

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITIZENS AGAINST LNG, INC.,
5 FRIENDS OF LIVING OREGON WATERS INC.,
6 JODY McCAFFREE, HARRY STAMPER,
7 and HOLLY STAMPER,
8 *Petitioners,*

9
10 vs.

11
12 COOS COUNTY,
13 *Respondent,*

14 and

15
16
17 PACIFIC CONNECTOR GAS PIPELINE, L.P.,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2010-086

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from Coos County.

26
27 Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of
28 petitioners.

29
30 No appearance by Coos County.

31
32 Roger A. Alfred, and Mark D. Whitlow, Portland, filed the response brief on behalf
33 of intervenor-respondent. With them on the brief was Perkins Coie LLP. Roger A. Alfred
34 argued on behalf of intervenor-respondent.

35
36 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
37 participated in the decision.

38
39 REMANDED

03/29/2011

40
41 You are entitled to judicial review of this Order. Judicial review is governed by the
42 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a permit to construct a 49.72-mile segment of a natural gas pipeline.

MOTION TO TAKE OFFICIAL NOTICE

Petitioners filed two motions to take official notice of several federal statutes and the Oregon Coastal Management Program. There is no opposition to the motions, and they are allowed.

FACTS

The challenged decision in this case approves those portions of a pipeline within the county necessary to connect a liquefied natural gas (LNG) import terminal and regasification facility to interstate gas transmission lines located outside the county. The county previously issued planning and zoning approvals for the terminal and regasification facility. *See SOPIP, Inc. v. Coos County*, 57 Or LUBA 44, *aff'd* 223 Or App 495, 196 P3d 123 (2008); *SOPIP, Inc. v. Coos County*, 57 Or LUBA 301 (2008).

The proposed pipeline will cross through several county zoning designations: Forest, Exclusive Farm Use, Rural Residential, and Industrial. Additionally, the pipeline will cross 14 Coos Bay Estuary Management Plan (CBEMP) management units, for a total of 5.99 miles, including Haynes Inlet. The project includes both permanent and temporary components. The permanent components include a 36-inch subsurface gas pipeline within a 50-foot right-of-way, four mainline block valves, and two permanent private roads accessing two of the block valves. Constructing the pipeline will also require a 45-foot temporary easement, temporary work and storage areas, and temporary roads.

On December 17, 2009, the Federal Energy Regulatory Commission (FERC) issued an order approving the pipeline and the associated LNG terminal, which order is on appeal. Intervenor-respondent (intervenor) subsequently applied to the county for permits necessary

1 to construct the portion of the pipeline within the county. The county hearings officer
2 conducted a hearing on May 20, 2010, and on July 16, 2010, issued a recommendation to the
3 county board of commissioners to approve the application. The board of commissioners
4 issued its final decision approving the application on September 8, 2010. This appeal
5 followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 The board of commissioners' decision states, in part:

8 **“Scope of Review**

9 “When addressing the criteria and considering evidence in the record, the
10 Board used the standard of review required for land use decisions. The
11 applicant must provide substantial evidence in the whole record to
12 demonstrate that all approval standards are met. When evidence conflicted,
13 the Board reviewed the entire record to see if the undermining evidence
14 outweighed the applicant's evidence * * *.” Record 21.

15 Petitioners argue that the above-quoted paragraph indicates that the commissioners
16 applied an erroneous standard of review when evaluating the evidence in the record.
17 According to petitioners, the commissioners applied a deferential standard of evidentiary
18 review similar to the standard of review that LUBA applies on appeal, rather than a *de novo*
19 review, where the commissioners are free to use their judgment in choosing between
20 conflicting substantial evidence. Petitioners contend that the commissioners apparently
21 believed, erroneously, that they were *obligated* to adopt the applicant's position regarding
22 compliance with an approval criterion as long as there was substantial evidence in the record
23 to support the applicant's position, even if the evidence in the record conflicted so that a
24 reasonably decision maker could also have concluded based on that conflicting evidence that
25 the applicant had not carried its burden with regard to one or more approval standards.

26 Intervenor responds that the above-quoted passage stating the commissioners'
27 standard of review simply restates the applicant's burden to provide substantial evidence in
28 support of the application. Intervenor argues, based on *Bouman v. Jackson County*, 23 Or

1 LUBA 628, 633 (1992), that that restatement of the applicant’s burden is accurate, and does
2 not show that the commissioners applied an erroneous standard of review or impermissibly
3 shifted the burden of proof or persuasion to the opponents to the application.

4 In any case, intervenor argues, even if the above-quoted passage read by itself can be
5 said to reflect an erroneous understanding of the county’s obligations in reviewing the
6 evidence, the county adopted a 162-page decision with detailed findings that reflect a
7 thorough weighing of the evidence submitted by both the applicants and opponents.
8 Intervenor argues that petitioners have not cited to any particular finding in which the county
9 applied an incorrect standard of review or impermissibly shifted the burden of proof to the
10 opponents.

11 We tend to agree with petitioners that when used to describe a “standard of review”
12 the term “substantial evidence” most accurately describes the standard a reviewing body
13 applies in reviewing evidentiary challenges to a decision on appeal, and does not accurately
14 describe the applicant’s burden of proof or the weighing of evidence in the record that the
15 initial decision maker undertakes in determining whether or not the application complies
16 with approval criteria. Intervenor does not dispute that under the county’s code the board of
17 commissioners’ review following the hearings officer’s recommendation was to be a *de novo*
18 review of the evidence in the record. If in fact the commissioners believed that they were
19 *obligated* to resolve all evidentiary conflicts in the applicant’s favor as long as a reasonable
20 person could rely on the applicant’s evidence, considering the whole record, a decision based
21 on that understanding of the commissioners’ role in evaluating the evidence would not
22 constitute *de novo* review and might well be erroneous for that reason.

23 However, as intervenor notes, petitioners do not identify any findings in which the
24 commissioners arguably applied an erroneous understanding of their role in reviewing the
25 evidence. If the commissioners believed that they were obligated to resolve all evidentiary
26 conflicts in the applicant’s favor, even where the evidence so conflicted that a reasonable

1 person could also have resolved those evidentiary conflicts in opponents' favor, the county's
2 findings would presumably be much shorter. Instead, the county's findings cited to us
3 appear to weigh all evidence regarding compliance with approval criteria, and if there is
4 conflicting evidence determine which evidence is more persuasive. There are no findings
5 cited to us suggesting that the commissioners believed they were obligated to resolve
6 evidentiary conflicts in the applicant's favor, absent overwhelming countervailing evidence.
7 Because it is not clear to us that the above-quoted passage reflects an erroneous
8 understanding of the commissioners' role in weighing the evidence, or if so that the
9 commissioners in fact applied that erroneous standard of review in weighing the evidence,
10 petitioners' arguments under this assignment of error do not provide a basis for reversal or
11 remand.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 Coos County Zoning and Land Development Ordinance (CCZLDO) 5.0.150 provides
15 that:

16 "Applications shall be submitted by the property owner or a purchaser under a
17 recorded land sale contract. 'Property owner' means the owner of record,
18 including a contract purchaser. The application shall include the signature of
19 all owners of the property. A legal representative may sign on behalf of an
20 owner upon providing evidence of formal legal authority to sign."

21 CCZLDO 5.0.150 clearly requires the signature of the equitable owner of the property, that
22 is, the fee owner or the contract purchaser.

23 As noted, the proposed pipeline will cross a number of parcels, some of which are not
24 (yet) owned by intervenor, the applicant. The application was signed by intervenor's
25 representative, and did not include the signatures of any property owners. Intervenor will
26 presumably need to acquire by negotiation or condemnation the fee interest or an easement in
27 order to construct the pipeline. Petitioners objected below that the application does not
28 comply with CCZLDO 5.0.150 because it does not include the signatures of all property

1 owners. The county disagreed, citing to a county interpretation of CCZLDO 5.0.150 in an
2 earlier proceeding involving a public gas utility, under which the county determined that it
3 would “accept land use applications for pipelines in Coos County without the signatures of
4 all landowners, as long as the applicant has condemnation authority and a condition is
5 imposed that the land use approval would not take effect until the applicant acquires the
6 necessary property.” Record 24. Accordingly, the county imposed two conditions designed
7 to ensure compliance CCZLDO 5.0.150.

8 Under this assignment of error, petitioners do not challenge the above interpretation
9 of CCZLDO 5.0.150, but argue that the two conditions are ambiguous and insufficient to
10 ensure compliance with CCZLDO 5.0.150. The two conditions, 20(a) and 20(b), state:

11 “20(a) This approval shall not become effective as to any affected property
12 until the Applicant has acquired ownership of an easement or other
13 interest in the property necessary for construction of the pipeline, and
14 obtains either: (i) the signature of all owners of property consenting to
15 the application, or (ii) an order of a court in condemnation of the
16 property interest required for the pipeline that operates to obviate the
17 need for consent of owners of property other than the applicant. In the
18 alternative, should this condition 20(a) be deemed insufficient on
19 appeal to satisfy applicable code requirements, the applicant shall
20 instead be subject to the alternative condition 20(b) immediately
21 below.

22 “20(b) In the alternative to the above condition 20(a), in the event that
23 condition 20(a) is deemed invalid on appeal, this approval shall not
24 become effective as to any affected property until the applicant has
25 acquired an ownership interest in the property and the signatures of all
26 owners of the property consenting to the land use application for
27 development of the pipeline, unless the signature requirement of
28 CCCCZLDO 5.0.150 is preempted or otherwise invalid under another
29 provision of law including without limitation federal statutes,
30 regulations, or the United States Constitution.” Record 167-68.

31 **A. All Owners of All Property**

32 Petitioners first argue that, under condition 20(a), it is unclear whether the approval
33 becomes effective only when the applicant obtains the signatures and/or condemnation
34 orders with respect to *all* owners of *all* property needed for the pipeline. According to

1 petitioners, condition 20(a) could be read to allow the approval to become effective in a
2 piecemeal fashion, property by property as particular signatures and/or condemnation orders
3 are obtained. If so, petitioners argue this would be inconsistent with CCZLDO 5.0.150.

4 While condition 20(a) might be read to allow the approval to become serially
5 “effective” property by property, rather than take effect only once, when all signatures and/or
6 condemnation orders for all properties are obtained, the latter interpretation is equally
7 consistent or more consistent with the text of the condition and almost surely what the county
8 intended in imposing it. The “approval” is for the 49-mile pipeline, not segments of the
9 pipeline. Further, the findings supporting condition 20(a) refer to the “properties” and the
10 “property owners” in the plural, and it is reasonably clear that the county intended the
11 approval to become effective only when all signatures and/or condemnation orders have been
12 obtained for all properties. To the extent necessary, we so construe condition 20(a). ORS
13 197.829(2).

14 **B. Public Input in Second Stage of Compliance Determination**

15 Petitioners next argue that the county erred in deferring the issue of compliance with
16 the signature requirement of CCZLDO 5.0.150 to a second proceeding that does not provide
17 for notice or public input. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 448 (1992) (a
18 local government may defer a finding of compliance with permit approval criteria to a
19 second proceeding, if the second proceeding provides for the notice and hearing required for
20 discretionary permit decisions). According to petitioners, the county can determine
21 compliance with the signature requirement of CCZLDO 5.0.150 only as part of a proceeding
22 that provides notice and a hearing on the issue.

23 The county rejected this argument, concluding that

24 * * * the act of verifying the signatures will be ministerial in nature, because
25 ownership can be verified without exercising discretionary decision-making.
26 County staff can simply verify the signatures received for a certain property
27 against the County’s ownership records for that property. The records will
28 either match or not; there will not be a need or opportunity to exercise

1 judgment in this process. As a result, the County will not need to conduct an
2 additional quasi-judicial land use hearing to verify ownership.” Record 35
3 (footnote omitted).

4 Petitioners disagree, arguing that county staff may have to exercise discretion in
5 determining who are the owners of the property and whether the application includes
6 signatures from “all” owners. For example, petitioners argue under the first prong of
7 condition 20(a) that if intervenor obtains an easement rather than the fee through negotiation
8 or condemnation it is not clear whether county staff will accept only the applicant’s signature
9 as owner of the easement as the signature of “all” owners, without the signature of the owner
10 of the underlying fee. Similarly, under the second prong of condition 20(a) petitioners argue
11 that staff may have to exercise discretion to determine whether a particular court order
12 “operates to obviate the need for consent of owners of property other than the applicant.”

13 We have some question whether it is consistent with *Rhyne* and its progeny to defer a
14 determination of compliance with an approval criterion or mandatory application
15 requirement to a second-stage proceeding that does not provide notice and opportunity to
16 request a hearing, even where the criterion or requirement is such that discretion or legal
17 judgment is not required to determine whether compliance. *See Boucot v. City of Corvallis*,
18 60 Or LUBA 57, 63-64 (2009) (so questioning). But even assuming that deferral of
19 compliance with CCZLDO 5.0.150.20(a) to a non-public proceeding is a potentially
20 permissible option, we agree with petitioners that as Condition 20(a) is drafted staff would
21 have to exercise discretion and legal judgment to determine compliance with CCZLDO
22 5.0.150 under the second prong of the condition.

23 The first prong of Condition 20(a) simply repeats CCZLDO 5.0.150 in requiring the
24 signature of all owners of property consenting to the application, and if that were all
25 Condition 20(a) required then little if any discretion would be required. County staff would
26 presumably match the signatures on the application against the names of the owners of the
27 fee interest for each property at issue, and if all required signatures for all properties are

1 present, then staff would deem CCZLDO 5.0.150 complied with and the pipeline approval
2 would be effective. We do not see that such review would require much discretion or legal
3 judgment.

4 The difficulty is the second prong of Condition 20(a), which allows the applicant to
5 provide in lieu of the signatures of the property owner “an order of a court in condemnation
6 of the property interest required for the pipeline that operates to obviate the need for consent
7 of owners of property other than the applicant.” This second prong is apparently intended to
8 allow the applicant to submit an order condemning an easement interest or less than fee
9 ownership of properties, and have that condemnation order somehow “obviate” the
10 requirement that the fee owner sign the application. Petitioners argue, and we agree, that it is
11 not clear to us how staff are to determine that a circuit court order “obviates” the need for the
12 fee owner to sign the application, or what that phrase means. It is difficult to understand how
13 the second prong of Condition 20(a) could be applied without considerable discretion and
14 legal judgment. Remand is necessary for the county to either delete the second prong of
15 Condition 20(a), modify it to eliminate the potential for staff discretion and exercise of legal
16 judgment, or simply provide for notice and an opportunity for hearing, consistent with
17 *Rhyne*.

18 Petitioners advance a similar challenge against condition 20(b), which provides that if
19 condition 20(a) is ruled invalid on appeal, the signatures of all property owners will be
20 required, “unless the signature requirement of CCCCZLDO 5.0.150 is preempted or
21 otherwise invalid under another provision of law including without limitation federal
22 statutes, regulations, or the United States Constitution.” Petitioners argue, and we agree, that
23 if condition 20(b) is intended to allow staff to determine whether the signature requirement
24 has been preempted by federal law, etc., then condition 20(b) also requires discretion and the
25 exercise of legal judgment. Remand is necessary for the county to either delete this language

1 from condition 20(b), modify it to eliminate the need for discretion and exercise of legal
2 judgment, or provide for notice and an opportunity for hearing, consistent with *Rhyne*.¹

3 The second assignment of error is sustained, in part.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioners argue that the county erred in approving a temporary 45-foot wide
6 construction easement for the pipeline, in addition to the permanent 50-foot wide right-of-
7 way.²

8 Most of the pipeline crosses land zoned for forest uses. CCZLDO 4.8.300(F) and
9 OAR 660-006-0025(4)(q) allow as a conditional use in forest zones new distribution lines,
10 including gas pipelines, “with rights-of-way 50 feet or less in width.” Petitioners argued to
11 the county that the combined 95-foot right-of-way and temporary construction easement is
12 inconsistent with the code and administrative rule. The county rejected that argument,
13 concluding that a temporary construction easement is not a “right-of-way” within the
14 meaning of the code and rule. The county cited to a recent Oregon Energy Facility Siting
15 Council (EFSC) pipeline siting decision that granted a similar temporary construction
16 easement on either side of a permanent 50-foot wide right-of-way in a forest zone. To the
17 extent the temporary easement is “right-of-way” for purposes of CCZLDO 4.8.300(F) and
18 OAR 660-006-0025(4)(q), the county concluded, the 50-foot right-of-way limitation in the
19 code and rule is inconsistent with either by federal law or ORS 772.510(3), a statute that

¹ One way to modify condition 20(b) to eliminate the need to exercise discretion or legal judgment would be to provide that the signatures that would otherwise be required under CCCCZLDO 5.0.150 will not be required if a federal agency or court of competent jurisdiction declares that the CCCCZLDO 5.0.150 signature requirement is preempted by federal law. The county may have intended that any federal preemption determination would have to be made by a federal agency or court of competent jurisdiction, but condition 20(b) is impermissibly ambiguous on the question.

² As we understand it, the 45-foot temporary construction easement will extend 22.5 feet on either side of the permanent 50-foot right-of-way, and will be used for stockpiling, storage and other temporary construction uses.

1 authorizes private pipeline companies to condemn easements “in such widths as is
2 reasonably necessary to accomplish their pipeline company purposes.”

3 Petitioners respond that if the 45-foot temporary easement is not part of the “right-of-
4 way,” then it is not allowed at all in the forest zone, because nothing in the code or
5 administrative rule governing forest lands authorizes temporary construction easements as a
6 “use” allowed on forest lands. Petitioners also argue that the EFSC decision has no binding
7 or precedential value, and that it is not clear ORS 772.510(3) must be understood to preempt
8 the 50-foot right-of-way limitation in OAR 660-006-0025(4)(q).

9 Intervenor responds, and we agree, that a temporary construction easement or area
10 necessary to construct a new distribution pipeline is not a “right-of-way” for purposes of
11 OAR 660-006-0025(4)(q). “Right-of-way” suggests a linear transportation or distribution
12 system of some kind, not a temporary storage or construction staging area, and the focus of
13 the rule is clearly the permanent right-of-way. As to whether a temporary construction area
14 that is necessary to construct an authorized use is itself an authorized use in a forest zone
15 under OAR chapter 660, division 006, it is reasonable to presume that the Land Conservation
16 and Development Commission (LCDC) did not view such a temporary construction area to
17 be a “use” in itself, but rather an accessory function that is necessary to construct the
18 authorized use. In any case, while the rule does not expressly authorize a temporary
19 construction easement or area, neither does the rule expressly prohibit it, and ORS
20 772.510(3) appears to provide ample express authority for intervenor to obtain a temporary
21 easement of the width necessary to accomplish construction of the pipeline. We see no
22 necessary inconsistency between the statute and the rule that would preclude a pipeline
23 company from obtaining an temporary easement necessary to construct a pipeline within the
24 50-foot wide permanent right-of-way authorized under the rule. To the extent there is a
25 conflict between the statute and the rule, it goes without saying, the statute would control.

1 Finally, although we need not address the question of federal preemption, intervenor
2 argues that the FERC has issued an approval for this same pipeline, which specifically
3 authorizes a 95-foot wide corridor to construct the pipeline. We tend to agree with
4 intervenor that under the Article VI of the United States Constitution, the Supremacy Clause,
5 the county would almost certainly lack authority to deny or modify aspects of the proposed
6 pipeline, based on local or state regulations, in a manner that directly conflicted with aspects
7 of the project that FERC has specifically approved under federal law. However, because the
8 county did not deny or modify the pipeline in any way inconsistent with the FERC approval,
9 and was not required to under the rules and statutes discussed above, we need not and do not
10 address that issue.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 Petitioners argue that the county failed to adopt adequate findings addressing issues
14 raised below regarding impacts on a particular species of oyster, Olympia oysters, found in
15 Haynes Inlet, where the pipeline crosses the estuary.

16 Two commercial oyster farms are located in the vicinity of the Haynes Inlet crossing,
17 which raise a species of oyster that is not native to Coos Bay. Intervenor's expert, Ellis,
18 testified based on a 1998 study that the only oyster species historically native to Coos Bay,
19 commonly known as the Olympia oyster, is not known to inhabit the estuarine area affected
20 by the pipeline. Record 1332.³ Ellis went on to address impacts to invertebrates in general
21 in Haynes Inlet and specifically on the oysters in the commercial oyster farms in the vicinity,
22 and concluded that with identified measures there would be only temporary impacts from
23 dredging and any bottom-dwelling invertebrates displaced by dredging would rapidly
24 recolonize the area. Record 1342. The county adopted the Ellis report as part of its findings,

³ The Olympia oyster apparently became extinct in Coos Bay prior to 1850, due to natural events. Record 1552.

1 and concluded based on the Ellis report that any impacts on estuarine resources would be
2 “temporary and insignificant.” Record 79.

3 Petitioners do not dispute the Ellis report or the findings with respect to impacts on
4 invertebrates and the commercial oyster farms, as far as they go, but argue that during the
5 proceedings below petitioners submitted a 2009 article from the Journal of Shellfish
6 Research that documented recovery of populations of native Olympia oysters in certain areas
7 of Coos Bay, including portions of Haynes Inlet. According to the 2009 article, high
8 densities of Olympia oysters “are limited to locations where substrate is suitable. Hard
9 substrate (*i.e.* sandstone, shell, bark, basalt, and gravel) is readily available throughout this
10 area and lends to the even distribution.” Record 1552. Petitioners cited to the 2009 article in
11 support of their arguments that dredging for the pipeline may frustrate an objective for the
12 11-NA and 13A-NA estuarine management districts, to “protect” resource productivity and
13 aquatic resources. Record 1553.

14 Petitioners contend that the county failed in its findings to address the issue raised
15 below of impacts from dredging on recovery of the Olympia oyster. According to
16 petitioners, Olympia oysters depend upon the existence of a hard substrate, and the findings
17 fail to consider the issue of whether the open trench excavation necessary to install the
18 pipeline on the sea floor would smother or remove the hard substrate that the Olympia oyster
19 needs for recovery.

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

1 local comprehensive plan provisions that implement Statewide Planning Goal 16 (Estuarine
2 Resources).

3 Turning to the last argument first, intervenor argues that the county did not attempt to
4 rely on measures that simply reduce or mitigate impacts, as was the case in *Columbia*
5 *Riverkeeper*, but instead found, based on substantial evidence, that the impacts will be
6 “temporary and insignificant” and thus estuarine resources will be “protected.” We agree
7 with intervenor that the county did not misunderstand its obligation to “protect” estuarine
8 resources, and that findings that impacts will be “temporary and insignificant” are focused on
9 the correct legal standard for purposes of the comprehensive plan management district
10 language that implements Goal 16.

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

1 regarding compliance with applicable criteria, we agree with petitioners that remand is
2 necessary for the county to adopt responsive findings addressing potential impacts on the
3 Olympia oyster.

4 The fourth assignment of error is sustained, in part.

5 The county's decision is remanded.