

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 OREGON PIPELINE COMPANY, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CLATSOP COUNTY,
10 *Respondent,*

11 and

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13
14 COLUMBIA RIVERKEEPER and NW
15 PROPERTY RIGHTS COALITION,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2013-106

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal on remand from the Court of Appeals.

24
25 E. Michael Connors, Portland, represented petitioner.

26
27 Jeffrey J. Bennett, Lake Oswego, represented respondent.

28
29 Lauren Goldberg, Hood River, represented intervenors-respondents.

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31 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board
32 Member, participated in the decision.

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34 AFFIRMED

04/29/2015

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

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INTRODUCTION

This matter is before us on remand from the Court of Appeals. *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014). The lengthy history of the events since October 9, 2009, when petitioner Oregon Pipeline submitted its application for county land use approval for a 41-mile long high pressure natural gas pipeline through the county, is set out in our initial opinion in this matter and will not be repeated here. *Oregon Pipeline Co. v. Clatsop County*, ___ Or LUBA ___, (LUBA No. 2013-106, June 27, 2014), slip op at 3-8. In this appeal, petitioner challenges an October 16, 2013 board of county commissioners’ decision denying petitioner’s application for land use approval for a natural gas pipeline.

Petitioner’s petition for review in this appeal included thirteen assignments of error. In our initial decision we rejected petitioner’s first and third assignments of error. The Court of Appeals’ decision does not require that we address those assignments of error further. Based on our conclusion that one of the county commissioners was biased and should not have participated in the decision, we sustained the petitioner’s second assignment of error and remanded the decision so that the county could render a decision without that county commissioner’s participation. It was this aspect of our decision that was reversed by the Court of Appeals. Consistent with the Court of Appeals’ decision, we now deny petitioner’s second assignment of error.

Because our initial decision regarding the second assignment of error required remand and a new decision, we did not consider most of petitioner’s ten remaining assignments of error. However, we did consider one more assignment of error, because our resolution of that assignment of error required

1 additional evidentiary proceedings by the county. In our initial decision, we
2 sustained petitioner's fourth assignment of error. Our disposition of
3 petitioner's fourth assignment of error was not challenged on appeal.
4 *Columbia Riverkeeper*, 267 Or App 586 n 7. In denying petitioner's
5 application on October 16, 2013, the board of county commissioners took
6 official notice of some Columbia River Resource Base Maps and concluded
7 that those maps show the proposed pipeline crosses Category 2 Shorelands.
8 The board of commissioners concluded that pipelines such as the one proposed
9 are not allowed in Category 2 Shorelands and cited that as one of its bases for
10 denying the application. In addition to its fourth assignment of error, petitioner
11 assigned error to that Category 2 Shorelands finding in its thirteenth
12 assignment of error. In sustaining petitioner's fourth assignment of error, we
13 concluded the noticed Columbia River Resource Base Maps constituted new
14 evidence that was accepted after the evidentiary phase of this matter had
15 concluded, and the county erred by failing to allow petitioner an opportunity to
16 rebut the maps. Our resolution of petitioner's fourth assignment of error would
17 normally require that we remand the county's decision. Then, following the
18 opportunity for rebuttal, the board of commissioners could again take up the
19 Category 2 Shoreland issue that is the subject of petitioner's thirteenth
20 assignment of error.

21 However, the decision that is now before us on remand also denied
22 petitioner's application for a number of other independent reasons. In its fifth
23 through twelfth assignments of error, petitioner assigns error to each of those
24 reasons for denial. As far as we can tell, only the thirteenth assignment of error
25 could be affected by the evidentiary proceedings required by our resolution of
26 the fourth assignment of error. Assignments of error five through twelve,

1 which challenge other bases cited by the county for denying the application,
2 would not be affected by any evidentiary proceedings required by our
3 disposition of the fourth assignment of error. To sustain a decision denying
4 permit approval, only one of the cited bases for denial must be sustained on
5 appeal. *Douglas v. Multnomah County*, 18 Or LUBA 607, 619, 792 P2d 117
6 (1990); *Garre v. Clackamas County*, 18 Or LUBA 877, 880, *aff'd* 102 Or App
7 123 (1990); *Weyerhaeuser v. Lane County*, 7 Or LUBA 42, 46 (1982).
8 Petitioner's challenges to those bases for denial, and respondent's and
9 intervenors-respondents' answers to those challenges are fully briefed.
10 Because we deny petitioner's challenges to a number of those bases for denial,
11 and each of those bases for denial provide an independent basis for affirming
12 the county's decision, no purpose would be served by remanding the
13 challenged decision based on our resolution of the fourth assignment of error.
14 We therefore turn to petitioner's fifth through twelfth assignments of error.

15 **REPLY BRIEF**

16 Our original decision did not rule on petitioner's motion to allow a reply
17 brief. The reply brief is allowed.

18 **FIFTH ASSIGNMENT OF ERROR**

19 **A. Compatibility**

20 A short segment of the proposed pipeline (.31 mile) will pass through the
21 county's Residential – Agriculture – 5 (RA-5) zone. Petitioner argues that the
22 board of commissioners erred in concluding that the proposed pipeline is not
23 compatible with surrounding residential uses. Within the RA-5 zone, single-
24 family dwellings are permitted outright and utilities necessary for public
25 service are allowed as a conditional use. Clatsop County Land and Water

1 Development and Use Ordinance (LWDUO) L3.224(1); L3.227(2).¹ The board
2 of county commissioners adopted a staff-proposed finding that the proposed
3 pipeline does not comply with L5.015(2)(D), a conditional use approval
4 criterion, which provides:

5 “The proposed use is compatible with existing and projected uses
6 on surrounding lands, considering the factors in (C) above.”²

¹ Two different county land use regulations are cited in this opinion. The Clatsop County Land and Water Development and Use Ordinance is sometimes referred to by the parties and us in this opinion by the acronym LWDUO. When the county and other parties cite subsections of LWDUO, those citations are preceded by the letter “L,” which we assume is a shorted form of the acronym. The other land use regulation cited in this opinion is the Clatsop County Standards Document. That document is referred to as the Standards Document or simply Standards. Citations to sections of that document are preceded by the letter S, we assume to distinguish those citations from citations to the LWDUO.

² The reference to “factors in (C)” is a reference to L5.015(2)(C), which provides:

“The site under consideration is suitable for the proposed use considering:

- “1) The size, design, and operating characteristics of the use, including but not limited to off-street parking, fencing/buffering, lighting, signage, and building location.
- “2) The adequacy of transportation access to the site, including street capacity and ingress and egress to adjoining streets.
- “3) The adequacy of public facilities and services necessary to serve the use.
- “4) The natural and physical features of the site such as topography, natural hazards, natural resource values, and other features.”

1 The findings concerning L5.015(2)(D) are set out below:

2 **FINDING #14:** In the applicant’s proposed findings for the RA-
3 5 zone, it states that provisions have been taken to minimize
4 impact on the residential zone. *‘Oregon LNG has made substantial*
5 *efforts to route the pipeline in [a] location that minimizes impacts*
6 *overall. One example is aligning the Pipeline along existing*
7 *property lines rather than through the center of established*
8 *parcels’*. The applicant continues, *‘The alignment through the*
9 *RA-5 zone is proposed across forestland, and there are no*
10 *residences located within 0.25 mile’*. On February 17, 2010, staff
11 was provided with GIS data of the proposed pipeline route. The
12 images below were prepared using that data. Figure 1 (below)^[3]
13 shows the pipeline alignment across the RA-5 zone does not align
14 with existing property lines. Figure 2 shows the pipeline as it
15 crosses T5N R7W Sec 32 TL 501. The pipeline is approximately
16 0.029 miles or 156-feet from the dwelling. A quick visual analysis
17 in the vicinity finds that an additional three residences are within
18 400-feet of the pipeline route in the RA-5 zone. In addition, staff
19 can’t determine if the proposed use is compatible with the
20 established RA-5 residential uses without reviewing any
21 limitations that may be placed on the property with the easement
22 agreement.

23 “Staff agrees with the Applicant’s assertion that horizontal direct
24 drilling (HDD) reduces potential adverse impacts during
25 construction; however, potentially adverse impacts will remain
26 after construction is completed, during the operation of the
27 pipeline and such impacts raise compatibility issues that Staff
28 believes have not been addressed by the Applicant. Of particular
29 concern to staff are safety issues for dwellings in close proximity
30 to the pipeline route. **Based on this analysis Staff concludes that**
31 **the pipeline is not compatible with existing and projected uses**
32 **on surrounding lands and does not meet the criteria set forth**

³ The cited figures appear at Petition for Review Appendix 18-19 and at Record A18 and A19.

1 ***in L5.015(2)(D) within the RA5 zone.***” Record A18 to A19
2 (italics, boldface and underlining in original.)

3 Petitioner argues L5.015(2)(D) does not impose a setback requirement
4 and contends that safety concerns are irrelevant under L5.015(2)(D). Petitioner
5 argues the pipeline will be reviewed by the Federal Energy Regulatory
6 Commission (FERC), and that the U.S. Department of Transportation (DOT) is
7 required to ensure pipeline safety. According to petitioner, the county planner
8 that the board of commissioners relied on has no natural gas pipeline expertise,
9 and the county has no authority to “override” FERC and DOT. Petition for
10 Review 44. Petitioner points to evidence in the record that the pipeline must
11 comply with an extensive array of federal safety regulations and its experts’
12 testimony that the pipeline will be safe. Viewed in context with that testimony
13 that the pipeline will be safe, petitioner contends the board of commissioners’
14 L5.015(2)(D) finding, which is supported only by the opinion of a single
15 county planner who has no natural gas pipeline expertise, is not supported by
16 substantial evidence, considering the whole record. *Younger v. City of*
17 *Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

18 We agree with petitioner that L5.015(2)(D) does not impose a setback
19 requirement, but we do not understand the board of commissioners to have
20 found it does impose a setback requirement. The board of commissioners
21 simply found that it did not believe the proposed pipeline, which would be
22 located only 156 feet from one residence and less than 400 feet from three
23 others, was compatible, due to safety concerns. The evidence concerning
24 safety is not as one-sided as petitioner suggests. In its brief the county points
25 to testimony that the hazard area for a 36” diameter high pressure natural gas
26 pipeline is over 900 feet. Record 4234. The county also identifies testimony

1 from a June 10, 2010 hearing by the assistant fire chief for the Elsie-Vinemaple
2 Fire District. In that testimony the assistant fire chief testified that over 20
3 miles of the pipeline would pass through the fire district and neither the Elsie-
4 Vinemaple Fire District nor surrounding districts have the training or resources
5 that are needed to fight the kind of fire that can result from an a high pressure
6 natural gas pipeline rupture.⁴ That is evidence a reasonable person could rely
7 on to conclude the pipeline poses a safety threat to nearby residences, such that
8 the pipeline is not compatible with those nearby residences.

9 We agree with the county that safety is not irrelevant under
10 L5.015(2)(D). One of the factors enumerated in L5.015(2)(C) is “operating
11 characteristics of the use.” *See* n 2. Under that factor, based on the testimony
12 submitted, the county was entitled to consider safety in determining whether
13 the pipeline is compatible with nearby residences in the RA-5 zone. The
14 county’s implicit interpretation of L5.015(2)(D), and the factors at
15 L5.015(2)(C), to allow it to consider safety in determining if the proposed
16 pipeline is compatible with nearby residences in the RA-5 zones, is not
17 implausible, and we therefore must defer to that interpretation. *Siporen v. City*
18 *of Medford*, 349 Or 247, 260-61, 243 P3d 776 (2010); ORS 197.829(1).⁵

⁴ The assistant chief testified that he was present at a very large LNG pipeline fire in Henderson, Nevada in 1980, and that fire covered miles.

⁵ ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

1 Finally, if petitioner’s argument that the county lacks authority “to
2 override” FERC and DOT was intended as a federal preemption argument, it is
3 undeveloped and petitioner cites no authority that FERC and DOT have
4 occupied the field when it comes to addressing LNG pipeline safety concerns.

5 This part of the fifth assignment of error is denied.

6 **B. Rural Lands**

7 Petitioner also assigns error to the board of commissioners’
8 determination that the proposed pipeline does not comply with Goal 2 of the
9 Clatsop County Comprehensive Plan. Plan Goal 2 explains that the entire
10 county has been placed into one of six different comprehensive plan map
11 designations: Development, Rural Agricultural Lands, Conservation Forest
12 Lands, Conservation Other Resources, Natural, and Rural Lands. The Rural
13 Lands designation is described as follows:

14 “Rural Lands are those which are outside the urban growth
15 boundary, outside of rural community boundaries and are not
16 agricultural lands or forest lands. Rural lands includes lands
17 suitable for sparse settlement, small farms or acreage homesites
18 with no or hardly any public services, and which are not suitable,
19 necessary or intended for urban use.”

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- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
 - “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
 - “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
 - “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 Citing only its earlier findings concerning L5.015(2)(D), the board of
2 commissioners found that proposed pipeline does not comply with the Rural
3 Lands Comprehensive Plan map designation. Record A99.

4 Viewed in isolation, the Rural Lands comprehensive plan designation
5 does not appear to be written as a mandatory permit approval standard.
6 Without some explanation from the county that might support a contrary
7 conclusion, we agree with petitioner that the general descriptions in the
8 comprehensive plan for comprehensive plan map designations do not operate
9 as mandatory approval criteria for individual permit applications. This part of
10 the fifth assignment of error is sustained.

11 The fifth assignment of error is sustained in part and denied in part.⁶

12 **SIXTH ASSIGNMENT OF ERROR**

13 Most of the proposed pipeline will be located in the Agricultural Forest
14 (AF) zone (1.59 miles) or the Forest-80 (F-80) zone (35.12 miles). Petitioner
15 assigns error to the board of commissioners' determination that the proposed
16 pipeline is not an allowed use in the AF or F-80 zone. Both of those zones
17 were adopted to comply with Statewide Planning Goal 4 (Forest Lands). The
18 Land Conservation and Development Commission's (LCDC's) Goal 4
19 administrative rule lists the uses that may be permitted outright and

⁶ Because we have sustained one of the county's bases for denial, under *Douglas v. Multnomah County*, *Garre v. Clackamas County* and *Wyerhaeuser v. Lane County* it would be possible to conclude our review at this point and affirm the county's decision. However, there has been protracted litigation over this proposal, and it is certainly possible our decision will be appealed. We therefore consider the sixth through twelfth assignments of error, which would not be affected by our rulings on the fourth and fifth assignments of error.

1 conditionally in forest zones. OAR 660-006-0025(3)(c) lists the following as
2 uses that “may be permitted outright on forest lands:”

3 “*Local distribution lines* (e.g., electric, telephone, natural gas) and
4 accessory equipment (e.g., electric distribution transformers,
5 poles, meter cabinets, terminal boxes, pedestals), or equipment
6 that provides service hookups, including water service
7 hookups[.]”⁷ (Emphasis added.)

8 OAR 660-006-0025(4)(q) lists the following as uses that may be permitted,
9 “subject to the review standards in section (5) of this rule.”⁸

10 “*New electric transmission lines* with right of way widths of up to
11 100 feet as specified in ORS 772.210. *New distribution lines* (e.g.,
12 *gas, oil, geothermal, telephone, fiber optic cable*) with rights-of-
13 way 50 feet or less in width[.]”⁹ (Emphases added.)

14 It is undisputed that the proposed natural gas pipeline is not a “[l]ocal
15 distribution line.” The board of county commissioners concluded that the

⁷ Identical language authorizing “local distribution lines” appears in both the AF and F-80 zones:

“Local distribution lines (e.g. electric, telephone, natural gas) and accessory equipment (e.g. electric distribution transformers, poles, meter cabinets, terminal boxes, pedestals), or equipment which provides service hookups, including water service hookups.” L3.514(5); L3.553(4).

⁸ OAR 660-006-0025(5) sets out review standards.

⁹ Nearly identical language authorizing “new electric transmission lines” and “new distribution lines” appears in both the AF and F-80 zones:

“New electric transmission lines with right-of-way widths of up to 100 feet subject to the standards in Section S3.509. New distribution lines (e.g. gas, oil, geothermal) with rights-of-way 50 feet or less in width subject to the standards in Section S3.509.” L3.518(3); L3.554(5).

1 proposed natural gas pipeline is neither a local distribution line nor a proposed
2 “new distribution line[.]” The board of commissioners looked at the ORS
3 215.276(1)(c) definition of “transmission line,” for EFU zoning purposes, and
4 concluded that because petitioner’s proposed pipeline would transmit gas from
5 across the county to a facility in the City of Warrenton that would liquefy that
6 gas for shipment overseas, the proposed pipeline is a “transmission line.”¹⁰
7 The board of county commissioners then observed that L3.518(3) and
8 L3.554(5) authorize “[n]ew electric transmission lines” in the AR and F-80
9 zones but do not authorize new *gas transmission* lines, only “[n]ew distribution
10 lines.” The board of commissioners ultimately interpreted L3.518(3) and
11 L3.554(5) not to authorize new gas transmission lines, such as the one
12 proposed here. Record A21-A22 (AF zone); A33 (F-80 zone).

13 The relevant county AF and F-80 zone language replicates and was
14 adopted to implement Goal 4 and OAR 660-006-0025(3)(c) and 660-006-
15 0025(4)(q). LUBA therefore owes no deference to the board of
16 commissioner’s interpretation of the AF and F-80 zone under ORS 197.829(1)
17 and *Siporen. Jordan v. Douglas County*, 40 Or LUBA 192, 201 (2001);
18 *Holsheimer v. Columbia County*, 28 Or LUBA 279, 282 (1994), *aff’d* 133 Or
19 App 126, 890 P2d 447 (1995); *Melton v. City of Cottage Grove*, 28 Or LUBA
20 1, 13, *aff’d* 131 Or App 626, 887 P2d 359 (1994). The board of

¹⁰ ORS 215.276(1)(c) provides:

“Transmission line’ means a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users.”

1 commissioners' interpretation of L3.518(3) and L3.554(5) must be consistent
2 with OAR 660-006-0025(4)(q). We review the board of commissioners'
3 interpretation to determine if it "improperly construed" the county analog of
4 OAR 660-006-0025(4)(q). ORS 197.835(9)(a)(D).¹¹

5 While the board of commissioners' interpretation of the AF and F-80
6 zone text has some textual support, in a decision that post-dated briefing and
7 oral argument in this appeal, LUBA interpreted the OAR 660-006-0025(4)(q)
8 ("[n]ew distribution lines") language. Whereas the board of commissioners
9 interpreted "[n]ew distribution lines" not to include new gas transmission lines,
10 LUBA reached the opposite conclusion, based on the history of OAR 660-006-
11 0025:

12 "[T]hat the Goal 4 rule allows new electric transmission lines but
13 does not specifically allow new *gas* transmission lines is not
14 conclusive. Rather, when the Goal 4 rule was first adopted in
15 1990, the rule classified all types of utility lines, including electric
16 lines, as either 'local distribution lines' or 'distribution lines.' The
17 rule was amended in 1992 to allow 'new electric transmission
18 lines * * *' with larger right-of-way widths (100 feet) than the
19 other types of utility lines are allowed (50 feet), consistent with
20 ORS 772.210's specification of a 100 foot right-of-way for
21 electrical transmission lines. The rule's history does not reflect an
22 intent on the part of LCDC to prohibit lines that could be, under
23 some circumstances, characterized as transmission lines. Rather,
24 the rule's text reflects that for purposes of conditional uses that are
25 allowed in the Forest zone, all *non-electrical* lines with rights-of-
26 way of up to 50 feet in width are classified as 'new distribution
27 lines.' *McCaffree v. Coos County*, ___ Or LUBA ___ (LUBA No.
28 2014-022, July 15, 2014), slip op at 10-11, *aff'd* 267 Or App 424,
29 341 P3d 252 (2014), *pet for rev pending*.

¹¹ Under ORS 197.835(9)(a)(D), LUBA is required to reverse or remand a decision if it "[i]mproperly construed the applicable law[.]"

1 Based on our decision in *McCaffree*, we agree with petitioner that the
2 board of commissioners’ interpretation of the AF and F-80 zones not to allow
3 natural gas transmission lines is inconsistent with OAR 660-006-0025(4)(q).
4 The board of commissioners therefore misconstrued the applicable law. ORS
5 197.835(9)(a)(D).

6 The county finally argues that any error the board of commissioners may
7 have committed in interpreting the AF and F-80 zone not to allow natural gas
8 transmission lines was harmless error, because the board of commissioners
9 relied on that finding to find that a number of other AF and F-80 zoning
10 requirements were not met, and petitioner failed to assign error to those
11 findings.¹²

12 In its reply brief, petitioner points out that it either did assign error to the
13 cited findings or was not required to. Reply Brief 9. We agree with petitioner.

14 The sixth assignment of error is sustained.

15 **SEVENTH ASSIGNMENT OF ERROR**

16 As previously noted, Clatsop County has adopted Clatsop County
17 Development Standards. *See* n 1. In its seventh assignment of error, petitioner
18 challenges the county’s findings that the proposed pipeline violates one of
19 those standards, S3.509(2)(A), and Clatsop County Comprehensive Plan Goal
20 4, Policy 1.¹³

¹² The county cites findings 31-34, 53, 63-66, 81, 83, 85 and 87. Respondent’s Brief 48.

¹³ Petitioner identifies findings “22, 31, 59, 63 and 216.” Petition for Review 52 n 25.

1 As explained in our discussion of the sixth assignment of error, the uses
2 allowed conditionally on forest lands by OAR 660-006-0025(4), including the
3 new gas “distribution lines” authorized by OAR 660-006-0025(4)(q), are
4 “subject to the review standards in [OAR 660-006-0025(5)].” One of those
5 standards is OAR 660-006-0025(5)(a), which requires a finding that “[t]he
6 proposed use will not force a significant change in, or significantly increase the
7 cost of, accepted farming or forest practices on agriculture or forest lands[.]”
8 S3.509(2)(A) imposes an identical requirement.¹⁴

9 Clatsop County Comprehensive Plan Goal 4, Policy 1 is to conserve
10 forest lands for forest uses.¹⁵ The county found that the proposal is
11 inconsistent with S3.509(2)(A) and Goal 4, Policy 1.¹⁶

¹⁴ S3.509(2) provides, in part:

“A use proposed on forest land requiring compliance with this section may be approved only where the County finds that the use will not:

“(A) Force a significant change in, or significantly increase the cost of accepted farm or forest practices on agriculture or forest lands[.]”

¹⁵ The text of Clatsop County Comprehensive Plan Goal 4, Policy 1 is set out below:

“Forest lands shall be conserved for forest uses, including the production of trees and the processing of forest products, open space, buffers from noise, visual separation from conflicting uses, watershed protection, wildlife and fisheries habitat, soils protection from wind and water, maintenance of clean air and water, outdoor recreational activities compatible with these uses, and grazing land for livestock.”

1 Once again, because S3.509(2)(A) is identical to and presumably was
2 adopted to implement OAR 660-006-0025(5)(a), the board of commissioners’
3 interpretations of S3.509(2)(A) are not entitled to deference under ORS
4 197.829(1) and *Siporen*. Our standard of review is to determine whether the
5 board of commissioners “improperly construed the applicable law[.]” ORS
6 197.835(9)(a)(D). In finding that the proposed pipeline does not comply with
7 S3.509(2)(A), the county relied in part on its finding that the proposed pipeline
8 is not an allowed use in the AF and F-80 zone. Record A25 to A26. We have
9 already concluded that the AF and F-80 zone do permit natural gas pipelines,
10 so long as they meet the applicable standards. In places, the county findings
11 effectively converted S3.509(2)(A) from a standard that requires that the
12 proposal not “[f]orce a significant change in, or significantly increase the cost
13 of” forest practices into a simpler and broader “significant impacts” standard
14 that appears to be divorced from “costs” or “changes in” “forest practices.” In
15 finding 31 the board states that it considers “* * * the permanent removal of
16 that amount of land from timber production along the 1.59 miles of pipeline
17 proposed in the AF zone as a “‘significant’ impact.” Record A26. As
18 petitioner notes, the harvesting of trees is a forest practice and the county never
19 explains how harvesting trees within the permanent and temporary easement

¹⁶ At page 54 of its response brief, the county contends it relied on Goal 4, Policy 3 instead of Goal 4, Policy 1 in denying the application. The findings at Record A101 are confusing. Although finding 216 purports to be addressing Plan Goal 4, Policy 3, the Plan text cited immediately before finding 216 is actually the text of Goal 4, Policy 1. The next finding (finding 217) states that “that the proposed pipeline is consistent with Policy #3.” Record A101. We assume in this opinion, the county was addressing Plan Goal 4, Policy 1 in finding 216.

1 could “[f]orce a significant change in,” or “[s]ignificantly increase the cost of”
2 forest practices on surrounding lands devoted to farm or forest use.

3 Other county findings do point out that trees over 20 feet tall will not be
4 allowed within 15 feet of the pipeline after construction, identify the acreage
5 affected by that limitation and conclude that this limitation would force a
6 significant change in forest practices. In other words, the county’s findings
7 take the position that the restriction on forest uses within the permanent
8 easement, which is necessary to construct, maintain and protect the pipeline,
9 constitutes a proscribed significant change in forest practices. That
10 interpretation of the county analog for OAR 660-006-0025(5)(a) is too broad.
11 Without some additional explanation from the county, we do not agree with the
12 county that the identified limitations on forest practices within 15 feet of the
13 pipeline in the future, alone, are sufficient to constitute a proscribed significant
14 change in forest practices.

15 In its brief the county suggests the board of commissioners’ reconsidered
16 decision may have been based on a belief that the 50-foot permanent easement
17 or the 50-foot temporary construction easement were excessive and should be
18 reduced in size. However, as petitioner points out, the reconsidered decision
19 does not clearly take that position and neither the decision nor the response
20 brief identify any evidence that might support such a belief. Petitioner
21 submitted evidence that both the 50-foot permanent easement and 50-foot
22 temporary construction easement are necessary to construct the proposed
23 pipeline. Record 994.

24 We conclude the board of commissioners improperly construed
25 S3.509(2)(A). ORS 197.835(9)(a)(D). In some of the findings the county
26 improperly converted S3.509(2)(A) into a “significant impact” standard and in

1 others the county failed to adequately explain why limitations on tree
2 production in the permanent easement near the pipeline will result in “a
3 significant change in * * * forest practices * * * on * * * forest lands,” and
4 result in a violation of S3.509(2)(A).

5 Turning to Goal 4, Policy 1, *see* n 15, we agree with petitioner that the
6 generally worded and aspirational policy was improperly applied as a
7 mandatory permit approval standard in this case. As far as we can tell, the
8 objections identified in the disputed findings would apply to any natural gas
9 pipeline across forest land. Goal 4, Policy 1 cannot be interpreted and applied
10 so broadly that it renders L3.518(3) and L3.554(5), which specifically
11 authorize natural gas “distribution lines” as conditional uses in the AF and F-80
12 zone, nullities.

13 It is not entirely clear to us whether Goal 4, Policy 1 is entitled to
14 deferential review under ORS 197.829(1) and *Siporen*, or is to be reviewed
15 under ORS 197.835(9)(a)(D). But here it does not matter. Even under the
16 deferential standard of review required by ORS 197.829(1) and *Siporen*,
17 interpreting Goal 4, Policy 1 so broadly that uses expressly allowed as
18 conditional uses in forest zones could never be approved is inconsistent with
19 the text of L3.518(3) and L3.554(5) and therefore implausible.

20 The seventh assignment of error is sustained.

21 **EIGHTH ASSIGNMENT OF ERROR**

22 The proposed pipeline would cross small areas zoned Aquatic
23 Development (AD), Aquatic Conservation Two (AC-2), and Aquatic Natural
24 (AN). The proposed pipeline is not a water-dependent use. Uses that are not
25 water-dependent are allowed in these zones if they will not “foreclose,” “limit

1 the potential” “preempt,” “preclude,” “significantly conflict with” or “unduly
2 conflict with” existing or future water-dependent uses or more intensive uses.¹⁷

3 Petitioner explains the proposed pipeline will not disturb the surface in
4 these zones at all, because the pipeline would be installed through the use of
5 horizontal directional drilling (HDD).¹⁸ Because the pipeline will be 60 to 100
6 feet below the surface, petitioner contends there is uncontroverted evidence
7 that the proposed pipeline will not “foreclose,” “limit the potential”
8 “preempt,” “preclude,” “significantly conflict with” or “unduly conflict with”
9 existing or future water-dependent uses or more intensive uses. Petitioner
10 contends the only possible exception is “deep pilings or drilling at depths of 40
11 to 70 feet directly over the pipeline.” Petition for Review 56. Petitioner took
12 the position below that pilings that deep or drilling to such depths for any of
13 the uses authorized in the AD, AC-2 and AN zones is “highly unlikely,” and
14 that there “is no basis for assuming that 40-plus foot pilings would ever be
15 proposed in the future.” Record 4177-4178.

¹⁷ L3.742 states that uses that are not water dependent are allowed in the AD zone “if they do not *foreclose* options for future higher priority uses or do not *limit the potential* for more intensive use of the area.” (Emphases added). L5.830(10) requires that an impact assessment for development within estuarine areas “[d]emonstrat[e] that non-water dependent uses will not *preempt* existing or future water-dependent utilization of the area.” (Emphasis added.) S4.203(1) provides that “[s]horeland and aquatic area uses and activities that are not water-dependent shall not *preclude* or *unduly conflict with* existing, proposed or potential future water-dependent uses or activities on the site or in the vicinity. (Emphases added). Goals 16 and 17, Policies 20.7(1) and 20.15(1) are worded nearly identically with S4.203(1) but prohibit “significant conflicts” rather than undue conflicts.

¹⁸ We discuss HDD further under the tenth and eleventh assignments of error.

1 The “do not limit the potential for more intensive use of the area”
2 standard in L3.742 appears to us to be the most restrictive of the identified
3 aquatic zone standards. *See* n 17. The county adopted the following planning
4 staff-prepared findings concerning L3.742:

5 “The applicant states that the pipeline, in the AD zone, will
6 preclude a ‘thin strip’ of land from more intensive use. This
7 conflicts with the purpose of the AD zone which states that uses
8 [that] are not water-dependent or water-related, ‘*do not limit the*
9 *potential for more intensive uses of the area.*’ Staff agrees with
10 the applicant that use of HDD will reduce impacts within the
11 aquatic zones and thus assists in demonstrating compliance with
12 the purpose statements of the AN and AC-2 zones. However, the
13 purpose statement of the AD zone is clear; non water-dependent or
14 water-related uses are allowed only if they do not ‘*foreclose*
15 *options for future higher priority uses*’. Again, unless the
16 Applicant can demonstrate that there are **no** restrictions for
17 development and use around the pipeline or within the pipeline
18 easement area, the proposed pipeline will limit options for higher
19 priority water-dependent and water-related uses. The record fails
20 to demonstrate how the pipeline, which will preclude the potential
21 for more intensive use in the area, is consistent with the purpose of
22 the zone. **Therefore, Staff concludes that the proposed pipeline**
23 **is not consistent with the purpose of the zone, as identified in**
24 **L3.742.”** Record A46 (italics, underling and bold face in
25 original).

26 Petitioner’s eighth assignment of error raises both a question of interpretation
27 and an evidentiary challenge. We turn first to the interpretive challenge.

28 Petitioner argues that the board of commissioners’ interpretation of its
29 aquatic zone provisions is inconsistent with the express language and purpose
30 of those provisions. The county’s interpretation of the L3.742 “do not limit the
31 potential for more intensive use of the area” standard—to the effect that the
32 standard is violated by the proposal unless the pipeline results in “no
33 restrictions” on more intensive uses—is a very strict interpretation. But under

1 *Siporen* and ORS 197.829(1) the county is entitled to strictly interpret L3.742
2 so long as the interpretation is “plausible” and is not inconsistent with the text.
3 The interpretation is not inconsistent with the text.¹⁹ Neither is the
4 interpretation implausible.

5 Petitioner also argues that the aquatic standards apply to “impacts on the
6 aquatic area as a whole, not the specific area where the non-water dependent
7 use will be located.” Petition for Review 58. We understand the county to
8 have rejected the argument that the standards do not apply to protect future
9 water-dependent development on the surface in the easement area, including
10 the surface area immediately above the pipeline. Under the county’s
11 interpretation of the policies, the pipeline must not impose any restrictions on
12 future water-dependent development within the permanent easement, including
13 the aquatic-zoned portion of the easement directly over the pipeline. The
14 proposed pipeline would impose restrictions on water-dependent uses in that
15 area if they required deep pilings or drilling. Under the county’s interpretation
16 of L3.742, L3.742 is violated by such restrictions. Again, while that is a broad
17 interpretation of L3.742, it is not inconsistent with the text of L3.742 and it is a

¹⁹ *Webster’s Third New International Dictionary* (unabridged ed 2002) includes the following definitions of “limit” and “potential:”

“**limit** * * * **3 a** : to set bounds or limits to : confine * * * **b** : to curtail or reduce in quantity or extent * * * **4 archaic** : to be or act as a boundary to * * * syn RESTRICT, CIRCUMSCRIBE, CONFINE * * * [.]” *Id.* at 1312.

“**potential** * * * **1 a** : existing in possibility : having the capacity or a strong possibility for development into a state of actuality * * * . *Id.* at 1775.

1 plausible interpretation. We reject petitioner’s challenge to the county’s
2 interpretation of L3.742.

3 Turning to petitioner’s evidentiary challenge, we understand petitioner to
4 argue that even if the pipeline could in theory limit water-dependent
5 development in the aquatic zones above the pipeline—because deep pilings or
6 drilling to depths greater than 70 feet over the center of the easement area will
7 not be permitted—no uses in the AD, AC-2 or AN zone will require pilings or
8 drilling that deep. Petitioner took that position before the county.

9 In response, the county found:

10 “* * * In the applicant’s June 9th memorandum, entitled, ‘Oregon
11 Pipeline, LLC – Consolidated Pipeline Application Response to
12 Clatsop County Staff Report, Dated June 3, 2010’ prepared by
13 Paul Seilo, the applicant states that all uses in the aquatic zones
14 can occur, ‘with a few minor exceptions’. These ‘minor’
15 exceptions relate to pile driving and geotechnical drilling with[in]
16 30 feet of the proposed pipeline. This restriction has the potential
17 to preclude or unduly conflict with water dependent uses such as
18 docks, piers, and water-related pipelines, cables and utility
19 crossings. * * *” Record A56.

20 Pile driving and drilling are not water-dependent uses; they are activities
21 that may be necessary to construct water-dependent uses. The water-dependent
22 uses that the county found the pipe line may restrict or preclude are “docks,
23 piers, and water-related pipelines, cables and utility crossings.” As noted
24 earlier, petitioner’s experts took the position that the uses allowed in the
25 aquatic zone would not be limited in any way except directly over the pipeline
26 and even there they would not be restricted because pilings or drilling should
27 typically not exceed 40 feet for such uses. Record 4177-4178; 4243-4244;
28 10255-10256. But that testimony does not appear to consider possible limits
29 on “water-related pipelines, cables and utility crossings.”

1 As intervenors-respondents point out, petitioner must shoulder a
2 significant burden to overcome a permit denial decision based on a substantial
3 evidence challenge. Petitioner must show that the application complies with
4 the disputed criteria “as a matter of law.” *Westside Rock v. Clackamas County*,
5 51 Or LUBA 264, 277-78, *aff’d* 207 Or App 320, 141 P3d 600 (2006); *Rogue*
6 *Valley Manor v. City of Medford*, 38 Or LUBA 266, 270 (2000); *Cook v. City*
7 *of Tigard*, 15 Or LUBA 344, 347 (1987). All of the evidence cited to us takes
8 the position that all of the uses allowed in the aquatic zones would be possible,
9 even the easement area above the pipeline. Since the evidence is so one-sided
10 it might be possible to conclude that petitioner carried its heavy burden in this
11 case. *See Walmart Stores Inc. v. City of Bend*, 52 Or LUBA 261, 271-77
12 (2006). However the evidence is somewhat equivocal about whether some
13 docks or piers might require pilings or drilling deeper than would be allowed
14 over the pipeline. And as just noted, that evidence does not appear to address
15 whether the pipeline might restrict future development of “water-related
16 pipelines, cables and utility crossings.” While the evidentiary question
17 presented by this assignment of error is a close one, we cannot say petitioner
18 carried its burden to establish that the limitations necessary to protect the
19 pipeline would not have the effect of imposing restrictions on one or more of
20 the water-dependent uses protected by the aquatic zone standards.

21 The eighth assignment of error is denied.

22 **NINTH ASSIGNMENT OF ERROR**

23 The board of commissioners adopted findings that the proposed pipeline
24 does not qualify as a “water-related” use. Petitioner challenges those findings

1 in its ninth assignment of error.²⁰ S4.243(2) provides that a use is water-related
2 if it:

3 “(A) Provides goods and/or services that are directly associated
4 with water-dependent uses, supplying materials to, or using
5 products of water-dependent commercial and industrial
6 uses; or offering services directly tied to the functions of
7 water-dependent; and

8 “(B) If not located adjacent to water, would experience a public
9 loss of quality in the goods and services offered (evaluation
10 of public loss of quality in the goods and services offered
11 (evaluation of public loss of quality will involve subjective
12 consideration of economic, social and environmental
13 value).”

14 The board of commissioners found the pipeline satisfies S4.243(2)(A)
15 but does not satisfy S4.243(2)(B):

16 “The pipeline meets the * * * water-related criterion in (2)(A)
17 because it provides natural gas (goods) that is directly associated
18 with a water-dependent use (the terminal). However, the pipeline
19 must also meet the criterion set forth in (2)(B) as a use that ‘would
20 experience a public loss of quality in the goods and services
21 offered’ if it is ‘not located adjacent to water.’ The Applicant
22 attempts but has failed to justify the reason that the pipeline
23 requires a location in proximity to the estuary. There are clearly
24 alternative locations for the pipeline and the applicant has not
25 adequately explained why those alternative locations were not
26 chosen. Staff finds **that the proposed pipeline is not a water-
27 dependent or water-related use.**” Record A47 to A48 (boldface
28 in original).

29 Petitioner argues that the county erred by denying the application, in
30 part, based on its finding that the proposed pipeline is not a water-related use.

²⁰ Petitioner cites findings 99-100, 110, 122 and 198. Petition for Review
62 n 29.

1 Petitioner contends the county’s findings are inadequate and are not supported
2 by substantial evidence.

3 Petitioner’s ninth assignment of error would only provide a basis for
4 reversal or remand of the appealed decision if the county did rely on its finding
5 that the proposed pipeline is not a water-related use as a basis for denying the
6 application. As petitioner recognizes, “[t]he aquatic zones do not limit
7 pipelines to those that are water-dependent or water-related.” Petition for
8 Review 64. The findings identified by petitioner all conclude the proposed
9 pipeline is not water-related, but none of those findings take the position that
10 the application should be denied on that basis. Accordingly, petitioner’s
11 challenge to those findings provides no basis for reversal or remand.

12 The ninth assignment of error is denied.

13 **ELEVENTH ASSIGNMENT OF ERROR**

14 As noted earlier, petitioner proposes to avoid environmental impacts in
15 aquatic areas, which would likely be unavoidable if the pipeline were installed
16 by conventional means from the surface, by installing the pipe using a
17 technique called horizontal directional drilling (HDD). One of the potential
18 drawbacks of HDD, however, is called hydraulic fracturing or “frac-out.”
19 Intervenors-respondents explain:

20 “* * * HDD is a process that allows for trenchless construction
21 across an area by drilling a hole well below the depth of a
22 conventional pipeline and pulling the pipeline through the
23 predrilled borehole. The HDD procedure uses bentonite slurry, a
24 fine clay material, as a drilling lubricant. An HDD frac-out occurs
25 when drilling cracks the bedrock or sediment and the drilling
26 fluids are released into the overlying waterway. * * *”
27 Intervenors-Respondents’ Brief 30 (record citations omitted).

1 L5.800 is a section of the LWDUO entitled “Columbia River Estuary
2 Impact Assessment and Resource Capability Determination.” Section L5.830
3 sets out the expectations for impact assessments and L5.830(9) requires
4 “[d]emonstration that the project’s potential public benefits will equal or
5 exceed expected adverse impacts.” The board of commissioners adopted
6 lengthy findings addressing L5.830(9). Those findings begin by
7 acknowledging petitioner’s claims that there is a need for the natural gas that
8 would flow through the proposed pipeline, and that the project, including the
9 terminal in the City of Warrenton, would create thousands of jobs during the
10 construction phase, hundreds of jobs during operation and generate millions of
11 dollars for the local economy. The board of county commissioners then
12 explained why they concluded the proposal does not comply with L5.830(9)
13 benefits/impacts standard:

14 “* * * When evaluating these potential public benefits, it is
15 difficult to reliably consider the number of jobs and economic
16 benefits cited by the Applicant because they relate to the LNG
17 plant in Warrenton, not the LNG pipeline proposed for Clatsop
18 County. There is no way to determine from the data submitted
19 how many jobs, construction or operational, relate to the pipeline
20 alone. The 36-inch pipeline, not the LNG terminal, is the subject
21 of this land use application. Therefore, the claims of employment
22 and economic benefits submitted by the Applicant are inaccurate
23 because they refer to the project as a whole and not just the
24 pipeline.

25 “The potential benefit is only one component of [L5.830(9)]. The
26 second component relates to adverse impacts within the estuary.
27 Although the project could have benefits, this subsection of
28 L5.830 requires those benefits to ‘equal or exceed expected
29 adverse impacts.’ Staff looks to the standards set forth in L5.840
30 to guide how that analysis is to occur. This section requires us to
31 first look at what the Impact Assessment (IA) reveals as ‘potential
32 degradation or reduction of estuarine resource.’ Such degradation

1 or reduction is the ‘impact’. When such impacts are identified,
2 Section L5.840 then requires us to look at what the IA identifies as
3 ‘reasonable alterations or conditions’ the applicant will employ to
4 ‘eliminate or minimize’ the impact ‘to an acceptable level.’ If
5 acceptable levels can be achieved the project can be approved. If
6 they cannot be achieved the project must be denied.

7 “The Applicant asserts that the use of HDD minimizes the impact
8 on estuary resources and carries minimal risk as compared to
9 traditional trenching techniques. In his decision documents the
10 Hearings Officer wrote, ‘There are significant risks to the estuary
11 associated with HDD’; Staff agrees with this statement. It is these
12 ‘significant risks’ that the Staff will address.

13 “The Applicant proposes three crossings of the Lewis and Clark
14 River. All three crossings would utilize HDD. Throughout the
15 application and subsequent submittals the Applicant correctly
16 points out that the use of HDD limits the ground disturbance when
17 compared to traditional pipeline installation techniques. Of
18 particular concern to Staff are the repercussions of a frac-out.
19 While, the Applicant dismisses the likelihood of frac-out, Staff is
20 persuaded there is evidence that frac-outs are indeed not only
21 possible but that the[y] actually have occurred at similar projects.
22 And, if they occur, the results would cause significant damage to
23 the estuary, damage that would exceed the benefits of the Pipeline.

24 “The Applicant states in its ‘*HDD Frac-out Contingency Plan*’
25 that if a frac-out occurs the drilling material ‘could potentially
26 affect the water quality of any waterbody if it were introduced’
27 then goes on to state, ‘it would not result in toxicity to aquatic life
28 in the stream’. However, the Applicant fails to explain that the
29 drilling fluid, a bentonite mixture, which would be released during
30 a frac-out, is not toxic to aquatic life.^[21] Merriam Webster

²¹ This sentence can be read to suggest the county does not believe the bentonite mixture is toxic. However, that is clearly not the case. The county probably meant to say something like: “However, the Applicant fails to *establish* that the drilling fluid, a bentonite mixture, which would be released during a frac-out, is not toxic to aquatic life.

1 defines 'toxic' as 'containing or being poisonous material when
2 capable of causing death or serious debilitation' and 'extremely
3 harsh, malicious, or harmful'. If released into the waterway the
4 bentonite mixture, or the thicker, leak-stopping additives, can
5 increase turbidity and clog the gills of fish and other aquatic
6 species causing serious debilitation or damage to the estuarine
7 ecology.

8 "The Applicant proposed the use of HDD for the crossing of
9 streams with listed fish species. The Oregon Department of Fish
10 and Wildlife, in its 2008 comments to FERC regarding the Jordan
11 Cove/Pacific Connector DEIS wrote,

12 "A couple of specific locations where HDD failures
13 have occurred have been along the Coos County
14 Pipeline in the Coquille watershed and along the
15 South Mist Pipeline in northwestern Oregon. These
16 past HDD failures have involved releases of large
17 amounts of bentonite (clayish material) into streams
18 and wetlands. Both the bentonite releases and the
19 clean-up actions have resulted in highly damaging
20 impacts to aquatic resources.'

21 "The equipment to be used by the Applicant for the 'containment
22 and cleanup of drilling mud' includes heavy equipment such as a
23 'backhoe or dozer'. The use of this type of equipment for the
24 containment and cleanup of a frac-out or spill would only
25 exacerbate the damage to the estuary and shorelands. The '*HDD
26 Frac-out Contingency Plan*' also fails to adequately address the
27 potential of borehole abandonment and relocation in the event of a
28 failure.

29 "Staff finds that Applicant has failed to address how a complete
30 HDD failure would impact the estuary and aquatic resources of the
31 County. Because the applicant has not completely analyzed the
32 impacts and has not conducted the balancing analysis required by
33 L5.830(9), Staff has determined that the project's potential public
34 benefits do not equal or exceed expected adverse impacts. **Staff
35 concludes that the criteria in [L]5.830(9) has not been met."**

1 Record A78 to A79 (emphases and boldface in original; footnotes
2 omitted.)

3 Petitioner first argues the county improperly interpreted L5.830(9) by
4 interpreting the word “project” to require assessment of the “potential public
5 benefits” and “expected adverse impacts” of the proposed 41-mile pipeline in
6 Clatsop County only. Under the county’s interpretation, the Warrenton
7 terminal, which is not part of the disputed application in this appeal, will be
8 subject to review by the City of Warrenton and is not a factor in applying
9 L5.830(9).

10 Once again, our review of the county’s more narrow interpretation of the
11 term “project” is governed by ORS 197.829(1) and the deferential standard of
12 review set out in *Siporen*. See n 5. The LWDUO does not define the term
13 “project.” Dictionary definitions of the term are not particularly helpful.²²
14 Both the county’s and petitioner’s preferred interpretation would be consistent
15 with the dictionary definition of the term since it does not explicitly address the
16 scope or extent of a project. Petitioner does not identify any purposes,
17 underlying policies, or state law that the term might have been adopted to
18 implement. Intervenors-respondents contend there is contextual support for the
19 county’s interpretation and that it furthers a LWDUO purpose.²³

²² *Webster’s Third New International Dictionary* (unabridged ed 2002) includes the following definition of “project:”

“**project** * * * **1** : a specific plan or design * * * **2** obs : a mental conception : idea **3** : a planned undertaking: as **a** : a definitely formulated piece of research **b** (1) : an undertaking devised to effect the reclamation or improvement of a particular area of land * * * [.]” *Id.* at 1813.

²³ Intervenors-respondents argue:

1 Petitioner has not shown that the county’s interpretation is inconsistent
2 with the text of L5.830(9), any relevant contextual LWDUO language or any
3 underlying purpose or policy. In fact, as respondent and intervenors-
4 respondents point out, there is an internal inconsistency in how petitioner
5 would interpret and apply L5.830(9). Petitioner would include the benefits of
6 the Warrenton LNG terminal in applying L5.830(9), but would not include the
7 expected adverse impacts of the terminal. The word “project” cannot mean one
8 thing when considering “potential public benefits” and something else when
9 considering “expected adverse impacts.” The county’s interpretation of

“The county’s interpretation of the term ‘project’ is also consistent with the term’s context within L5.840(4). Based on the Impact Assessment, the County must select one of four conclusions under L5.840. L5.840(4) is one possible conclusion. L5.840(4) states: ‘Available information is insufficient for predicting and evaluating potential impacts. More information is needed before *the project can be approved*. [Intervenors-respondents’ emphasis.] This possible outcome of the Impact Assessment focuses on informing whether the ‘project’ that is proposed in the application ‘can be approved,’ not whether a component of a larger project can be approved.

“Finally, the County’s interpretation of ‘project’ is consistent with the purpose of L5.830(9). The purpose of L5.830(9) is to inform the County’s selection of one of four conclusions in its Impact Assessment Conclusion, L5.840. Three of the four possible outcomes describe a spectrum of conclusions regarding the impacts of ‘[t]he proposed uses and activities.’ L5.840(1)-(3). Therefore the underlying purpose of L5.730(9) is to support a conclusion on the ‘proposed uses and activities,’ not the larger proposal that the pipeline application is part of (i.e., the LNG terminal and additional portions of the natural gas pipeline). * * *” Intervenors-Respondents’ Brief 42-43.

1 L5.830(9) to require that it consider only the project that is before the county in
2 this matter, *i.e.*, the 41-mile pipeline, is not reversible under ORS 197.829(1).

3 Petitioner challenges the evidence the county relied on, arguing that just
4 because other projects may have experienced frac-outs does not mean
5 petitioner will. Petitioner contends it presented largely uncontradicted
6 evidence that the measures it will put in place will be sufficient to avoid frac-
7 outs.

8 Petitioner clearly put forth evidence from its experts that would have
9 been sufficient for the board of county commissioners to reasonably conclude
10 that the threat posed by frac-outs is sufficiently small and the economic
11 benefits of the 41-mile pipeline (as one component of the larger complete
12 facility) are sufficiently great that the “potential public benefits” of the pipeline
13 equal or exceed the “expected adverse impacts.” But the board of county
14 commissioners apparently was not persuaded by the evidence and decided to
15 rely on other evidence to reach a contrary conclusion regarding L5.830(9).

16 As we have already explained petitioner’s burden in challenging the
17 board of commissioners’ conclusion to the contrary is a difficult one. That
18 burden is rendered all the more difficult by the highly subjective nature of the
19 standard imposed by L5.830(9). *Oien v. City of Beaverton*, 46 Or LUBA 109,
20 115 (2003). Petitioner must show that its evidence of the lack of danger from
21 frac-outs is so overwhelming that it carried its burden under L5.830(9) as a
22 matter of law. *Westside Rock; Rogue Valley Manor; Cook*. As respondents
23 point out, petitioner falls short of demonstrating that is the case here.
24 Petitioner’s own evidence showed there are some risks of habitat damage
25 associated with frac-outs. Record 11660-61. Other evidence was also
26 submitted that frac-outs happen, they have happened recently in Oregon, and

1 they can result in environmental damage when they occur. Record 8532
2 (Oregon Department of Fish and Wildlife); 8184 (Columbia River Estuary
3 Study Task Force); 8466-71, 8486 (Columbia Riverkeeper). Given that
4 evidence in the record before the board of county commissioners, we cannot
5 say petitioner carried its burden under L5.830(9) to show “potential public
6 benefits will equal or exceed expected adverse impacts,” as a matter of law.

7 The eleventh assignment of error is denied.

8 **TENTH ASSIGNMENT OF ERROR**

9 In its tenth assignment of error, petitioner challenges ten findings that
10 address a number of LWDUO standards, Clatsop County Standards Document
11 standards, and comprehensive plan requirements.²⁴ In almost all cases the
12 challenged finding simply incorporates and relies on finding 174, which
13 addresses the L5.830(9) “potential public benefits will equal or exceed
14 expected adverse impacts” standard that we just considered. We have already
15 rejected petitioner’s challenge to finding 174 in our resolution of the eleventh
16 assignment of error. However, we address petitioner’s arguments under the
17 tenth assignment of error that are not resolved by our disposition of the
18 eleventh assignment of error.

²⁴ The challenged findings, along with the standard the finding addresses, are as follows: finding 95 (L3.754(2)); finding 116 (L3.802); finding 126 (Plan Goal 6, Policy 3); finding 130 (Plan Goals 16/17 P20.8(1)-(3)); finding 133 (Plan Goals 16/17 P20.15(2)); finding 156 (L4.092(1)); finding 174 (L5.830(9)); finding 183 (S4.202); finding 190 (S4.230); finding 212 (Plan Goal 2, Policy 4); finding 213 (Plan Goal 2, Policy 5).

1 **A. Some of the Standards are not Mandatory**

2 Petitioner argues “[t]he Board erred in denying the Application based on
3 a number of LWDUO and Comprehensive Plan provisions that are not
4 mandatory approval standards.” Petition for Review 66. However, petitioner
5 only identifies L3.802 (finding 116), Plan Goal 2, Policies 4 (finding 212) and
6 5 (finding 213) and Plan Goal 6, Policy 3 (finding 126).

7 We agree with petitioner that Plan Goal 2, Policies 4 and 5 are not
8 mandatory permit approval criteria. They are descriptions of the “Conservation
9 Other Resources” and “Natural” comprehensive plan designations. As was the
10 case for the Goal 2, Policy 3 “Rural” plan designation description that we
11 concluded under the fifth assignment of error is not a mandatory permit
12 approval standard, we conclude that these plan designation descriptions are not
13 properly applied as mandatory permit approval standards. Plan Goal 6, Policy
14 3 presents a closer question and based on its wording might or might not
15 qualify as a permit approval criterion.²⁵ For different reasons, L3.802 may or
16 may not be a permit approval standard. L3.802 is the AN zone purpose
17 statement. While the particular wording of a purpose statement or related
18 provisions can lead to a contrary result, purpose statements generally are not
19 applied as permit approval criteria. *Jones v. City of Grants Pass*, 64 Or LUBA

²⁵ Plan Goal 6, Policy 3 provides:

“The cumulative effect of development on the County’s environment should be monitored and, where appropriate, regulated. When evaluating proposals that would affect the quality of the air, water or land in the County, consideration should be given to the impact on other resources important to the County’s economy such as marine resource habitat and recreational and aesthetic resources important to the tourist industry.”

1 103, 110 (2011); *SEIU v. City of Happy Valley*, 58 Or LUBA 261, 271-72, *aff'd*
2 228 Or App 367, 208 P3d 1057, *rev den* 347 Or 42, 219 P3d 688 (2009); *Tylka*
3 *v. Clackamas County*, 22 Or LUBA 166, 172 (1991). But here petitioner cites,
4 but does not discuss L5.880. L5.880 provides in part “[c]ertain uses in Aquatic
5 Development, Aquatic Conservation and Aquatic Natural zones may be
6 permitted only if they are consistent with the purpose of the aquatic zone in
7 which they occur.” Petitioner takes no position regarding whether L5.880
8 applies to the disputed pipeline.

9 We need not and do not attempt to decide if Plan Goal 6, Policy 3 and
10 L3.802 were properly applied as mandatory approval standards. That is
11 because petitioner does not argue that any of the standards applied by the other
12 six findings at issue in this assignment of error are not mandatory approval
13 standards. As respondent and intervenors-respondents explain in their briefs, at
14 least some of them clearly are mandatory permit approval standards.

15 **B. The County Interprets the Standards to be too Restrictive**

16 Petitioner next argues the chance of frac-outs in constructing the
17 proposed pipeline is remote and the county’s interpretation that the resource
18 protection standards at issue in this assignment of error are violated by that
19 remote risk overstates the risk and constitutes an improperly strict
20 interpretation and application of those standards. Petitioner contends that all
21 parties agree that HDD is a technique that permits installation of a pipeline in
22 circumstance where the damage to environmental values on the surface from
23 conventional pipeline construction might otherwise be unacceptable. In this
24 case petitioner points out that at one point planning staff found that a number

1 of standards were satisfied here *because* HDD avoided such impacts.²⁶
2 Petitioner contends the county should not interpret and apply its standards so
3 that approval of a pipeline (a use that is expressly permitted as a conditional
4 use in the relevant zoning districts) is effectively made impossible. Instead,
5 petitioner argues, the county should interpret its plan and land use regulations
6 to avoid such a regulatory conflict. Petitioner contends this is especially the
7 case, since at least some of the standards in the LWDUO explicitly envision the
8 possibility of some environmental degradation from development and merely
9 call for mitigation of adverse impacts “to an acceptable level.”²⁷

10 We agree with petitioner that a county is generally obligated, where
11 possible, to interpret its plan and land use regulations to avoid actual conflicts
12 between standards, particularly where such a conflict would have the effect of
13 rendering one of the conflicting standards a nullity. *Foster v. City of Astoria*,
14 16 Or LUBA 879; 884-85 (1988). However, we cannot determine that the

²⁶ For example, a March 2, 2011 staff report included the following finding:

“The Aquatic Natural (AN) and Aquatic Conservation Two (AC-2) zones are intended for conservation as stated in these zone’s purpose statements. Since the applicant proposes to bore underneath these resources the vegetation and biological function of these resources areas will be preserved. Staff Finds that the applicant has demonstrated consistency with the purpose of the AN zone.” Record A1105.

²⁷ For example, one of the possible four conclusions under the Impact Assessment required by L5.820 is set out at L5.840(2), which provides:

“The proposed uses and activities represent a potential degradation or reduction of estuarine resources. The Impact Assessment identifies reasonable alterations or conditions that will eliminate or minimize to an acceptable level expected adverse impacts.”

1 standards will conflict in all cases because we cannot assume that the frac-out
2 concerns that led the county in this case to find these resource protection
3 standards to be violated by the proposal in this case necessarily would be
4 repeated and lead to the same result for a different pipeline proposal in the
5 future.

6 We can appreciate that petitioner believes strongly that the quality of the
7 expert testimony it presented to the hearings officer and board of
8 commissioners should have led to approval. However, at least some of the
9 standards addressed by the disputed findings impose strict environmental
10 protection standards.²⁸ Others call for highly subjective judgments.²⁹ We have
11 already concluded that in applying such standards, a reasonable decision maker
12 could have decided as the board of commissioners did in this case, based on

²⁸ For example, finding 130 addresses Plan Goals 16/17 P20.8(1)-(3), which provide:

“This subsection applies to uses and activities with potential adverse impacts on fish or wildlife habitat, both in Columbia River estuarine aquatic areas and in estuarine shorelands.

- “1. Endangered or threatened species habitat shall be protected from incompatible development.
- “2. Measures shall be taken to protect nesting, roosting, feeding and resting areas used by resident and migratory bird populations.
- “3. Major marshes, significant wildlife habitat, coastal headlands, and exceptional aesthetic resources in the Coastal Shorelands Boundary shall be protected.”

²⁹ For example see L5.830(9), which was discussed in our resolution of the eleventh assignment of error.

1 concerns raised about the possibility of frac-outs and the damage that a frac-out
2 might cause. We do not agree with petitioner that the record in this case shows
3 that the board of commissioners’ interpretation and application of the standards
4 addressed in this assignment of error, if replicated in the future, necessarily
5 would make approval of any pipeline in the future impossible.

6 The tenth assignment of error is denied.

7 **TWELFTH ASSIGNMENT OF ERROR**

8 In its twelfth assignment of error, petitioner assigns error to the board of
9 county commissioners’ finding that the proposed pipeline does not comply with
10 Plan Goal 11, General Public Facilities Policy 8, which provides “[a]ll utility
11 lines and facilities should be located on or adjacent to existing public or private
12 rights-of-way to avoid dividing farm units.” Petitioner’s challenge under the
13 twelfth assignment of error is fourfold. Its first argument is that no issue was
14 raised regarding Plan Goal 11, General Public Facilities Policy 8 before the
15 hearings officer or the board of commissioners in the proceedings that led to
16 the county’s initial decision in this matter, so that whether the pipeline
17 complies with Plan Goal 11, General Public Facilities Policy 8 was beyond the
18 scope of the board of commissioners’ reconsideration proceedings.

19 The county concedes that the Plan Goal 11, General Public Facilities
20 Policy 8 issue was beyond the scope of the board of commissioners’
21 reconsideration proceedings. With that concession it is unnecessary to
22 consider petitioner’s remaining arguments under the twelfth assignment of
23 error.

24 The twelfth assignment of error is sustained.

1 **CONCLUSION**

2 We deny, in whole or in part, the fifth, eighth, ninth, tenth, and eleventh
3 assignments of error. Our denial of the fifth, eighth, tenth, and eleventh
4 assignments of error has the legal effect of sustaining a number of findings that
5 the proposed pipeline does not comply with applicable approval standards.

6 Accordingly, the county's decision to deny the requested permit approval
7 is affirmed.