

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

CITIZENS FOR RENEWABLES,  
NATALIE RANKER, and JODY MCCAFFREE,  
*Petitioners,*

vs.

CITY OF NORTH BEND,  
*Respondent,*

and

PACIFIC CONNECTOR GAS PIPELINE, LP,  
*Intervenor-Respondent.*

LUBA No. 2019-120

FINAL OPINION  
AND ORDER

Appeal from City of North Bend.

Tonia Moro, Medford, filed the petition for review and reply brief and argued on behalf of petitioners.

No appearance by City of North Bend.

Seth J. King, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Steven L. Pfeiffer and Perkins Coie LLP.

ZAMUDIO, Board Member; RUDD, Board Chair; RYAN, Board Member, participated in the decision.

RUDD, Board Chair, concurring.

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REMANDED

01/05/2021

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

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving a permit to install a  
4 section of a natural gas transmission pipeline under the Coos Bay Estuary.

5 **RENEWED MOTION TO FILE OVERLENGTH REPLY BRIEF**

6 Petitioners renew their previously denied motion to file an overlength reply  
7 brief. We have considered petitioners' additional arguments and are not  
8 persuaded that the proposed overlength reply brief is warranted. OAR 661-010-  
9 0039. The motion is denied.

10 **MOTIONS TO TAKE OFFICIAL NOTICE**

11 **A. Coos Bay Estuary Management Plan (CBEMP)**

12 The city moves to take official notice of the 1982 city ordinance that adopts  
13 the CBEMP as part of the city's land use legislation. ORS 40.090(7) (defining  
14 law subject to judicial notice to include an "ordinance, comprehensive plan or  
15 enactment of any county or incorporated city in this state"). There is no  
16 opposition to the motion, and it is granted.

17 **B. February 19, 2020 Department of Land Conservation and**  
18 **Development (DLCD) Decision**

19 Petitioners move to take official notice of a February 19, 2020 DLCD  
20 decision that objects to the certification of the proposed pipeline under the federal  
21 Coastal Zone Management Act (CZMA). ORS 40.090(2) (defining law subject  
22 to judicial notice to include the public acts of state executive departments).  
23 Intervenor-respondent Pacific Connector Gas Pipeline, LP (PCGP), does not

1 dispute that the DLCD decision is the type of public act that is judicially  
2 cognizable. However, PCGP disputes that the decision is material to any issue in  
3 the present appeal. If LUBA considers the DLCD decision, PCGP argues that  
4 LUBA may not consider or apply any “adjudicative facts” from the DLCD  
5 decision in the present appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688  
6 (2007). We agree with PCGP that a judicially cognizable state agency action  
7 cannot be cited to establish facts for the purpose of supporting or challenging  
8 findings of compliance with applicable land use approval criteria. With that  
9 caveat, petitioners’ motion is granted.

10 **C. March 19, 2020 Federal Energy Regulatory Commission**  
11 **(FERC) Decision**

12 PCGP moves to take official notice of a March 19, 2020 FERC decision  
13 that certifies that the proposed pipeline complies with federal law. The decision  
14 determines that FERC has jurisdiction over the proposed pipeline because it is  
15 part of an interstate natural gas pipeline. Petitioners object to LUBA taking  
16 official notice of the FERC decision because that decision is subject to a motion  
17 to vacate and not yet final. Further, petitioners argue that the only proposition for  
18 which PCGP wishes to cite the FERC decision—that the pipeline is part of an  
19 interstate natural gas pipeline—is not a matter of law, but rather a disputed,  
20 adjudicative fact that LUBA may not consider or apply in the present appeal.

21 As we understand matters, PCGP wishes to cite the FERC decision for the  
22 limited purpose of responding to petitioners’ assertion, under the first assignment

1 of error, that the pipeline is not an interstate natural gas pipeline, which  
2 petitioners argue is relevant to the legal issue of whether the city properly  
3 characterized the pipeline as a low-intensity utility facility under the CBEMP.  
4 However, our resolution of that legal issue does not depend on whether the  
5 pipeline is an interstate natural gas pipeline. As far as the parties have established,  
6 whether the pipeline is an interstate natural gas pipeline has no bearing on any  
7 issue that we must resolve in this appeal. Because the only asserted basis to  
8 consider the FERC decision has no apparent bearing on this appeal, PCGP's  
9 motion to take official notice is denied.

10 **MOTION TO TAKE EVIDENCE**

11 Petitioners next move to take two documents into evidence pursuant to  
12 OAR 661-010-0045(1).<sup>1</sup> The first document is PCGP's appeal of the February

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<sup>1</sup> OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. \* \* \*

“(2) Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving

1 19, 2020 DLCD decision to the United States Department of Commerce, seeking  
2 to override DLCD’s objection to the CZMA certification. The second document  
3 is a petition that PCGP filed with FERC, seeking to obtain a waiver of the federal  
4 requirement to obtain a Clean Water Act (CWA) permit. Relatedly, petitioners  
5 also seek to establish that PCGP withdrew its application with the state for  
6 permission for the pipeline to cross state-owned lands. Petitioners argue that,  
7 instead, PCGP is seeking to obtain the right to cross state-owned lands via  
8 eminent domain.

9 As grounds for the motions, petitioners argue that the two documents and  
10 the withdrawal of the application to cross state-owned lands represent  
11 “procedural irregularities not shown in the record and which, if proved, would  
12 warrant reversal or remand of the decision.” OAR 661-010-0045(1). According  
13 to petitioners, PCGP represented to the city below that it would obtain all  
14 necessary state and federal permits and approvals, presumably including the  
15 CZMA certification and CWA permit, and the city imposed a condition of  
16 approval requiring that PCGP obtain all necessary permits. Petitioners argue that,  
17 rather than comply with that condition, PCGP instead filed the appeal and  
18 petition, contrary to the expectations established during the city proceedings.  
19 Similarly, petitioners argue that PCGP’s withdrawal of its request to cross state-

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party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.”

1 owned lands, and its apparent reliance on eminent domain to establish that right,  
2 represents a “manipulation of the process” that warrants LUBA’s consideration  
3 of extra-record evidence under OAR 661-010-0045. Petitioners’ Motion to Take  
4 Official Notice and Motion to Take Evidence 6.

5 In *Oregon Shores Conservation Coalition v. Coos County*, we addressed  
6 similar motions regarding the same two documents at issue in this motion. \_\_\_\_  
7 Or LUBA \_\_\_\_, \_\_\_\_ (LUBA Nos 2019-137/2020-006, Dec 22, 2020) (slip op at  
8 6-9). We concluded that, because no party disputed the bare facts that the  
9 applicant (1) had appealed the DLCD decision objecting to the CZMA  
10 certification and (2) filed the petition seeking a CWA waiver, the parties could  
11 cite those facts in support of their arguments, even in the absence of a successful  
12 motion to take evidence. *Id.* at \_\_\_\_ (slip op at 8). Similarly, in this appeal, because  
13 no party disputes that PCGP has appealed the DLCD decision, is seeking a CWA  
14 waiver, and has withdrawn its request for permission to cross state-owned lands,  
15 the parties may, if they wish, note the existence of these undisputed  
16 circumstances in their arguments.

17 However, in *Oregon Shores Conservation Coalition*, we also held that, to  
18 the extent the proponents sought LUBA’s consideration of the content of the two  
19 documents for other evidentiary purposes, the proponents had failed to establish  
20 a “procedural irregularit[y]” within the meaning of OAR 661-010-0045(1). *Id.* at  
21 \_\_\_\_ (slip op at 8-9). Similarly, in this appeal, we conclude that petitioners have  
22 failed to demonstrate that PCGP’s post-decision actions in front of state and

1 federal entities is evidence of a violation of the procedures governing the  
2 challenged local land use decision. Accordingly, petitioners' motion to take  
3 evidence is denied.

#### 4 **FACTS**

5 In 2010, Coos County approved permits to install a section of a natural gas  
6 transmission pipeline across the Coos Bay Estuary. The county-approved  
7 alignment is known as the "Haynes Inlet Crossing." This section of the pipeline  
8 was part of a much larger development proposal to transport pressurized natural  
9 gas to domestic markets from a proposed natural gas import terminal at Jordan  
10 Cove, located on the North Spit area of the estuary. That larger proposal has since  
11 been reconfigured as a natural gas export terminal, with the pipeline instead  
12 delivering natural gas from a main trunk line to the export terminal to be shipped  
13 overseas. Over the years, the terminal and pipeline have been the subject of a  
14 number of city and county land use decisions and appeals of those decisions. In  
15 addition, the pipeline has been the subject of decisions by, and is the subject of  
16 applications pending before, FERC and other state and federal bodies. We discuss  
17 some of those decisions and applications elsewhere in this opinion.

18 In December 2018, PCGP, the current applicant, filed an application with  
19 the city seeking approval for alternative pipeline alignments to the Haynes Inlet  
20 Crossing. The proposed new alignments pass through seven properties within city  
21 jurisdiction, managed variously for urban, shoreland, or aquatic uses. To cross  
22 the estuary itself, and to minimize impacts on estuarine resources, PCGP



1 proposes that the pipeline be installed under the seafloor, using horizontal  
2 directional drilling (HDD) technology, instead of traditional open-trench  
3 methods. HDD technology involves drilling a pilot hole from shorelands at an  
4 angle down to an approximate depth of 50 to 75 feet below the seafloor, then  
5 drilling horizontally under the seafloor. The next step is to enlarge the pilot hole  
6 to 48 inches in width using a cutting head lubricated by high-pressure drilling  
7 fluid consisting of a slurry of water and bentonite (a type of clay). The slurry also  
8 stabilizes the tunnel surfaces and allows casings and the 36-inch pipeline to be  
9 pulled through the tunnel. Excess drilling fluid and soil cuttings are returned  
10 under pressure to the shoreland borehole and removed.

11 The city hearings officer conducted hearings on the application for new  
12 pipeline alignments and adopted findings recommending approval. The city  
13 council held additional hearings and, on October 10, 2019, approved the  
14 application, adopting the hearings officer's findings, with revisions, as its own.

15 This appeal followed.

## 16 **FIRST ASSIGNMENT OF ERROR**

17 In three sub-assignments of error, petitioners argue that the city council  
18 misconstrued applicable CBEMP provisions.

### 19 **A. A gas line is a low-intensity utility.**

20 The CBEMP management units that the pipeline crosses allow low-  
21 intensity utilities, including "gas lines," as an outright permitted use. The city  
22 concluded that, under the CBEMP, the proposed pipeline is a "gas line" and, thus,

1 qualifies as a low-intensity “utility” that is a permitted use in the applicable  
2 management units. CBEMP 3.2 defines “utilities” as

3 “[p]ublic service structures which fall into two categories: (1) **Low-**  
4 **intensity facilities** consist of communication facilities (including  
5 power and telephone lines), sewer, water, and gas lines, and (2)  
6 **High-intensity facilities** consist of storm water and treated waste  
7 water outfalls (including industrial waste water). **Note:** in shoreland  
8 units this category also includes sewage treatment plants, electrical  
9 substations and similar public service structures. However, these  
10 structures are defined as ‘fill for non-water-dependent/related uses’  
11 in aquatic areas.” (Boldface in original).

12 Petitioners first argue that the city misconstrued the applicable law in  
13 concluding that the pipeline is a “gas line” within the meaning of CBEMP 3.2.  
14 According to petitioners, the text and context of CBEMP 3.2 suggest that “gas  
15 lines,” like other listed examples of public service utilities, are lines that distribute  
16 and deliver gas ultimately to local end users and, thus, the phrase “gas lines” does  
17 not include gas transmission lines that function only to transport gas to an export  
18 terminal for shipping and sale to overseas markets.

19 Petitioners also argue that the city council’s expansive interpretation of  
20 “gas line” to include a gas transmission line is inconsistent with the context  
21 provided by North Bend City Code (NBCC) 18.04.040(1), which specifies that  
22 no premises may be used except as permitted by the city’s zoning ordinance.<sup>2</sup>

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<sup>2</sup> Petitioners also cite “NBCC 3.1.400” for the statement that, “[u]nless an exception is specifically listed in the Ordinance, any use not listed or specifically identified as not permitted [is] prohibited.” Petition for Review 16. This citation

1 PCGP responds that, because the city has adopted the CBEMP as part of  
2 its land use legislation, the city council's interpretation of the term "gas line" is  
3 entitled to a deferential standard of review under ORS 197.829(1) and *Siporen v.*  
4 *City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).<sup>3</sup> Petitioners argue, to the  
5 contrary, that the deferential standard of review described in *Siporen* does not  
6 govern LUBA's review of the city council's interpretations of the CBEMP  
7 because the CBEMP was promulgated initially by Coos County, and the city  
8 council simply adopted the county's CBEMP into the city's land use legislation.  
9 However, petitioners cite no authority for the proposition that, where a governing  
10 body adopts into its comprehensive plan or zoning ordinance a document initially

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appears to be an error, because NBCC title 3 governs revenue and finance while NBCC title 18 governs zoning.

<sup>3</sup> ORS 197.829(1) provides:

"[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:

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

1 promulgated by another jurisdiction, the governing body’s interpretations of that  
2 document are not entitled to the deferential standard of review articulated in  
3 *Siporen*.

4 We rejected this same standard of review argument in *Oregon Shores*  
5 *Conservation Coalition v. City of North Bend*:

6 “LUBA is required to reverse or remand a decision that  
7 ‘[i]mproperly construe[s] the applicable law.’ ORS  
8 197.835(9)(a)(D). ORS 197.829(1) requires LUBA to affirm the city  
9 council’s interpretation of the CBEMP if the interpretation is not  
10 inconsistent with the express language, purpose, or policy of the  
11 city’s comprehensive plan or land use regulations. Although  
12 petitioner argues that the city council’s interpretation of the CBEMP  
13 is not entitled to deference under ORS 197.829(1) because,  
14 petitioner argues, the CBEMP was adopted by Coos County, that  
15 argument fails to acknowledge that the city has adopted the CBEMP  
16 as part of the city’s comprehensive plan and the NBCC.  
17 Accordingly, the city council’s interpretation of the CBEMP is  
18 entitled to review under the deferential standard in ORS 197.829(1),  
19 as described in *Siporen* \* \* \*. *Mintz v. City of Beaverton*, 67 Or  
20 LUBA 374, 384 (2013) (where a city has adopted a standard from  
21 an urban area planning agreement between the city and the county  
22 into its comprehensive plan and its land use regulations, the city  
23 council’s interpretation of the standard is entitled to deference under  
24 ORS 197.829(1) and *Siporen*).” \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No  
25 2019-118, July 17, 2020) (slip op at 8-9) (footnote omitted).

26 Petitioners have provided no reason for us to revisit that conclusion.

27 We conclude that the city council’s interpretation of the phrase “gas line”  
28 to include a gas transmission line is plausible because nothing in the text or  
29 context distinguishes between different types of gas lines or different destinations  
30 for the gas conveyed by the lines.

1           Petitioners argue, nonetheless, that all of the uses listed in CBEMP 3.2,  
2 including “gas lines,” are described as “public service structures,” which suggests  
3 that, to qualify as a “utility” under that definition, a gas line must provide some  
4 service to the public. Petitioners contend that a gas transmission line that simply  
5 conveys gas to an export terminal does not provide any kind of “public service.”  
6 The city council adopted a number of findings in response to this argument,  
7 including findings that, under federal law, up to four percent of the gas conveyed  
8 in the pipeline must be made available to serve local customers. Record 50. The  
9 city also found that the qualifier “public service” is not intended to distinguish  
10 between utilities that serve a single property and utilities that serve the broader  
11 public, noting that, under the provisions governing high-intensity utilities, a  
12 privately owned wastewater system serving a single industrial user would qualify  
13 as a public service utility. Record 46. The findings also note that the terminal  
14 itself will use a small amount of gas to power its turbine generators. Record 50.

15           Petitioners dispute that the potential availability of small amounts of gas  
16 to the general public, or the use of small amounts of gas to power the terminal’s  
17 generators, is sufficient to qualify the pipeline as a “public service structure”  
18 within the meaning of CBEMP 3.2. However, even if petitioners are correct that  
19 the phrase “public service structures” acts as a qualifier limiting permissible  
20 utilities to those that provide some service to the public, nothing in the definition  
21 or anything else cited to us imposes a minimum quantity of service. Petitioners  
22 have not demonstrated that the city’s findings that gas conveyed by the pipeline

1 will provide some service to the public and, thus, that the pipeline qualifies as a  
2 “public service structure,” are erroneous, inadequate, or unsupported by  
3 substantial evidence.

4 This subassignment of error is denied.

5 **B. Horizontal directional drilling is an “activity.”**

6 The CBEMP distinguishes between “uses” and “activities,” the latter of  
7 which are regulated actions. CBEMP 3.2 defines “activity” as

8 “[a]ny action taken either in conjunction with a use or to make a use  
9 possible. Activities do not in and of themselves result in a specific  
10 use. Several activities such as dredging, piling, and fill may be  
11 undertaken for a single use such as a port facility. Most activities  
12 may take place in conjunction with a variety of uses.”

13 The CBEMP distinction between “use” and “activity” is derived from  
14 language in Statewide Planning Goal 16 (Estuarine Resources), which the  
15 CBEMP implements. Goal 16 states, in relevant part, that “[e]stuary plans and  
16 activities shall protect the estuarine ecosystem, including its natural biological  
17 productivity, habitat, diversity, unique features and water quality.” Goal 16,  
18 Implementation Requirement 1, discusses “actions” and “activities” such as  
19 dredging and fill that are not necessarily tied to a land “use”:

20 “Unless fully addressed during the development and adoption of  
21 comprehensive plans, actions which would potentially alter the  
22 estuarine ecosystem shall be preceded by a clear presentation of the  
23 impacts of the proposed alteration. Such activities include dredging,  
24 fill, in-water structures, riprap, log storage, application of pesticides  
25 and herbicides, water intake or withdrawal and effluent discharge,  
26 flow-lane disposal of dredged material, and other activities which

1       could affect the estuary's physical processes or biological  
2       resources.”

3       No deference is due to the city council's interpretation of “activity”  
4       because that term implements a distinction found in Goal 16. *See* ORS  
5       197.829(1)(d) (providing that LUBA is not required to affirm a local government  
6       interpretation of a local comprehensive plan provision or land use regulation that  
7       “[i]s contrary to a state statute, land use goal or rule that the comprehensive plan  
8       provision or land use regulation implements”).

9       Opponents argued below that the use of HDD technology to install the  
10      pipeline constitutes an “activity” under the CBEMP, similar to dredging or fill,  
11      and, thus, can be approved only if consistent with the management objectives of  
12      the applicable management units. The city council rejected that argument,  
13      concluding that the HDD technology is simply a particular construction  
14      technique that is not an “activity” under the CBEMP and, hence, not regulated by  
15      the CBEMP or any land use regulations.<sup>4</sup>

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<sup>4</sup> The city council findings state, in relevant part:

“A number of opponents expressed their dislike for (and safety concerns concerning) the proposed [HDD] pipe installation method. Many of these concerns go far beyond the scope of these proceedings. Only two of the districts have management objectives that allow for the consideration of impacts related to construction. Generally speaking, if an applicant proposes a use which is allowed in a zone, and the applicant satisfies the management objective and general and special conditions, then the applicant's chosen method for building that use is generally outside the scope of the land use hearing. To use an analogy, if an applicant meets the legal criteria

1        On appeal, petitioners argue that HDD technology for installing pipeline  
2 long post-dates Goal 16 and adoption of the CBEMP, and it is not surprising that  
3 the CBEMP does not include HDD technology among the listed examples in the  
4 definition of “activity.” Nonetheless, petitioners argue that HDD technology, or  
5 at least its early steps, is fundamentally a form of “dredging,” one of the listed  
6 examples, because it involves digging a hole under the estuary and removing up  
7 to 10,000 cubic yards of soil in order to place a pipeline within the hole. Further,  
8 petitioners argue that, if soil cuttings removed from the borehole are then placed  
9 anywhere within the estuary, that action would constitute the placement of “fill,”  
10 another listed example of “activity.”

11        In its findings, the city council distinguished between dredging, which it  
12 characterized as a type of “site-preparation activity,” and HDD technology,  
13 which it characterized as a construction technique that, over three phases,  
14 “result[s] in a specific use,” *i.e.*, the installed pipeline ready to convey pressurized  
15 natural gas.<sup>5</sup>

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to build a house, or a bridge, the particular construction method used to build that house or bridge is immaterial. As a general matter, and in the case at hand, the zoning laws generally do not govern construction methods.” Record 68.

<sup>5</sup> The city council findings continue:

“The HDD method of installing the pipeline is not an ‘activity’ because, contrary to the CBEMP definition [of activity], it ‘result[s] in a specific use,’ which is the pipeline. Specifically, as explained at pages 4-5 of the Application Narrative, the HDD installation process



1       The first listed activity with which Goal 16, Implementation Requirement  
2 1, is concerned is dredging. We agree with petitioners that, by any other name,  
3 drilling a hole under the seafloor and removing soil cuttings from the hole  
4 involves the activity of “dredging.” The city attempts to distinguish soil removal  
5 that occurs as a distinct “site-preparation activity” from soil removal that occurs  
6 as part of the three-phase HDD process to install a pipeline. As we understand  
7 the city’s findings, while the first two phases of the HDD process (drilling the  
8 pilot hole and then enlarging the pilot hole using a cutter bit and drilling fluid)  
9 involve removing soil, because the third phase (pullback of the pipeline) follows  
10 immediately after the first two phases and results in the installed pipeline, any  
11 soil removal that occurs as part of the first two phases should be viewed as  
12 incidental to pipeline construction and as resulting in the actual “use,” rather than  
13 as dredging that is a distinct site-preparation “activity.” Record 68.

14       However, the distinction the city draws between soil removal that is part  
15 of “site-preparation” and soil removal that is part of the HDD process not only is  
16 tenuous in itself but also, in our view, would undermine one of the principal  
17 means by which Goal 16 protects estuarine resources.

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consists of three phases (pilot hole, reaming, and pullback) that, together, result in the placement of a pipeline that is ready for operation. As the explanation in the narrative demonstrates, the HDD installation method is not merely a site-preparation activity like dredging or fill. Rather, it is a construction method that results in the utility / gas line use.” Record 68.

1       As far as we can tell, the HDD process was not analyzed during the  
2 development of the CBEMP. The findings note that, prior to the development of  
3 HDD technology, the usual process for installing a pipeline on the seafloor  
4 involved open trenching. As we understand it, and as the findings suggest, open  
5 trenching does involve dredging as a first distinct “site-preparation” phase,  
6 followed by the subsequent phases of laying pipeline in the open trench and  
7 covering the trench with the previously dredged soil. The HDD process  
8 essentially compresses these distinct stages into a more unified process, with the  
9 laying of the pipeline occurring immediately after digging and enlarging the hole,  
10 and eliminates the final step of covering the trench with dredged soil. However,  
11 that compressed phasing does not eliminate the fact that the initial phase of the  
12 HDD process requires removal of soil under the seafloor, *i.e.*, an activity that  
13 functionally and in all other material ways constitutes “dredging.” The fact that  
14 it is now technologically possible to both dredge *and* install infrastructure for a  
15 proposed use at nearly the same time does not obviate Goal 16’s concerns with  
16 the impact of dredging on estuarine resources. We agree with petitioners that  
17 HDD is an “activity” for purposes of Goal 16 and the CBEMP, which is not  
18 addressed in the CBEMP but which could affect the estuary’s physical processes  
19 or biological resources. We agree with petitioners that the decision misconstrues  
20 “activity.” Consequently, because the city erroneously determined that HDD is  
21 not a regulated “activity,” the city failed to make adequate findings regarding

1    which criteria are applicable and whether those criteria are satisfied, considering  
2    the character, use, and impacts of HDD.

3           PCGP responds by pointing to the city’s findings that respond to and reject  
4    opponents’ evidentiary arguments concerning HDD, including findings  
5    regarding the risks and potential biological impacts of HDD, and finding that  
6    HDD installation of the pipeline is feasible. Record 121-46. We have reviewed  
7    those findings. The reasoning and evidence cited within those findings may  
8    support conclusions that other criteria are satisfied. However, in large part, the  
9    decision does not tie those findings to the satisfaction of applicable criteria that  
10   the city may have addressed but for its error in concluding that HDD is not itself  
11   an “activity.” On remand, the city must determine whether, as a regulated  
12   “activity,” the HDD pipe installation process is subject to criteria that are  
13   applicable to dredging and is otherwise consistent with applicable criteria.<sup>6</sup>

14          Petitioners also argue that soil cuttings removed from the borehole may be  
15   deposited in estuarine or shoreland areas, which would constitute “fill,” another  
16   activity regulated under the CBEMP. PCGP responds that it did not propose, and  
17   the city did not approve, deposition of soil cuttings in any estuarine or shoreland

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<sup>6</sup> We note that the city found that HDD installation satisfies some CBEMP management objectives, such as the management objective of the 48-CA management unit, addressed and affirmed below under the second assignment of error. However, PCGP does not argue that any error in the city’s construction of the term “activity” is harmless because the city adopted findings that HDD is consistent with all applicable criteria.

1 areas. We agree with PCGP that petitioners' speculation that PCGP would  
2 deposit soil cuttings in estuarine or shoreland areas regulated under the CBEMP  
3 (as opposed to upland areas not regulated under the CBEMP) does not provide a  
4 basis for reversal or remand.

5 This subassignment of error is sustained, in part.

6 **C. The pipeline is not "fill" in aquatic areas.**

7 As noted, the CBEMP definition of "utilities" includes:

8 "Public service structures which fall into two categories: (1) **Low-**  
9 **intensity facilities** consist of communication facilities (including  
10 power and telephone lines), sewer, water, and gas lines, and (2)  
11 **High-intensity facilities** consist of storm water and treated waste  
12 water outfalls (including industrial waste water). **Note:** in shoreland  
13 units this category also includes sewage treatment plants, electrical  
14 substations and similar public service structures. However, these  
15 structures are defined as 'fill for non-water-dependent/related uses'  
16 in aquatic areas." CBEMP 3.2 (boldface in original).

17 Petitioners argue that, under the "note" in this definition, all public service  
18 structures of any type, when installed in aquatic areas, are treated as "fill for non-  
19 water-dependent/related uses." Therefore, petitioners argue, the city should have  
20 applied to the pipeline the CBEMP standards that govern placement of fill.

21 The city council rejected that argument, concluding that the note applies  
22 only to high-intensity utilities, such as sewage treatment plants, electrical  
23 substations, and similar public service structures, and that the proposed gas  
24 pipeline is not similar to those uses:

25 "In any event, a gas pipeline can easily be factually differentiated  
26 from a 'sewage treatment plant,' and 'electrical substation' simply

1 on the basis that, unlike the other listed uses, it is a below-ground  
2 utility. Therefore, it is not a ‘public service structure’ that is ‘similar’  
3 to the delineated structures and thus, it is not considered to be ‘fill’  
4 for non-water-dependent/related uses in aquatic areas.” Record 44.

5 The “note” in CBEMP 3.2 is opaquely worded, but we agree with the city  
6 and PCGP that the “category” of utilities to which it refers is high-intensity  
7 utilities. The note immediately follows the description of “high-intensity  
8 facilities” and refers to “this category,” singular, rather than the two categories,  
9 plural, that are described in the definition. Petitioners do not explain the basis for  
10 their view that the note refers to both categories of utilities. Petitioners do not  
11 dispute the finding that a gas pipeline is not similar to a sewage treatment plant  
12 or electrical substation and, thus, not a high-intensity utility. Accordingly,  
13 petitioners’ arguments do not provide a basis for reversal or remand.

14 This subassignment of error is denied.

15 The first assignment of error is sustained, in part.

## 16 **SECOND ASSIGNMENT OF ERROR**

17 In four subassignments of error, petitioners challenge findings that the  
18 proposed pipeline is consistent with the policies and management objectives of  
19 three CBEMP management units.

### 20 **A. 47-Urban Water-Dependent (47-UW) Management Unit**

21 The proposed pipeline alignments will run underground in the North Point  
22 area of the city, within a shoreland management unit designated 47-UW. The 47-  
23 UW management objective states:

1 “The immediate shoreline of this segment shall be managed to  
2 encourage continuance of water-dependent uses such as the existing  
3 off-loading of rock materials barged to the site with non-water-  
4 dependent uses only allowed, as per Policy #16a. The immediate  
5 shoreline is especially suited to accommodate shallow-draft vessels  
6 such as barges, so the shoreline shall be managed so as to not  
7 preclude such development. However, the remainder of the site has  
8 only marginal suitability for water-dependent development, and  
9 hence non-water-dependent/related uses shall be allowed back from  
10 the immediate shoreline when findings are developed which  
11 document that such proposed use would not preclude or interfere  
12 with water-dependent development on the immediate shoreline.”

13 The city found that burying the pipeline underground, protected by a  
14 concrete pad, will preserve vehicle access to the shoreline over the pipeline right-  
15 of-way and, thus, that the pipeline will not interfere with water-dependent uses  
16 of the shoreline. Record 41-42. Petitioners argue that these findings are  
17 inadequate because they do not identify the current water-dependent use of the  
18 shoreline and fail to address impacts on recreational use of the shoreline.

19 PCGP responds that the findings address impacts to the existing shoreline  
20 use described in the management objective (off-loading of rock materials from  
21 barges) and argues that the findings are not inadequate for failing to address  
22 impacts to speculative and unknown other water-dependent uses. We agree with  
23 PCGP. The 47-UW management objective states that the site is only marginally  
24 suitable for other water-dependent uses. Petitioners do not assert that any other  
25 water-dependent uses occur on the site or suggest how a pipeline buried away  
26 from the shoreline, and covered with a concrete cap to preserve access to the  
27 shoreline, could interfere with water-dependent use of the shoreline, including

1 speculative recreational uses of the shoreline. Absent a more developed  
2 argument, petitioners have not established that the findings on this point are  
3 inadequate.

4         The 47-UW management objective also states that non-water-dependent  
5 uses of the immediate shoreline are only allowed “per Policy #16a.” The CBEMP  
6 includes a Policy “#16a,” which requires local governments to protect minimum  
7 estuarine shoreland acreage for water-dependent uses and new non-water-  
8 dependent uses in urban water-dependent units. The city concluded that the  
9 reference to CBEMP Policy 16a in the 47-UW management objective is likely a  
10 “typo,” and that the management objective actually refers to CBEMP Policy  
11 “16.” Record 42. No party disputes that conclusion.

12         CBEMP Policy 16(III)(2) allows new non-water-dependent uses if they are  
13 “in conjunction with and incidental and subordinate to a water-dependent use.”  
14 CBEMP Policy 16(III)(2)(a) further requires that “[s]uch non-water-dependent  
15 uses \* \* \* be constructed at the same time as or after the water-dependent use of  
16 the site is established and \* \* \* be carried out together with the water-dependent  
17 use.” The city found that (1) the pipeline is incidental and subordinate to a water-  
18 dependent use, the proposed natural gas export terminal at Jordan Cove, (2) the  
19 pipeline will be constructed at the same time as or after the terminal, and (3) the  
20 pipeline use will be carried out together with the terminal use. Record 86-87.

21         Initially, petitioners appear to dispute the conclusion that the Jordan Cove  
22 terminal is a “water-dependent use” for purposes of CBEMP Policy 16(III)(2)(a).

1 However, as PCGP points out, LUBA has previously concluded that the Jordan  
2 Cove terminal is a water-dependent use under OAR 660-037-0040(6)(a), an  
3 administrative rule implementing Statewide Planning Goal 17 (Coastal  
4 Shorelands), which CBEMP Policy 16 in turn implements. *Oregon Shores  
5 Conservation Coalition v. Coos County*, 76 Or LUBA 346, 381-83 (2017).  
6 Petitioners offer no basis for us to reach a different conclusion in this appeal.

7 Petitioners also argue that CBEMP Policy 16(III)(2)(a) implicitly allows  
8 non-water-dependent uses only on the same “site” as the water-dependent use to  
9 which it is subordinate and that the city misconstrued CBEMP Policy  
10 16(III)(2)(a) in allowing a pipeline in the 47-UW management unit that serves a  
11 terminal located on a different site outside the 47-UW management unit. On this  
12 point, the findings state:

13 “[I]t appears that the policy was written primarily with the idea in  
14 mind that the non-water dependent uses allowed in a district would  
15 be serving water dependent uses that occur in the same district. But  
16 it is not expressly so limited. It is not clear that it is even intended to  
17 apply to utility facilities at all, so long as the utility in question does  
18 not interfere with the ability of the site to accommodate shallow-  
19 draft vessels such as barges.” Record 86.

20 The relevant language of CBEMP Policy 16(III)(2)(a) appears to  
21 implement OAR 660-037-0080(3)(b)(A).<sup>7</sup> We agree with the city and PCGP that

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<sup>7</sup> OAR 660-037-0080(3) provides, in relevant part:

“To protect a designated water-dependent shoreland site, local land  
use regulations may do any of the following:



1 the policy focus of CBEMP Policy 16(III)(2)(a) and OAR 660-037-  
2 0080(3)(b)(A) is concurrency, ensuring that subordinate non-water-dependent  
3 uses are constructed no earlier than the water-dependent uses they serve. While  
4 CBEMP Policy 16(III)(2)(a) and OAR 660-037-0080(3)(b)(A) both refer to  
5 “water-dependent uses of the site,” neither provision expressly requires co-  
6 location or specifies that the subordinate non-water-dependent use must be  
7 located on the same site as the water-dependent use. If a co-location requirement  
8 is implied, and applied strictly to essential linear utilities such as water,  
9 telephone, electricity, and gas lines that serve water-dependent uses, then it may  
10 become very difficult to approve water-dependent uses in coastal shorelands in  
11 circumstances where the only way to provide linear utilities to the water-  
12 dependent use is across a different coastal shoreland “site.” Because an important  
13 policy purpose of Goal 17, the Goal 17 rule, and CBEMP Policy 16 is to allow  
14 coastal shorelands to be used for water-dependent uses, we decline to read into  
15 those provisions an implicit utility co-location requirement that, in particular

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“(a) Allow only water-dependent uses.

“(b) Allow nonwater-dependent uses that are in conjunction with  
and incidental and subordinate to water-dependent uses on the  
site.”

“(A) Such nonwater-dependent uses shall be constructed at  
the same time as or after the water-dependent use of the  
site is established, and must be carried out together  
with the water-dependent use.”

1 cases, could make it more difficult or impossible to develop coastal shorelands  
2 with water-dependent uses.

3       Petitioners correctly argue that the placement of any utilities on a different  
4 coastal shorelands site from the primary water-dependent use must not conflict  
5 with existing or potential water-dependent uses on the coastal shoreland site on  
6 which the utilities are located. Petitioners repeat their arguments that the buried  
7 pipeline in the 47-UW management unit may interfere with unspecified  
8 recreational uses of the shoreline. However, we have already rejected those  
9 arguments as undeveloped.

10       Petitioners' subassignments of error directed at the findings of compliance  
11 with criteria under the 47-UW management unit provide no basis for reversal or  
12 remand.

13       These subassignments of error are denied.

14       **B.    48-Conservation Aquatic (48-CA) Management Unit**

15       48-CA is a conservation management unit located in the estuary waters. Its  
16 management objective is simple: "This segment shall be managed so as to  
17 conserve the aquatic resources of the area." As proposed, the pipeline crosses the  
18 48-CA management unit entirely buried beneath the seafloor, pursuant to the  
19 HDD technology discussed above.

20       **1.    Future Availability**

21       In its findings, the city consulted the CBEMP and Statewide Planning Goal  
22 definition of "conserve" and related terms and concluded that "conserve" means

1 that the 48-CA management objective requires management of that unit in a  
2 manner that provides for the “future availability” of aquatic resources by  
3 avoiding “long term” degradation to estuarine species, habitats, biological  
4 productivity, and water quality. Record 70.<sup>8</sup> Under that interpretation, the city

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<sup>8</sup> The city council findings state:

“Under the Goal 16 construct, conservation units generally allow more intensive development than a corresponding natural management unit. This is evidenced by the terminology associated with the units. Natural units generally require ‘preservation’ and ‘protection,’ whereas conservation units generally require that resources therein be ‘conserved.’ The management objective of the 48-CA district reflects this vernacular.

“The Statewide Planning Goals and the CBEMP define ‘conserve’ to mean ‘[t]o manage in a manner that avoids wasteful or destructive uses and provides for future availability.’ This term is to be contrasted with the more strict term ‘protect,’ which means to ‘save or shield from loss, destruction, or injury or for future intended use.’ It is also contrasted with the term ‘preserve,’ which means ‘[T]o save from change or loss and reserve for a special purpose.’ The term ‘aquatic’ means ‘[o]f or pertaining to water.’ The term ‘resources’ is not defined, but the City Council assigns it a general and broad definition, including estuarine species, habitats, biological productivity and water quality.

“Based on these definitions, the City Council interprets the management objective to require the management of the 48-CA district in a manner that avoids ‘wasteful uses’ or ‘destructive uses’ and provides for future availability of the aquatic resources of the area by not creating any long term degradation to estuarine species, habitats, biological productivity and water quality. The general idea behind Goal 16 conservation management units is to allow uses that will continue to allow for the long-term availability of aquatic

1 council concluded that temporary, short-term impacts to the estuary—for  
2 example, impacts that might occur during construction of the pipeline—are not  
3 inconsistent with the objective to “conserve” estuarine resources.

4       Petitioners first challenge the interpretation that “conserve” is not  
5 concerned with short-term or temporary degradation to estuarine resources.  
6 Petitioners agree that some minor or insignificant degree of degradation is  
7 consistent with “conserve” but contend that the definition considered by the city  
8 does not support the temporal distinction the city drew between short-term and  
9 long-term degradation to estuarine resources or the city’s view that the obligation  
10 to conserve extends only to long-term impacts.

11       PCGP responds that the CBEMP and Goal definition of “conserve”  
12 explicitly refers to the “future availability” of estuarine resources, and that the  
13 city’s formulation properly focused on “long-term” impacts and properly  
14 disregarded short-term or temporary impacts that might arise from construction.  
15 We agree with PCGP that, under the CBEMP and Goal definition of “conserve,”  
16 the focus is on the future or long-term preservation of aquatic resources and that  
17 temporary or short-term impacts which dissipate and have no consequences for  
18 the future availability of aquatic resources are not inconsistent with the obligation  
19 to conserve those resources.

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resources. The management objective does allow for temporary, non-significant construction-related impacts to the estuary, but prohibits more significant impacts which have long-term consequences to the estuary.” Record 70.

## 2. Substantial Evidence

Petitioners next challenge the evidentiary support for the city's findings of consistency with the 48-CA management objective. PCGP's engineers submitted several reports concluding that installing the pipeline via HDD technology is feasible and unlikely to cause harm to estuarine resources, in large part, because the pipeline will be buried and the HDD boring and pipe installation will occur deep under the seafloor and, thus, unlike open trenching, will not cause turbidity and similar impacts to estuarine resources. The reports note the possibility that mistakes made during construction using the HDD technology could result in drilling fluid escaping, but they also note that such "frac-outs" are unlikely if best practices are followed. The reports further note contingency plans to mitigate the impacts of any inadvertent loss of drilling fluid. The reports also describe the use of hydrostatic testing to test for leaks prior to operation and the protocols for monitoring and testing the pipeline once operational.

Michael Graybill, an expert in estuarine sediment, submitted testimony critiquing PCGP's engineers' reports. Graybill's testimony raised two principal concerns: (1) the escape of drilling fluid during construction caused by improper use of the HDD technology and (2) natural gas leaking from the pipe during operation and percolating up into the sediment, resulting in turbidity that could harm aquatic wildlife. Graybill questioned how PCGP would monitor the buried pipeline for leaks and repair it if leaks develop.

1           The city adopted findings of consistency with the 48-CA management  
2     objective. Record 69-75. The city's primary rationale is that

3           "[t]he City Alignment will be drilled under the estuary waters and  
4     will not interfere with the use of the 48-CA district for such  
5     purposes. Assuming the success of an HDD bore, the underground  
6     use easily complies with this management objective. Even if during  
7     construction, the HDD boring results in inadvertent returns, the City  
8     Council does not see how that would lead to long-term impacts to  
9     the estuary that would prevent the future availability of resources in  
10    the estuary. This is especially true when comparing the alternative,  
11    which is an open trench installation method." Record 70.

12    The findings address and reject Graybill's two concerns:

13           "[T]he evidentiary foundation for two key premises to Mr.  
14     Graybill's argument are weak. Mr. Graybill does not hold himself  
15     out to be an expert on HDD boring, although he does note that he  
16     'spent [his] entire professional career considering the behavior and  
17     dynamics of estuarine sediments and estuarine processes.' Although  
18     the City Council is willing to draw certain inferences from evidence  
19     submitted by the parties, the argument that there exists a greater  
20     potential for pipeline leaks and failures following the installation of  
21     HDD pipeline segments lacks an adequate foundation. [PCGP]  
22     submitted expert testimony that downplays the significance of the  
23     concern:

24           'Each HDD and Direct Pipe crossing require pre-installation  
25     and post-installation hydrostatic testing. Should a leak or  
26     break occur, the pipeline would be repaired and retested to  
27     ensure the required specifications are met. HDD segment  
28     testing requires a small volume of water due to the relatively  
29     short section of pipe involved. \* \* \*

30           'As experienced by PCGP on previous pipeline projects and  
31     as reported by Kirkwood and Cosham (2000), hydrostatic test  
32     failure on new pipeline construction is extremely rare due to  
33     modern steel and construction techniques that include better

1 controls, non-destructive testing (e.g., X-Ray or ultrasonic  
2 testing), and inspection of the whole pipeline fabrication  
3 process.'

4 "Also lacking foundation is the argument that 'gas leaks from deeply  
5 buried HDD pipeline segments traversing under water bodies will  
6 be harder to detect than leaks from conventionally buried pipeline  
7 segments installed in upland areas.' [Federal] regulations require  
8 operators at intervals not exceeding 5 years to inspect each crossing  
9 under a navigable waterway to determine the condition of the  
10 crossing. Given the fact that pipelines are inspected both externally  
11 using patrols and leak detection in conformance with [federal  
12 regulations] and internally using Inline Inspection (ILI) tools (aka  
13 'pigs'), it is not clear why a pipeline located deep underground  
14 would be any more difficult to inspect." Record 74-75 (citations  
15 omitted).

16 On appeal, petitioners argue that Graybill's critiques of PCGP's engineers'  
17 reports undermine the evidentiary value of those reports, rendering them  
18 insufficient to support the city's finding of consistency with the 48-CA  
19 management objective.

20 LUBA may remand a decision that is not supported by substantial evidence  
21 in the whole record, *i.e.*, evidence that a reasonable person would rely upon to  
22 reach a decision. ORS 197.835(9)(a)(C); *Younger v. City of Portland*, 305 Or  
23 346, 358-60, 752 P2d 262 (1988). The city is generally entitled to choose between  
24 conflicting evidence, including conflicting expert evidence, as long as the  
25 evidence relied upon, viewed in light of the whole record, is substantial. PCGP's  
26 engineers submitted reports, which a reasonable person could rely upon to  
27 conclude that (1) the pipeline will conserve aquatic resources for future  
28 availability, in large part, because the pipeline will be buried far below the

1 seafloor, (2) the possibilities of inadvertent drilling fluid release during  
2 construction, or gas leaks during operation, are rendered unlikely by best  
3 practices and maintenance protocols and, (3) even if fluid release or gas leaks  
4 occur, they will not result in long-term impacts on aquatic resources. Petitioners  
5 submitted the testimony of an expert in estuarine sediments, disputing how likely  
6 the two “leaky pipe” scenarios are and, if they occurred, how significant and  
7 long-lasting the consequences for aquatic resources would be. We have reviewed  
8 the relevant testimony and cannot say that, considering all the evidence in the  
9 record, a reasonable person could not conclude, as the city did, that the pipeline  
10 is consistent with the 48-CA management objective to “conserve” aquatic  
11 resources.

### 12                   **3.     Static Tidal Action**

13           Finally, petitioners argue that the findings fail to address the testimony of  
14 petitioner Jody McCaffree, critiquing turbidity modeling:

15           “Jordan Cove did not actually do [a] test of the static tidal action  
16 with respect to sedimentation transport; they used computer  
17 modeling that is obviously severely flawed. The modeling  
18 methodology used by Moffatt & Nichols (the contractor hired to do  
19 the modeling) is fundamentally flawed for a number of reasons. The  
20 most important reason is they treat Coos Bay as a 2D problem when  
21 it is in fact 3D due to vertical variability in temperature, salinity, and  
22 sediment concentrations in the water column. This will affect how  
23 and where suspended sediment is transported by the currents in the  
24 bay, it will also affect the concentration of the suspended sediment.”  
25           Record 913-14.



1 PCGP responds that the city's decision addresses this testimony, rejecting  
2 it as unrelated to any approval criteria and unsupported by any citation to  
3 evidence or authority. Record 164-65. We agree with PCGP that petitioners have  
4 not demonstrated any inadequacy in the city's findings.

5 This subassignment of error is denied.

6 **C. 48-Conservation Shoreland (48-CS) Management Unit**

7 Development within the 48-CS management unit must comply with  
8 CBEMP Policy 17, which requires local governments to protect from  
9 development major marshes, significant wildlife habitat, coastal headlands, and  
10 exceptional aesthetic resources within coastal shorelands.

11 The city found that the proposed pipeline will not be located in any major  
12 marshes, significant wildlife habitat, coastal headlands, or exceptional aesthetic  
13 resources and, indeed, that Coos County inventories and maps do not identify any  
14 such resources within the 48-CS management unit. Record 93. The city rejected  
15 arguments that Policy 17 requires an evaluation of impacts on marshes, etc., that  
16 are located outside the 48-CS management unit, quoting our opinion in *SOPIP*,  
17 *Inc. v. Coos County*, 57 Or LUBA 44, *aff'd*, 223 Or App 495, 196 P3d 123 (2008).  
18 Record 92-93. In *SOPIP*, we interpreted Policy 17 to apply only to identified  
19 resources located on the development site, not resources located in adjacent or  
20 nearby areas. 57 Or LUBA at 51. In any case, the city concluded, even if Policy  
21 17 is read broadly to require evaluation of impacts outside the site or the 48-CS

1 management unit, opponents failed to identify any marshes or other resources in  
2 the vicinity of the pipeline that could be affected by the pipeline. Record 93.

3 On appeal, petitioners argue, without citing any evidence, that the use of  
4 HDD technology could potentially degrade unidentified marshes and significant  
5 wildlife habitat “throughout the Bay.” Petition for Review 29. Therefore,  
6 petitioners argue, the city must demonstrate that all major marshes and significant  
7 wildlife habitat in the estuary are protected, no matter where those resources are  
8 located.

9 The legal flaw in that argument, as PCGP points out, is that, in *SOPIP*, we  
10 interpreted Policy 17 to require evaluation of impacts only to designated  
11 resources on the development site that would be directly impacted by the  
12 development. Petitioners do not distinguish *SOPIP* or argue that it was  
13 incorrectly decided. Even if Policy 17 were applied more broadly to adjacent or  
14 nearby resources, on appeal, petitioners must do more than allege, without citing  
15 any evidence, that the development could potentially impact unidentified  
16 resources throughout the estuary. To obtain remand under an expansive view of  
17 Policy 17, petitioners would, at a minimum, have to identify the location of at  
18 least one designated resource and cite some evidence, or at least a plausible  
19 argument, indicating that the pipeline could impact that resource. Petitioners’  
20 arguments do not provide a basis for reversal or remand.

21 This subassignment of error is denied.

22 The second assignment of error is denied.

### 1   **THIRD ASSIGNMENT OF ERROR**

2           The 47-UW management unit is subject to both CBEMP Policy 27 and the  
3   city's floodplain regulations, which require that encroachment by new  
4   construction, including fill, in floodplain areas not result in any increase in flood  
5   levels. The city found that, because the proposed pipeline will be buried deep  
6   underground and includes no above-ground structures, it is incapable of causing  
7   any increase in flood levels.

8           On appeal, petitioners repeat their argument that the pipeline must be  
9   treated as "fill" in aquatic management units, pursuant to the "note" in the  
10   definition of "utility" discussed under the first assignment of error. However, we  
11   have already rejected that argument. In addition, petitioners argue that the HDD  
12   technology will remove up to 10,000 cubic yards of soil cuttings, and it is possible  
13   that those soil cuttings will be disposed as "fill" somewhere in the estuary.  
14   Without more information about how PCGP will dispose of the soil cuttings,  
15   petitioners argue, the city is in no position to conclude that the pipeline is not an  
16   encroachment in floodplain areas, contrary to Policy 27 and the city floodplain  
17   regulations. However, as discussed above, PCGP did not propose, and the city  
18   did not approve, disposal of soil cuttings in the estuary. In its application  
19   materials, PCGP stated only that the soil cuttings would be disposed of in  
20   accordance with state and federal law. Petitioners' speculation that disposal may  
21   occur in floodplain areas or estuarine waters does not provide a basis for reversal  
22   or remand.

1           The third assignment of error is denied.

2   **FOURTH ASSIGNMENT OF ERROR**

3           The city imposed Condition 3, which requires that PCGP obtain all  
4   “necessary” local, state, and federal permits. Record 9. On May 6, 2019, the  
5   Oregon Department of Environmental Quality (DEQ) denied PCGP a water  
6   quality certification or permit for failure to demonstrate compliance with state  
7   and federal water quality standards, including the CWA. The permit denial was  
8   without prejudice, meaning that PCGP is free to reapply and submit new evidence  
9   and application materials. Record 2643. As noted above, following issuance of  
10   the city’s decision in the present case PCGP also filed a petition with FERC  
11   seeking waiver of CWA requirements.

12           On appeal, petitioners argue that, given the DEQ denial, it was incumbent  
13   on the city to address in its findings whether it is “feasible” for PCGP to comply  
14   with Condition 3, *i.e.*, to obtain the DEQ permit in a new application. Further,  
15   petitioners argue, PCGP’s attempt to obtain a federal waiver demonstrates that  
16   the city should have required specific assurances from PCGP that it would obtain  
17   the DEQ permit and imposed conditions ensuring that the pipeline would not  
18   proceed absent the permit.

19           PCGP responds, initially, that petitioners failed to raise any issue below  
20   regarding the city’s supposed obligation to adopt findings addressing the  
21   feasibility of obtaining the DEQ permit and, thus, that issue is waived, pursuant

1 to ORS 197.763(1).<sup>9</sup> In the petition for review, petitioners argue that the issue  
2 was raised when a participant commented that, given the DEQ denial, “perhaps  
3 it is premature to issue the requested permit.” Record 1464. Petitioners’ reply  
4 brief does not address PCGP’s waiver challenge or cite any other place in the  
5 record where this issue was raised. We tend to agree with PCGP that the  
6 statement cited by petitioners is insufficient under ORS 197.763(1) to raise the  
7 issue of whether the city is obligated to adopt findings of feasibility. Nonetheless,  
8 the question is close enough that we will address the merits.

9 On the merits, PCGP responds that, under LUBA’s cases, there is no  
10 obligation for a local government to adopt findings that it is “feasible” for an  
11 applicant to obtain a state or federal permit. *Wal-Mart Stores, Inc. v. City of Bend*,  
12 52 Or LUBA 261, 286-89 (2006); *Bouman v. Jackson County*, 23 Or LUBA 626,  
13 646-47 (1992). PCGP argues that, where the local government imposes a general  
14 condition of approval requiring that an applicant obtain all permits required under  
15 state and federal law, the applicant need at most demonstrate that obtaining the

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<sup>9</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 state or federal permit is not “precluded as a matter of law.” *Bouman*, 23 Or  
2 LUBA at 647. PCGP argues that the DEQ denial expressly states that it is without  
3 prejudice and that PCGP may file a new application. PCGP argues that nothing  
4 more is necessary to demonstrate that obtaining the DEQ permit is not precluded  
5 as a matter of law.

6 We agree with PCGP that, for the reasons stated in *Bouman*, the city was  
7 not obligated to adopt findings that it is “feasible” for PCGP to obtain the DEQ  
8 permit under the applicable state or federal water quality standards. PCGP  
9 submitted evidence that would allow a reasonable person to conclude that  
10 obtaining the DEQ permit, based on a new application, is not precluded “as a  
11 matter of law.” Petitioners cite to no countervailing evidence.

12 We also agree with PCGP that Condition 3 is not defective for failing to  
13 specifically require that PCGP obtain the DEQ permit. As far as the parties  
14 inform us, Condition 3 was not imposed in order to support a finding of  
15 compliance with any applicable city approval standards. Rather, Condition 3 is a  
16 general condition, imposed as a matter of concurrency, to ensure that the  
17 approved development does not proceed under the city permit until all necessary  
18 state and federal permits are also obtained. Condition 3 does not specify which  
19 state and federal permits are “necessary,” and petitioners have not demonstrated  
20 that it would violate Condition 3 or any other provision of law if, in fact, PCGP  
21 obtains a federal waiver of CWA requirements, in which case, as a matter of state

1 and federal law, at least portions of the DEQ permit would appear to not be  
2 “necessary.”

3 The fourth assignment of error is denied.

4 The city’s decision is remanded.

5 Rudd, Board Chair, concurring.

6 I agree with the majority’s resolution of the appeal, remanding the decision  
7 for additional findings. For the reasons described below, however, I write  
8 separately. The majority concludes that HDD is an activity comparable to  
9 dredging and states that, “[o]n remand, the city must determine whether, as a  
10 regulated ‘activity,’ the HDD pipe installation process is subject to criteria that  
11 are applicable to dredging and is otherwise consistent with applicable criteria.”  
12 Slip op at 19. To the extent that this suggests that HDD is indeed subject to the  
13 approval criteria applicable to dredging projects, I write to explain that I believe  
14 the city may be able to show either that the impact of installing the pipeline has  
15 been fully addressed during the development and adoption of the CBEMP into  
16 the city’s comprehensive plan or that the city has already provided any necessary  
17 impact analysis.

18 Goal 16 requires, at a minimum, the establishment of natural, conservation,  
19 and development management units. The most restricted is the natural  
20 management unit. The least restricted is the development management unit.  
21 PCGP’s proposed pipeline crosses areas designated conservation and  
22 development and, therefore, does not implicate the most restricted type of

1 management unit. In any event, Goal 16 provides that “pipelines, cables and  
2 utility crossings, including incidental dredging necessary for their installation,”  
3 are permitted uses in all three management units “[w]here consistent with the  
4 resource capabilities of the area and the purposes of th[e] management unit.”  
5 Therefore, the text of Goal 16 expressly allows pipelines and a means for their  
6 installation. The allowance of pipelines where consistent with the purposes of the  
7 management unit and resource capabilities of the area, along with an identified  
8 means for their installation, suggests that Goal 16 envisions an analysis of the  
9 impacts of the pipeline as installed and does not require a separate analysis or  
10 permitting of the construction methods. In this case, the pipeline is a use allowed  
11 in the applicable management units and HDD is, as the city found, simply a  
12 means of installing the pipeline. I agree with the city that HDD may be analyzed  
13 in the context of the pipeline itself.

14       The majority writes that, “by any other name”—in this case, HDD—  
15 “drilling a hole under the seafloor and removing soil cuttings from the hole  
16 involves the activity of ‘dredging.’” Slip op at 17. Although Goal 16 expressly  
17 allows dredging incidental to pipelines, and therefore indicates a recognition and  
18 allowance of construction-related work, there are distinctions between dredging  
19 and HDD worth noting. In the civil engineering context, “dredge” is generally  
20 defined as “a machine for scooping up or removing earth (as in excavating or  
21 deepening stream or harbor channels, building levees, or digging ditches) usu. by  
22 a series of buckets on an endless chain, a pump or suction tube.” *Webster’s Third*



1 *New Int'l Dictionary* 688 (unabridged ed 2002). Dredging may occur  
2 independent of other development and, as Goal 16, Implementation Requirement  
3 1, explains, it is not necessarily tied to a land "use." For example, a navigation  
4 channel may be dredged to facilitate transit by deep draft ships without being tied  
5 to a specific land use. As explained in the city's findings, the HDD process  
6 consists of drilling a pilot hole, enlarging the pilot hole using a cutter bit and  
7 drilling fluid, and then pulling the pipeline through the newly created subsurface  
8 corridor. Through the HDD process, as I understand it, the top layer of the  
9 seafloor is not intended to be altered or disturbed in any way, much less removed.  
10 The only soil planned to be removed as part of the HDD process is from 50 to 75  
11 feet below the seafloor. Unlike traditional dredging, HDD will not deepen the  
12 waterway because it does not alter the seafloor.

13 As explained in Goal 16,

14 "[a] use or activity is consistent with the resource capabilities of the  
15 area when either the impacts of the use on estuarine species, habitats,  
16 biological productivity and water quality are not significant or that  
17 the resources of the area are able to assimilate the use and activity  
18 and their effects and continue to function in a manner to protect  
19 significant wildlife habitats, natural biological productivity, and  
20 values for scientific research and education."

21 To ensure consistency with the resource capabilities of an area, Goal 16,  
22 Implementation Requirement 1, provides that,

23 "[u]nless fully addressed during the development and adoption of  
24 comprehensive plans, actions which would potentially alter the  
25 estuarine ecosystem shall be preceded by a clear presentation of the  
26 impacts of the proposed alteration. Such activities include dredging

1           \* \* \* and other activities which could affect the estuary's physical  
2           processes or biological resources."

3       CBEMP Policy 2 explains that the CBEMP's "Use and Activity Matrices"  
4       conform with Goal 16 and that, unless otherwise noted, the requisite "resource  
5       capability assessments" have already been conducted, and the uses allowed by  
6       the CBEMP are "subject only to Policies and Special Conditions set forth [in the  
7       CBEMP]." The management units in the challenged decision are 48-CA, 48-CS,  
8       47-UW, and 47-DA. High- and low-intensity utilities are allowed in each of these  
9       management units "outright, subject only to Policies and Management  
10      Objectives," and without special conditions. CBEMP 3.8. By contrast, new  
11      dredging is not listed as an allowed activity in the 48-CS, 48-CA, or 47-UW  
12      management units, and it is only allowed in the 47-DA management unit subject  
13      to special conditions.

14           PCGP proposes to install the pipeline using a combination of HDD, open  
15      trenching, and conventional boring. As proposed, HDD technology will be used  
16      to cross under the estuary, entering the city limits and continuing to Mile Post  
17      (MP) 1.1. Record 7024, 7050, 7092. Between MP 1.15 and 1.3, on the land  
18      surface, construction of the pipeline will use trenching and conventional boring  
19      methods. Record 7024. At MP 1.4, the HDD method will be used again, starting  
20      on land and continuing beneath the estuary floor until the pipeline exits the city.  
21      *Id.* In response to petitioners' argument that the city failed to adequately analyze  
22      HDD, PCGP points to the city's extensive findings concerning HDD's risks and  
23      potential biological impacts to the estuary. Record 121-46. Because the city's

1 findings in response to petitioners' challenge do not explain whether the potential  
2 impact of the pipeline on the estuary was fully addressed during the development  
3 and adoption of the CBEMP into the city's comprehensive plan, the findings on  
4 remand should explain whether the necessary inquiry has already occurred. If  
5 not, the findings should explain whether the pipeline, after it has been installed,  
6 "could affect the estuary's physical processes or biological resources" and  
7 conduct any necessary analysis. Goal 16.