazard boundaries for its findings of compliance with any approval standards in 2010 or on remand in 2012. With Condition 15 in place, the County has assurance that Pacific Connector must address FEMA's mapped flood hazard areas prior to construction. Alterations in those maps are accommodated within the current approval; a new application is unnecessary.

K. Pipeline Alignment

Ms. McCaffree further argues that Pacific Connector has changed the alignment of the pipeline by way of her reference to Exhibits 17 and 18 on page 24 of her July 11, 2014 letter. The simple response is that this application merely seeks to extend the Coos County approval of the original pipeline route. The final decision and order did not include a condition to build the approved alignment. Any potential alternate alignments from the FERC record are irrelevant and do not constitute any change in the County's zoning ordinance or land use patterns in the surrounding area.

L. Potential Impacts to Oysters Were Addressed in the 2010 and 2012 Decisions and by the Oyster Mitigation Plan

Two letters from Ms. Lili Clausen, Clausen Oysters, express concerns regarding access to oyster beds, construction-related suspended sediment impacts, and potential alternative routes. *See* Exhibit 1 (letter from L. Clausen to Coos County Planning Department dated June 28, 2014), Exhibit 3 (Undated submittal from Lili Clauson asking various questions of the County), and Exhibit 7 (letter from L. Clausen to Coos County Planning Department dated July 21, 2014). Ms. Clausen has previously expressed similar concerns in a prior letter dated May 13, 2010, which was specifically considered by the County in its original decision approving the Pipeline. 2010 Decision, at 74–77. The applicant directly addressed issues raised by Ms. Clausen through a letter report prepared by Robert Ellis, Ph.D., of Ellis Ecological Services. That report described the measures taken by the applicant to avoid and mitigate impacts to oyster beds, providing substantial evidence that any impacts on commercial oyster beds in Haynes Inlet (and other natural resources) caused by the Pipeline would be "temporary and de minimis." *Id.* at 74–77, 80.

Various opponents appealed the original 2010 land use approval to LUBA. LUBA remanded the 2010 Decision for further analysis of potential impacts to native Olympia oysters. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162, LUBA No. 2010-086 (March 29, 2011). On remand, the County conducted a land use proceeding in which an extensive record pertaining to native Olympia oysters was developed. After extensive consideration of potential impacts to such native oysters, the County concluded that "the applicant has met its burden of proof to demonstrate that the proposed pipeline construction will reduce any potential harm to the Olympia Oyster population in Haynes Inlet to such a degree that there is at most a de-minimis or insignificant impact on the oyster resources that the aquatic zoning districts 11-NA and 13A-NA require to be protected." 2012 Decision at 68. As part of the remand proceedings,

the applicant has developed an Oyster Mitigation Plan and has agreed to not only relocate Olympia oysters from the Pipeline route, but also to create additional new habitat within the pipeline right of way "that will result in a significant *increase* in the numbers of Olympia oysters in Haynes Inlet." *Id.* at 29; *see also* 2012 Decision, Condition of Approval, Conditions on Remand No. 1 ("The applicant shall comply with the terms and conditions of the applicant's proposed Olympia oyster mitigation plan prepared by Bob Ellis of Ellis Ecological Services, Inc. dated October 7, 2011 (the 'Mitigation Plan'). . . ."

In her July 21, 2014 letter, Ms. Clausen states that "I did not like the tone used in telling me, at the meeting, that the whole oyster issue was settled. We the commercial oyster growers, do expect our concerns to be addressed." However, in his recommendation, the hearings officer indicated that he was "taken aback" by the lack of situational awareness evident in the Clausen Oysters' oral presentation. Neither Ms. Clausen's written nor oral testimony indicates that she or Clausen Oysters had participated in the "remand" proceedings in which oyster issued were extensively discussed and debated, and the hearings officer did not recall Ms. Clausen's or her company's participation in those proceedings. The hearings officer characterized Ms. Clausen's testimony as seeming "unprepared" and consisting merely of a recitation of a "laundry list" of questions regarding the case. Hearings Officer Recommendation, at 38-39.

The County has previously found that the applicant has demonstrated that it will not have a significant impact on oysters in Haynes Inlet, either commercially farmed or wild native oysters. The Board finds that nothing in Ms. Clausen's letters or oral testimony identifies a substantial change in land use patterns, the zoning Ordinance, or the Pipeline that would justify revisiting these prior determinations.

M. The Record Demonstrates the County Commissioners Were Not Biased in Their Decision-Making and Did Not Have Any Impermissible *Ex Parte* Contacts

At the beginning of the Board's deliberations on September 30, 2014, Chair Cribbins asked Commissioners whether they needed to declare any conflicts and bias. All, including the Chair, answered "no." All three commissioners also indicated that they did not need to abstain from participating in the hearing.

The Chair then asked: "Does anyone present today wish to challenge any member of the Board of Commissioners from participating in today's hearing?" The only response was from Jody McCaffree:

> McCAFFREE: You're saying that you don't have a bias when you support the project and ran your campaign on that?
>
> CRIBBINS: Who are you addressing, Ms. McCaffree?
>
> McCAFFREE: Both you and Mr. Sweet.
>
> CRIBBINS: I would challenge you to show where I've ever run my campaign on that. Thank you.
>
> SWEET: I don't think I have a bias.

McCAFFREE: You've openly supported this project though. And that is a bias. Right?

Ms. McCaffree also alleged that Commissioner Sweet had met with representatives of the Jordan Cove project:

McCAFFREE: And you've never met with the applicant privately or in meetings where you've not included opponents of the project? You were seen at the airport meeting with them. That's why I'm questioning you. But you never gave us the opportunity to meet with you.

LEGAL COUNSEL: Was it directly related to this appeal?

McCAFFREE: I have no idea. I wasn't at the meeting.

SWEET: Who was at that meeting?

McCAFFREE: You met with Jordan Cove's representatives, Michael Henricks and, um, Ray [inaudible].

SWEET: Yes, I met with them. It was pretty much social in nature. I don't recall any conversation relating to the pipeline.

CRIBBINS: I have never discussed this appeal with either party.

SWEET: I certainly have not discussed the appeal.

We understand Ms. McCaffree to have raised two allegations: (1) she alleged that Commissioner Cribbins and Commissioner Sweet had supported "this project" in campaigning for office; and (2) she alleged that Commissioner Sweet had been seen meeting with two representatives of the Jordan Cove Energy Project at "the airport." As these allegations involve different factual and legal issues, we address them separately.

With respect to the first allegation, Ms. McCaffree presented no documentation to her claim of bias: no news articles, campaign materials, transcripts of speeches, or other evidence that either Commissioner Cribbins or Commissioner Sweet had campaigned for office based on a promise to support the Pipeline generally or any application specifically. Indeed, Commissioner Cribbins specifically challenged Ms. McCaffree to "show where I've ever run my campaign" on support for the project, and Ms. McCaffree did not respond.

Consideration of this appeal by the Board of Commissioners is "quasi-judicial" in nature. Parties to quasi-judicial proceedings are "entitled to ... a tribunal which is impartial in the matter ...." *Fasano v. Bd. of Cnty. Comm'rs of Wash. Cty.*, 264 Or 574, 588, 507 P.2d 23, 30 (1975).

In the context of land use hearings, however, a Commissioner is "impartial" if he or she is able to render a decision based on the merits of the case. As the Land Use Board of Appeals (LUBA) has put it, local decision makers in quasi-judicial land use proceedings are not expected to be free of bias; rather, they are expected to put whatever positive or negative biases

they may have aside, and render a decision based on the merits. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

We note that the LUBA recently provided an extensive analysis of Oregon law on the question of bias, as it applies to disqualifying members of a county Board of Commissioners from participation in an adjudicatory land use proceeding. *Oregon Pipeline Company, LLC v. Clatsop County*, __ Or LUBA __ (LUBA No. 2013-106, June 27, 2014). Several principles are evident from LUBA's discussion:

- There is a "high bar" for disqualification of a county commissioner for bias because county commissioners, unlike judges, cannot be replaced if they recuse themselves. County commissioners, moreover, are not expected to be "neutral," given that they are elected because of their political predisposition.

- Campaign statements of support or opposition for specific land use actions are not by themselves "sufficient basis for questioning [commissioners'] representations ... that they could decide the matter impartially." *Oregon Pipeline Company* (slip. op. at 30).

As LUBA noted, the Oregon Supreme Court has spoken to how the threshold for recusals differs between judges and county commissioners:

> "[County commissioners] are politically elected to positions that do not separate legislative from executive and judicial power on the state or federal model; characteristically they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure."

1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 82-83, 742 P2d 39 (1987).

The "actual bias" necessary to disqualify a county commissioner must be demonstrated in a "clear and unmistakable manner." *Halvorson Mason Corp. v. City of Depoe Bay,* 39 Or LUBA 702, 710 (2001).

In this case, it is clear from the proceedings on September 30 that Commissioners Cribbins and Sweet did not have any direct stake in the outcome of the proceeding:

> LEGAL COUNSEL: I can read the definition of conflicts of interest to see if they apply. Do you have any direct or substantial financial interest in this?
>
> SWEET: No.
>
> LEGAL COUNSEL: Any private benefit?
>
> SWEET: No.

CRIBBINS: Just to be clear, I do not have a financial interest nor a direct interest or benefit.

There is, moreover, no "clear and unmistakable" evidence of "actual bias." At most, there is a general allegation that Commissioners Cribbins and Sweet indicated support for "the project" during their campaigns. Commissioner Cribbins denied the allegation, and no evidence to the contrary was provided by Ms. McCaffree. Ms. McCaffree's general reference to "the project" also undermines any allegation of bias. It is impossible to tell whether her allegation relates to the Pipeline, to the Jordan Cove Energy Project (i.e., the LNG terminal) or to a specific application. The only relevant question with respect to bias in this proceeding is whether each commissioner is capable of rendering a fair judgment on *this appeal*. Each commissioner stated that they could, and there is no "clear and unmistakable" evidence to the contrary.

Ms. McCaffree's second allegation – that Commissioner Sweet met privately with representatives of the Jordan Cove Energy Project – appears to be more an allegation of *ex parte* contacts than of bias. We note that Jordan Cove Energy Project is not the applicant in this case, or even a party. In any event, there is no prohibition on an individual commissioner meeting or conversing with persons – even parties – who may take an interest in matters that come before the Board of Commissioners.

Commissioner Sweet indicated that his airport meeting was "pretty much social in nature," that he didn't remember "any conversation relating to the pipeline," and that he had not discussed the appeal involved in this case. Based on Commissioner Sweet's representations and the absence of any evidence to the contrary, we find that the meeting did not involve any *ex parte* communication with respect to this appeal. To the extent that Commissioner Sweet's meeting with representatives of the Jordan Cove Energy Project might be construed as evidence of bias, we reject that conclusion. Again, there is no legal prohibition on a county commissioner meeting individually with representatives of a major project proposed in the county. The fact that such a meeting took place does not come close to providing "clear and unmistakable" evidence that Commissioner Sweet is incapable of rendering a fair judgment in this appeal.

III. CONCLUSION.

For all of the above stated reasons, and after consideration of the applicable law and all argument and evidence in the record, the Board of Commissioners approves a one year extension to Order No. 12-03-018PL.

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-16-003

Applicant: Richard Allan, Marten Law representing Pacific Connector Gas Pipeline, LP

Property Information:

Map Number	Acreage	Landowner	Zoning	Special Considerations
25-12-20-300	161.19	Echo Creek, LLC	FMU	AOG, BGR(P)
25-12-28-1500	44.11	Jeanette M. Brunell Trust	20-CA, 20-RS, EFU, FMU	FP, WM(E), AOG, BGR, (P&G), CSB
25-12-29-100	160.26	Weyerhaeuser Company	FMU	ARC, AOG, BGR(P&I)
25-12-29-400	28.68	Michelle Zink	FMU	ARC, FP, AOG, BGR(I)
25-12-29-1400	9.92	Weyerhaeuser Company	20-CA, 20-RS, FMU	ARC, FP, WM(E), AOG
25-12-29-1700	40.04	Running 3, LLC	20-CA, EFU, 20-RS	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-29-1800	10.52	Fred Messerle Sons INC	20-RS, 20-CA, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-29-1900	21.93	Fred Messerle Sons INC	20-RS, 20-CA, EFU	ARC, FP, AOG, BGR(I), CSB
25-12-29-2000	10.18	Jeanette M. Brunell Trust	20-CA, 20-RS, EFU	ARC, FP, AOG, BGR(I), CSB
25-12-32A-100	18.96	Running 3, LLC	20-RS, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-32A-200	41.12	Running 3, LLC	20-RS, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-32A-600	31.85	Fred Messerle Sons INC	20-RS, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
26-12-05-1100	148.65	Stalcup Living Trust	FMU, EFU	FP, AOG, CBCF, BGP(P)
26-12-08-800	.08	Mark & Melody Sheldon Prop, LLC	EFU	FP, AOG, CBCF, BGP(P)

FMU= Forest Mixed Use	ARC=Archaeological Sites
EFU= Exclusive Farm Use	FP= Floodplain
20-RS= 20-Rural Shoreland	WM= Wet Meadow Wetland (E=Estuary & B= Balance of County)
20-CA= 20-Conservative Aquatic	AOG= Area of Oil & Gas Exploration Leases
	CBCF= Coos Bay Coal Field, Prospective Coal
	BGR= Big Game Range (Elk & Deer) (I= Impacted & P=Peripheral)
	CSB= Coastal Shorelands Boundary- Esturaine

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)

File Number: ACU-16-003

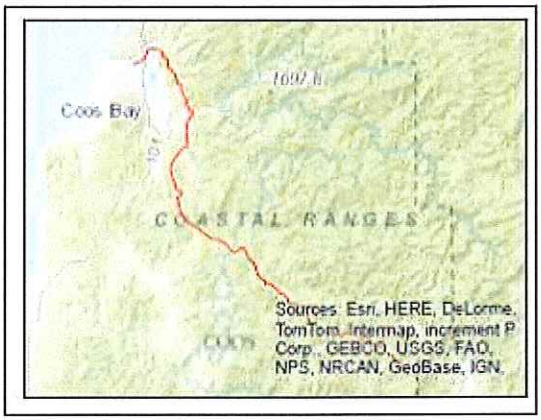
EXHIBIT "A"
CONDITIONS OF APPROVAL

1. All conditions of approval that were placed on HBCU-13-04 (Order No. 14-01—007PL) remain in effect.
2. This application approval grants a one year extension to the approval. Therefore, this conditional use will expired on February 25, 2017 unless another extension is submitted prior to the expiration date.

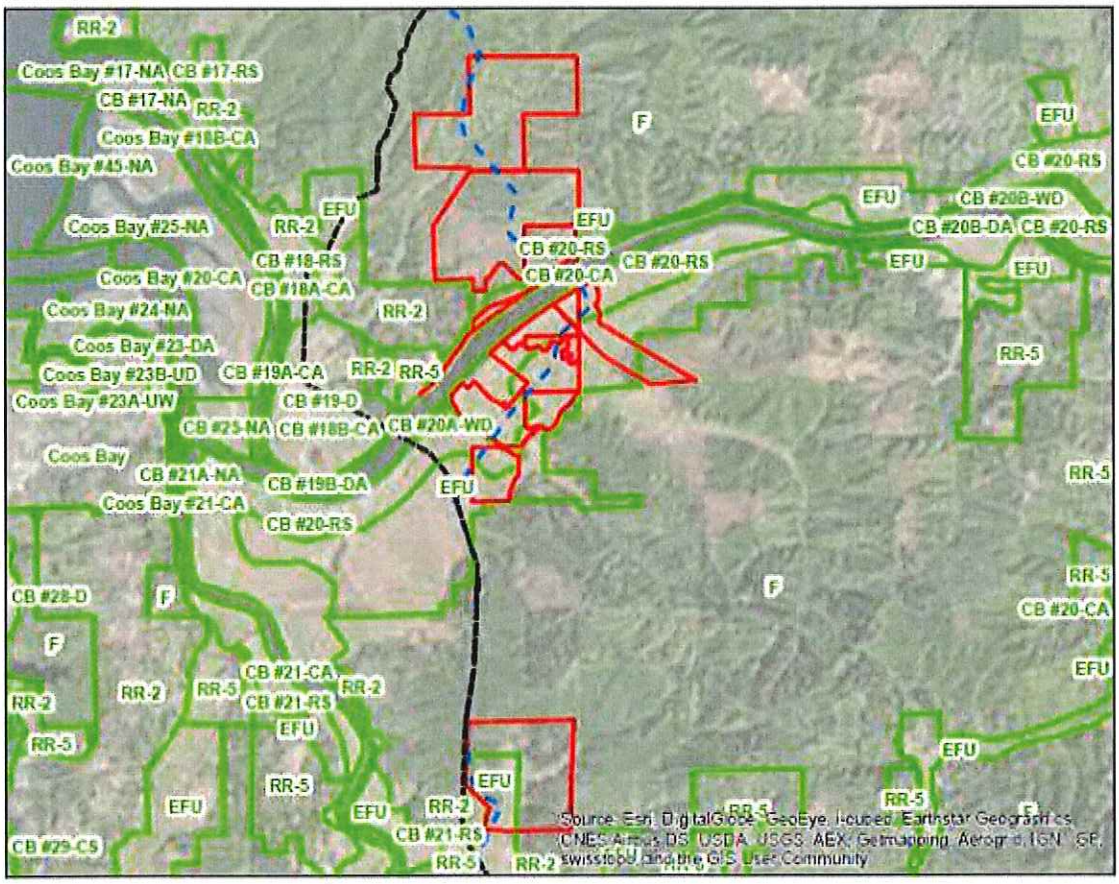
EXHIBIT "B"
VICINITY MAP

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-16-003
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-16-003

EXHIBIT "C"
Staff Report

File Number: ACU-16-009

Applicant: Richard Allan, Marten Law representing Pacific Connector Gas Pipeline, LP

Property Information:

Map Number	Acreage	Landowner	Zoning	Special Considerations
25-12-20-300	161.19	Echo Creek, LLC	FMU	AOG, BGR(P)
25-12-28-1500	44.11	Jeanette M. Brunell Trust	20-CA, 20-RS, EFU, FMU	FP, WM(E), AOG, BGR, (P&G), CSB
25-12-29-100	160.26	Weyerhaeuser Company	FMU	ARC, AOG, BGR(P&I)
25-12-29-400	28.68	Michelle Zink	FMU	ARC, FP, AOG, BGR(I)
25-12-29-1400	9.92	Weyerhaeuser Company	20-CA, 20-RS, FMU	ARC, FP, WM(E), AOG
25-12-29-1700	40.04	Running 3, LLC	20-CA, EFU, 20-RS	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-29-1800	10.52	Fred Messerle Sons INC	20-RS, 20-CA, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-29-1900	21.93	Fred Messerle Sons INC	20-RS, 20-CA, EFU	ARC, FP, AOG, BGR(I), CSB
25-12-29-2000	10.18	Jeanette M. Brunell Trust	20-CA, 20-RS, EFU	ARC, FP, AOG, BGR(I), CSB
25-12-32A-100	18.96	Running 3, LLC	20-RS, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-32A-200	41.12	Running 3, LLC	20-RS, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
25-12-32A-600	31.85	Fred Messerle Sons INC	20-RS, EFU	ARC, FP, WM(E), AOG, BGR(I), CSB
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26-12-08-800	.08	Mark & Melody Sheldon Prop, LLC	EFU	FP, AOG, CBCF, BGP(P)

FMU= Forest Mixed Use	ARC=Archaeological Sites
EFU= Exclusive Farm Use	FP= Floodplain
20-RS= 20-Rural Shoreland	WM= Wet Meadow Wetland (E=Estuary & B= Balance of County)
20-CA= 20-Conservative Aquatic	AOG= Area of Oil & Gas Exploration Leases
	CBCF= Coos Bay Coal Field, Prospective Coal
	BGR= Big Game Range (Elk & Deer) (I= Impacted & P=Peripheral)
	CSB= Coastal Shorelands Boundary- Esturaine

Reviewing Staff: Jill Rolfe, Planning Director
Date of Report: April 8, 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.

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 Federal Energy Regulatory Commission (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.

In response to requests from FERC, Pacific Connector has also evaluated and secured local Coos County approval for various alternative alignments to certain sections of the originally-proposed route – the Brunschmid/Stock Slough alternative alignment at issue in this application and the Blue Ridge alternative alignment. See Exhibit A (File No. HBCU-13-04, Final Order No. 14-01-007PL (Feb. 4, 2014)); File No. HBCU-13-06, Final Order No. 14-09-062PL (Oct. 21, 2014) (approving application for Blue Ridge alternative alignment originally filed on December 3, 2013).

An extension of the County approval for the Brunschmid/Stock Slough alternative alignment is the sole subject of this application. Pacific Connector notes that the Final Environmental Impact Statement (FEIS) includes the Brunschmid/Stock Slough alignment as part of the preferred alternative route; however, the ultimate Pipeline alignment to be constructed by Pacific Connector will be determined by FERC in the yet-to-be-issued Certificate of Public Convenience and Necessity.

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 February 4, 2016, prior to the expiration date of February 25, 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 reqnest for the extension of the Pacific Connector Gas Pipeline development. The applicant submitted the application for an extension on February 4, 2016, prior to the expiration date of February 25, 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 pipcline was approved to cross.

IV. DECISION:

The applicant has supplied written findings and evidence to snpport 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.

The original conditional use application was valid for two years but the applicant has requested a one year extension. This approval is valid for one year unless the development, activity or use has been extended.

Table 1.6-1
Permits and Approvals Necessary for Construction and Operation

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
Federal				
U.S. Department of Energy (DOE)	Order Granting Long Term, Multi-Contract Authorization to Export Natural Gas to Free Trade Agreement Nations under Section 3 of the Natural Gas Act	Amy Sweeney (202) 586-2627 1000 Independence Ave., SW Room 3E-052 Washington, D.C. 20585	September 2011	Received December 7, 2011[6]
	Order Conditionally Granting Long-Term Multi-Contract Authorization To Export Liquefied Natural Gas To Non-Free Trade Agreement Nations under Section 3 of the Natural Gas Act.	Amy Sweeney (202) 586-2627 1000 Independence Ave., SW Room 3E-052 Washington, D.C. 20585	March 2012	Conditionally received March 24, 2014[1]
Federal Energy Regulatory Commission	Section 7 of the Natural Gas Act – issuance of Certificate of Public Convenience and Necessity	John Peconom (202) 502-6352 888 First St., NE Washington, D.C. 20426	September 2017	November 2018
	Section 3 of the Natural Gas Act – order granting Section 3 authorization		September 2017	November 2018
FERC (as lead agency)	National Historic Preservation Act § 106 Review/Memorandum of Agreement among federal agencies, consulting parties, and SHPO	Paul Friedman (202) 502-8059 888 First St., NE Washington, D.C. 20426	September 2017	November 2018
FERC (as lead agency)	National Environmental Policy Act Review - EIS	John Peconom (202) 502-6352 888 First St., NE Washington, D.C. 20426	September 2017	August 2018

[6] JCEP will submit an amendment to the FTA authorization and pending non-FTA authorization to reflect the new export capacity of the LNG Terminal and will confirm receipt of such authorizations prior to construction.

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
U.S. Army Corps of Engineers	Clean Water Act – issuance of permit under Section 404 to allow placement of dredge or fill material into waters of the United States	Tyler Krug Regulatory Project Manager 541-756-2097 tyler.j.krug@usace.army.mil North Bend Field Office 2201 N. Broadway, Suite C North Bend, OR 97459	October 2017	November 2018
	Section 10 of the Rivers and Harbors Act – permit issued to allow structures or work in or affecting navigable waters of the United States			
	Section 408 of the Clean Water Act – issuance of permit allowing the occupation or alteration of Army Corps of Engineers civil works projects	Marci Johnson U.S. Army Corps of Engineers P.O. Box 2946 Portland, OR 97285 (503) 808-4765	September 2017	November 2018
U.S. Coast Guard (USCG)	Letter of Recommendation and Letter of Recommendation Analysis under the Ports and Waterway Safety Act	Captain Timmons USGS Sector Columbia River 2185 SE 12th Place Warrenton, Oregon 97146	April 2006	December 2017
U.S. Fish and Wildlife Service	Endangered Species Act – consultation under Section 7 and issuance of biological opinion	Joe Zisa 503-231-6179 joe_zisa@fws.gov Oregon Fish and Wildlife Office 2600 SE 98th Ave., Ste. 100 Portland, OR 97266	September 2017	November 2018
	Fish and Wildlife Coordination Act – consultation with federal agencies to prevent loss or damage to wildlife resources		September 2017	November 2018
	Migratory Bird Treaty Act Review		September 2017	

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
National Marine Fisheries Service	ESA Section 7 Consultation – issuance of biological opinion	Chuck Wheeler Fisheries Biologist 541-957-3379 chuck.wheeler@noaa.gov 2900 Stewart Parkway Roseburg, OR 97471	September 2017	November 2018
	Magnuson-Stevens Fishery Conservation and Management Act consultation on Essential Fish Habitat		September 2017	November 2018
	Marine Mammal Protection Act – Issuance of Incidental Harassment Authorization	Jordan Carduner 1315 East West Highway Silver Spring, MD 20910	October 2017	November 2018
Federal Aviation Administration (FAA)	Determination of No Hazard to Air Navigation pursuant to 14 CFR Part 77.	Dan Shoemaker 1601 Lind Ave SW Renton, WA 98055 (425) 227-2791	October 2017	Prior to Construction
USDOI Bureau of Land Management	Mineral Leasing Act – issuance of Right-of-Way Grant	Miriam Liberatore Planning and Environmental Coordinator 541-618-2412 mliberat@blm.gov 3040 Biddle Road Medford, OR 97504	October 2017	November 2018
	Mineral Leasing Act – issuance of Temporary Use Permit			
	Federal Land Policy and Management Act - Amendments to Resource Management Plans			
USDA Forest Service	Mineral Leasing Act - Right-of-Way Grant Letter of Concurrence	David Krantz PCGP Project Manager 541-618-2082 dkrantz@fs.fed.us 3040 Biddle Road Medford, OR 97525	October 2017	November 2018
	Federal Land Policy and Management Act - Amendments to Existing Forest Plans			

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
USDI Bureau of Reclamation	Right-of-Way Grant Letter of Concurrence	Lila Black 541-880-7510 lblack@usbr.gov Klamath Basin Area Office 6600 Washburn Way Klamath Falls, OR 97603	October 2017	November 2018
	Letter of Consent covering lands on which BOR has reserved rights or acquired easements			
Tribal				
Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians	FERC to consult with the Tribes under NHPA Section 106	Ms. Stacy Scott 541-888-9577x7513 sscott@ctclusi.org 1245 Fulton Avenue Coos Bay, OR 97420	FERC to initiate after receipt of applications	November 2018
Coquille Indian Tribe		Kassandra Rippee 541-756-0904x10216 kassandrarippee@coquilletribe.org 3050 Tremont Street North Bend, OR 97459		
Cow Creek Band of Umpqua Indians		Mr Dan Courtney (541) 672-9405 dlcourtney5431@msn.com 2371 Stephens Street, Suite 500 Roseburg, OR 97470		
The Klamath Tribes		Mr. Perry Chocktoot Culture & Heritage Director 541-783-2219x159 Perry.Chocktoot@klamathtribes.com P.O. Box 436 Chiloquin, OR 97624		
Confederated Tribes of the Siletz Indians		Mr. Robert Kentta Cultural Resources Director 541-444-2532 rkentta@ctsi.nsn.us P.O. Box 549 Siletz, OR 97380		

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
Confederated Tribes of the Grand Ronde Community		David Harrelson 503-879-1630 david.harrelson@grandronde.org 9615 Grand Ronde Road Grand Ronde, OR 97347		
State				
Oregon Division of State Parks Office of Historic Preservation	National Historic Preservation Act – Section 106 Consultation	John Pouley Assistant State Archaeologist 503-986-0675 john.pouley@oregon.gov 725 Summer St. NE, #C Salem, OR 97301	Initiated by FERC upon receipt of application	November 2018
Oregon Department of Environmental Quality	CWA 401 Water Quality Certification	Mary Camarata 541-687-7435 camarata.mary@deq.state.or.us 165 East 7th Ave., Ste. 100 Eugene, OR 97401	October 2017	October 2018
	Clean Air Act – issuance of Title V Operating Air Permit		To be filed one year after operation.	Within 1 year of filing
	Clean Water Act – issuance of permit under the National Pollutant Discharge Elimination System (“NPDES”) - 1200A General Permit for Concrete Batch Plant		Prior to construction	Prior to construction
	Clean Water Act – issuance of NPDES - 1200-C General Permit for any Contiguous Sites		Prior to construction	October 2018
	Clean Water Act – issuance of NPDES Wastewater Permit for current site conditions – allows discharge of treatment of leachate from landfill through the ocean outfall		Renewed July 26, 2015. Expires June 30, 2020	Issued

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
	CWA 402 NPDES Construction Stormwater Permit		Prior to construction	Prior to construction
	CWA 402 NPDES Operating Stormwater Permit		Prior to operation	Prior to operation
	CWA 402 NPDES Water Pollution Control Facility (WPCF) – Hydrostatic Test Water		Prior to operation	Prior to operation
	Type B NSR Air Permit for LNG Terminal		Updated filed September 2017	Approved June 2015/October 2018
	Air Contaminant Discharge Permit for Compression Facilities		Modifying pending application October 2017	October 2018
Oregon Department of Water Resources	Permit to Appropriate Water	Jerry K. Sauter Water Rights Program Analyst 503-986-0817 jerry.k.sauter@state.or.us Water Right Services Division 725 Summer Street NE, Ste. A Salem, OR 97301	Prior to operation	Prior to operation
Oregon Department of Fish and Wildlife	In-Water Blasting Permit Fish Passage	Sarah Reif Energy Coordinator, Wildlife Division 503-947-6082 sarah.j.reif@state.or.us 4034 Fairview Industrial Drive SE Salem, OR 97302	October 2017	October 2018
	Fish Passage Approval	Greg Apke 4034 Fairview Industrial Dr. SE Salem, OR 97302 503-947-6228 Greg.d.apke@state.or.us	December 2017	October 2018
Oregon Department of Transportation	State Highway Crossing Permit	Roger B. Allemand Permit Specialist – District 8	Prior to construction	Prior to construction

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
	Railroad Flagging Permit	541-774-6360 roger.b.allemand@odot.state.or.us	Prior to Construction	Prior to construction
	Oversize Load Permit	Dave Wells Permit Specialist – District 7 541-957-3588 david.wells@odot.state.or.us	Prior to Construction	Prior to construction
	Overweight Load Permit		Prior to Construction	Prior to construction
	Street Use Permit		Prior to Construction	Prior to construction
Oregon Department of State Lands	Joint Permit with the USACE Removal/Fill Permit	Bob Lobdell 503-986-5282 bob.lobdell@state.or.us 775 Summer Street NE, Ste. 100 Salem, OR 97301	October 2017	October 2018
	Proprietary easements and licenses for land access and gravel use		October 2017	October 2018
	Wetland Report Concurrence	Lynne McAllister Jurisdiction Coordinator 503-986-5300 lynne.mcallister@state.or.us 775 Summer Street NE, Ste. 100 Salem, OR 97301	October 2017	October 2018
Oregon Department of Land Conservation and Development	Coastal Zone Management Consistency Determination	Elizabeth Ruther 503-934-0029 elizabeth.j.ruther@state.or.us 635 Capitol Street, Suite 150 Salem, Oregon 97301-2540	November 2017	October 2018
Oregon Department of Forestry	Operate Mechanical Equipment	Josh Barnard Field Support Unit Manager 503-945-7493 josh.w.barnard@oregon.gov 2600 State Street, Bldg. A Salem, OR 97310	Prior to Construction	Prior to Construction
	Written Plan & Alternate Plan			
Oregon State Building Codes Division (BCD)	Building Permits – for various permanent structures.	Mark Long (503) 373-7235	Prior to Construction	Prior to Construction
BCD	Temporary Building Permit – for any temporary structures.	Mark Long (503) 373-7235	Prior to Construction	Prior to Construction

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
Oregon State Historic Preservation Office (SHPO)	Section 106 Consultation	John O. Pouley 503-986-0675	September 2017	November 2018
County				
City of North Bend Planning Department	Conditional Use Permit (for pipeline in City of North Bend)	Chelsea Schnabel City Planner City of North Bend (541) 756-8535 cschnabel@northbendcity.org 835 California Avenue North Bend, OR 97459	October 2017	May 2018
Coos County Planning Department	Conditional Use Permit	Jill Rolfe 541-396-7770 jrolfe@co.coos.or.us Coos County Planning Department 225 N. Adams Coquille, OR 97423		Approved 2016
Douglas County Planning Department	Conditional Use Permit	Cheryl Goodhue Planning Department 541-440-4289 cagoodhu@co.douglas.or.us Douglas County Courthouse Justice Building – Room 106 Roseburg, OR 97470		Approved 2010 and 2014
Klamath County Planning Department	Conditional Use Permit – Compressor Station	Mark Gallagher Planning Director 541-883-5121x3064 mgallagher@co.klamath.or.us 305 Main Street Klamath Falls, OR 97601		Approved 2015

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

absent
COMMISSIONER

COMMISSIONER

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
(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. Pacific Connector's Compliance with the Applicable Standards for a CUP Extension Request on Farm and Forest Lands

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. 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.

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 Statemcnts 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.

LEGAL STATUS

This site displays a prototype of a "Web 2.0" version of the daily Federal Register. It is not an official legal edition of the Federal Register, and does not replace the official print version or the official electronic version on GPO's govinfo.gov.

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LEGAL STATUS

Federal Consistency Appeal by Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP

A Notice by the National Oceanic and Atmospheric Administration on 04/20/2020

DOCUMENT DETAILS

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Feedback

AGENCY:

National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION:

Notice of appeal.

SUMMARY:

This announcement provides notice that the Department of Commerce has received a "Notice of Appeal" filed by Appellants Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP. Appellants are requesting that the Secretary of Commerce override an objection by the Oregon Department of Land Conservation and Development to a consistency certification for a proposed project to construct and operate a liquified natural gas export terminal and a 229-mile interstate natural gas pipeline and compressor station off the Pacific Coast.

ADDRESSES:

NOAA intends to post publicly available materials and related documents comprising the appeal record on the following website: *http://www.regulations.gov/#!docketDetail;D=NOAA-HQ-2020-0058 (http://www.regulations.gov/#!docketDetail;D=NOAA-HQ-2020-0058).*

FOR FURTHER INFORMATION CONTACT:

For questions about this Notice, contact Rachel Morris, Attorney-Advisor, NOAA Office of the General Counsel, Oceans and Coasts Section, and Patrick Carroll, Attorney-Advisor, NOAA Office of the General Counsel, Oceans and Coasts Section, at *jordancove.appeal@noaa.gov (mailto:jordancove.appeal@noaa.gov)* or (301) 713-7387.

SUPPLEMENTARY INFORMATION:

I. Notice of Appeal

On March 20, 2020, the Secretary of Commerce (Secretary) received a "Notice of Appeal" filed by Appellants Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP pursuant to the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 (https://www.govinfo.gov/link/uscode/16/1451?type=usc&year=mostrecent&link-type=html) *et seq.*, and implementing regulations found at 15 CFR part 930 (/select-citation/2020/04/20/15-CFR-930), subpart H. Appellants are appealing an objection by the Oregon Department of Land Conservation and Development to Appellants' CZMA federal consistency certification for a proposed project to construct and operate a liquified natural gas (LNG) export terminal within the North Spit of Coos Bay and a 229-mile interstate natural gas pipeline and compressor station to connect the LNG export terminal to existing pipeline infrastructure. This matter constitutes an appeal of an "energy project" within the meaning of the CZMA regulations. *See* 15 CFR 930.123 (/select-citation/2020/04/20/15-CFR-930.123)(c).

Under the CZMA, the Secretary may override the Oregon Department of Land Conservation and Development's objection on grounds that the project is consistent with the objectives or purposes of the CZMA, or is necessary in the interest of national security. To make the determination that the proposed activity is "consistent with the objectives or purposes of the CZMA," the Secretary must find that: (1) The

proposed activity furthers the national interest as articulated in sections 302 or 303 of the CZMA, in a significant or substantial manner; (2) the national interest furthered by the proposed activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively; and (3) no reasonable alternative is available that would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the applicable coastal management program. 15 CFR 930.121 (/select-citation/2020/04/20/15-CFR-930.121). To make the determination that the proposed activity is "necessary in the interest of national security," the Secretary must find that a national defense or other national security interest would be significantly impaired if the proposed activity is not permitted to go forward as proposed. 15 CFR 930.122 (/select-citation/2020/04/20/15-CFR-930.122).

II. Public Availability of Appeal Documents

NOAA intends to provide access to publicly available materials and related documents comprising the appeal record on the following website: *http://www.regulations.gov/#!docketDetail;D=NOAA-HQ-2020-0058 (http://www.regulations.gov/#!docketDetail;D=NOAA-HQ-2020-0058).*

The consolidated record maintained by the lead federal permitting agency is also located at FERC Docket Numbers CP17-494 and CP17-495, FERC Online Docket Search, available at *https://elibrary.ferc.gov/idmws/docket_search.asp (https://elibrary.ferc.gov/idmws/docket_search.asp).*

Authority Citation: 15 CFR 930.128 (/select-citation/2020/04/20/15-CFR-930.128)(a).

Start Printed Page 21835

Adam Dilts,

Chief, Oceans and Coasts Section, NOAA Office of General Counsel.

[FR Doc. 2020-07862 (/a/2020-07862) Filed 4-17-20; 8:45 am]

BILLING CODE 3510-JE-P

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 DODDS AND RANKER	)	FINAL DECISION AND ORDER NO. 19-11-069PL

NOW BEFORE THE Board of Commissioners sitting for the transaction of County business on the 26th day of November, 2019, is the matter of the appeal of the Planning Director's June 21, 2019, 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 appointed 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 September 30, 2019. At the conclusion of the hearing the record was closed.

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners on October 10, 2019. Staff presented some minor 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 15, 2019. All members present and participating unanimously voted to tentatively accept the decision of the Hearings Officer, and continued the final decision on

ATTACHMENT D

the matter to allow staff to draft the appropriate order and findings. The meeting was continued to November 26, 2019, for final approval.

On November 15, 2019, the meeting on deliberation was opened to provide an additional opportunity to the Board of Commissioners to declare any potential ex-parte contacts or conflicts of interest. All Commissioners revealed potential ex-parte communications and those present were allowed to challenge and rebut the substance of the Commissioner'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 June 21, 2019, 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 26th day of November 2019.

BOARD OF COMMISSIONERS:

COMMISSIONER

COMMISSIONER

COMMISSIONER

RECORDING SECRETARY

APPROVED AS TO FORM:

Office of Legal Counsel

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 THE SIXTH EXTENSION REQUEST FOR
COUNTY FILE NO. HBCU 10-01 / REM 11-01,
AKA: THE "ORIGINAL ALIGNMENT")
COOS COUNTY, OREGON

FILE NO. AP 19-004
(APPEALS OF COUNTY FILE NOS. EXT-19-04).

NOVEMBER 26, 2019

I. INTRODUCTION

The Board of Commissioners ("Board") has received and reviewed the record of proceedings and the Hearings Officer's Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners dated October 10, 2019 ("Recommended Order"). In this decision, the Board adopts the Recommended Order, as modified, denies the appeal, and approves the requested application.

A. Nature of the Local Appeal

The appellants appealed the Planning Director's decision to allow the applicant Pacific Connector Gas Pipeline, LP, (hereinafter "Applicant" or "Pacific Connector"), an additional one-year extension to implement its development approval for HBCU 10-01, Final Order 10-08-045PL, as amended on remand from LUBA, County File No. REM 11-01, Final Order 12-03-18 PL. The staff decision under appeal approves the permit for a sixth one-year extension. The staff decision for the file, which was assigned file No. EXT-19-04 is dated June 21, 2019. Staff assigned the file No. AP 19-004 to the appeal.

Previous one-year extensions are documented as follows:

- File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).
- File No. ACU 15-07/ AP-15-01, Final Ord. No. 15-08-039PL (Oct. 6, 2015).
- File No. ACU-16-013 (no appeal filed after staff decision)
- File No. EXT-17-005/ AP-17-004, Final Ord. No. 17-11-046PL (Dec. 19, 2017).
- File No. EXT 18-003 / AP-18-003, Final Order No. 18-11-073PL (Nov. 20, 2018).

B. Detailed Case History of the Pipeline

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 Pacific Connector's request for a Conditional Use Permit ("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"). *Citizens Against LNG, Inc v. Coos County*, 63 Or LUBA 162 (2011).

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 Board adopted the Hearings Officer's recommendation 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 December 5, 2013, Pacific Connector submitted an application requesting approval of another alternative segment of pipeline route, known as the "Blue Ridge Alternative Alignment." The Hearings Officer recommended approval of these route amendments and the Board accepted those recommendations on October 21, 2014. Final Decision and Order HBCU-13-06; Order No. 14-09-0062PL.

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 Approved, 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). The Hearings Officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. 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. File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).

On November 12, 2014, Jody McCaffree and John Clarke filed a Notice of Intent to Appeal the Board's decision to LUBA. Petitioners 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 Board 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 - addition 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 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 Pacific Connector's application for a Certificate. Nonetheless, on March 16, 2016, Pacific Connector filed for a third extension of the original pipeline alignment, which 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 Pacific Connector can 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 the first one-year extension request for the Brunschmid and Stock Slough alignments, (HBCU-13-04 /ACU- 16-003). No local appeal was filed.

On April 11, 2016, Staff approved the third one-year extension request for the original alignment (HBCU-10-01 / ACU-16-013). No local appeal was filed.

On December 28, 2016, Staff approved the first one-year extension request for the Blue Ridge alignment, (HBCU-13-06 /EXT 16-007). 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, Pacific Connector submitted a second extension request for the Brunschmid and Stock Slough alignments (County File No. EXT-17-002). The Planning Director approved this extension on May 21, 2017. The opponents did not file an appeal of the Planning Director's decision.

On March 30, 2017, Pacific Connector submitted a 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, which staff assigned file no. AP-17-004. The Hearings Officer recommended approval of the extension, and that recommendation was approved by the Board on December 19, 2017 (Final Decision and Order No. 17-11046PL). No further appeal ensued.

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.

On February 21, 2018, Pacific Connector submitted a third extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on

May 18, 2018 (HBCU-13-04 / EXT-18-001). The opponents filed a timely appeal of the Planning Director's decision. AP-18-001. The Board issued a final decision approving the extension Nov. 20, 2018 (No. 18-11-072PL). Opponents appealed to LUBA.

On or about March 20, 2018, Pacific Connector filed a fifth extension request of the original pipeline alignment. (EXT 18-003). The Planning Director approved this extension request on May 21, 2018, and followed that up with a corrected notice on May 24, 2018. Opponents filed a timely appeal, and the Board issued a final decision on Nov 20, 2018. AP-18-002. Opponents appealed to LUBA.

LUBA consolidated the two appeals (AP-18-001 and AP-18-002). On April 25, 2019, LUBA issued a Final Opinion and Order in which it rejected challenges to the Board's decision to grant additional extensions. *See Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019). Opponents filed a petition for reconsideration with the Court of Appeals, which the Court denied.

On October 18, 2018, the Board adopted certain legislative amendments to the CCZLDO, including CCZLDO 5.2.600, which governs time extensions of permits. *See* Ord. 18-09-009PL. Opponents appealed the Board's decision to LUBA, but both LUBA and the Court of Appeals denied opponents' contentions on appeal. *McCaffree v. Coos County*, __ Or LUBA ___ (LUBA No. 2018-132, June 6, 2019). *aff'd without opin.*, 299 Or App 521 (2019).

On or about March 28, 2019, Pacific Connector filed the current (sixth) extension request of the original pipeline alignment. (EXT 19-004). The Planning Director approved extension request on June 21, 2019. Opponents filed a timely appeal on July 1, 2019. AP-19-004. The Hearings Officer held a noticed public hearing, but the appellants did not attend and did not submit additional testimony in support of their appeal. At the public hearing, the Hearings Officer accepted testimony from Pacific Connector and various opponents of the project. The Hearings Officer closed the public hearing and the record.

C. Timeline of Events.

The timeline of key dates for this application is set forth below:

- Application Submitted — March 28, 2019
- Staff Decision — June 21, 2019
- Local Appeal filed — July 1, 2019
- Public hearing, record closed — Sept 30, 2019
- Hearings Officer Recommendation — October 10, 2019
- Board Deliberations — November 15, 2019

II. LEGAL ANALYSIS.

A. Appellants' "Objection" Has No Merit.

Appellants state that they "object to the numerous errors stated in the Planning Director's decision's 'background' statement because many statements are not true and they are not supported by substantial evidence." The Board finds that appellants' generalized statement is an insufficient way to preserve error in an appeal. If an appellant seeks to challenge specific findings of fact, the appellant has the obligation to identify those issues with sufficient specificity to enable review.

The appellants further state that "[a]ll of the issue[s]raised in the previous proceedings on the 2018 extensions are pending resolution on appeal and have not been resolved so they can be raised again, here." As stated above, opponents' appeals of the 2018 extensions failed at both LUBA and the Oregon Court of Appeals. Further, the Court of Appeals denied opponents' petition for reconsideration. Accordingly, all appeals that are available by right have been exhausted.

B. 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 were amended on October 2, 2018 (County File No. AM-18-005), and the current version is reproduced below.

New Version:
SECTION 5.2.600 EXPIRATION AND EXTENSION of Conditional Uses

1. ***Permit Expiration Dates for all Conditional Use Approvals and Extensions:***
    a. ***On lands zoned Exclusive Farm, Forest and Forest Mixed Use:***
        (1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.
        (2) A county may grant one extension period of up to 12 months if:
            (a) An applicant makes a written request for an extension of the development approval period;
            (b) The request is submitted to the county prior to the expiration of the approval period;
            (c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

(d) The county determines that the applicant was unable to begin or continue development during the approval period[1] for reasons for which the applicant was not responsible.

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

(3) Approval of an extension granted under this rule is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.
(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.
(5) (a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.
(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.
(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).
(7) There are no limit on the number of extensions that can be applied for unless this ordinance otherwise allows.

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

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

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

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

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

CCZLDO 5.2.600. 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.

The opponents contend that a previous version of CCZLDO 5.2.600 (*i.e.* the 2013 version of the extension criteria) apply to this case, as opposed to the current version. For example, in the appeal narrative, the appellants state that:

> "[a]ny changes to the provisions since 2010 or since 2013 are not applicable to the extension requests because the provisions in effect at the time of the application constitute the applicable goal posts for subsequent decisions related to the permits. The extension of the permits on non-resource lands has exceeded the applicable time limit of two years."

See Appeal Narrative at p. 2.

ORS 215.427(3) is known as the "goal post" statute. It states that the law that applies to a land use application is the law in effect on the date the application is filed:

> ***(3)(a) If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.***

Appellants are correct that the "goal post" statute applies to Pacific Connector's application, though it does not have the effect appellants contend that it does. The version of CCZLDO 5.2.600 in effect when Pacific Connector filed its application (March 29, 2019) was adopted in

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

2018. Pursuant to ORS 215.427(3), the 2018 version of CCZLDO 5.2.600 applies to the application. Although the appellants contend that ORS 215.427(3) locks in the extension criteria that govern any further extension request to an approved permit to those criteria that were in effect when the original permit application was first approved, the Board finds that this contention is not supported by any plausible reading of ORS 215.427(3), and LUBA has therefore correctly rejected appellants' contention. *See Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019).

ORS 215.427(3) is limited to locking in the "standards and criteria" that apply to the particular pending application. Nothing in ORS 215.428(3) requires a county to apply standards in effect at the time one development application is submitted to a distinct and subsequent development application. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991). In this case, the application for an extension is governed by different criteria than governed the initial approval decision, and the filing of the original application does not vest the criteria for an extension.

C. Pacific Connector Has Established Compliance with the Applicable Standards for a Conditional Use Extension Request on Farm and Forest Zoned Lands.

1. **The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600.1.a.(2)(a).**

CCZLDO §5.2.600.1.a.(2)(a) provides as follows:

> ***(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;***

The Board finds that Pacific Connector's application and attachments demonstrate compliance with the code requirements at CCZLDO §5.2.600.1.a.(2)(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. Pacific Connector submitted a written narrative and application, which specifically requests an extension, on March 28, 2019, which is within the development approval period.

This criterion is met.

2. **Pacific Connector's request was submitted to the County prior to the expiration of the approval period. § 5.2.600.1.a.(2)(b).**

CCZLDO § 5.2.600.1.a.(2)(b) provides as follows:

> ***(2) A county may grant one extension period of up to 12 months if:***
> *****
> ***(b) The request is submitted to the county prior to the expiration of the approval period;***

The approval period for the fifth extension expired on April 2, 2019, and it was incumbent upon Pacific Connector to submit an extension request prior to that date. Pacific Connector complied with this requirement by submitting the "Application for Extension" on March 28, 2019.

This criterion is met.

3. **Pacific Connector was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible. §5.2.600.1.a.(2)(c) & (d)**

CCZLDO §5.2.600.1.a.(2)(c) & (d) provides as follows:

> ***(2) A county may grant one extension period of up to 12 months if:***
> * * * * *
> ***(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[1] for reasons for which the applicant was not responsible.***
>
> ***Coos County has and will continue to accept reasons for which the applicant was not responsible as, but limited too, financial hardship, death or owner, transfer of property, unable to complete conditions of approval and projects that require additional permits. The County's Ordinance does not control other permitting agency processes and the County shall only consider if the applicant has requested other permits as a valid reason and to show they are attempting to satisfy conditions of approval. This is a different standard then actually showing compliance with conditions of approval. This also, does not account for other permits that may be required outside of the land use process.***

To approve this extension application, the Board must find that Pacific Connector has stated reasons that prevented it 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.a.(2)(c), (d).

In the recent appeal of two other pipeline extension decisions, LUBA affirmed (and quoted) the County's determination that applied a "reasonable efforts" test to determine whether

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

Pacific Connector was responsible for not yet obtaining permits from other agencies to allow development of the pipeline to proceed:

> 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.

Williams v. Coos County, __ Or LUBA __ (LUBA Nos. 2018-141/ 142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019). The Board finds that Pacific Connector has presented credible evidence to support that it has made reasonable efforts in this case. In support of this conclusion, the Board relies upon the following:

In its application narrative for the extension, Pacific Connector explains why it has not begun construction on this alignment:

> 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.

Continuing, Pacific Connector further states:

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, Exhibit 4 at 8.

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 (April 2018-April 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. Furthermore, due to delays in its review associated with the shutdown of the federal government, FERC has recently issued a revised schedule extending the deadline for completion of its environmental review and final order for the Jordan Cove Energy Project, which includes the Pipeline. *See* FERC Notice of Revised Schedule for the Environmental Review and the Final Order for the Jordan Cove Energy Project in Exhibit 8. The certificate request is still pending before FERC. *Id.* Applicant is not responsible for FERC's lengthy review process and delays of the same.
>
> 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.

The Board has reviewed the evidence in the record regarding the implementing steps taken in the past 12 months by Pacific Connector and agrees that such actions are sufficient to show that Pacific Connector is being diligent in pursuing its permits. The Board agrees with the above-quoted analysis from Pacific Connector and adopts it as findings for this case.

The appellants argue that "the applicant has not been diligent in pursuing a dispositive permit." The appellants note, correctly, that DEQ denied its DEQ permit application in part because it did not submit sufficient information to obtain the permit. However, the DEQ permit is an extremely complex permit, and even the letter of denial is 80+ pages long. DEQ did invite Pacific Connector to re-apply for the permit, so the DEQ denial is not dispositive of the project. Under these circumstances, it would be unjust to deny an extension to the County permit.

For the same reason, the Board also does not fault Pacific Connector for proposing "significant changes" to the pipeline route. If Pacific Connector did not propose significant changes along the way, the opponents would complain that Pacific Connector is not being responsive to their concerns. Obviously, in a project of this magnitude, there are going to be changes to the project as time goes on. Most of the proposed changes are done to be responsive to FERC and other agencies, which is exactly what is supposed to happen during a complex permitting project. The Board will not fault Pacific Connector for proposing changes midstream, and in fact, finds Pacific Connector's willingness to propose changes to be laudable. The opponents' views on this point seem extreme, unworkable, and unjust.

The appeal narrative argues that the fact that Pacific Connector's preferred alignment proposed in the current FERC application is different than the alignment approved by Coos County disproves Pacific Connector's claim that the delay in the FERC proceedings is actually holding up implementation of the County permit. *See* Appellant's Narrative, at p. 4. This argument was raised and rejected by the Board in the local proceedings that resulted in previous extensions and is a "collateral attack" on the previous extension approvals. Moreover, LUBA affirmed the Board's previous determination on appeal:

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

Williams, __ Or LUBA at ___ (slip op. at 10).

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 Board can tell, the argument is intended to relate to CCZLDO 5.2.600.1.a.(2)(c) and (d) 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 Pacific Connector 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.

The appellants are also wrong to the extent that they contend that "pursuing additional [required] permits" does not provide valid grounds for granting an extension. They contend that Pacific Connector is required to start "actual construction" in order to be eligible for a permit extension. The argument is not well-developed and is difficult to follow. However, this argument does not assist the appellants. To be granted an extension, Pacific Connector need only show that "reasons" exist why "development" did not occur. Even assuming the appellants are correct that "development" is the same as "construction / ground breaking" (an issue the Board does not decide), the inability to obtain permits despite reasonable efforts would be a reason to grant an extension despite not breaking ground, unless Pacific Connector is somehow foreclosed as a matter of law from obtaining those needed permits.

4. <u>The Board's Decision at Issue Will Constitute a Land Use Decision.</u>

CCZLDO § 5.2.600.1.a.(3) provides as follows:

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

Notwithstanding the language in this subsection, at Pacific Connector's request, the County has processed this request pursuant to the City's Type II procedures. The Board finds that the Type II process has provided for greater public notice and opportunity for public comment (including an appeal hearing and Board-level decision) than would have occurred if the County followed the process under this subsection. Further, the Board finds that the County's

land use decision is a final land use decision, and appeal of that decision will be as determined by Oregon law, not this code section.

5. <u>The Criteria Governing the Pipeline Permit Have Not Changed.</u>

CCZLDO § 5.2.600.1.a.(4) provides as follows:

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

This request is Pacific Connector's sixth request for an extension of the original approval. As a result, the County must find that, for that portion of the alignment located on resource land, "applicable criteria for the decision have not changed." CCZLDO 5.2.600.1.a.(4). The time period that the Board will consider consists of the time period that the last permit extension was in place: April 2, 2018 to April 2, 2019. Legislative Amendments that occurred prior to April 2, 2018 are not relevant to this sixth extension request.

In their appeal narrative, the opponents argue that the following are "criteria" that have "changed."

- 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.
- CCZLDO 5.11.100 to .5.11.300 (Geologic Hazards).Comprehensive Plan Vol 1, Part 1, §5.11 & Part 2, §3.9 Natural Hazard Maps, amended by County File AM-15-03 and County File AM-15-04 (Ord. 15-05-005PL, dated July 30, 2015, which had a delayed effective date of July 30, 2016 and was again delayed until July 30, 2017).[1]
- CCZLDO 5.0.175(1), amended by County File AM 14-11 (Ord. 14-09-012PL dated January 20, 2015, effective April 20, 2015).
- Amendments adopted in AM-18-005.

See Appeal Narrative at p. 2. With regard to the first three bulleted points, these issues are all a collateral attack on previous extension decisions and cannot be re-raised here. With regard to "AM-18-005," the appellants do not explain what decision they are referring to, and therefore the issue is not developed sufficiently to allow a response. To the extent that they are referring to the legislative amendments adopted by Ord. 18-09-009PL, that Ordinance is 208 pages long and it is unclear which provisions in that Ordinance would be new approval standards for a pipeline in the EFU zone. The Board can simply not respond to the concern because it is insufficiently developed. Nonetheless, staff testified at the hearing that no approval standards for pipelines were amended in 2018.

[1] 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.

In a 2017 permit extension decision, the Board 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. LUBA and the Court of Appeals affirmed the Board's analysis on this point. *Williams*, __ Or LUBA at ___ (slip op. at 11-13), *aff'd* 298 Or App 841 (2019). In the present case, opponents have not provided a sufficient legal basis for the Board to find that LUBA and the Court of Appeals erred. Therefore, pursuant to CCZLDO 4.11.125(7), the natural hazard provisions are not "applicable approval criteria" that have changed.

As noted above, the appellants cite to requirements for geologic assessments, including new reporting requirements, which were adopted in July of 2015 and which were delayed until 2017. *See* 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 Pacific Connector 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. LUBA and the Court of Appeals affirmed the Board's analysis on this point. *Williams*, __ Or LUBA at ___ (slip op. at 13-15), *aff'd* 298 Or App 841 (2019). In the present case, opponents have not provided a sufficient legal basis for the Board to find that LUBA and the Court of Appeals erred. Therefore, as presented, appellants' contention provides no basis for determining that these new requirements are changes in the law that would constitute approval standards for a pipeline permit.

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 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 *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd without opin.,* 298 Or App 841 (2019), LUBA rejected appellants' argument on this point. LUBA stated as follows:

> LDO 5.0.175 took effect in 2015. LDO 5.0.175(1) provides that for an application for a permit "[a] transportation agency, utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 may submit an application to the Planning Department for a permit or zoning authorization required for a project without landowner consent otherwise required by this ordinance." Differently, LDO 5.0.150(1) provides that an application for a permit "shall include the signature of all owners of the property." Petitioners argue that LDO 5.0.175 is a new "approval criteri[on]" within the meaning of LDO 5.2.600.1(c), and that it applies to the 2010 CUP and the 2013 CUP.
>
> The board of commissioners adopted findings that LDO 5.0.175 is not an "approval criteri[on]" but rather is an application submittal requirement. The board of commissioners also adopted alternative findings that even if LDO 5.0.175 is an "approval criterion," it is not "applicable" to the 2010 CUP and the 2013 CUP, because it is an optional provision that allows certain entities to choose to apply for a permit without landowner consent. Petitioners argue that in its decision approving the 2010 CUP, the county concluded that LDO 5.0.150 is an "approval criterion," and accordingly, the county must also conclude that LDO 5.0.175 is an approval criterion, and not merely a submittal requirement.
>
> As intervenor points out, petitioners' argument does not address the board of commissioners' alternative finding that, even if LDO 5.0.175 could constitute an "approval criterion," it is not an "applicable" approval criterion within the meaning of LDO 5.2.600.1(c) because it merely provides an alternative, optional pathway for certain entities to apply for a permit. We agree with intervenor that absent any challenge to that finding, petitioners' argument provides no basis for reversal or remand.

In the present case, appellants have not established that CCZLDO 5.0.175 is an "applicable" criterion or presented any other contentions that would allow the Board to reach a different conclusion than LUBA did. Therefore, the appellants' contentions provide no basis for denial of another extension.

6. The Extension Does Not Seek Approval of Residential Development.

CCZLDO 5.2.600.1.a.(5) & (6) provide as follows:

> ***(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).***

The original approval did not authorize any residential development on agricultural or forest land outside of an urban growth boundary. The Board finds that these provisions are not applicable.

7. The Code Allowed for Multiple Extensions.

CCZLDO 5.2.600.1.a.(7) provides as follows:

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

This provision provides express authority for the County to grant multiple extensions of the original approval. This is the sixth one-year extension, with previous extensions being granted in 2014, 2015, 2016, 2017, and 2018.

D. <u>Pacific Connector Has Established Compliance with the Applicable Standards for a Conditional Use Extension Request on Non-Farm and Non-Forest Zoned Lands.</u>

CCZLDO 5.2.600.1.b. provides as follows:

> ***b. On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:***
> ***(1) All conditional uses for residential development including overlays shall not expire once they have received approval.***
> ***(2) All conditional uses for non residential development including overlays shall be valid for period of four (4) years from the date of final approval.***
> ***(3) Extension Requests:***
> ***a. For all conditional uses subject to an expiration date of four (4) years are eligible for extensions so long as the property has not been:***
> ***i. Reconfigured through a property line adjustment or land division; and***
> ***ii. Rezoned to another zoning district.***
> ***(4) An extension shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.***
> ***(5) An extension shall be received prior the expiration date of the conditional use or the prior extension.***

Pacific Connector 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.

The original 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 original approval. Therefore, the original approval is eligible for an extension.

Pacific Connector has included a completed and signed County extension application form and the required application fee with this request. The County received the extension request on March 28, 2019, which was before the expiration of the approval period. Therefore, the application meets the requirements of this provision.

The appellants argue that "the county erred in giving the applicant additional CUP extensions on non-resource lands for four years." Not only does the amendment not apply, even if it did, these permits are not eligible for a four-year extension because they were "subject to an expiration date of four years." *See* Appeal Narrative at p. 2. Moreover, the Board finds that the appellants' contention is exceedingly difficult to follow and is not adequately developed for review.

To the extent that the appellants are arguing that the previous "2 year" time period applies with only one possible two-year extension available (for a total of four years), that argument is rejected. The code allowed for additional extensions to be submitted. In any event, even if the challenge were valid it has long since been waived; this is the sixth extension and the issue could have been raised beginning in 2016.

E. <u>CCZLDO 5.2.600(2) Provides No Reason for Denial.</u>

CCZLDO 5.2.600(2)(2018) reads as follows:

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

In the appeal narrative, the appellants contend that the County lacks the authority to apply this section:

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

> "[A]pplication of CCZLDO 5.2.600(2)(as amended in 2018) is beyond of the scope of the County's authority. As understood[,] it is an attempt to avoid the application of the hazard-related criteria that are applicable if the application was filed today and would have been applicable at the time the CUP application was filed. The county may not legislate around the rule's prohibition of extensions when the applicable criteria has changed.

The Board finds that this contention is conclusory in nature and appears to reflect a policy disagreement, as opposed to making an argument based on applicable law. Appellants make no attempt to support the argument in any manner or to explain that "rule" to which they refer. The issue is simply not raised with sufficient specificity to give fair notice of the nature of the problem. For this reason alone, the Board denies appellants' contention on this issue.

Nonetheless, to the extent the Board understands the issue, it appears to be similar to an argument raised and rejected by LUBA in *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019). The proper time for appealing the new language set forth in CCZLDO 5.2.600(2)(2018) was at the time of adoption. In fact, Ms. McCaffree did appeal these amendments to LUBA; however, she did not raise this issue and also did not prevail on appeal. *McCaffree v. Coos County,* __ Or LUBA __ (LUBA No. 2018-132, June 6, 2019). Any current attempt to declare CCZLDO 5.2.600(2) (2018) inconsistent with state law is a collateral attack on the legislative enactment and is waived.

This criterion is met.

F. <u>Other Issues Raised by Opponents.</u>

1. Right of Condemnation: Alleged Violation of CCZLDO 5.0.150(1) and CCZLDO 5.0.175(1).

The appellants argue that the county is violating CCZLDO 5.0.150(1) & 5.0.175(1) because the applicant no longer has the right of condemnation pursuant to ORS Chapter 35. The opponents base their argument on the fact that Pacific Connector's right of condemnation stems from federal law and is premised on the acquisition of a Certificate. They argue that since Pacific Connector lost its certificate, it may no longer file land use applications.

As previously noted, CCZLDO 5.0.150(1) and CCZLDO §5.0.175 are not approval criteria for a permit extension. *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019).

As noted, Pacific Connector has applied for a Certificate 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, Pacific Connector is not precluded as a matter of law from obtaining FERC permits. Although FERC denied the previous application, it did so for reasons that can be remedied by obtaining foreign or

domestic contracts for the purchase of natural gas. The County's original approval for the pipeline matter is conditioned to require Pacific Connector to obtain landowner signatures. Pacific Connector must obtain a Certificate in order to effectuate that condition. Granting this extension does not modify or eliminate that condition. As a result, the consent issue will be resolved before the original approval, as extended, is implemented.

Moreover, whatever the merits of this argument, this issue could have been raised in any of the five other land use applications that resulted in permit extensions. The issue is not jurisdictional, and therefore the issue can be, and has been, waived. For these reasons, the Board does not agree with the opponent's understanding of CCZLDO 5.0.150 or CCZLDO 5.0.175. Having said that, it remains the fact that the County permits cannot be acted upon unless and until FERC issues a Certificate.

2. CCZLDO Section 5.0.500 Does Not Apply.

On page 1 of the Appeal Narrative, appellants contend that the County violated CCZLDO 5.0.500, which provides as follows:

> ***SECTION 5.0.500 INCONSISTENT APPLICATIONS:***
>
> ***Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency. Such revocation shall not be cause for refund of any previously submitted application fees.***

Th appellants contend that CCZLDO 5.0.500 is violated because the County failed to deem the original permit automatically revoked because a different alignment was submitted to FERC. However, any application submitted to FERC is not an "application for a land use" within the meaning of this provision. Moreover, the decision for which this extension is being sought is no longer "pending," so CCZLDO 5.0.500 does not apply to this case.

3. The Appellants' "Takings" Argument Lacks Merit.

In the appeal narrative, the opponents argue that the "extensions continue to impose a taking on property of the landowners along the alignment through inverse condemnation." *See* Appeal narrative at p. 3. The Board addressed this issue in previous extension decisions and the answer has not changed since then. This argument does not relate to an approval standard for an extension, and therefore provides no basis for a denial of the extension.

4. Contention that Original Alignment Became Void in 2015 because the Extension Request was Untimely.

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 public hearing, 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.

The appellants now seek to revisit the decision to grant the second extension, because they argue that the application was filed three days late (i.e. on March 16, 2016 instead of the deadline they assume to apply: March 13, 2016). *See* Appeal Narrative, at p 2. However, the premise of the contention, which is that the permit expired on March 13, 2015, appears to be incorrect. The contention is based upon the fact that the Board signed the "Oyster Remand" decision on March 12, 2012. However, CCZLDO §5.0.250 delays the effective date of the decision until after the 21-day appeal period to LUBA has run:

> ***SECTION 5.0.250 TIMETABLE FOR FINAL DECISIONS (ORS 215.427):***
>
> ******
>
> ***4. Time periods specified in this Section shall be computed by excluding the first day and including the last day. If the last day is a Saturday, Sunday, legal holiday or any day on which the County is not open for business, the time deadline is the next working day. [OAR 661-010-0075]***
>
> ***5. The period for expiration of a permit begins when the appeal period for the final decision approving the permit has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.***

For this reason, the appellants are wrong when they assert that the extension needed to be filed on, or prior to, March 13, 2015. The correct "deadline" date was April 2, 2015, and the applicant complied with this requirement by submitting on March 16, 2015.

In addition to being wrong on the merits, any argument directed at the second extension is a collateral attack on Final Decision No. 15-08-039PL. It is simply too late to revisit that decision here. The appellants seek to avoid the collateral attack doctrine by stating that the decision became "null and void." Although the appellants do not develop the argument, the Board understands this contention to be that a decision that is "null and void" can be attacked at any time. Appellants cites only to the definition of "land use decision" and states that "the rule that CCZLDO implements uses the same term so there is no authority for the Director to interpret the term differently." Appeal Narrative at p. 5. The appellants' contention is difficult to follow. In any event, in this case the appeal narrative is not drafted in a sufficiently coherent manner to enable review. The Board will not conduct extensive independent research to develop the argument on the appellant's behalf.

5. Allegations of *Ex Parte* Communications and Bias

At the November 15, 2019 Board deliberation hearing, Board members were provided an opportunity to disclose any *ex parte* contacts as described in ORS 215.422 and 197.835(12), conflicts of interest as described in ORS 244.120, and any actual bias regarding the application. *1000 Friends of Oregon v. Wasco County Court,* 304 Or 76, 747 P2d 39 (1987). Board members made disclosures, including Commissioner Sweet disclosing his attendance at a 2014 civic luncheon at which elements of the broader JCEP and Pacific Connector project were discussed.

Natalie Ranker and Jody McCaffree contended that Commissioners were 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 and AP-18-18-002 November 20, 2018). Opponents then raised these issues on appeal to 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, 76 Or LUBA 346, 369-370 (2017). 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, 76 Or LUBA at 370-71. 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 Pacific Connector and County: The Board denies the contention that the Board members were biased due to a 2007 agreement between Pacific Connector and the County pursuant to which Pacific Connector 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 Pacific Connector. 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 application 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, as noted above, the Board finds 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 Pacific Connector and Board Members: The Board denies Ms. McCaffree's contention that Board members were biased due to their attendance at private meetings with Pacific Connector. 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 Pacific Connector 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).

Ms. Ranker echoed many of the circumstances identified by Ms. McCaffree, but she did not offer any additional evidence or legal authority to support these allegations.

Finally, before taking final action to approve these findings, each of the Board members 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 denies the bias and *ex parte* challenges in this case.

No other challenges were made, and Board members participated in the deliberations and the decision.

III. CONCLUSION.

To summarize this case, 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 sets of standards for granting an extension. For granting an extension on ***resource lands***, Pacific Connector must, among other things, show it was unable to begin construction for reasons out of its control. The Board finds that, despite Pacific Connector's diligent pursuit of the federal approvals required, those approvals have not yet been secured, and thus Pacific Connector was unable to commence its development proposal before the expiration date for reasons beyond Pacific Connector's control.

For granting an extension on ***non-resource lands***, CCZLDO 5.2.600 requires that Pacific Connector show, among other things, that the proposed use is still listed as a conditional use in the relevant non-resource zones under the current zoning regulations, that the subject property has not been reconfigured through a property line adjustment or land division, and that the subject property has not been rezoned. For the reasons explained in this decision, the Board finds that the application meets these criteria 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 one-year extension of the original approval. Accordingly, the Board denies the appeal and affirms the Planning Director's June 21, 2019 decision granting the one-year time extension in County File No. HBCU 10-01 / REM 11-01 to April 2, 2020 (EXT-19-004).

Adopted this 26th day of November, 2019.