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

CITIZENS FOR RENEWABLES,
NATALIE RANKER, and JODY McCAFFREE,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

PACIFIC CONNECTOR GAS PIPELINE, LP,
Intervenor-Respondent.

LUBA No. 2020-003

FINAL OPINION
AND ORDER

Appeal from Coos County.

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

No appearance by Coos County.

Seth J. King filed the response brief and argued on behalf of intervenor-respondent. Also on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

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

RUDD, Board Chair, did not participate in the decision.

REMANDED 02/11/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners challenge a board of county commissioners decision approving a post-acknowledgement plan amendment (PAPA), conditional use permit (CUP), compliance determinations, and floodplain development permit authorizing the development of a natural gas pipeline.[1]

MOTION TO FILE OVERLENGTH REPLY BRIEF

Petitioners move to file a proposed 3,462-word overlength reply brief that exceeds the 1,000-word limit in OAR 661-010-0039. Petitioners argue that an overlength reply brief is warranted by the number of assignments of error and length of the decision and to ensure that LUBA and the parties understand petitioners' arguments. A lengthy or complex challenged decision and lengthy or complex petition for review do not justify an overlength reply brief. A reply brief is permitted to allow petitioners to respond to arguments in the response brief. A reply brief is not an opportunity to supplement arguments in the petition for review. The motion is denied.

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[1] The pipeline is intended to serve a liquefied natural gas (LNG) terminal proposed to be developed at Jordan Cove on the North Spit of the Coos Bay estuary. Over the years, the terminal and pipeline have been the subject of a number of city and county land use decisions and appeals of those decisions. In addition, the pipeline has been the subject of decisions by other state and federal bodies.

MOTIONS TO TAKE OFFICIAL NOTICE

A. February 19, 2020 Department of Land Conservation and Development (DLCD) Decision

Petitioners move for LUBA to take official notice of a February 19, 2020 DLCD decision that objects to the certification that the proposed pipeline is consistent with the federal Coastal Zone Management Act (CZMA Consistency Objection). ORS 40.090(2) (Oregon Evidence Code 202) (defining law subject to judicial notice to include the public acts of state executive departments). Petitioners argue that the DLCD decision is relevant to petitioners' sixth assignment of error, in which petitioners argue that the county was required but failed to find that it is feasible for intervenor-respondent Pacific Connector Gas Pipeline, LP (PCGP), to obtain all required state and federal permits, including a CZMA certification.

PCGP does not dispute that the DLCD decision is the type of public act that is judicially cognizable. However, PCGP disputes that the decision is material to any issue in the present appeal. If LUBA considers the DLCD decision, PCGP argues that LUBA may not consider or apply any "adjudicative facts" from the DLCD decision in the present appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007). We agree with PCGP that a judicially cognizable state agency action cannot be cited to establish facts for the purpose of supporting or challenging findings of compliance with applicable land use

approval criteria. With that caveat, petitioners' motion to take official notice is granted.

B. March 19, 2020 Federal Energy Regulatory Commission (FERC) Decision

PCGP moves to take official notice of a March 19, 2020 FERC decision which certifies that the proposed pipeline complies with federal law. The FERC decision determines that FERC has jurisdiction over the proposed pipeline because it is part of an interstate natural gas pipeline. PCGP cites the FERC decision in response to petitioners' assertion in the fourth assignment of error that the county erred in concluding that the pipeline is an "interstate natural gas pipeline" and, thus, is exempt from the requirement to establish that the pipeline is a utility facility "necessary for public service" that "must be sited in an [EFU] zone in order to provide the service." ORS 215.275(1), (6).

Petitioners object to LUBA taking official notice of the FERC decision because that decision is subject to a motion to vacate and not yet final. Petitioners have cited nothing that requires that otherwise judicially noticeable decisional law be unappealable in order for LUBA to take notice of it. The FERC decision is subject to official notice as a decision of the executive department of the United States. ORS 40.090(2). However, petitioners correctly state that PCGP may not rely on the FERC decision to establish any adjudicative fact. *See Martin v. City of Central Point*, 73 Or LUBA 422, 426 (2016), *aff'd*, 283 Or App 648, 389 P3d 1198 (2017); *ODOT v. Clackamas County*, 27 Or LUBA 141, 143 (1994); *Blatt*

v. City of Portland, 21 Or LUBA 337, 342, *aff'd*, 109 Or App 259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992). With that caveat, PCGP's motion to take official notice is granted.

MOTION TO TAKE EVIDENCE

LUBA may 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." OAR 661-010-0045(1). A motion to take evidence must include a statement "explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). It is the movant's burden to demonstrate a sufficient basis for LUBA to take evidence outside the record.

Petitioners move LUBA to take as extra-record evidence the following two documents that petitioners assert demonstrate procedural irregularities not shown in the record: (1) PCGP's March 19, 2020 appeal to the United States Department of Commerce to override DLCD's CZMA Consistency Objection; and (2) PCGP's April 21, 2020 petition to FERC requesting a waiver of the requirement to obtain a federal Clean Water Act (CWA) certification, after the Oregon Department of Environmental Quality (DEQ) denied PCGP such a certification.

Petitioners argue that these documents demonstrate "procedural irregularities" and support their argument under the sixth assignment of error that the county was required, but failed, to determine whether it is feasible for PCGP to obtain required state and federal permits.

In *Oregon Shores Conservation Coalition v. Coos County*, we addressed similar motions regarding the same two documents at issue in this motion. ___ Or LUBA ___, ___ (LUBA Nos 2019-137/2020-006, Dec 22, 2020) (*Oregon Shores II*) (slip op at 6-9). We concluded that, because no party disputed the bare facts that the applicant (1) had appealed the CZMA Consistency Objection and (2) filed the petition seeking a CWA waiver, the parties could cite those facts in support of their arguments, even in the absence of a successful motion to take evidence. *Id.* at ___ (slip op at 8). Similarly, in this appeal, because no party disputes that PCGP has appealed or is seeking a CWA certification waiver, the parties may refer to those undisputed circumstances in their arguments.

However, in *Oregon Shores II*, we also held that the proponents had failed to establish a "procedural irregularit[y]" within the meaning of OAR 661-010-0045(1). *Id.* at ___ (slip op at 8-9). Similarly, in this appeal, we conclude that petitioners have failed to demonstrate that PCGP's post-decision actions in front of state and federal entities is evidence of a violation of the procedures governing the challenged local land use decision. Accordingly, petitioners' motion to take evidence is denied. *See also Citizens for Renewables v. City of North Bend*, ___

Or LUBA ___ (LUBA No 2019-120, Jan 5, 2021) (*Citizens I*) (slip op at 5-8) (same).

BACKGROUND

This appeal concerns PCGP's proposal to develop an approximately 3.67-mile section of a 36-inch-diameter, pressurized natural gas pipeline that is planned to extend approximately 229 miles from an existing hub where regional pipelines intersect in Malin, Oregon, to a proposed liquefied natural gas (LNG) terminal at Jordan Cove on the North Spit of the Coos Bay estuary.

The county previously approved a CUP for an alignment of the pipeline that crosses Haynes Inlet as well as two alternate alignments. The decision challenged in this appeal approves an alternate alignment of the pipeline utilizing horizontal directional drilling (HDD) (as opposed to open trenching) to place the pipeline underneath the estuary in Coos Bay. HDD technology involves drilling a pilot hole from shorelands down at an angle and then drilling horizontally under the seafloor. The next step is to enlarge the pilot hole using a cutting head lubricated by high-pressure drilling fluid consisting of a slurry of water and bentonite (a type of clay). The slurry also stabilizes the tunnel surfaces and allows casings and the 36-inch pipeline to be pulled through the tunnel. Excess drilling fluid and soil cuttings are returned under pressure to the shoreland borehole and removed. PCGP will utilize open trenching to install the pipeline in the upland areas.

This alternative alignment is located on land zoned Industrial, Exclusive Farm Use (EFU), and Forest, as well as in the following 10 Coos Bay Estuary Management Plan (CBEMP) management units: 7-Development Shorelands (7-D), 7-Natural Aquatic (7-NA), 13A-Natural Aquatic (13A-NA), Deep-Draft Navigation Channel (DDNC-DA), 45A-Conservation Aquatic (45A-CA), 15-Natural Aquatic (15-NA), 13B-Natural Aquatic (13B-NA), 14-Development Aquatic (14-DA), 14-Water–Dependent Development Shorelands (14-WD), and 15-Rural Shorelands (15-RS).[2] Utilities are allowed in all of those management units, except that the DDNC-DA management unit—which cuts through Coos Bay—did not previously allow utility uses. The PAPA challenged in this appeal amends the CBEMP, county comprehensive plan, and Coos County Zoning and Land Development Ordinance (CCZLDO) to allow subsurface utilities as a conditional use in the DDNC-DA management unit.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

In multiple arguments under two subassignments of error, petitioners argue that the county misconstrued applicable law and made inadequate findings in

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[2] Pursuant to Statewide Planning Goal 16 (Estuarine Resources), the CBEMP designates estuarine and shoreland areas within Coos Bay as "management units." Each management unit is subject to certain "management objectives." The county has adopted the CBEMP into its comprehensive plan and implementing ordinances in CCZLDO chapter 3.

approving a PAPA to allow subsurface utilities in the DDNC-DA management unit.

A. Studies, Need, and Justification for the Change

Statewide Planning Goal 2 (Land Use Planning), Guideline E(2), provides, in part, "Minor changes, i.e., those which do not have significant effect beyond the immediate area of the change, should be based on special studies or other information which will serve as the factual basis to support the change. The public need and justification for the particular change should be established." In the first subassignment of error, petitioners argue that the county erred by failing to require PCGP to submit studies establishing a need and justification for the change. Petitioners further argue that the county's conclusion that there is a need for the PAPA is not supported by substantial evidence. Finally, petitioners argue that the pipeline use is not consistent with the DDNC-DA management objective.

1. Studies

The county concluded that studies were not required to support the PAPA because the change is needed as a matter of "common sense." The county reasoned that the DDNC-DA management unit created a utility "dead zone" in the middle of the bay and prevented industrial development of the North Spit, which is designated in the CBEMP for water-dependent industrial use. The county found that CCZLDO 5.1.130, which provides that the board of county commissioners may direct the planning director "to make such studies as are necessary to determine the need for" a text amendment, does not require studies;

instead, studies are optional.[3] Record 33-34. Alternatively, the county found that the application and its supporting documentation constitute a "study" supporting the PAPA. Record 33.

Petitioners argue that the county erred by not requiring studies to support the PAPA. Petitioners cite CBEMP 2.2 and 2.3 for the proposition that the county was required to undertake "special studies" and determine that the pipeline use is consistent, coordinated, and compatible with other uses, policies, and needs set forth in the CBEMP.[4]

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[3] CCZLDO 5.1.130 provides:

> "The Board of Commissioners, Hearings Body, or Citizen Advisory Committee may direct the Planning Director to make such studies as are necessary to determine the need for amending the text of the Plan and/or this Ordinance. When the amendment is initiated by application, such studies, justification and documentation are a burden of the initiator."

[4] CBEMP 2.2 provides, in part:

> "Coos County shall approve minor revisions/amendments to its Comprehensive Plan when justified. Minor revisions/amendments are smaller in scope than major revision/amendments, and generally include, but are not limited to changes in uses and activities allowed and changes in standards and conditions.
>
> "II. The County shall undertake special studies and projects deemed beneficial and/or necessary to the community to keep current key inventories, which are the factual basis of this Plan.

PCGP responds that no party raised the issue of compliance with CBEMP 2.2 and 2.3 during the local proceeding and that issue is waived, pursuant to ORS 197.835(3) and ORS 197.763(1).[5] Petitioners do not reply to that waiver

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> "This policy shall be implemented through on-going Planning efforts to keep a statistical data base on Coos County's changing socio-economic characteristics (including, but not limited to, population and housing data, employment statistics, traffic counts, agricultural production, etc.). The County welcomes agency cooperation in providing relevant new data as it is published."

CBEMP 2.3 provides, in part:

> "If uses and activities allowed within various management units or the standards and conditions under which specific uses and activities are allowed are proposed to be changed, new or changed uses and activities will only be allowed when they are consistent with the LCDC Goals and statutes, compatible with adjacent uses and activities set forth in this Plan, and when they are in keeping with the designation and management objective of the management unit and otherwise coordinated with other policies and the inventoried needs set forth within the Plan."

[5] ORS 197.835(3) provides: "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

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."

argument in their reply brief. In the absence of any assistance from petitioners explaining how their argument was preserved, or why preservation is not required, we agree with PCGP that the issue is waived.

In support of their argument, petitioners also cite CCLZDO 5.1.130. CCZLDO 5.1.130 provides that a county hearing body "*may* direct the Planning Director to make such studies *as are necessary* to determine the need" for the text amendment. (Emphases added.) PCGP responds that the county correctly construed CCZLDO 5.1.130 as providing discretionary authority to require studies. *See* ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).[6] We agree. The term "may" is permissive and not mandatory.

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[6] 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:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

The phrase "as are necessary" also requires exercise of discretion to determine whether studies are necessary.

Petitioners have not explained why the board of commissioners' interpretation is inconsistent with the terms of that provision. Petitioners have not established that the county was required to base the PAPA on special studies. Accordingly, petitioners' argument that the decision is not supported by studies provides no basis for reversal or remand.

2. Need and Justification

Petitioners further argue that the record does not demonstrate a need for the PAPA. Specifically, petitioners argue that nothing in the record demonstrates a need for utilities on the North Spit or that the "dead zone" created by the DDNC-DA management unit needs to be remedied by a text amendment allowing low-intensity utilities in that management unit.

PCGP responds that petitioners have not cited any applicable criterion that requires the county to identify a need for the text amendment and that CCZLDO 5.1.130 does not require the county to conclude that there is a need for the text amendment.

Petitioners argue in the petition for review that the text amendment is a "minor change" under Goal 2 and, thus, Goal 2 requires PCGP to establish and the county to find a public need and justification for the change. Petition for Review 17. Petitioners argue in their reply brief, without any additional analysis,

that "Goal 2 and/or CCZLDO 5.1.130 require applicants seeking a text amendment to demonstrate a need for the change." Reply Brief 1.

We agree with PCGP that CCZLDO 5.1.130 does not itself require the county to conclude that there is a need for the change. Instead, that provision authorizes a hearings body to direct the planning to director "to make such studies as are necessary to determine the need for amending the text of the Plan and/or this Ordinance." However, that provision does not prescribe in what circumstances the county must determine that there is a need.

PCGP argues that we should reject petitioners' Goal 2 argument as underdeveloped. Alternatively, PCGP points to the county's unchallenged findings that Goal 2 is satisfied. Record 35. PCGP characterizes those Goal 2 findings as "detailed." Response Brief 9. However, those findings simply state that there is an adequate factual base for the decision because the regulations for a text amendment in the CCZLDO and ORS provide the framework for a text amendment. Those findings say nothing about a need for the change.

While we agree with PCGP that petitioners' Goal 2 argument is terse and not well-developed, the argument itself is straightforward. As a PAPA, the county's decision is subject to Goal 2. Goal 2, Guideline E(2), provides that "[t]he public need and justification for the particular change should be established." The county was required to conclude that the change is supported by a public need and justification.

The county concluded that the factual basis and justification for the change is that the DDNC-DA management unit regulations effectively prohibited industrial development on the North Spit, which is an area designated in the CBEMP for water-dependent industrial development. The county determined that there is a need for zoning that allows industrial development on the North Spit when the county adopted that designation. Based on that existing industrial designation, the county determined in the challenged decision that water-dependent industrial development requires connection to utilities. Further, PCGP's application to develop a utility crossing under the navigation channel provides a factual basis that there is a demand for utility connection, justifying the change. The county concluded that the change is supported by a public need and justification sufficient to satisfy Goal 2.

3. DDNC-DA Management Objective

Petitioners argue that the county's findings are inadequate to address whether the change is consistent with the DDNC-DA management objective to maintain the deep-draft navigation channel and prohibit conflicting uses.

The county found that "[s]ubsurface low-intensity utilities, including pipelines, do not innately conflict with shipping in the navigation channel" and that minimum burial depths and regular assessment of buried utilities mitigate the risks that subsurface utilities pose to shipping in navigation channels and maintenance dredging. Record 31. In addition to allowing low-intensity utilities in the DDNC-DA management unit, the text amendment imposes a special

condition on such uses. That condition provides: "Low-Intensity utilities are only permitted if they are installed sufficiently below the surface of the estuary, so not to interfere with navigation, maintenance dredging, or new dredging for purposes of deepening the channel." Record 31.

The county found that "the pipeline will be installed far below the water/ground interface. In most areas, it will be more than 150 feet below the surface." Record 42. The county reasoned that it is "implausible" that a vessel or its anchor would penetrate so far below the bay bed as to snag upon the pipeline. *Id.*

Petitioners do not acknowledge or challenge those findings. Instead, petitioners argue that the findings are inadequate because the text amendment itself does not specify a depth requirement for all utilities passing under the navigation channel to avoid conflicts with maintenance dredging and navigation in the channel. Petitioners' argument ignores the fact that the PAPA does not amend the DDNC-DA management objective. The county's findings and the special condition are sufficient to establish that the pipeline approved by the CUP will not conflict with the deep-draft navigation channel. Any future utilities permitted under the text amendment will also be required to satisfy the DDNC-DA management objective. Thus, the PAPA does not conflict with the DDNC-DA management objective and petitioners' findings challenge provides no basis for reversal or remand.

The first subassignment of error is denied.

B. Statewide Planning Goals

In the second subassignment of error, petitioners argue that the PAPA violates various statewide planning goals.

1. Goal 16 (Estuarine Resources)

Goal 16 is

> "[t]o recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and
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> "[t]o protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries."

Goal 16 directs local governments to classify estuarine areas into natural, conservation, and development management units. The most restricted is the natural management unit. The least restricted is the development management unit. The DDNC-DA is a development management unit. Goal 16 provides that "pipelines, cables and utility crossings, including incidental dredging necessary for their installation," are permitted uses in all three management units "[w]here consistent with the resource capabilities of the area and the purposes of th[e] management unit."

The county found that the change allowing subsurface, low-intensity utilities is consistent with the purposes of the DDNC-DA management unit because the subsurface location does not interfere with navigation and water-dependent uses. Record 44.

Petitioners argue that the county erred by approving the text amendment and CBEMP compliance determinations without first analyzing the potential impacts on the estuary from the pipeline and HDD installation. Goal 16, Implementation Requirement 1, provides:

> "Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources."

PCGP responds that the county carefully considered and summarized the potential impacts of the pipeline to the estuary (1) in its findings that the pipeline complies with the applicable CBEMP policies and management objectives for the 10 CBEMP management units through which the pipeline will pass and (2) in response to opponents' general concerns about the use of HDD installation. Response Brief 23-24 (citing Record 89-153).

The county observed that low-intensity utilities are allowed in every CBEMP management unit except DDNC-DA. The county explained that that difference "is undoubtedly due to the fact that [the CBEMP] drafters did not contemplate the use of HDD technology." Record 139. The county rejected PCGP's argument that the decision did not authorize HDD and that HDD is not subject to the 7-NA management objective, which requires protection of natural

resources. *See* Record 97 ("[PCGP] states that 'the Application does not seek authorization for HDD and HDD is not subject to approval criteria.' The Board disagrees with [PCGP] on both of these points."). The county considered potential impacts of the pipeline on the estuary, including HDD installation, and determined that development of the pipeline is consistent with the applicable CBEMP policies and management objectives for the 7-NA management unit.[7] The county explained that, as a natural management unit, the 7-NA management unit regulations are more restrictive on development than the conservation and development management units that the pipeline will cross because the 7-NA management objective requires the county to "protect natural resources" in that unit. Record 97.[8]

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[7] In that regard, this case is different from *Citizens I*, in which we determined that the city erroneously concluded that the HDD technology is not regulated by the CBEMP or any land use regulations. ___ Or LUBA at ___ (slip op at 14-20).

[8] The decision also explains:

> "The management objective of the 7-D District requires the County to manage the zone for industrial use and allows the continuation of and expansion of existing non-water-dependent/nonwater-related industrial uses if they do not impact the 7-NA zone. Thus, the management objective requires the consideration of any impacts to the neighboring aquatic (7-NA) District.
>
> "* * * * *
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> "Although HDD technology is not the 'use' for which this Application seeks authorization, it is a construction technique that

To demonstrate the anticipated impacts of the HDD installation and pipeline, PCGP submitted a Draft Environmental Impact Statement (DEIS), Hydrostatic Test Plan, Corrosion Control Plan, Safety and Reliability Report, HDD Fluid Plan, and HDD Feasibility Report (collectively, PCGP's reports). The county relied on PCGP's reports as evidence to support its conclusion that HDD and the pipeline will not adversely impact natural resources because the pipeline will be buried beneath the surface of the bay and HDD will be completed in a manner that will create no more than *de minimis* impacts to natural resources. Record 100-01. The county relied on PCGP's evidence that the pipeline is safe and durable and that it is unlikely to leak or have other accidents that could jeopardize natural resources in the 7-NA management unit. The county relied on PCGP's evidence concerning HDD and found that "there is a low risk of inadvertent releases of HDD drilling fluids that could harm natural resources in the 7-NA [management unit] and that PCGP has a plan to contain such releases should they occur." Record 97. The county expressly found PCGP's evidence to be more reliable than opponents' evidence. Record 97, 101.

Petitioners argue that PCGP's reports are not substantial evidence to support a conclusion that an HDD-installed, subsurface pipeline will not potentially alter the estuarine ecosystem. Petitioners argue that PCGP's evidence is undermined by DLCD's and DEQ's criticism of PCGP's reports as preliminary

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enables a specific use still subject to the management objective of the 7-D zone." Record 92-93.

and those agencies' requests for further information. We review this argument to determine whether a reasonable person would rely on PCGP's reports to conclude, as the county did, that the pipeline will not alter the estuarine ecosystem. That Goal 16 standard is distinct from state agencies' obligations with respect to CWA and CZMA certification requirements.

"Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)). We agree with PCGP that, under the substantial evidence standard of review, when viewing the record as a whole, PCGP's reports constitute evidence upon which a reasonable person could rely to conclude that authorization of the pipeline was "preceded by a clear presentation of the impacts of the proposed alteration," as required by Goal 16. The fact that state agencies determined that PCGP's evidence was insufficient to support state and federal permits does not undermine that evidence such that a reasonable person would not rely upon it for the purposes that the county did.

PCGP further responds, and we agree, that PCGP presented the potential impacts to the estuary and the county made detailed findings on those potential impacts in response to estuarine management unit objectives, CBEMP policies, and opponents' general concerns about the impacts of HDD installation. Record 83-153. The county concluded that "HDD is safe, feasible, and unlikely to have significant adverse impacts on the estuary or its wildlife." Record 140. Petitioners

have not challenged all of those findings or explained why the evidence and findings do not constitute a "clear presentation of the impacts" of the pipeline and HDD installation.

The county's conclusion that the decision complies with Goal 16 is supported by adequate findings and substantial evidence.

2. Goal 6 (Air, Water and Land Resources Quality)

Goal 6 is "[t]o maintain and improve the quality of the air, water and land resource of the state." Goal 6 further provides, in part:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources.
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> "***Waste and Process Discharges*** -- refers to solid waste, thermal, noise, atmospheric or water pollutants, contaminants, or products therefrom." (Boldface and italics in original.)

As we explained in *Friends of the Applegate v. Josephine County*,

> "[t]he function served by Goal 6 is not to anticipate and precisely duplicate state and federal environmental permitting requirements. The function of Goal 6 is much more modest. Goal 6 requires that the local government establish that there is a *reasonable expectation* that the use that is seeking land use approval will also be able to comply with the state and federal environmental quality standards that it must satisfy to be built." 44 Or LUBA 786, 802 (2003)

(emphasis in original).

The county found that Goal 6 applies only to the PAPA that allows low-intensity utilities as a conditional use in the DDNC-DA management unit and that Goal 6 does not apply directly to development of the pipeline or to HDD, the latter of which the county found is "merely" a construction method. Record 36. The county found that, as allowed by the text amendment, a low-intensity utility will not result in any discharges into the air or water because such a utility must be enclosed in a pipe. The county found that "there is a reasonable expectation that a low intensity utility use will also be able to comply with the state and federal environmental quality standards that it must satisfy to be built." *Id.*

Petitioners argue that the county erred by failing to apply Goal 6 to the pipeline and HDD and instead applied Goal 6 in the abstract to subsurface, low-intensity utilities without considering how the utility is installed and whether the installation and pipeline will cause waste and process discharges. We agree. Goal 6 requires the local government to assess "[a]ll waste and process discharges" from the allowed development. No text amendment in itself will produce waste or discharge. That assessment must be made in the context of the approved use.

PCGP responds that the county was not required to apply Goal 6 directly to the proposed pipeline CUP simply because the CUP application was processed concurrently with the PAPA. We agree with petitioners that the county was required to determine whether the pipeline and HDD comply with Goal 6. That obligation is not based on the fact that PCGP applied for the PAPA and CUP

concurrently. Instead, that obligation is based on the fact that the record before the county in the PAPA included sufficient information regarding the pipeline and HDD to determine whether those particular developments, which are allowed only due to the PAPA, are consistent with the requirement in Goal 6 that the county assess "[a]ll waste and process discharges" from the allowed development.

As we explained in *Friends of Yamhill County v. Yamhill County*, where the record includes sufficient information regarding proposed or contemplated uses to determine whether a PAPA is consistent with applicable goals, the local government must address and resolve whether the uses are consistent with those goals at the time the amendment is adopted. 47 Or LUBA 160, 171 (2004). That the PAPA may allow a variety of low-intensity utilities and pipeline installation techniques that may have different potentials for waste and discharges does not obviate the county's responsibility to consider whether, on the specific record before it, the PAPA allows uses that would violate Goal 6.

PCGP further argues that HDD is not subject to compliance with Goal 6 because HDD is not a regulated "activity" under the CBEMP. We recently concluded in *Citizens I*, and conclude again here, that HDD is an "activity" under the CBEMP. ___ Or LUBA at ___ (slip op at 14-20). Consistent with those conclusions, we agree with petitioners that the county is required to determine whether the pipeline and HDD comply with Goal 6.

Petitioners argue that the county's finding that there is a reasonable expectation that the pipeline will be able to comply with the state and federal environmental quality standards that it must satisfy to be built is not supported by substantial evidence because the record establishes that DEQ denied the necessary water quality certification based on findings related to HDD installation.

PCGP responds that the county was not required to determine that the pipeline will *definitely* satisfy the state and federal environmental quality standards that it must satisfy to be built, but only that there exists a reasonable expectation that the use will be able to satisfy those standards. PCGP contends that PCGP's submissions are sufficient to meet that standard, notwithstanding DEQ's decision denying the required water quality certification. PCGP further argues that petitioners fail to identify any particular state or federal water quality standard that it is unreasonable to expect that the pipeline will meet. PCGP attempts to downplay the significance of the DEQ denial because DEQ issued the denial without prejudice and did not review PCGP's updated HDD feasibility reports.

We agree with PCGP that the county was not required to determine that the pipeline will *definitely* satisfy all applicable state and federal environmental quality standards to find that the PAPA complies with Goal 6. Instead, the county needed to establish a reasonable expectation that HDD and the pipeline will be able to comply with the state and federal environmental quality standards that it

must satisfy to be built. Viewing the record as a whole, we agree with petitioners that the DEQ denial demonstrates that it is not reasonable for the county to expect that applicable state and federal environmental quality standards can be met. The fact that the DEQ denial was without prejudice and that PCGP might be able to obtain the required approvals in the future does not undermine the DEQ denial to the extent that a reasonable person would instead rely entirely on PCGP's evidence that the pipeline and HDD are unlikely to cause water quality violations to support a conclusion that PCGP will be able to comply with the state and federal environmental quality standards that it must satisfy to build the pipeline. *See Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488, 513 (2016), *aff'd*, 284 Or App 314, 397 P3d 1007 (2017) (rejecting argument that Goal 6 was violated where intervenor did not identify anything in the record that demonstrated that it was unreasonable for the city to expect that applicable state and federal environmental quality standards could be met). The county's conclusion that the PAPA satisfies Goal 6 is not supported by substantial evidence.

3. Goal 7 (Areas Subject to Natural Hazards)

Goal 7 requires local governments to evaluate risks from natural hazards and to avoid or prohibit development in areas where the risk to public safety cannot be mitigated. The county found that the text amendment is consistent with Goal 7 because any new uses or activities allowed by the text amendment must

comply with the CCZLDO natural hazards provisions. With respect to natural hazards overlays, CCZLDO 1.5.600 explains:

> "Development considerations play a very important role in determining where development should be allowed. In the Estuary Plans the development considerations, also referred to as inventoried areas, have been incorporated into the site specific zoning. In the Balance of County the development considerations were applied as a broad area and the maps have to be examined in order to determine how the inventory applies to the specific site."

Citing CCZLDO 1.5.600, the county concluded that, "to comply with natural hazards provisions in the CBEMP zones, an applicant need only comply with the specific approval criteria of that zone." Record 38. The county concluded that PCGP had demonstrated compliance with the applicable CBEMP approval criteria.

Petitioners argue that the county erred in concluding that the decision satisfies Goal 7. The county's hazard inventory is implemented by special development considerations and overlays in CCZLDO 4.11. However, CCZLDO 4.11 does not apply to the CBEMP planning area.[9]

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[9] County zoning is generally broken into three zoning areas controlled by different comprehensive plans, including two estuary management plans (Coos Bay Estuary and Coquille River Estuary) and the remainder of the county's zoning area, referred to as the "Balance of County." CCZLDO chapter 4. CCZLDO 4.11 applies to the Balance of County, but does not apply to the CBEMP planning area.

Petitioners argue that the county erred in relying on hazard policies in the CCZLDO to find Goal 7 compliance because those policies do not apply in the CBEMP management units in which the pipeline will be developed. According to petitioners, only CBEMP Policy 27, regarding floodplain protection, addresses natural hazards within the CBEMP planning area.[10] Petitioners do not specify what natural hazards are implicated that are not accounted for within the CBEMP management objectives or policies. As PCGP points out, the CBEMP has been acknowledged by DLCD as complying with Goal 7. Petitioners' Goal 7 argument is insufficiently developed for our review and provides no basis for reversal or remand. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

4. Goal 9 (Economic Development)

Goal 9 is "[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." Under Goal 9, local governments inventory areas suitable for economic growth that can be provided with public services, with a focus on planning for industrial and commercial development and having a ready supply

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[10] CBEMP Policy 27 is titled Floodplain Protection within Coastal Shorelands and provides:

> "The respective flood regulations of local government set forth requirements for uses and activities in identified flood areas; these shall be recognized as implementing ordinances of this Plan.
>
> "This strategy recognizes the potential for property damage that could result from flooding of the estuary."

of land appropriately zoned and located for those purposes. Local governments must address Goal 9 when approving a PAPA that redesignates land to or from industrial or commercial use or that effectively converts lands planned and zoned for industrial or commercial uses to nonindustrial and noncommercial uses. *Grahn v. City of Newberg*, 50 Or LUBA 219, 221-24 (2005), *aff'd*, 203 Or App 639, 129 P3d 281 (2006).

The county found that Goal 9 applies only to the PAPA and not to the pipeline CUP and compliance determinations. Record 40. The county observed that the PAPA supports industrial development on the North Spit by providing the ability to connect to utilities across the estuary. "The North Spit Waterfront plan and industrial lands addressed in both the Balance of County and the CBEMP are vital to economic growth in Coos County. The allowances of certain utilities will facilit[ate] the growth envisioned and increase economic opportunities to the future and current development." Record 39. In the alternative, the county found that the pipeline is consistent with Goal 9. The county rejected opponents' contention that the pipeline will adversely impact aquaculture, including commercial oyster production and the Dungeness crab fishery. Record 40.

Petitioners argue that Goal 9 "requires a balancing of economic interests" and that the county's findings are inadequate with respect to potential impacts to aquatic life, including commercial crab fisheries. Petition for Review 26.

We agree with PCGP that petitioners' Goal 9 argument is insufficiently developed. Goal 9 is primarily concerned with ensuring that local governments designate sufficient land for commercial and industrial uses. The PAPA in this appeal does not redesignate any land. However, PCGP does not argue and the county did not conclude that Goal 9 is not implicated by the PAPA in this appeal. Accordingly, we assume that it is.

To the extent that Goal 9 applies to the this PAPA, the county's findings are adequate to establish that it considered the impact of its decision on broad categories of commercial and industrial uses. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870, 880-81, *aff'd*, 169 Or App 599, 10 P3d 316 (2000), *rev den*, 331 Or 583 (2001). Goal 9 requires local governments to provide adequate opportunities for a variety of economic activities, but does not require local governments to protect one type of economic activity against impacts created by other economic and non-economic uses. *Setniker v. ODOT*, 66 Or LUBA 54, 68, *aff'd*, 253 Or App 607, 293 P3d 1091 (2012).

The second subassignment of error is sustained, in part.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

A. The pipeline is a low-intensity utility gas line.

With the exception of the DDNC-DA management unit, all other CBEMP management units that the pipeline will cross allow low-intensity utilities, including "gas lines," as an outright permitted use. The county concluded that,

under the CBEMP, the proposed pipeline is a "gas line" and, thus, qualifies as a low-intensity "utility" that is a permitted use in the applicable management units. CBEMP 3.2 defines "utilities" as

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

Petitioners first argue that the county misconstrued the applicable law in concluding that the pipeline is a "gas line" within the meaning of CBEMP 3.2. According to petitioners, the text and context of CBEMP 3.2 suggest that "gas lines," like other listed examples of public service utilities, are lines that distribute and deliver gas ultimately to local end users and, thus, the phrase "gas lines" does not include gas transmission lines that function only to transport gas to an export terminal for shipping and sale to overseas markets. Petitioners also argue that the county's expansive interpretation of "gas line" to include a gas transmission line is inconsistent with the context provided by CCZLDO 3.1.400, which provides that any uses not listed or specifically identified are prohibited.

The county has adopted the CBEMP as part of its land use legislation. Thus, the board of county commissioners' interpretation of the phrase "gas line" is entitled to a deferential standard of review under ORS 197.829(1) and *Siporen*,

349 Or 247. *Oregon Shores Conservation Coalition v. City of North Bend*, ___ Or LUBA ___, ___ (LUBA No 2019-118, July 17, 2020) (*OSCC*) (slip op at 8-9).

We conclude that the board of county commissioners' interpretation of the phrase "gas line" to include a gas transmission line is plausible because nothing in the text or context distinguishes between different types of gas lines or different destinations for the gas conveyed by the lines.

Petitioners dispute that the potential availability of small amounts of gas to the general public, or the use of small amounts of gas to power the terminal's generators, is sufficient to qualify the pipeline as a "public service structure" within the meaning of CBEMP 3.2. However, even if petitioners are correct that the phrase "public service structures" acts as a qualifier limiting permissible utilities to those that provide some service to the public, nothing in the definition or anything else cited to us imposes a minimum quantity of service.

B. The pipeline is not "fill" in aquatic areas.

As quoted above, the CBEMP definition of "utilities" includes:

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

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

The county rejected that argument, concluding that the note applies only to high-intensity utilities, such as sewage treatment plants, electrical substations, and similar public service structures, and that the proposed gas pipeline is not similar to those uses. Record 57.[11]

We addressed this same argument in *Citizens I*:

> "The 'note' in CBEMP 3.2 is opaquely worded, but we agree with the city and PCGP that the 'category' of utilities to which it refers is high-intensity utilities. The note immediately follows the description of 'high-intensity facilities' and refers to 'this category,' singular, rather than the two categories, plural, that are described in the definition. Petitioners do not explain the basis for their view that the note refers to both categories of utilities. Petitioners do not dispute the finding that a gas pipeline is not similar to a sewage treatment plant or electrical substation and, thus, not a high-intensity utility. Accordingly, petitioners' arguments do not provide a basis for reversal or remand." ___ Or LUBA at ___ (slip op at 21).

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[11] The county found:

> "[A] gas pipeline can easily be factually differentiated from a 'sewage treatment plant,' an 'electrical substation,' and 'similar public service structures' simply on the basis that, unlike the other listed uses, it is a below-ground utility. Therefore, it is not considered to be 'fill' for non-water-dependent/related uses in aquatic areas." Record 57.

The county's decision in this appeal is indistinguishable from the city's decision. We reach the same conclusion here.

C. HDD is an "activity" for purposes of CBEMP regulation.

Petitioners argue that HDD is an "activity" that is not permitted in the CBEMP management units. The CBEMP and CCZLDO distinguish between "uses" and "activities" and define "activity" as

> "[a]ny action taken either in conjunction with a use or to make a use possible. Activities do not in and of themselves result in a specific use. Several activities such as dredging, piling, and fill may be undertaken for a single use such as a port facility. Most activities may take place in conjunction with a variety of uses." CBEMP 3.2; CCZLDO 2.1.200 (providing the same definition).

The distinction between "use" and "activity" is derived from language in Goal 16, which the CBEMP implements. No deference is due to the county's interpretation of "activity" because that term implements a distinction found in Goal 16. *See* ORS 197.829(1)(d) (providing that LUBA is not required to affirm a local government interpretation of a local comprehensive plan provision or land use regulation that "[i]s contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements").

As noted, the county observed that the CBEMP drafters "undoubtedly * * * did not contemplate the use of HDD technology" to install utility pipelines. Record 139. However, the county concluded that HDD is not an "activity" regulated by the CBEMP.

"HDD is not an activity that any CBEMP zone lists or regulates,

> although it arguably satisfies CCZLDO §2.1.200's [] first sentence of the definition of 'activity.' This is due to the fact that HDD boring does not meet the second sentence of the term 'activity.' HDD does, in and of itself, result in a specific 'use:' a utility. Stated another way, the HDD method of installing the pipeline is not an 'activity' because, contrary to the CBEMP definition, it 'result[s] in a specific use,' which is the pipeline.
>
> "As explained at pages 4-5 of the Application narrative, the HDD installation process 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 is not merely a site-preparation activity like dredging or fill. Rather, it is a construction method that results in the use.
>
> "CCZLDO §3.1.400 explains that '[u]nless an exception is specifically listed in the [CCZLDO], any *use* not listed or specifically identified as not permitted are (sic) prohibited.' (Emphasis added). Thus, this 'not-listed-not-allowed' limitation applies only to *uses*, although the CBEMP zones regulate *uses and activities*. The inference is that the code simply does not regulate activities that it does not specifically list (the omission makes sense for activities like HDD, which are purely incidental to a listed use, and are thus analogous to any other construction method that [a]n applicant uses to construct or install a use). Therefore, the Board finds that the HDD installation method is not an 'activity' within the meaning of the CBEMP." Record 140 (emphases in original).

In *Citizens I*, we determined that HDD is an "activity" under the CBEMP similar to dredging because the initial phase of the HDD process requires removal of soil under the seafloor. ___ Or LUBA at ___ (slip op at 18). We concluded that, because the city erroneously determined that HDD is not a regulated "activity," the city failed to make findings regarding which CBEMP criteria are

applicable and whether those criteria are satisfied, considering the character, use, and impacts of HDD. *Id.* at ___ (slip op at 18-19).

Similarly, here, we agree with petitioners that the county erred in concluding that HDD is not an "activity" regulated by the CBEMP. Consistent with our decision in *Citizens I*, we conclude that HDD is an "activity" under the CBEMP similar to dredging because the initial phase of the HDD process requires removal of soil under the seafloor. Accordingly, the county was required to determine whether HDD is an allowed activity within applicable management units and apply management objectives and policies.

In this case, petitioners argue that LUBA should reverse the decision because HDD is an activity analogous to fill and removal, which is completely prohibited in the DDNC-DA, 7-NA, 45A-CA, 13A-NA, and 15-NA management units. Petition for Review 33. Alternatively, petitioners argue that LUBA should remand the decision because the county failed to apply applicable management objectives and CBEMP policies related to removal/fill activity in those management units where it is allowed.

"Fill" is defined in CBEMP 3.2 as

> "[t]he placement by man of sand, sediment, or other material, usually in submerged lands or wetlands, to create new uplands or raise the elevation of land. Except that 'fill' does not include solid waste disposal or site preparation for development of an allowed use which is not otherwise subject to the special wetland, sensitive habitat, archaeological, dune protection, or other special policies set forth in this Plan (solid waste disposal, and site preparation on shorelands, are not considered 'fill'). 'Minor Fill' is the placement

> of small amounts of material as necessary, for example, for a boat ramp or development of a similar scale. Minor fill may exceed 50 cubic yards and therefore require a permit."

Petitioners do not explain how the pipeline or HDD fit the CBEMP definition of "fill," and it is not clear to us that they do. Specifically, we do not understand that the pipeline constitutes "other material" placed "to create new uplands or raise the elevation of land." This argument is undeveloped for our review. *Deschutes Development*, 5 Or LUBA at 220.

Petitioners also argue that HDD involves "removal," which is regulated by the CBEMP but not defined therein. Petitioners argue that HDD is "removal" as defined in ORS 196.800(13), which provides:

> "'Removal' means:
>
> "(a) The taking of more than 50 cubic yards or the equivalent weight in tons of material in any waters of this state in any calendar year; or
>
> "(b) The movement by artificial means of material within the bed of such waters, including channel relocation."

ORS 196.800 provides definitions related to fill and removal permits, which are administered by the Department of State Lands. *See* ORS 196.815(1) ("A person who is required to have a permit to remove material from the bed or banks or fill any waters of this state shall file a written application with the Director of the Department of State Lands for each individual project before performing any removal or fill."). Petitioners do not explain how the statutory

definition of "removal" in ORS 196.800(13) relates to any applicable criteria in the CBEMP.

PCGP responds that, "for reasons explained by the [board of commissioners], the HDD installation is not removal or fill." Response Brief 38. However, PCGP does not quote or provide citations to applicable findings in the challenged decision. We assume that PCGP refers to the county's findings that HDD is not an "activity" because it results in the pipeline use. Response Brief 34-35 (quoting Record 140). Those findings do not address whether HDD involves removal or fill.

In sum, petitioners' arguments that HDD constitutes removal or fill provide no independent bases for reversal or remand. However, we determine above that the county erred in concluding that HDD is not an "activity" subject to CBEMP regulations. PCGP's response provides no basis for us to determine whether the county considered, let alone concluded, whether HDD involves removal or fill. It appears to us that the county did not reach that analysis because it concluded that HDD is not an "activity." On remand, the county should make findings regarding which CBEMP criteria are applicable to HDD and whether those criteria are satisfied, considering the character, use, and impacts of HDD. The county may consider and adopt findings addressing whether, as an "activity," HDD involves removal or fill.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, in four subassignments of error, petitioners argue that the county misconstrued the applicable law and made inadequate findings regarding compliance with various CBEMP management objectives and policies.

A. 7-D Management Unit

The 7-D management unit is located at the lower bay of the North Spit. The northern boundary is the inland limits of the 100-year floodplain, including freshwater wetlands within the floodplain. The management objective for that unit provides:

> "This shoreland district, which borders a natural aquatic area, shall be managed for industrial use. Continuation of and expansion of existing non-water-dependent/non-water-related industrial uses shall be allowed provided that this use does not adversely impact Natural Aquatic District #7. In addition, development shall not conflict with state and federal requirements for the wetlands located in the northwest portion of this district." CCZLDO 3.2.285.

The county found that the pipeline is a water-dependent and water-related use that is allowed in the 7-D management unit. Record 92. The county found that the pipeline is not a "[c]ontinuation of and expansion of existing non-water-dependent/non-water-related industrial uses" because the LNG terminal and pipeline have not yet been developed and thus are not "existing." *Id.* Accordingly, the county found that the 7-D management objective does not require PCGP to show that the pipeline will not adversely impact the adjacent 7-NA unit. *Id.*

Petitioners argue that the county's conclusion that the pipeline is not a "[c]ontinuation of and expansion of existing non-water-dependent/non-water-related industrial uses" effectively allows new non-water-dependent uses in the 7-D management unit regardless of impacts on the adjacent 7-NA management unit and argues that that interpretation is implausible. Petition for Review 35-36. Petitioners also argue that the county's finding that the pipeline is a water-dependent use allowed in the 7-D unit is inadequate and unsupported by substantial evidence because the pipeline does not require access to the water.

PCGP responds, and we agree, that petitioners' argument mischaracterizes the county's decision. The decision does not allow the pipeline as a new non-water-dependent use in the 7-D management unit regardless of impacts on the adjacent 7-NA management unit. Instead, the county determined that the pipeline is a water-dependent use because it is associated with the LNG terminal, which is a water-dependent shipping export terminal. Record 92.[12] Moreover, while the

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[12] The county found:

> "[T]he purpose of the pipeline is for use as a utility line, in order to transport the Natural Gas to the LNG Terminal so it can be prepared for shipment. The purpose of the LNG Terminal is to liquefy the gas and export it via the water. Both uses are thus water-dependent and water-related. Because the pipeline is not a continuation of or an expansion of an existing use, and because it is water-dependent and water-related, the management objective of the 7-D zone does not require that PCGP show that the pipeline will not adversely impact the 7-NA zone." Record 92.

county found that PCGP was not required to demonstrate that the pipeline will not adversely impact the 7-NA management unit, the county also made alternative findings that the pipeline and HDD will not adversely affect the 7-NA management unit. Record 92-93. We agree with PCGP that petitioners have not established that the county misconstrued the 7-D management objective.[13]

B. 7-NA Management Unit

The 7-NA management unit is located at the lower bay of the North Spit. The northern boundary is the shoreline and the southern boundary extends to the deep-draft navigation channel. The management objective for that unit provides: "This aquatic district shall be managed to protect natural resources. Maintenance, replacement and repair of bridge crossing support structures shall be allowed." CCZLDO 3.2.290.

The county reasoned that the term "protect" does not require prohibiting any activity that may impact natural resources in the 7-NA management unit. Instead, the county interpreted "protect natural resources" to mean that the county is required to manage the 7-NA management unit in a manner that "saves and shields" the natural resources in that unit from change, loss, destruction, or injury. The county further observed that LUBA has interpreted "protect" in the Goal 16 context to mean "reducing harm to such a degree that there is at most a *de minimis*

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[13] We address petitioners' additional argument regarding wetland development in the 7-D management unit under the sixth assignment of error.

or insignificant impact on aquatic resources." Record 98 (quoting *Citizens Against LNG vs. Coos County*, 63 Or LUBA 162 (2011)).

The county observed that low-intensity utilities are an allowed use in the 7-NA unit, which necessarily involves construction methods used to install the utilities. The pipeline is a low-intensity utility. The county found:

> "[B]oth the pipeline and HDD satisfy the management objective of the 7-NA zone. PCGP has submitted into the record extensive evidence demonstrating that neither HDD nor the pipeline will adversely impact natural resources there. The DEIS concludes that the pipeline would not significantly impact wildlife and aquatic resources. *See* Record Exhibit 16, Exhibit 9 at 1091-92. PCGP has also submitted a Hydrostatic Test Plan, Corrosion Control Plan, and Safety and Reliability Report, which evidence demonstrates that the pipeline is safe and durable and that it is unlikely to leak or have other accidents that could jeopardize natural resources in the 7-NA zone. Section II.C. of this contention discusses the HDD Fluid Plan and HDD Feasibility Report, which demonstrate both that there is a low risk of inadvertent releases of HDD drilling fluids that could harm natural resources in the 7-NA zone and that PCGP has a plan to contain such releases should they occur.
>
> "Opponents have submitted no rebuttal evidence to suggest that the pipeline or HDD is a significant threat to the protection [of] natural resources in the 7-NA zone. The Board finds that [PCGP's] evidence constitutes substantial evidence, and that such expert testimony is more credible than any evidence to the contrary." Record 97.

Petitioners argue that the findings that the pipeline and HDD meet the 7-NA management objective are inadequate and not supported by substantial evidence because DLCD and DEQ rejected PCGP's evidence as preliminary and because the findings do not address opponents' evidence.

The county's findings address evidence submitted by both sides and determined that PCGP's evidence was more credible. We agree with PCGP that, under our substantial evidence standard of review, when viewing the record as a whole, PCGP's reports constitute evidence upon which a reasonable person could rely to conclude that the pipeline and HDD will not violate the 7-NA management objective. *Dodd*, 317 Or at 179. The fact that state agencies determined that PCGP's evidence was preliminary and insufficient to support state and federal permits does not so undermine that evidence such that a reasonable person would not rely upon it for the purposes that the county did.

C. 13A-NA Management Unit

The 13A-NA management unit consists of the lower part of the natural channel in Haynes Inlet. The management objective for that unit provides, in part: "This district shall be managed to allow the continuance of shallow-draft navigation while protecting the productivity and natural character of the aquatic area." CCZLDO 3.2.425.

The county found that the pipeline and HDD installation will not affect the continuance of shallow-draft navigation or impact the natural character of the aquatic area because the pipeline will be buried under the bay. The county cited PCGP's reports as evidentiary support for that conclusion.

Petitioners reiterate the same arguments that they made challenging the county's conclusion that the pipeline development satisfies the 7-NA management objective. We reject those arguments for the same reasons.

D. CBEMP Policy 17

CBEMP Policy 17 requires local governments to protect from development major marshes, significant wildlife habitat, coastal headlands, and exceptional aesthetic resources within coastal shorelands. The county found that Policy 17 does not apply because Policy 17 protection extends only to inventoried and/or mapped resources and the pipeline does not cross any inventoried and/or mapped resources. Record 120 (quoting *SOPIP, Inc. v. Coos County*, 57 Or LUBA 44, 51, *aff'd*, 223 Or App 495, 196 P3d 123 (2008)). In *SOPIP*, we concluded that Policy 17 applies only to identified resources located on the development site, not resources located in adjacent or nearby areas. 57 Or LUBA at 51.

Petitioners argue that the county misconstrued Policy 17 as applying to only inventoried resources. Petitioners argue that "[t]he application of polic[y] 17 is pervasive in the aquatic [management units] and suggests a recognition that uses in the water [management units] are not bounded and could impact marshes, habitat and headlands." Petition for Review 38. Petitioners contend that the use of HDD technology could potentially degrade unidentified major marshes and significant wildlife habitat "throughout the Bay." *Id.* Therefore, petitioners argue, the county must demonstrate that all major marshes and significant wildlife habitat in the estuary are protected, no matter where those resources are located.

We rejected a similar argument in *Citizens I*:

> "The legal flaw in that argument, as PCGP points out, is that, in *SOPIP*, we interpreted Policy 17 to require evaluation of impacts

only to designated resources on the development site that would be directly impacted by the development. Petitioners do not distinguish *SOPIP* or argue that it was incorrectly decided. Even if Policy 17 were applied more broadly to adjacent or nearby resources, on appeal, petitioners must do more than allege, without citing any evidence, that the development could potentially impact unidentified resources throughout the estuary. To obtain remand under an expansive view of Policy 17, petitioners would, at a minimum, have to identify the location of at least one designated resource and cite some evidence, or at least a plausible argument, indicating that the pipeline could impact that resource. Petitioners' arguments do not provide a basis for reversal or remand." ___ Or LUBA at ___ (slip op at 34).

We reject petitioners' Policy 17 argument for the same reasons.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Oregon land use law preserves land for agricultural uses by restricting uses allowed in EFU zones to agricultural uses and certain non-farm uses listed in ORS 215.283. ORS 215.203.[14] "Utility facilities necessary for public service" is a use allowed in EFU zones. ORS 215.283(1)(c).[15] A utility facility is necessary

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[14] ORS 215.203(1) provides, in part: "Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use[EFU] zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284."

[15] ORS 215.283 provides:

"(1) The following uses may be established in any area zoned for exclusive farm use:

"* * * * *

for public service if the facility must be sited in an EFU zone in order to provide the service. ORS 215.275(1).[16]

Under ORS 215.275(2) and (3), an applicant for approval to develop a utility facility on EFU zoned land must show that reasonable alternatives have been considered and that the facility must be sited in an EFU zone, which may include analysis of costs. Additionally, under ORS 215.275(4) and (5), the local government must impose clear and objective conditions to mitigate and minimize the impacts of the proposed facility on surrounding lands devoted to farm use and the owner of a utility facility is responsible for restoring agricultural land. The provisions of ORS 215.275(2) to (5) do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by FERC. ORS 215.275(6); OAR 660-033-0130(16)(a)(G).

> "(c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in:
>
> "(A) ORS 215.275; or
>
> "(B) If the utility facility is an associated transmission line, as defined in ORS 215.274 and 469.300."

[16] ORS 215.275(1) provides: "A utility facility established under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) is necessary for public service if the facility must be sited in an [EFU] zone in order to provide the service."

The county applied ORS 215.283 and ORS 215.275 directly to the application and concluded that a utility facility is an outright permitted use in the EFU zone under those statutes and the associated administrative rule, OAR 660-033-0130. Record 53-54 (citing *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) for the proposition that uses listed in ORS 215.283(1) are uses permitted in the EFU zone, "as of right"). The county concluded that the pipeline is an interstate pipeline that ORS 215.275(6) exempts from the requirements in ORS 215.275(2) to (5). Record 55. The county further reasoned that ORS 215.275(1) does not require PCGP to establish that the pipeline is "necessary for public service," because that analysis depends on factors in ORS 215.275(2) to (5), from which the pipeline is exempt by ORS 215.275(6). *Id.* The county reasoned:

> "Subsection 1 of ORS 215.275 contains the requirement that the applicant * * * show that the proposed facility 'is necessary for public service.' According to subsection 2, the 'necessary for public service' requirement is met if the applicant demonstrates that 'the facility must be sited in an [EFU] zone in order to provide the service.' Of course, given that the determination of whether something is 'necessary' is dependent on analysis which is set forth in subsections 2 through 5, it remains unclear exactly what an applicant proposing a natural gas pipeline is required to do to demonstrate that its facility is 'necessary.' LCDC seems [to] have recognized this in their administrative rule implementing ORS 215.275, as they exempt FERC-regulated pipelines from the 'necessary for public service' test. Given the nature of ORS 215.275(2)-(5), the Board concludes that ORS 215.275(1) contains no substantive standards applicable to interstate natural gas pipelines, but even if it did, those requirements would be preempted by federal law." Record 55 (internal citation omitted).

In the alternative, the county found that the pipelines is "locationally dependent" because the pipeline must cross EFU land within the county to achieve a reasonably direct route connecting the LNG terminal to existing, inland gas pipelines. Record 55-56.[17] *See* ORS 215.275(2)(b) ("A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands[.]").

Petitioners argue that ORS 215.283(1)(c) and ORS 215.275 do not permit the pipeline in the EFU zone because, according to petitioners, the record does not contain substantial evidence that the pipeline will provide a public service

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[17] The county found:

> "[T]he pipeline is a locationally-dependent linear facility that must cross EFU land in order to achieve a reasonably direct route. In order to achieve the project purpose, the pipeline must start at the Jordan Cove LNG shipping export terminal and exit Coos County on the county's eastern boundary in order to eventually connect to the existing pipelines near Roseburg, Medford and Malin, Oregon. Given the number and configuration of EFU zoned lands in the rural portions of Coos County, it is not possible for the pipeline to avoid all EFU zoned lands and maintain a reasonably direct route through Coos County. [PCGP] is working through the Federal Process which requires and Environmental Impact Study. [PCGP's] Application is intended to consider an 'alternative route' that will minimize the impacts to Haynes Inlet. [PCGP] has described that the only reasonable path to do so requires a southward initial leg followed by a turn to the east. [PCGP] further states that there is limited option for exiting Coos Bay and these constraints require the pipeline to cross a small area of EFU zoning." Record 55-56 (footnote omitted).

and, thus, it is not a utility "necessary for public service." Petitioners argue that the county misinterpreted ORS 215.275(1) as not requiring a threshold finding that the pipeline will provide a public service. Petitioners further argue that the county erred in its alternative conclusion that the pipeline is locationally dependent because FERC considered alternative routes "and the record does not support any speculation that those routes require siting in an EFU zone." Petition for Review 41.

PCGP responds that the county's interpretation of ORS 215.275(1) is consistent with the text of ORS 215.275(6) and that petitioners have not identified any text or context of the relevant statutory provisions to support their contention that the county misconstrued that statute. We agree.

ORS 215.283(1)(c)(A) permits on EFU zoned land a utility facility necessary for public service as provided in ORS 215.275. ORS 215.275(1) provides that a utility facility established under 215.283(1)(c)(A) "is necessary for public service if the facility must be sited in an [EFU] zone in order to provide the service." As the county observed, ORS 215.275(2) to (5) provide the factors for determining whether a utility facility is "necessary." ORS 215.275(6) provides that FERC-regulated pipelines are exempt from the requirements of ORS 215.275(2) to (5).

We are required to construe a statute in a manner that gives effect to all parts of the statute and avoid constructions that would render a provision meaningless. *See* ORS 174.010 ("[W]here there are several provisions or

particulars such construction is, if possible, to be adopted as will give effect to all."); *State v. Cloutier*, 351 Or 68, 98, 261 P3d 1234 (2011) ("[I]f possible, we give a statute with multiple parts a construction that 'will give effect to all' of those parts."). While ORS 215.275(1) refers to utilities that are "necessary for public service," the exemption in ORS 215.275(6) would be meaningless if an applicant for a FERC-regulated pipeline was required to establish that the pipeline is "necessary for public service." The county correctly concluded that, if the exemption in ORS 215.725(6) applies, then ORS 215.275(1) does not independently impose substantive requirements.

Petitioners argue that the exemption in ORS 215.275(6) does not apply because the pipeline is not an interstate natural gas pipeline authorized by and subject to regulation by FERC. PCGP responds that the March 19, 2020 FERC decision demonstrates that the pipeline is an interstate pipeline subject to FERC jurisdiction and, thus, subject to the exemption in ORS 215.275(6). We agree.

ORS 215.275(6) provides that the provisions of ORS 215.275(2) to (5) "do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by [FERC]." The FERC decision authorizes the pipeline and determines that it is subject to FERC regulation. Petitioners do not assert otherwise. Instead, petitioners argue that FERC's determination that the pipeline is a natural gas pipeline is an "adjudicative fact" not subject to official notice in this land use appeal.

The FERC decision demonstrates that the pipeline is an interstate gas pipeline authorized and regulated by FERC. Whether the pipeline is an interstate natural gas pipeline subject to FERC regulation requires a legal conclusion and is not an adjudicative fact. An adjudicative fact is a fact "[g]enerally known within the territorial jurisdiction of the trial court" or a fact that can be determined "by resort to sources whose accuracy cannot reasonably be questioned." ORS 40.065 (OEC 201(b)). For example, a court may take judicial notice of demographic, geographic, anatomical, and scientific facts. *See, e.g.*, *Volny v. City of Bend*, 168 Or App 516, 519 n 2, 4 P3d 768 (2000) (taking judicial notice of the fact that the population of the City of Bend substantially exceeds 2,500); *SAIF v. Calder*, 157 Or App 224, 227, 969 P2d 1050 (1998) (explaining that the fact that the coracobrachial ligament as a ligament of the arm involved in flexion is an adjudicative fact subject to judicial notice); *State v. Corey*, 123 Or App 207, 211, 859 P2d 560 (1993) (taking judicial notice of the fact that Rhododendron is a community in Clackamas County approximately 35 miles from the City of Portland). LUBA does not take notice of adjudicative facts.

Petitioners argue that the FERC decision is not dipositive because it is not final and cite federal case law to support their contention that the pipeline is not an interstate natural gas pipeline. Petitioners argue that FERC erred in its legal conclusion that the pipeline is an interstate pipeline. Petitioners do not cite anything in ORS 215.275, or the statutes governing LUBA's review, that indicates that we can or should review the legal correctness of FERC's decision.

Similarly, petitioners do not cite anything in ORS 215.275 that indicates that the exemption in ORS 215.275(6) applies only if a federal decision regarding the nature of the pipeline is final in that it is no longer appealable. Thus, the county did not err in concluding that the pipeline is authorized and regulated by FERC and, thus, the exemption in ORS 215.275(6) applies.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The general conditions in the 7-D, 14-WD, and 15-RS management units require consideration of CBEMP Policy 27, concerning floodplain protection, which provides:

> "The respective flood regulations of local government set forth requirements for uses and activities in identified flood areas; these shall be recognized as implementing ordinances of this Plan.
>
> "This strategy recognizes the potential for property damage that could result from flooding of the estuary."

The county found that Policy 27 does not create any independent, affirmative obligations but, instead, requires the county to adopt and implement floodplain regulations as approval criteria.[18] The county regulates development in the floodplain by application of a Floodplain (FP) overlay , which applies to all areas of special flood hazards within the county that have been identified on

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[18] Petitioners state that they "do not agree" that Policy 27 is only implemented through the FP overlay but do not develop any argument that Policy 27 itself provides a basis for reversal or remand. Petition for Review 42.

the Flood Insurance Maps. CCZLDO 4.11.231. The FP overlay regulates "other development" including "mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of a special flood hazard." CCZLDO 4.11.251(7).[19]

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[19] CCZLDO 4.11.251(7) provides:

> "Other Development. Includes mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of a special flood hazard, but does not include such uses as normal agricultural operations, fill less than 12 cubic yards, fences, road and driveway maintenance, landscaping, gardening and similar uses which are excluded from definition because it is the County's determination that such uses are not of the type and magnitude to affect potential water surface elevations or increase the level of insurable damages.
>
> "Review and authorization of a floodplain application must be obtained from the Coos County Planning Department before 'other development' may occur. Such authorization by the Planning Department shall not be issued unless it is established, based on a licensed engineer's certification that the 'other development' shall not:
>
> "a. Result in any increase in flood levels during the occurrence of the base flood discharge if the development will occur within a designated floodway; or,
>
> "b. Result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway." (Underscoring in original.)

Two areas along the pipeline segment at issue in this appeal are located within flood hazard areas within Coos Bay and Kentuck Slough. Record 1029. The Coos Bay segment will be constructed by HDD, which will install the pipeline approximately 200 feet below the bay. The Kentuck Slough segment will be constructed by conventional trench excavation. The pipeline segment within the Kentuck Slough flood hazard area will be buried with a minimum of 14 feet of cover to protect against scour during flooding and tsunami inundation. The pipeline trench will be backfilled to match existing grades and returned to its preconstruction condition. Record 1030. The county found that the pipeline satisfies the applicable floodplain standards both within and outside the CBEMP management units. Record 129.

The county reasoned that, generally, the FP overlay regulations do not apply to the pipeline itself because a majority of the proposed pipeline will be installed subsurface, all construction areas will be restored to the pre-construction grade and condition, and no permanent structures will be developed "above existing grades within the * * * 100-year floodplain." Record 157, 129. With respect to the portion of the pipeline within the floodplain, the county found that CCZLDO 4.11.251(7) is satisfied because PCGP submitted a licensed engineer's certification, which concludes that "[t]he proposed PCGP pipeline construction meets the requirements of [CCZLDO 4.11.251(7)] because: (a) the proposed pipeline construction will not increase flood levels during the base flood

discharge; and (b) will not result in a cumulative increase of more than 1 foot during the occurrence of the base flood discharge[.]" Record 129.

Later in the decision, the county found that PCGP must obtain a floodplain permit for portions of the pipeline construction that will involve grading within the floodplain. Record 157. The county found:

> "[PCGP] will submit the licensed engineer's certification that the 'other development' will not result in a cumulative increase of more than one foot during the occurrence of the base flood discharge, as required by [CCZLDO 4.11.251(7)(b)]. It is reasonable and likely that such engineering report can be successfully obtained, because grading that occurs in a large basin is highly unlikely to raise the flood level during a base flood discharge. Once the report is filed it is reasonable to find the proposal complies with the requirements of the [FP] overlay." Record 157-58.

Petitioners argue that the challenged decision failed to impose a condition of approval requiring PCGP to submit the licensed engineer's certification that other development will not result in a cumulative increase of more than one foot during the occurrence of the base flood discharge. Petitioners assert that LUBA should reverse the decision because the decision does not conclude that the FP overlay criteria are satisfied or will be satisfied by an appropriate condition of approval. Petitioners further argue that the findings are inadequate to support a decision that CCZLDO 4.11.251(7) is satisfied because the county failed to analyze HDD entry points as "drilling," which is regulated as "other development" in the FP overlay.

PCGP responds, and we agree, that petitioners failed to challenge the county's alternative findings that CCZLDO 4.11.251(7) is satisfied because PCGP submitted the report required by that provision. Petitioners do not address the county's floodplain findings at Record 129. To demonstrate that the county adopted inadequate findings to support the county's conclusion that CCZLDO 4.11.251(7) is satisfied, petitioners were required to assign error to all independent findings that that criterion is met. Therefore, petitioners' findings challenge provides no basis for remand. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132, 149 (2014), *rev'd and rem'd on other grounds*, 269 Or App 176, 344 P3d 503 (2015); *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291, 295-96 (2012).

Finally, petitioners argue that the record lacks substantial evidence that HDD technology will not increase the flood level. PCGP responds that the engineer certification upon which the county relied includes consideration of the HDD installation of the pipeline. Petitioners do not address that evidence or explain why it was unreasonable for the county to rely upon it. The county's decision that CCZLDO 4.11.251(7) is satisfied is supported by substantial evidence.

We agree with PCGP that the county found that the proposal complies with CCZLDO 4.11.251(7) with respect to "other development" in the floodplain. Thus, the county did not err by failing to impose a condition of approval requiring additional engineer certifications.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The county imposed Condition 4, which requires that PCGP obtain all "necessary" state and federal permits. Record 167. On May 6, 2019, DEQ denied PCGP a water quality certification or permit for failure to demonstrate compliance with state and federal water quality standards, including the CWA. The permit denial was without prejudice, meaning that PCGP is free to reapply and submit new evidence and application materials. On December 18, 2019, the county issued the decision challenged in this appeal. As noted above, following issuance of the county's decision, PCGP filed a petition with FERC seeking waiver of CWA requirements.

Petitioners argue that the county was required to find that it is "feasible" for PCGP to obtain the DEQ permit to comply with Condition 4. Further, petitioners argue, PCGP's attempt to obtain a federal waiver demonstrates that the county should have required specific assurances from PCGP that it would obtain the DEQ permit and imposed conditions ensuring that the pipeline would not proceed absent the permit.

PCGP responds that there is no general obligation for a local government to adopt findings that it is "feasible" for an applicant to obtain a state or federal permit.

> "As we explained in *Bouman* [*v. Jackson County*], where a local government finds that a local approval standard will be met by imposing conditions of approval that the local government itself will

ultimately enforce, the record must demonstrate that it is feasible for the proposed use to satisfy that condition. [23 Or LUBA 626, 646 (1992)]. However, in *Bouman* we distinguished the situation where a condition of approval requires that an applicant secure a state agency permit:

> "'However, where a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, we think a decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as a matter of law. There does not have to be substantial evidence in the record that it is feasible to comply with all discretionary state agency permit approval standards because the state agency, which has expertise and established standards and procedures, will ultimately determine whether those standards are met.' *Id.* at 646-47."

Wal-Mart Stores, Inc. v. City of Bend, 52 Or LUBA 261, 286-87 (2006).[20]

PCGP argues that the county did not impose Condition 4 to demonstrate compliance with any applicable county standard, citing *OSCC*, ___ Or LUBA at ___ (slip op at 41), where we rejected a similar argument because the petitioners had not identified any approval criterion that depended on a DEQ permit for a demonstration of compliance. Response Brief 66-67. *See also Citizens I*, ___ Or LUBA at ___ (slip op at 38) (same).

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[20] We note that this "not precluded from obtaining such state agency permits as a matter of law" standard is distinct from the "reasonable expectation" standard that we applied under Goal 6, in the first assignment of error.

However, as petitioners point out under the third assignment of error, the 7-D management objective provides that "development shall not conflict with state and federal requirements for the wetlands located in the northwest portion of this [management unit]," and the county found that the pipeline satisfies that management objective based on Condition 4, which requires PCGP "to obtain necessary state and federal permits, which would include wetland impact permits." Record 93.[21]

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[21] The county reasoned:

> "The [7-D] management objective does not prohibit interference with the wetlands. Rather, it states that development 'shall not conflict *with state and federal requirements* for the wetlands * * *.' Stated another way, development is not allowed to interfere with whatever the state and federal government has determined must occur, if anything, with regard to that particular wetland. The Opponents do not explain what state and/or federal requirements the pipeline infringes upon with respect to these wetlands. The Board suspects that the wetland in question is *likely* part of the Henderson Marsh Mitigation Plan, although the record is unclear on this point.
>
> "According to [PCGP's] narrative and maps, the pipeline itself does not cross the wetlands located in the northwest portion of the 7-D zone. However, those maps do show the wetland being used as a part of the [temporary extra work area (TEWA)] for the HDD bore installation. *To address the wetland issue, the Board imposes a condition of approval requiring [PCGP] to obtain necessary state and federal permits, which would include wetland impact permits*." Record 93 (underscoring in original; first and second emphases in original; final emphasis added).

Petitioners argue that, because compliance with the local criterion, the 7-D management objective, depends on satisfaction of Condition 4, the county was required but failed to determine that it is feasible for PCGP to obtain required state and federal permits, including wetland impact permits. PCGP responds that petitioners have not demonstrated that the 7-D management objective explicitly requires a DEQ permit to demonstrate compliance with that objective. While we agree that petitioners' argument could be better articulated, we ultimately agree with petitioners that Condition 4 was imposed, at least in part, to establish compliance with the 7-D management objective. Thus, this appeal is distinguishable from *OSCC* and *Citizens I*.

However, we agree with PCGP that the standard articulated in *Wal-Mart* and *Bouman* applies here and is satisfied. The DEQ denial is without prejudice. Petitioners have not established that PCGP is precluded as a matter of law from obtaining a DEQ permit. Thus, petitioners' argument provides no basis for reversal or remand.

The sixth assignment of error is denied.

The county's decision is remanded.