

**July 17-19 EFSC Meeting – Agenda Item G – Staff Report Attachment 3 Index**

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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY, ENERGY FACILITY SITING DIVISION**

IN THE MATTER OF: ) **RULINGS ON MOTIONS FOR**  
 ) **SUMMARY DETERMINATION AND**  
**APPLICATION FOR SITE** ) **PROPOSED CONTESTED CASE**  
**CERTIFICATE FOR THE NOLIN** ) **ORDER**  
**HILLS WIND POWER PROJECT** )  
 ) OAH Case No. 2022-ABC-05140

**HISTORY OF THE CASE**

This matter involves the Application for a Site Certificate (ASC) for Nolin Hills Wind Power Project (Project or proposed facility) submitted by Nolin Hills Wind, LLC (Applicant) to the Energy Facility Siting Council (Council or EFSC) on January 31, 2022.

On April 19, 2022, the Oregon Department of Energy (ODOE or Department) issued a draft proposed order (DPO) and public notice of a 37-day comment period on the DPO. Thereafter, on May 26, 2022, Senior Administrative Law Judge (ALJ) Kate Triana from the Office of Administrative Hearings (OAH) conducted a public hearing via a combination of in-person (at the Red Lion Hotel in Pendleton, Oregon – in the affected local jurisdiction) and video conference appearance. Members of the public had the opportunity to provide oral and written testimony at the public hearing. The Department accepted public comments on the DPO from April 19, 2022 to May 26, 2022. The ALJ held the record open until June 24, 2022, to allow the Applicant an opportunity to respond to comments made at the DPO hearing.

On August 4, 2022, the Department issued a Proposed Order and a Public Notice of the Proposed Order. The Public Notice of the Proposed Order set the deadline to request party or limited party status at 5:00 p.m. on September 6, 2022. Attorney Wendie L. Kellington filed a timely petition for party/limited party status on behalf of Umatilla County. Pursuant to a *Notice of Petitions to Request Party Status; Order Scheduling Prehearing Conference; and Prehearing Conference Agenda (Notice)* issued September 12, 2022, ALJ Triana notified the Department and Applicant of the petition for party status or limited party status received in this matter.

On October 5, 2022, ALJ Triana convened a telephone prehearing conference to address the petition for party/limited party status and the responses to the petitions from Applicant and the Department.<sup>1</sup> At the prehearing conference, ALJ Triana provided Umatilla County an opportunity to address whether it had satisfied the eligibility requirements for party/limited party status. The ALJ also provided Applicant and the Department the opportunity to respond.

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<sup>1</sup> The following persons participated in the October 5, 2022, prehearing conference: for the Department, Senior Assistant Attorney General (AAG) Patrick Rowe and Department representatives Sarah Esterson and Kathleen Sloan; for Applicant, Attorney Timothy McMahan, Linnea Fossum, and Matthew Martin; for Petitioner, Attorney Wendie Kellington and Robert Walder.

Following the October 5, 2022 conference, the Department provided the OAH with the entire Decision and Administrative Project Record and Decision-Making Record for the contested case proceeding for the Nolin Hills Wind Power Project.

On November 2, 2022, ALJ Triana issued an *Order on Petitions for Party Status and Issues for Contested Case Hearing (Order on Party Status)*, granting Umatilla County limited party status and identifying all properly raised issues to be addressed in the contested case hearing. No appeals to Council were filed on the *Order on Party Status*.

On December 13, 2022, ALJ Triana held a prehearing conference to discuss the contested case process and set the contested case schedule. Assistant Attorney General Patrick Rowe participated for the Department, with Sarah Esterson and Kathleen Sloan. Attorney Timothy McMahan participated for Applicant, with Matthew Martin, Laneah Fossum, Walter Clemence and John Sohn. Attorney Wendie Kellington participated for Umatilla County, with Doug Olsen and Carol Johnson. During the conference, in consideration of the parties' input, ALJ Triana authorized motions for summary determination in this matter.

On December 14, 2022, ALJ Triana issued an Update to Council pursuant to OAR 345-015-0023(4). On December 15, 2022, ALJ Triana issued an *Order on Case Management Matters and Contested Case Schedule (Case Management Order)*, setting the schedule for discovery, motions for summary determination, and the contested case hearing, if needed.

On January 20, 2023, Umatilla County submitted discovery documents to the OAH. That same date, Applicant confirmed that, like the Department, it would rely on the Department's Decision Making Record on the ASC for purposes of the parties' summary determination motions.

On January 24, 2023, the Council issued an *Order Appointing Replacement Hearing Officer*, appointing ALJ Alison Greene Webster as the hearing officer in this matter. On February 15, 2023, ALJ Webster issued an Update to Council.

On February 23, 2023, in accordance with the Case Management Order, the parties and Umatilla County filed their motions for summary determination seeking a favorable ruling on Issues 1, 1.1 and 2. On or about March 20, 2023, the parties and limited party Umatilla County filed their respective responses to the motions for summary determination. On April 11, 2023, the parties filed replies to the responses.

On April 13, 2023, in response to an inquiry from AAG Rowe, ALJ Webster advised the parties and Umatilla County that, on or before May 12, 2023, she would issue a comprehensive Ruling on Motions for Summary Determination and Proposed Contested Case Order. The Department, Applicant, and Umatilla County concurred with this approach. On April 20, 2023, ALJ Webster issued an Update to Council.

## **BURDEN OF PROOF**

ORS 183.450(2) and OAR 345-021-0100(2), together, identify the appropriate allocation

of the burdens applicable to EFSC contested case proceedings on an ASC. Applicant bears the burden of proving that the proposed facility complies with all applicable statutes, administrative rules, and local government ordinances. OAR 345-021-0100(2). The party/limited party raising an issue in this contested case by challenging the Department's Proposed Order bears the burden of producing evidence in support of the facts alleged and/or positions taken on any properly raised issue. ORS 183.450(2). That party/limited party also bears the burden of persuading the trier of fact that the alleged facts are true or the proffered position on the issue is correct. Neither Applicant nor the Department is required to disprove an opposing party/limited party's allegations and argument that Applicant has not met a particular statutory/regulatory requirement or Council siting standard. Rather, the party/limited party asserting a deficiency in the findings and/or conclusions in the Department's Proposed Order on the ASC bears the burden of establishing the claim or alleged facts.

Accordingly, Applicant maintains the burden to show by a preponderance of the evidence in the decision record that the proposed facility complies with Council's siting standards and other applicable statutes and rules. The Department's Proposed Order, as conditioned, determined that the decision record on the ASC indicates Applicant satisfied the requirements for issuance of the requested site certificate. That determination creates a rebuttable presumption that Applicant has satisfied its burden to show that the proposed facility will, more likely than not, comply with all applicable statutes, administrative rules, and local government ordinances. Thus, with regard to provisions of the Department's Proposed Order not challenged in this contested case, the presumption stands and Applicant is not required to make additional showings at the contested case hearing to meet its initial burden.

With regard to those provisions of the Department's Proposed Order challenged through the petitions for party status/requests for contested case hearing, the party/limited party bears the burden of producing evidence sufficient to establish the claim with regard to that issue (*i.e.*, the alleged deficiency in the Department's Proposed Order) to rebut the presumption created by the Department's Proposed Order. Applicant has no obligation to disprove unsubstantiated claims and/or allegations raised by the limited parties.

## ISSUES

As set out in the *Case Management Order*, the issues for the contested case hearing are as follows:

**Issue 1:** Whether the County's land use regulation UCDC 152.616(HHH)(6)(a)(3) ("Criterion (3)," requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land) constitutes "applicable substantive criteria" within the meaning of OAR 345-022-0030(3) that apply to the Project.

**Issue 1.1:** If so, whether the Project complies with Criterion (3).

**Issue 2:** Whether the Project is required to obtain a conditional use permit from the County.

## DOCUMENTS CONSIDERED

The ALJ admitted the entire Decision-Making and Administrative Project Record for the Nolin Hills Wind Power Project into the contested case hearing record.<sup>2</sup>

The following additional exhibits were admitted and considered in ruling on the parties' motions: Exhibits 1 through 5 to Umatilla County's Motion for Summary Determination; and Exhibit 1 to Umatilla County's Response to Nolin Hills Wind LLC's Motion for Summary Determination.

## FINDINGS OF FACT

1. On September 11, 2017, the Department received a Notice of Intent (NOI) from Nolin Hills Wind, LLC (Applicant), a wholly-owned subsidiary of Element Power US, LLC, to file an ASC for a proposed energy facility. The proposal included wind and solar energy generating components with a nominal generating capacity of approximately 600 megawatts (MW) (approximately 340 MW from wind and 260 MW from solar), to be located within a proposed site boundary located near the Town of Nolin in Umatilla County, Oregon. (NHWNOIDoc1 Notice of Intent 2017-09-07 at 1; NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 9.)

2. On October 19, 2017, pursuant to ORS 469.480, the Council appointed the Umatilla County Board of Commissioners as the Special Advisory Group (SAG) for the proposed facility. Council tasked the SAG with recommending applicable substantive criteria from Umatilla County's acknowledged comprehensive plan and land use regulations required by the statewide planning goals and in effect on the date the preliminary ASC (pASC) is submitted, any Land Conservation and Development Commission administrative rules and goals, and any land use statutes that apply directly to the facility under ORS 197.646. (NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 10.)

3. In November 2017, the SAG submitted a Response to Notice of Intent, identifying the standards that the County would apply to the wind energy generation facility and a transmission line if the application had been submitted to the County for land use review. The SAG identified the following criteria in the Umatilla County Development Code (UCDC) as applicable to the wind energy generation facility:

UCDC §152.060 Conditional Uses allowed on lands zoned EFU

UCDC §152.061 Standards for all Conditional Uses on EFU Lands

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<sup>2</sup> In the Project Record, all documents are named using a prefix that includes references to the proposed facility, the EFSC process phase, document identification number ("Doc ID"), description of the document, and the date. The Department added "ODOE" in front of the Doc ID footer to indicate that the Department provided the document for the contested case proceeding. The Department also provided page numbers in the Doc ID footer to serve as "Bates Stamping" for consistent reference to record documents and pages.

UCDC §152.615 Additional Conditional Use Permit Restrictions

UCDC §152.616(HHH) Conditional Use Criteria for Commercial Wind Energy Generation Facilities

(NHWNOIDoc3-5 SAG Comment 2017-11-06 at 1.)

4. On January 10, 2018, and pursuant to ORS 469.370(10) and OAR 345-015-0160, the Department issued a Project Order specifying the state statutes and administrative rules, and local, state, and tribal laws, regulations, ordinances and other requirements applicable to the siting of the proposed facility. (NHWNOIDoc7 Project Order 2018-01-10.)

5. On February 27, 2020, Applicant filed its pASC for the proposed facility. On April 27, 2020, the Department determined the pASC incomplete and issued a Request for Additional Information (RAI) to Applicant. Applicant responded on June 16 and August 18, 2020, with additional facts, evidence, and analysis. (NHWAPPDoc4 through 4-4. 2020-06-17; 2020-08-28.)

6. On November 6, 2020, Applicant submitted a revised pASC to the Department. The revised pASC included a substantive change to the capacity and generation components of the proposed facility from a 350 MW wind facility to a 600 MW wind and solar facility. (NHWAPPDoc6 Revised pASC 2020-11-06 at 1.)

7. By letter dated January 20, 2021, Umatilla County provided comments on the revised pASC. As pertinent here, the County commented:

Exhibit K, Page 14 - The project does not comply with Umatilla County's standard for two-mile setback from rural residences outside the project area. The county's two-mile setback for rural residences was adopted by Umatilla County through Ordinance 2012-13. The original intent of the standard was to mitigate noise and visual impacts to rural residences caused by wind towers. Umatilla County requests that the applicant adjust the location of the turbines in order to meet the required standard.

(NHWAPPDoc3-9 pASC Umatilla County Comment 2021-01-20 at 1.)

8. On August 2, 2021, the Department issued an Amended Project Order. With regard to the Land Use standard, the Amended Project Order stated, in part:

The facility would be located on land zoned EFU in Umatilla County. In addition, the portion of the UEC Cottonwood transmission line corridor near Interstate 84 includes areas of Rural Tourist Commercial, Agri-Business, and Light Industrial zoning. As provided in ORS 469.401(3), if the Council issues a site certificate, Umatilla County would be bound to issue all required permits and other land use approvals, subject to the conditions set forth in the site certificate, that are included in and governed by the site certificate.

The applicant should discuss each applicable substantive criteria from the Umatilla County comprehensive plan and zoning ordinances, and should demonstrate how the proposed facility complies with those criteria. Umatilla County provided its initial list of applicable substantive criteria in a comment letter on the NOI, when the proposed facility was limited to wind energy generation and the specific proposed transmission corridors were unknown. The county then reviewed the revised preliminary application for site certificate Exhibit K, which included updates to the applicant's proposed facility design, and concluded that the applicant appeared to have provided a comprehensive list of the County's applicable substantive criteria. If the proposed facility does not comply with one or more of the applicable substantive criteria, the applicant must demonstrate that the facility nevertheless complies with the applicable statewide planning goals or that an exception to a goal is justified under ORS 469.504(2) and OAR 345-022-0030(4).

(NHWNOIDoc7-1 Amended Project Order 2021-08-02 at 21-22.)

9. In October 2021, the Department requested more information specific to Applicant's request for an exception to Statewide Planning Goal 3 for the proposed solar photovoltaic energy generation components, as presented in pASC, Exhibit K. In response, Applicant provided additional facts and analysis, including two landowner letters. (*See* NHWAPPDoc9 ODOE RAI on Goal 3 Exception 2021-10-06; NHWAPPDoc9-1 Goal 3 Exception Request Response 2021-12-06; NHWAPPDoc9-1 Landowner Letter 2022-01-27, NHWAPPDoc9-1 Landowner Letter 2022-01-14.)

10. On January 28, 2022, following review of the responses, the revised pASC Exhibits and supplemental information submitted by Applicant in response to the RAIs and agency comments, the Department determined the ASC for the Nolin Hills Wind Power Project to be complete. (NHWAPPDoc1 ASC Determination of Complete Application Letter\_2022-01-28 at 2-3.)

11. In the ASC, and pursuant to ORS 469.504(4), Applicant elected to have Council determine whether the proposed facility complies with statewide planning goals. (NHWAPPDoc2-10 ASC Exhibit K Land Use\_2022-01-31 at 8; *see also* NHWAPPDoc1 - Proposed Order on ASC 2022-08-04 at 74.)

12. The proposed facility would be located in an Exclusive Farm Use (EFU) zone, with a grid-interconnection transmission line (the proposed UEC Cottonwood transmission line) that would intersect three additional zones: Rural Tourist Commercial, Agri-Business, and Light Industrial. (NHWAPPDoc2-10 ASC Exhibit K Land Use 2022-01-31 at 8-9 of 158, and attached Figure K-2; *see also* NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 123.)

13. As required by the Amended Project Order, Applicant addressed, in ASC Exhibit K, compliance with applicable substantive criteria from the Umatilla County Development Code for the proposed wind power generation facility and solar power generation facility and related and

supporting facilities separately from the UEC Cottonwood transmission line.<sup>3</sup> With regard to UCDC §152.616(HHH)(6)(a)(3) (Criterion (3)), which requires a two-mile setback from a turbine tower to a rural residence, the Applicant stated:

The Applicant is siting the Project to maintain the distance between turbine towers and rural residences to the maximum extent practicable. Although the turbine locations have not been finalized, some of the final locations may not ultimately meet the above setback standard for rural residences outside of the Project lease area (see Figure K-9). This may be the case for up to approximately eight rural residences. Siting of wind turbines is driven by many factors including land availability, habitat, landowner agreement, existing land uses, access, wind regime, turbine spacing requirements, and wind farm energy generation optimization. Therefore, while some micrositing of the Project is anticipated prior to construction, substantial relocations are not anticipated due to these many interacting siting factors.

Of those eight rural residences, all will be more than a mile away from a turbine tower including three residences that are over 1.9 miles and two over 1.7 miles from a turbine (Table K-2). One of the owners of these residences has executed a “Good Neighbor Agreement Waiver” with the Applicant.

Because the setback criterion is not a land use regulation required by the statewide planning goals, it does not qualify as one of the “applicable substantive criteria” defined in OAR 345-022-0030(3).

Therefore, the Project is not subject to the setback criterion. In addition, as noted in the [Project] Order, if the proposed Project does not comply with one or more of the applicable substantive criteria, the Applicant can demonstrate that the Project nevertheless complies with the applicable statewide planning goals. Sections 5.0 and 6.0 demonstrate the Project complies with all statewide planning goals, specifically applicable statewide planning goals, Goal 3 and Goal 14[.]

(NHWAPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31 at 20-21, footnotes omitted.)

14. In the DPO, the Department agreed with Applicant’s analysis in Exhibit K. The Department recommended the Council find that Criterion (3) does not apply because it is not required by statewide planning Goal 3, Goal 14 nor any other statewide planning goal, therefore, Applicant need not comply with it. (NHWAPDoc1 Draft Proposed Order with Attachments 2022-04-19 at 80-86.)

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<sup>3</sup> In Exhibit K, Applicant explained that the Project has three different transmission line components: (1) the Project substation connector line connecting two substations within the site boundary; (2) the BPA Stanfield transmission line; and (3) the UEC Cottonwood transmission line. (NHWAPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31 at 14.) Applicant analyzed the UEC Cottonwood transmission line as an associated transmission line necessary for public service under ORS 215.274 and ORS 215.275 and independent of the wind facility. (*Id.* at 15.)



15. In its May 26, 2022 comments on the DPO, Umatilla County acknowledged that Criterion (3) “is not explicitly ‘required’ by the statewide planning goals.” Nevertheless, the County asserted that because Criterion (3) is part of their acknowledged comprehensive plan and land use ordinances, it constitutes “applicable substantive criteria” identified by the SAG, and that Council must, therefore, apply this criterion to the proposed facility “rather than evaluating the proposed facility against the statewide planning goals.” (NHWAPPDoc3-12 DPO SAG Comment Umatilla County 2022-05-26 at 1-2.)

16. In the Proposed Order, the Department found as follows with regard to “applicable substantive criteria”:

“Applicable substantive criteria” are criteria from the affected local government’s (Umatilla County) acknowledged comprehensive plan and land use ordinance, which then must satisfy two requirements. The criteria within the acknowledged comprehensive plan and land use regulations must 1) be required by the statewide planning goals applicable to the proposed facility based on facility type or facility component and land use zone, and 2) be in effect on the date the applicant submits the preliminary application for site certificate (pASC), which in this instance occurred on February 27, 2020.

For this ASC, the applicant requests a Council determination under ORS 469.504(1)(b)(B). \* \* \*

ORS 469.504(1)(b)(B) \* \* \* allows for Council to find that an applicant has satisfied the requirements of the Land Use standard, even if the proposed facility cannot comply with one or more “applicable substantive criteria” if the proposed facility otherwise complies with applicable statewide planning goals or demonstrates that an exception to the applicable statewide planning goal is justified. Strict compliance with “applicable substantive criteria” is therefore not required if compliance with statewide planning goals is demonstrated or Council finds that an exception is justified.

In addition to ORS 469.504(1)(b)(B), ORS 469.504(5) applies. ORS 469.504(5) applies to proposed facilities that include components that would be located in three or more zones. The proposed facility includes a related or supporting facility that would be located in four or more zones (the proposed 230 kV UEC Cottonwood transmission line). \* \* \*

[B]ased on a review of the ORS 469.504(5) factors in consultation with the SAG, the Department recommends Council find that the proposed facility complies with Council’s Land Use standard, by applying, as authorized in ORS 469.504(1)(b)(B), a combination of applicable substantive criteria recommended by the SAG and statewide planning goals for the evaluation of proposed wind facility components and by taking an exception to statewide planning goal 3 for the proposed solar facility components.

17. With regard to the County’s Criterion (3), the Department found:

Criterion (3) establishes a 2-mile setback from a turbine tower to rural residences, but does not apply to residences located on properties within the Wind Power Generating Facility project. The proposed facility would not comply with this 2-mile setback because 8 proposed wind turbine locations are less than 2 miles from approximately 16 rural residences (see ASC Exhibit 16 K Figure K-9). To address the potential issue of non-compliance with Criterion (3), the applicant requests that Council find that Criterion (3) does not meet the Council’s definition of “applicable substantive criteria” under OAR 345-022-0030(3) and therefore is not required to be satisfied to meet the Land Use standard; or, in the alternative, that non-compliance with the criterion is allowable per ORS 460.504(1)(b)(B) because the proposed facility otherwise complies with applicable statewide planning goals.

The proposed facility includes a related or supporting facility that crosses three or more zones<sup>4</sup> and, depending on Council’s interpretation of whether Criterion (3) is “applicable substantive criteria” is potentially non-compliant with Criterion (3). ORS 469.504(1)(b)(B) and ORS 469.504(5) both establish a regulatory approach of evaluating a combination of criteria and statewide planning goals in order to make findings of compliance with the Land Use standard.

\* \* \* \* \*

For this proposed facility, the SAG recommended applicable substantive criteria. On November 6, 2017, the SAG commented on the NOI and provided a list of relevant criteria from the UCDC and County Comprehensive Plan, which included Criterion (3). On April 15, 2020, the SAG commented on the initial pASC and reaffirmed the inclusion of Criterion (3) as part of the applicable substantive criteria and stated that the proposed facility would not comply with Criterion (3). \* \* \* .

As authorized by ORS 469.504(1)(b)(B) and ORS 469.504(5), the Department recommends Council evaluate the proposed facility, specifically the proposed wind facility components, against a combination of the applicable substantive criteria recommended by the SAG and statewide planning goals. The Department provides the following analysis of the factors in ORS 469.504(5)(a) through (c):

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<sup>4</sup> While the proposed facility would almost entirely be located in the Exclusive Farm Use (EFU) zone, the proposed UEC Cottonwood transmission line route would intersect three additional zones: Rural Tourist Commercial, Agri-Business, and Light Industrial. The proposed facility would therefore pass through more than three zones in a single jurisdiction. (NHWAPDoc2-10 ASC Exhibit K Land Use 2022-01-31, see ASC Exhibit K Figure K-2.)

For factor (a) – the number of jurisdictions and zones in question – one of the proposed 230 kV transmission line route options would intersect more than three zones. The remaining proposed facility components as well as the vast majority of the UEC Cottonwood transmission line option would be located in a single zone (EFU) in a single jurisdiction (Umatilla County).

For factor (b) - the degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process – the setback was adopted by Umatilla County specifically to consider the impacts of energy facilities (wind energy facilities) in the planning process. In their January 20, 2021 letter on the pASC, the SAG commented:

The county’s two-mile setback for rural residences was adopted by Umatilla County through Ordinance 2012-13. The original intent of the standard was to mitigate noise and visual impacts to rural residences caused by wind towers. Umatilla County requests that the applicant adjust the location of the turbines in order to meet the required standard.

Factor (c) requires the Council to consider the level of consistency of the applicable substantive criteria from the various zones and jurisdictions. There is only one jurisdiction – Umatilla County – Council must consider the level of consistency of the applicable substantive criteria from the various zones. The two-mile setback from rural residences required for wind turbines by UCDC 152.616(HHH)(6)(a)(3) is part of UCDC 152.616, Standards for Review of Conditional Uses and Land Use Decisions. These criteria are specific to certain types of uses, rather than specific zones, and therefore UCDC 152.616(HHH)(6)(a)(3) appears consistent from the various zones.

After consultation with the SAG and consideration of the ORS 469.504(5) factors (a) - (c), as authorized by ORS 469.504(1)(b)(B), the Department recommends that the Council evaluate the proposed facility, specifically the proposed wind facility components, against a combination of the applicable substantive criteria and statewide planning goals. Based on the applicant’s request, though, the Department first evaluates whether Criterion (3) meets the Council’s definition of “applicable substantive criteria” and then, secondly, evaluates whether the proposed facility would otherwise comply with applicable statewide planning goals.

(NHWAPDoc1 Proposed Order on ASC 2022-08-04 at 93-95.)

18. In its evaluation of whether Criterion (3) meets the definition of “applicable substantive criteria,” the Department found as follows:

Question 1

The question whether or not Criterion 3 meets the Council’s definition of “applicable substantive criteria” is addressed first. ORS 469.504(1)(b)(A) and

OAR 345-022-0030(3) define “applicable substantive criteria” \* \* \*.

ORS 469.504(5) states the SAG shall recommend the applicable substantive criteria “under section (1)(b)(A)” – i.e., criteria from the local government’s comprehensive plan and land use regulations that are “required” by the statewide planning goals. Further, ORS 469.504(1)(b)(B), authorizes Council to approve a facility that does not comply with applicable substantive criteria recommended by a SAG if it otherwise complies with applicable statewide planning goals.

Similarly, OAR 345-022-0030(3) states “applicable substantive criteria” are “criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application” (emphasis added) and OAR 345-021-0050(6)(b)(A) states that when an applicant has elected to obtain a Council determination of compliance with the Council’s land use standard under ORS 469.504(1)(b), each local government with land use jurisdiction over the proposed facility shall include in their comments or recommendations to the Department “A complete list of applicable substantive criteria from the local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the application was submitted” (emphasis added).

The County has not sought to explain how the 2-mile setback from rural residences is required by the statewide planning goals.

In most applications, applicants meet all of the requirements set forth in the acknowledged comprehensive plan and land use regulations that counties provide, therefore an assessment of whether or not they all constitute applicable substantive criteria is not typically done. Only when an applicant states that their proposed facility would not meet a specific comprehensive plan provision or land use regulation does the Council evaluate whether or not it constitutes applicable substantive criteria. The two clarifying provisions related to such an assessment in the statute above are whether the local comprehensive plan and land use regulations are “required by the statewide planning goals” and whether they were “in effect on the date the application was submitted.”

\* \* \* \* \*

The preliminary application was submitted on February 27, 2020, so Criterion (3) was in effect on that date. That leaves whether or not it is “required by the statewide planning goals.” Oregon’s statewide program for land use planning consists of 19 goals. Each county comprehensive plan and land use regulation that is approved must be consistent with all applicable statewide planning goals and they are reviewed by the Land Conservation and Development Commission (LCDC) for consistency. LCDC had the opportunity to evaluate Criterion (3) and did not challenge its consistency with applicable statewide planning goals.

However, being consistent with applicable statewide planning goals is not the same as being “required” by them. Therefore, an evaluation of Criterion (3) against applicable statewide planning goals is necessary to determine whether or not it is required.

\* \* \* \* \*

Criterion (3) was adopted by Umatilla County to meet “local concerns”, as allowed by OAR 660-033-0120 and 0130 which is consistent with Goal 3. This is further evidenced by the fact that the Department is unaware of any other county that has adopted a similar setback requirement between wind turbines and residences. The Department therefore recommends Council conclude that while Criterion (3) is both allowed by and consistent with Goal 3, it is nevertheless not “required” by Goal 3.

\* \* \* \* \*

None of [LCDC’s rules to implement Goal 14 (Urbanization)] “require” specific setback distances between wind turbines and rural residences. The Department therefore recommends Council agree with the applicant’s conclusion that Criterion (3) is also not “required” by Goal 14.

The Department has evaluated the other 17 Statewide Planning Goals and concludes the specific setback distances between wind turbines and rural residences is not “required” by any of them either. The Department therefore recommends that Council agree with the applicant and conclude that Criterion (3) is not “required” by any of the 19 statewide planning goals, therefore it does not constitute applicable substantive criteria.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 95-100.)

19. The Department then considered whether the proposed facility would otherwise comply with applicable statewide planning goals, based on an evaluation of a combination of applicable substantive criteria and statewide planning goals. The Department found that the Project complies with applicable statewide planning goals:

Question 2

Although the Department recommends Council find Criterion (3) is not “applicable substantive criteria required by the statewide planning goals”, because that Criterion was recommended by the SAG and the proposed facility would not comply with that Criterion, the Department recommends Council still consider the second question – whether the proposed facility would otherwise comply with applicable statewide planning goals. ORS 469.504(1)(b)(B) and ORS 469.504(5) apply to the proposed facility and authorize a finding of compliance under the Land Use standard based on an evaluation of a combination of applicable substantive criteria and statewide planning goals when a proposed facility either

does not comply with an applicable substantive criteria or is necessitated based on varying zone requirements.

\* \* \* \* \*

Because the ASC presents up to 8 wind turbines that would not comply with Criterion (3), the applicant evaluates the proposed facility against all 19 Statewide Planning Goals consistent with ORS 469.504(1)(b)(B). The Department is in agreement with some but not all of the Goal Compliance evaluations provided by the applicant.

- [Goal 1, Citizen Involvement – satisfied]
- [Goal 2, Land Use Planning – not applicable as Applicant is proceeding under ORS 469.504(1)(b)(B)]
- [Goal 3, Agricultural Lands – satisfied]
- [Goal 4, Forest Lands – satisfied]
- [Goal 5, Open Spaces, Scenic, Historic and Natural Resources – satisfied]
- [Goal 6, Air, Water and Land Resources – satisfied]
- [Goal 7, Areas Subject to Natural Disasters and Hazards – satisfied]
- [Goal 8, Recreational Needs – satisfied]
- [Goal 9, Economic Development – satisfied]
- [Goal 10, Housing – satisfied]
- [Goal 11, Public Facilities and Services – satisfied]
- [Goal 12, Transportation – satisfied]
- [Goal 13, Energy Conservation – not applicable]
- [Goal 14, Urbanization – satisfied]
- [Goal 15, Willamette River Greenway – not applicable]
- [Goal 16, Estuarine Resources – not applicable]
- [Goal 17, Coastal Shorelands – not applicable]
- [Goal 18, Beaches and Dunes – not applicable]
- [Goal 19, Ocean Resources – not applicable]

Based on the above analysis and findings, the Department recommends Council conclude, as authorized under ORS 469.504(1)(b)(B), that while some wind turbine locations will not comply with Criterion (3), the entire proposed facility nevertheless complies with applicable Statewide Planning Goals.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 100-106.)

20. In the Proposed Order, in analyzing the standards for the proposed UEC Cottonwood transmission line, the Department explained as follows:

The proposed 230 kV UEC Cottonwood transmission line would extend approximately 25.3 miles from the proposed northern project substation to the existing UEC Cottonwood Substation. The line would include 8.4 miles of new line, 9.6 miles of replacement line, and 7.3 miles of upgraded line. Approximately

23 miles of the proposed transmission line would be located within EFU-zoned land; the remaining northern portion of the route would be located within RTC, LI and AB zoned lands.

The route of the proposed UEC Cottonwood transmission line allows for interconnection of the proposed northern project substation to two existing structures – UEC Transmission Network Junction (located on the corner of White House Road and County Road 1348) and the UEC Cottonwood Substation (north of the I-84 crossing location). The proposed northern project substation and UEC Transmission Network Junction are located within EFU-zoned lands; the existing UEC Cottonwood Substation is located in the LI zone. ASC Exhibit K Figure K-2 Zoning demonstrates that there are no non-EFU zoned lands between the wind, solar and transmission line site boundary area or within ½-mile of these areas, except for the northern 2-miles of the transmission line route which is over 23 miles from the location of proposed energy generation equipment. Because there are no non-EFU zoned lands within ½-mile of the portions of the site boundary containing the wind and solar micro siting areas or for the majority (approximately 23 miles) of the transmission line site boundary, the Department recommends Council find that there are no reasonable alternatives for the proposed 230 kV UEC Cottonwood transmission line that would be located on non-EFU zoned lands.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 123.)

21. With regard to the Project’s compliance with the Land Use Standard, the Proposed Order concluded:

Based on the foregoing findings and the evidence in the record, and subject to compliance with the recommended conditions, the Department recommends the Council find an exception to Goal 3 is justified under OAR 345-022-0030(4)(c) and ORS 469.504(2)(c); therefore, the Council finds that the proposed facility complies with OAR 660-033-0130(38)(f) and complies with the applicable statewide planning goal (Goal 3). As such, subject to the recommended conditions, the Department recommends the Council find that the proposed facility complies with the Council’s Land Use standard.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 172.)

## CONCLUSIONS OF LAW

**Issue 1:** The Criterion (3) is not an applicable substantive criterion under OAR 345-022-0030(3) because it is not required by the statewide planning goals. Therefore, Criterion (3) does not apply to the Project.

**Issue 1.1:** The Project does not comply with Criterion (3) but otherwise complies with applicable statewide planning goals.

**Issue 2:** The Project is required to obtain a conditional use permit from the County, but pursuant to ORS 469.401(3), the County cannot require Applicant to comply with Criterion (3) as a requirement of the conditional use permit.

## OPINION

### A. *Standard of Review for Motion for Summary Determination*

As set out in the *Case Management Order*, OAR 137-003-0580 sets out requirements and the standard for granting summary determination in contested case proceedings. The rule states, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

In *Watts v. Board of Nursing*, 282 Or App 705 (2016), the Oregon Court of Appeals clarified the standard for granting motions for summary determination in administrative proceedings, stating:

The board can grant a motion for summary determination only if the relevant documents, including affidavits, create “no genuine issue as to any material fact that is relevant to resolution of the legal issue.” OAR 137-003-0580(6)(a) \* \* \*. If there is evidence creating a relevant fact issue, then no matter how “overwhelming” the moving party’s evidence may be, or how implausible the nonmoving party’s version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing.

282 Or App 714; emphasis in original. *See also Wolff v. Board of Psychologist Examiners*, 284 Or App 792 (2017).



Similarly, in *King v. Department of Public Safety Standards and Training*, 289 Or App 314 (2017), the court stated:

Issues may be resolved on a motion for summary determination only where the application of law to the facts requires a single, particular result. Therefore, the issues on summary determination must be purely legal.

289 Or App 321; internal citations omitted.

These cases make clear that summary determination may only be granted when there are no relevant facts in dispute and the question(s) to be resolved are purely legal. In this contested case, all parties/limited parties concede that there are no material facts in dispute and the question to be resolved, specifically, whether Council may find the Project in compliance with the Land Use standard despite the Project's lack of compliance with County Criterion (3), is a purely legal one. Therefore, this case is appropriate for resolution on summary determination.

**B. *Applicable Law – Facility Compliance with Statewide Planning Goals***

**1. *Council's Land Use Standard***

As pertinent here, ORS 469.503 states as follows:

In order to issue a site certificate, the Energy Facility Siting Council shall determine that the preponderance of the evidence on the record supports the following conclusions:

\* \* \* \* \*

(4) The facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.

ORS 469.504 addresses facility compliance with statewide planning goals and the exceptions thereto, and provides in pertinent part:

*(1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503 (4) if:*

*(a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or*

*(b) The Energy Facility Siting Council determines that:*

*(A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development*

Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646;

(B) For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section; or

(C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section.

\* \* \* \* \*

(5) Upon request by the State Department of Energy, the special advisory group established under ORS 469.480 shall recommend to the council, within the time stated in the request, the applicable substantive criteria under subsection (1)(b)(A) of this section. \* \* \* If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group. If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300 (11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. In making its determination, the council shall consult with the special advisory group and shall consider:

- (a) The number of jurisdictions and zones in question;
- (b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and
- (c) The level of consistency of the applicable substantive criteria from the various zones and jurisdictions.

(Emphasis added.)

To implement the requirements of ORS 469.503(4) and 469.504, the Council adopted

OAR 345-022-0030, the Land Use standard:

(1) To issue a site certificate, the Council must find that *the proposed facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.*

(2) The Council shall find that a proposed facility complies with section (1) if:

(a) The applicant elects to obtain local land use approvals under ORS 469.504(1)(a) and the Council finds that the facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or

(b) *The applicant elects to obtain a Council determination under ORS 469.504(1)(b) and the Council determines that:*

(A) *The proposed facility complies with applicable substantive criteria as described in section (3) and the facility complies with any Land Conservation and Development Commission administrative rules and goals and any land use statutes directly applicable to the facility under ORS 197.646(3);*

(B) *For a proposed facility that does not comply with one or more of the applicable substantive criteria as described in section (3), the facility otherwise complies with the statewide planning goals or an exception to any applicable statewide planning goal is justified under section (4); or*

(C) For a proposed facility that the Council decides, under sections (3) or (6), to evaluate against the statewide planning goals, the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under section (4).

(3) *As used in this rule, the “applicable substantive criteria” are criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application. If the special advisory group recommends applicable substantive criteria, as described under OAR 345-021-0050,<sup>5</sup> the Council shall apply them. If the special advisory group does not recommend applicable substantive criteria, the Council shall decide either to make its own determination of the applicable substantive criteria and apply them or to evaluate the proposed facility against the statewide planning goals.*

\* \* \* \* \*

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<sup>5</sup> OAR 345-021-0050 addresses distribution of a preliminary ASC and reviewing agency comments or recommendations. For purposes of this rule, the term “applicable substantive criteria” means “the criteria and standards that the local government would apply in making all land use decisions necessary to site the proposed facility in the absence of a Council proceeding[.]” OAR 345-021-0050(6)(b)(A).

(5) If the Council finds that applicable substantive local criteria and applicable statutes and state administrative rules would impose conflicting requirements, the Council shall resolve the conflict consistent with the public interest. In resolving the conflict, the Council cannot waive any applicable state statute.

(6) If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300(11)(a)(C) to (E) or for a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the Council shall apply the criteria recommended by the special advisory group. If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300(11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the Council shall review the recommended criteria and decide whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. In making the decision, the Council shall consult with the special advisory group, and shall consider:

- (a) The number of jurisdictions and zones in question;
- (b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and
- (c) The level of consistence of the applicable substantive criteria from the various zones and jurisdictions.

Emphasis added.

## ***2. The Umatilla County Development Code***

The UCDC implements Umatilla County’s Comprehensive Plan. UCDC §152.002.

UCDC Section §152.616 sets out the standards for review of conditional uses and land use decisions. The standards for review of a “Commercial Wind Power Generation Facility” are set out in §152.616(HHH). As pertinent here, UCDC §152.616(HHH)(6) provides:

### ***(6) Standards/Criteria of Approval***

The following requirements and restrictions apply to the siting of a Wind Power Generation Facility:

- (a) Setbacks. The minimum setback shall be a distance of not less than the following:

(1) From a turbine tower to a city urban growth boundary (UGB) shall be two miles. The measurement of the setback is from the centerline of a turbine tower to the edge of the UGB that was adopted by the city as of the date the application was deemed complete. (2) From turbine tower to land zoned Unincorporated Community (UC) shall be 1 mile. (3) From a turbine tower to a rural residence shall be 2 miles.

(2) From turbine tower to land zoned Unincorporated Community (UC) shall be 1 mile.

*(3) From a turbine tower to a rural residence shall be 2 miles.*

For purposes of this section, “rural residence” is defined as a legal, existing single family dwelling meeting the standards of UCDC §152.058 (F) (1)-(4), or a rural residence not yet in existence but for which a zoning permit has been issued, on a unit of land not a part of the Wind Power Generation Facility, on the date a Wind Power Generation Facility application is submitted. \* \* \* The measurement of the setback is from the centerline of the turbine tower to the center point of the rural residence.

Emphasis added.

### ***C. The Parties’ Cross-Motions***

Umatilla County requested a contested case challenging the Department’s recommendation that Council find the proposed facility in compliance with the Land Use standard, OAR 345-022-0030. All three parties filed motions for summary determination in this matter seeking favorable rulings on the issues set out above. In its motion, Umatilla County argues that the Project does not comply with the Land Use standard because:

(1) Criterion (3) constitutes “applicable substantive criteria” within the meaning of OAR 345-022-0030(3) applicable to the Project;

(2) The Project does not comply with Criterion (3); and

(3) The Project is required to obtain a conditional use permit from the County, and must demonstrate compliance with Criterion (3) to obtain the permit.

UC Amended Motion at 5-30.

The Department and Applicant, on the other hand, argue in their respective motions that:

(1) Criterion (3) does not meet the definition of “applicable substantive criteria” within the meaning of OAR 345-022-0030(3) because the applicable statewide planning goals do not require this setback;

(2) Even if Criterion (3) constitutes an applicable substantive criterion within the meaning of OAR 345-022-0030(3), Council is not obligated to require that Applicant comply with it; and

(3) Although the Project is required to obtain a conditional use permit from the County, the County cannot predicate issuance of the conditional use permit on the Project's compliance with Criterion (3).

ODOE Motion at 9-16; Applicant's Motion at 3-8. The parties' respective arguments are addressed below.

**1. Issue 1:** Whether Criterion (3) constitutes applicable substantive criteria within the meaning of OAR 345-022-0030(3).

As set out above, Applicant elected to obtain land use approval for the Project from the Council under ORS 469.504(1)(b). Under ORS 469.504(1)(b) there are three different methods for the Council to determine a proposed facility's compliance with statewide planning goals. The methods are described in ORS 469.504(1)(b), subparagraphs (A), (B), and (C), respectively:

- Under ORS 469.504(1)(b)(A), the Council must find that the Project “complies with applicable substantive criteria from the affected local government’s acknowledged comprehensive plan and land use regulations that are *required by the statewide planning goals and in effect on the date the application is submitted.*”
- Under ORS 469.504(1)(b)(B), if the Project does not comply with the local government’s applicable substantive criteria, then the Council must find that the Project “*otherwise compl[ies] with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified.*”
- And finally, under ORS 469.504(1)(b)(C), for a facility that Council elects to evaluate against the statewide planning goals in consultation with a special advisory group, the Council must find that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified.

Emphasis added.

The Land Use standard, OAR 345-022-0030(3), similarly provides:

As used in this rule, the “applicable substantive criteria” are criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances *that are required by the statewide planning goals and that are in effect on the date the applicant submits the application.*

Emphasis added.

In the Proposed Order, the Department evaluated the Project's compliance with statewide planning goals under ORS 469.504(1)(b)(A) and, alternatively, subparagraph (B). In its analysis under ORS 469.504(1)(b)(A), the Department recommended that Council find the Project complies with all applicable substantive criteria from Umatilla County's acknowledged comprehensive plan and land use regulations that are required by statewide planning goals.<sup>6</sup> The Department recommended the Council find that because specific setback distances between turbines and rural residences is not "required" by any statewide planning goal, Criterion (3) does not constitute applicable substantive criteria for purposes of ORS 469.504(1)(b)(A) and OAR 345-022-0030(3).<sup>7</sup>

In its alternative analysis under ORS 469.504(1)(b)(B) and (5), the Department acknowledged that the proposed locations for a few of the wind turbines would be less than two miles from a rural residence. Therefore, if Council were to evaluate the Project against the SAG's recommended criteria, the Project would not comply with Criterion (3). However, the Department recommended that Council find the Project's noncompliance with Criterion (3) is allowable under ORS 469.504(1)(b)(B) because the proposed facility otherwise complies with the applicable statewide planning goals.<sup>8</sup>

In its motion, Umatilla County argues that Criterion (3) constitutes "applicable substantive criteria" under OAR 345-022-0030(3) because the County SAG identified it as such. The County asserts that Council has no authority to review and/or overrule the SAG's determination, and therefore the Department erred by recommending that Council find the Project in compliance with all applicable substantive criteria. UC Amended Motion at 13-14. In addition, the County argues that, even if Council had jurisdiction to review and reject the SAG's identification of applicable substantive criteria, the Department erred by recommending that Council find Criterion (3) is not required by statewide planning goals. *Id.* at 14. The County maintains that Goal 2 (Land Use Planning) requires that the Project comply with Criterion (3). *Id.*

Applicant and the Department, on the other hand, argue that while the two-mile residential setback is part of the local substantive criteria, Criterion (3) is not "required" by any statewide planning goal, and therefore does not constitute applicable substantive criteria under OAR 345-022-0030(3). Both parties cite to the Proposed Order's analysis of Question 1,<sup>9</sup> where the Department found that although Criterion (3) is allowed by, and consistent with, Goal

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<sup>6</sup> See NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 95-100 (the analysis under Question 1).

<sup>7</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 100.

<sup>8</sup> See NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93 and 100-106 (the analysis under Question 2).

<sup>9</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 95-100.

3,<sup>10</sup> it is not required by Goal 3 or any of the 18 other statewide planning goals.<sup>11</sup> ODOE Motion at 9-14; Applicant Motion at 6. The Department maintains that because Criterion (3) is not required by any statewide planning goal, the Council is not required to find that the Project complies with Criterion (3) to establish compliance with statewide planning goals as required by ORS 469.503(4) and ORS 469.504(1)(b)(A).

For the reasons that follow, I agree with the Department and Applicant. I find that, as a matter of law, Criterion (3) is not an applicable substantive criterion under ORS 469.504 and OAR 345-022-0030(3) because it is not required by the statewide planning goals. And, because Criterion (3)'s two-mile setback does not constitute "applicable substantive criteria" under OAR 345-022-0030(3) it is not applicable to the Project and does not preclude Council from finding that the Project complies with statewide planning goals and approving a site certificate. I also agree with the Department and Applicant that, even if Criterion (3) were applicable to the Project, the Project otherwise complies with statewide planning goals under ORS 469.504(1)(b)(B).

*a. Meaning of "applicable substantive criteria"*

In ORS 469.504(1)(b)(A), the legislature described "applicable substantive criteria" as local land use regulations that are "required by the statewide planning goals and in effect on the date the application is submitted." The first sentence of OAR 345-022-0030(3) tracks the language in ORS 469.504(1)(b)(A) in describing "applicable substantive criteria." The second sentence of OAR 345-022-0030(3) then states "[i]f the special advisory group recommends applicable substantive criteria, as described under OAR 345-021-0050, the Council shall apply them."<sup>12</sup> The second sentence of OAR 345-022-0030(3) appears to address the provisions of

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<sup>10</sup> Statewide Planning Goal 3: Agricultural Lands states:

Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700.

OAR 660-015-0000(3).

<sup>11</sup> The 19 statewide planning goals established by the Land Conservation and Development Commission are listed in Finding of Fact no. 19.

<sup>12</sup> As noted previously, OAR 345-021-0050 discusses the distribution of a preliminary ASC to reviewing agencies for the proposed facility. In OAR 345-021-0050(6)(b)(A), the Department requires each local government with land use jurisdiction over the proposed facility to submit comments or recommendations including "a complete list of all applicable substantive criteria \* \* \* that are required by statewide planning goals and that are in effect" when the application was submitted. The rule then states, "'Applicable substantive criteria' means the criteria and standards that the local government would apply in making all land use decisions necessary to site the proposed facility in the absence of a Council proceeding." (Emphasis added.) However, to construe this definition of "applicable substantive criteria" in OAR 345-021-0050(6)(b)(A) broadly, *i.e.*, as including local land use regulations and standards in compliance with, but not necessarily required by, the statewide planning goals, would be inconsistent with the language in 469.504(1)(b)(A), OAR 345-022-0030(3), and the first sentence in subparagraph (6)(b)(A). Because the term "applicable substantive criteria" should be given the same meaning



ORS 469.504(5).

Because nothing in ORS Chapter 469 suggests otherwise, the term “applicable substantive criteria” should have the same meaning throughout ORS 469.504 and in OAR 345-022-0030. ORS 174.010; *see e.g., Pete’s Mountain Homeowners Association v. OWRD*, 236 Or App. 507, 518 (2010) (“It is a longstanding principle of statutory construction that words may be assumed to be used consistently throughout a statute.”); *see also Scott v. State Farm Mutual Auto. Ins.*, 345 Or. 146, 153, (2008) (“The legislature’s use of the same term, ‘proof of loss,’ in all three of the statute’s subsections indicates that the legislature intended the term to have the same meaning throughout the statute.”). If the legislature intended “applicable substantive criteria” to mean something other than local comprehensive plans and land use standards that are “required by the statewide planning goals and in effect on the date the application is submitted,” as stated in ORS 469.504(1)(b)(A), then it could and would have so indicated. *See State v. Gaines*, 346 Or 160, 171 (2009) (“[A]s this court and other authorities have long observed, there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.”)

Insofar as the County argues that the term “applicable substantive criteria” as used in OAR 345-022-0030(3) should be construed to require Council to apply local land use criteria and standards that are more restrictive than what the statewide planning goals require, such a reading of the rule is contrary to the provisions of ORS 469.504(1)(b)(A). A rule is not valid if it conflicts with the statutory policy directive. *See Planned Parenthood Assn. v. Dep’t of Human Services*, 297 Or 562 (1984). Consequently, “applicable substantive criteria” means the same thing throughout ORS 469.504 and in OAR 345-022-0030(3): local comprehensive plans and land use standards that are “required by the statewide planning goals and in effect on the date the application is submitted.”

In addition to principles of statutory construction, two Oregon Supreme Court decisions support this determination. First, in *Save Our Rural Oregon v. EFSC*, 339 Or 353 (2005), the court analyzed the intricacies of ORS 469.504, subparagraphs (1)(b) and (5), and the methods that Council may use to evaluate a proposed facility’s compliance with planning goals. There, as here, the applicant opted to have Council determine the proposed facility’s compliance with statewide planning goals. There, as here, Council designated a special advisory group (Klamath County) to recommend applicable substantive criteria for Council to use in making its determination. However, there, unlike here, the special advisory group did not make any recommendations.

In the absence of any recommendations from the special advisory group, Council evaluated the proposed facility under ORS 469.504(1)(b)(A) and (B), approving certain aspects under subparagraph (1)(b)(A) and others under subparagraph (1)(b)(B). Council found that the proposed facility met most of the local criteria but there were certain aspects of the proposed facility that did not conform. Council also found that the nonconforming aspects of the proposed facility did not meet statewide planning goals, but the proposed facility nevertheless qualified for

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throughout the EFSC statutes and rules, a broad reading of OAR 345-021-0050(6)(b)(A) should be rejected.

exceptions to those goals under ORS 469.504(2). Petitioners sought review of Council’s final order approving a site certificate.

On review, the court found that Council erred in interpreting paragraph ORS 469.504 (1)(b) to permit it to determine compliance with the applicable substantive criteria under subparagraph (1)(b)(A), and then, as to aspects of the facility that did not comply with those criteria, evaluate the facility under subparagraph (1)(b)(B). The court explained that Council “may choose to determine compliance with statewide planning goals by evaluating a facility under subparagraph (A) or (B) or (C), but that it may not combine elements or methods from more than one subparagraph, except to the extent that the chosen subparagraph itself permits.” However, the court also found that Council’s review was substantially the same as that contemplated in ORS 469.504(1)(b)(B), and therefore, Council’s review of the proposed facility satisfied the requirements of ORS 469.504.

In affirming Council’s order, the court explained:

[W]e conclude that the council’s review of the proposed facility met ORS 469.504’s requirements.

That conclusion is consistent with the legislature’s intention, apparent from the text and structure of ORS 469.504 as outlined above, to permit the council to review proposed energy facilities for compliance with both local land use regulations and statewide planning goals. The statewide planning goals are umbrella regulations establishing state policy in land use planning. ORS 197.225 — 197.250. State agencies, special districts, and local governments all are subject to the goals; local government plans and implementing regulations must comply with the goals. \* \* \*. In short, the statewide land use planning goals establish broad policy objectives, while the “applicable substantive criteria” provide specific ways of implementing those objectives through local regulation. Because the local criteria often are more specific than the goals, an ASC may fail to meet the local criteria but still meet the goals. ORS 469.504(1)(b)(B) allows a comprehensive inquiry that requires the council to determine compliance with the most specific criteria that it can: local “applicable substantive criteria” where possible; findings of compliance with the statewide planning goals in the alternative; and exceptions to the goals if necessary. That scheme is consistent with the overall land use planning structure in Oregon.

339 Or at 363, citations omitted.

The *Save Our Rural Oregon* decision is pertinent here in that the court addresses the meaning of the phrase “applicable substantive criteria” in ORS 469.504(1)(b):

The phrase “applicable substantive criteria” also is used in ORS 469.504(1)(b)(A) and (1)(b)(B). Subparagraph (1)(b)(A) clarifies that the legislature understood that phrase to denote criteria “from the affected local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide

planning goals and in effect on the date the application is submitted[.]” Because “use of the same term throughout a statute indicates that the term has the same meaning throughout the statute,” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P.2d 1143 (1993), we determine that the references to “applicable substantive criteria” in ORS 469.504(1)(b)(B) and (5) also denote those local regulations. *See also Columbia Steel Castings, Co. v. City of Portland*, 314 Or 424, 430, 840 P.2d 71 (1992) (“Generally, and in the absence of some specific indication of a contrary intent, terms are read consistently throughout a statute.”).

339 Or at 364, n. 7.

The other case that informs the compliance with statewide planning goals review under ORS 469.504(1)(b) is *Blue Mountain Alliance v. EFSC*, 353 Or 465 (2013). In *Blue Mountain Alliance*, the petitioners challenged a Council final order that approved an amended site certificate for the Helix Wind Power Facility in Umatilla County. Council approved a site certificate for the facility in 2009. Then, in 2012, Helix applied for an amendment, seeking to extend the construction start and completion dates for the facility. In the weeks following Helix’s amendment application, Umatilla County adopted Ordinance 2012-4 (Criterion (3) herein), requiring the two-mile setback between wind turbines and rural residences.<sup>13</sup> In challenging the site certificate amendment, the petitioners argued that Council should require Helix to comply with the two-mile setback pursuant to ORS 469.401(2).<sup>14</sup> In approving the amendment, Council determined that the ordinance did not apply to the determination whether the facility complied with statewide planning goals under ORS 469.504(1). Council also found that because the ordinance constituted a “land use regulation” for purposes of ORS 469.504(1), it fell outside the scope of the “abide by local ordinances” clause of ORS 469.401(2).

In affirming Council’s final order, the court found that Council correctly characterized the two-mile setback requirement as a “land use regulation” subject to consideration under ORS 469.504(1)(b). The court also found that, under ORS 469.504(1)(b)(A), Council properly declined to apply the setback requirement to the facility because the criterion was not “in effect” on the amendment application date. The court explained:

Under the first part of ORS 469.504(1)(b)(A), the council must determine that the

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<sup>13</sup> The setback provision in Ordinance 2012-4 was later codified as UCDC §152.616(HHH)(6)(a)(3).

<sup>14</sup> ORS 469.401(2) states, in pertinent part:

The site certificate or amended site certificate shall contain conditions for the protection of the public health and safety, for the time for completion of construction, and to ensure compliance with the standards, statutes and rules described in ORS 469.501 and 469.503. The site certificate or amended site certificate shall require both parties to abide by local ordinances and state law and the rules of the council in effect on the date the site certificate or amended site certificate is executed \* \* \* [.]

In *Blue Mountain Alliance*, the petitioners contended that Umatilla County adopted the ordinance (Criterion (3)) as a public health and safety measure to protect against turbine noise. 353 Or at 468.

facility complies with substantive criteria—derived from the local government’s “acknowledged comprehensive plan and land use regulations”—that are (1) required by statewide planning goals; and (2) “in effect” on the certificate or amendment application date. \* \* \* We agree with the council and Helix that the council was not required to consider the ordinance in its determination whether the facility complied with statewide planning goals because the ordinance was not “in effect” on the Amendment # 2 application date.

353 Or at 473-74. The court later summarized its determination as follows:

As previously explained, we agree with the council that (1) Ordinance 12-04 qualifies as a “land use regulation [ ]” within the meaning of ORS 469.504(1)(b)(A); and, (2) because the ordinance was not “in effect” on the Amendment # 2 application date, it should not be considered as part of the substantive criteria assessment set out under that statute. The council did not err in applying ORS 469.504(1)(b)(A) in that manner.

353 Or at 487.

The *Blue Mountain Alliance* opinion establishes that Criterion (3) is properly characterized as a “land use regulation”<sup>15</sup> subject to consideration under ORS 469.504(1)(b)(A) and OAR 345-022-0030. Because Criterion (3) was not in effect when Helix submitted its amendment application, it was not applicable to the wind energy facility. The court did not need to address whether the two-mile setback is “required by statewide planning goals.”

*b. Whether Criterion (3) is required by the statewide planning goals*

As discussed above, Oregon’s LCDC has established 19 statewide goals for and use planning. In the Proposed Order, the Department analyzed Criterion (3) under the pertinent goals applicable to the Project, *i.e.*, Goal 3, Agriculture and Goal 14, Urbanization. With regard to Goal 3, the Department explained:

Criterion (3) was adopted by Umatilla County to meet “local concerns,” as allowed by OAR 660-033-0120 and 0130 which is consistent with Goal 3. This is further evidenced by the fact that the Department is unaware of any other county that has adopted a similar setback requirement between wind turbines and residences. The Department therefore recommends Council conclude that while Criterion (3) is both allowed by and consistent with Goal 3, it is nevertheless not “required” by Goal 3.

NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 98.

---

<sup>15</sup> “Land use regulation” is defined in ORS 197.010(11) as “any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

With regard to Goal 14, the Department noted that LCDC has adopted numerous rules in OAR Chapter 660 to implement the urbanization goal, including rules relating to public facilities planning, transportation planning, urban growth boundaries, and periodic review. The Department noted, however, that none of these urban planning rules requires specific setback distances between wind turbines and rural residences. Thus, the Department recommended that Council conclude that Criterion (3) is also not required by Goal 14. NHWAPDoc1 Proposed Order on ASC 2022-08-04 at 100.

The Department also considered Criterion (3) in light of the remaining 17 statewide goals and determined that none of these goals requires specific setback distances between wind turbines and rural residences. Accordingly, in the Proposed Order, the Department recommended that Council conclude that Criterion (3) is not an applicable substantive criterion that is required by any statewide planning goal. *Id.*

In challenging the Proposed Order, Umatilla County bears the burden of establishing that Criterion (3) is required by the statewide planning goals. The County does not contest the Department's analysis of Criterion (3) under Goal 3 or Goal 14. Rather, in its motion and response, the County asserts that Criterion (3) is required by Goal 2, Land Use Planning. The County argues that the two-mile setback from rural residences is the County's "expression of statewide planning goal requirements," and is acknowledged by LCDC as such. UC Amended Motion at 15. The County adds that, "Goal 2 reflects the foundational premise underpinning the Oregon land use planning program (viz.), that the requirements of the state planning goals are expressed by, and reflected in, acknowledged local land use rules." UC Response at 2.

Other than arguing that LCDC has acknowledged Umatilla County's comprehensive plan, the County offers no explanation or analysis as to how Goal 2 requires that the County adopt a two-mile setback between wind turbines and rural residences. Indeed, Goal 2 requires cities and counties to adopt comprehensive plans and to enact land use regulations to implement those plans. Goal 2 further requires that all comprehensive plans and adopted land use regulations comply with the statewide planning goals. ORS 197.175; 197.250, 215.050. While Goal 2 requires that comprehensive plans and local land use regulations be consistent with statewide goals, nothing in Goal 2 specifically requires a local government to enact regulations establishing setbacks for wind turbines. Thus, while Criterion (3) is a land use regulation enacted to implement Umatilla County's acknowledged comprehensive plan, and the County's plan is consistent with and in compliance with Goal 2, the County has not shown that Criterion (3) is required by Goal 2.

Moreover, as the Department notes, the fact that the County adopted the two-mile setback to mitigate turbine noise, visual impacts, and lost residential property values<sup>16</sup> rather than in response to any statewide planning goal further demonstrates that Criterion (3) is not an applicable substantive criterion that is required by statewide planning goals.

---

<sup>16</sup> See NHWAPDoc1 Proposed Order on ASC 2022-08-04 at 97; see also *Blue Mountain Alliance*, 353 Or at 468 (petitioners argued that a setback of less than two miles would not adequately protect against turbine noise) and Umatilla County's Response to Nolin Hills Wind LLC's MSD, Exhibit 1.

Because Criterion (3) is not a land use regulation that is required by the statewide planning goals, it is not an applicable substantive criterion within the meaning of ORS 469.504(1)(b)(A) and OAR 345-022-0030(3) that applies to the Project. Consequently, Issue 1 herein must be answered in the negative. The Department did not err in recommending that Council find that the Project need not comply with Criterion (3) to satisfy the Land Use Standard.

*c. Evaluation under ORS 469.504(1)(b)(B) and (5)*

In the Proposed Order, the Department addressed whether Council must nevertheless consider Criterion (3) as part of the substantive criteria assessment under ORS 469.504(1)(b)(B) and (5), because the SAG identified it as applicable, even though it is not required by the statewide planning goals. The Department determined that the proposed facility or a related or supporting facility (the proposed UEC Cottonwood transmission line) will pass through more than three zones in the county, and as authorized by ORS 469.504(5), evaluated the Project against the statewide planning goals. The Department further determined that, although some wind turbine locations will not comply with Criterion (3), the entire proposed facility complies with applicable statewide planning goals and therefore the Project's non-compliance with Criterion (3) is authorized under ORS 469.504(1)(b)(B). NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 100.

In challenging this determination, the County argues that because the SAG identified Criterion (3) as applicable to the Project, the Council must apply it under ORS 469.504(1)(b)(B) and (5).<sup>17</sup> The County relies on the second scenario in ORS 469.504(5), which states:

If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group.

The County also asserts that the Department erred in characterizing the UEC Cottonwood transmission line as a related or supporting facility, and erred in concluding that the proposed facility or a related or supporting facility would pass through more than three zones. UC Amended Motion at 6. The County argues that because the wind generation facility is limited to the EFU zone, the third scenario of ORS 469.504(5) is inapplicable and, under the second scenario, Council must apply the substantive criteria identified by the SAG. *Id.* at 20.

The County's contentions are not persuasive. First, as discussed above, "applicable substantive criteria" must be given the same meaning throughout the statute. Because Criterion (3) is not required by statewide planning goals, it is not an applicable criterion under ORS 469.504(1)(b) and (5), even though the SAG recommended it as such. I reject the County's

---

<sup>17</sup> The County does not contest the Department's finding that "while some wind turbine locations will not comply with Criterion (3), the entire proposed facility nevertheless complies with applicable Statewide Planning Goals." NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 106.

claim that the Department and Council have no jurisdiction to review or reverse the SAG’s identification of Criterion (3) as an applicable substantive criterion. The legislature, in ORS 469.504(1)(b), set the standard for applicable substantive criteria for purposes of Council review for compliance with statewide planning goals. To the extent the local government/special advisory group recommends local criteria not required by statewide planning goals, Council has no obligation to apply the criteria under ORS 469.504(5).

Second, the County has not established that the Department erred evaluating the Project against the statewide planning goals under the third scenario of ORS 469.504(5). The County’s contention that the UEC Cottonwood transmission line is not a related or supporting facility is untenable. As set out in ORS 469.300(24) “related or supporting facilities” means:

*[A]ny structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines,<sup>18</sup> reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures. \* \* \*.*

Emphasis added. In OAR 345-001-0010(27), the Department explained as follows:

“Related or supporting facilities” as defined in ORS 469.300. The Council interprets the terms “proposed to be constructed in connection with” to mean that *a structure is a related or supporting facility if it would not be built but for construction or operation of the energy facility.* “Related or supporting facilities” does not include any structure existing prior to construction of the energy facility, unless such structure must be substantially modified solely to serve the energy facility.

Emphasis added.

In the Proposed Order, the Department found that although the proposed facility will almost entirely be located in the EFU zone, the proposed UEC Cottonwood transmission line route would pass through more than three zones. NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93, n. 30. In its motion, the County argues that the UEC Cottonwood transmission line is not a “related or supporting facility” because it will be upgraded regardless of the Project and will serve a variety of energy facilities and projects. UC Amended Motion at 7. However, the County has not presented evidence to support this contention. Further, the County does not dispute the Proposed Order’s findings that the proposed UEC Cottonwood route would include construction of a new segment and substantial modifications to existing

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<sup>18</sup> “Associated transmission lines” is defined in ORS 469.300(3) as “new transmission lines constructed to connect an energy facility to the first point of junction of such transmission line or lines with either a power distribution system or an interconnected primary transmission system or both or to the Northwest Power Grid.”

segments.<sup>19</sup> Therefore, the County has not established that the Department erred in evaluating the UEC Cottonwood transmission line as a related or supporting facility, or that the Department erred in finding that the proposed facility or a related or supporting facility will pass through more than three zones within Umatilla County.

In summary, the County has not sustained its burden on Issue 1. The County has not demonstrated that Criterion (3) is an “applicable substantive criterion” within the meaning of OAR 345-022-0030(3) that applies to Council’s evaluation of the Project under ORS 469.504(1)(b). Moreover, even if Criterion (3) was applicable to Council’s evaluation, the County has not established that the Department erred in its evaluation under ORS 469.504(1)(b)(B) and (5). Council has no obligation to require that the Project comply with Criterion (3), because the Project otherwise complies with the applicable statewide planning goals. For these reasons, the County is not entitled to a favorable ruling on Issue 1.

On the other hand, because Criterion (3) is not an applicable substantive criterion within the meaning of ORS 469.504 and the Land Use standard, and Applicant has demonstrated that the Project complies with statewide planning goals (or is entitled to an exception), the Department and Applicant are entitled to favorable rulings on Issue 1.

***Issue 1.1:*** Whether the Project complies with Criterion (3).

It is undisputed that the Project, as proposed, would not comply with Criterion (3).<sup>20</sup> However, for the reasons discussed above, the Project need not comply with Criterion (3) because the two-mile setback is not required by the statewide planning goals. The Project complies with all applicable statewide planning goals and all applicable local land use regulations that are required by the statewide planning goals.

Because it is immaterial to Council’s review under the Land Use standard whether the Project complies with Criterion (3), the County is not entitled to a favorable ruling on Issue 1.1.

***Issue 2:*** Whether the Project requires a conditional use permit from the County.

All parties agree that the Project requires a conditional use permit from the County. Indeed, in the Proposed Order, the Department included, as Recommended Land Use Condition 1, the requirement that, prior to construction, Applicant obtain conditional use permits and zoning permits from the County. NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 80.

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<sup>19</sup> As set out in the Proposed Order, the UEC Cottonwood route alternative would be approximately 25.3 miles in length, and consist of approximately 8.4 miles of new single-circuit 230-kV transmission line, approximately 9.6 miles of replacing an existing 12.47-kV with a 230-kV line, and approximately 7.3 miles of upgrading an existing 115-kV line to a double-circuit 230/115-kV line. NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 29.

<sup>20</sup> See NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93 (“The proposed facility would not comply with this 2-mile setback because 8 proposed wind turbine locations are less than 2 miles from approximately 16 rural residences.”)



Pursuant to ORS 469.401(3),<sup>21</sup> once the Council issues a site certificate, the County must issue the conditional use permit (and all other county permits contemplated by the site certificate) without further hearings or other proceedings and subject only to the conditions set out in the site certificate. *See also Save Our Rural Oregon*, 339 Or at 356-57 (recognizing that “council’s decision to issue a site certificate binds state, county, and city governments in accordance with the council’s determination and requires state agencies and local governments to issue any permits specified in the site certificate without further proceedings.”)

Where the parties disagree is whether, in obtaining the conditional use permit, Applicant must demonstrate compliance with Criterion (3). In its motion, the County acknowledges that it is bound by Council’s determination on the applicability of Criterion (3) and therefore this question “will be answered under the first and second issues above.” UC Amended Motion at 4.

As explained in Issues 1 and 1.1 above, Applicant is not required to demonstrate compliance with Criterion (3) because: (1) the two-mile setback for wind turbines and rural residences is not an applicable substantive criterion under ORS 469.504 and OAR 345-022-0030(3); and (2) the Project otherwise complies with the applicable statewide planning goals. Therefore, the County is not entitled to a favorable ruling on Issue 2.

### **RULINGS ON MOTIONS**

Umatilla County’s Amended Motion for Summary Determination is DENIED.

The Department’s Motion for Summary Determination is GRANTED.

Nolin Hills LLC’s Motion and Legal Argument for Summary Determination is GRANTED.

### **ORDER**

I propose the Oregon Department of Energy, Energy Facility Siting Council issue a Final Order granting the requested site certificate consistent with the Department’s Proposed Order dated August 4, 2022, including the recommended site certificate conditions.

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<sup>21</sup> ORS 469.401(3) states, in pertinent part:

(3) Subject to the conditions set forth in the site certificate or amended site certificate, any certificate or amended certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility. After issuance of the site certificate or amended site certificate, any affected state agency, county, city and political subdivision shall, upon submission by the applicant of the proper applications and payment of the proper fees, but without hearings or other proceedings, promptly issue the permits, licenses and certificates addressed in the site certificate or amended site certificate, subject only to conditions set forth in the site certificate or amended site certificate. \* \* \*

Alison Greene Webster  
Senior Administrative Law Judge  
Office of Administrative Hearings

---

**Exceptions to the Administrative Law Judge's Proposed Order**

EXCEPTIONS. Pursuant to OAR 345-015-0085(5) parties and limited parties may file exceptions to this proposed contested case order. Any party or limited party filing an exception must: a) in the exception(s) specifically identify the finding of fact, conclusion of law or recommended site certificate conditions to which the party excepts and state the basis for the exception; and b) email the exception(s) to Jesse Ratcliffe, legal counsel to EFSC in this contested case at [Jesse.D.Ratcliffe@state.or.us](mailto:Jesse.D.Ratcliffe@state.or.us) and to the other parties/limited parties and the Office of Administrative Hearings no later than 5:00 p.m. Pacific Time on **June 12, 2023**.

RESPONSES. Pursuant to OAR 345-015-0085(6), parties and limited parties may file responses to exceptions. All responses must be emailed to Mr. Ratcliffe, the other parties/limited parties and the Office of Administrative Hearings no later than 5:00 p.m. Pacific Time on **June 27, 2023**.

EFSC HEARING ON PROPOSED CONTESTED CASE ORDER AND EXCEPTIONS. The Council will conduct a hearing to review the Proposed Contested Case Order and the parties' and limited parties' exceptions and responses. Parties and limited parties will be provided notice of that hearing once scheduled.

**CERTIFICATE OF MAILING**

On May 12, 2023, I mailed the foregoing RULING ON MOTIONS FOR SUMMARY DETERMINATION AND PROPOSED CONTESTED CASE ORDER issued on this date in OAH Case No. 2022-ABC-05140.

By: Electronic Mail

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Cortney Hokanson  
Hearing Coordinator

**OAH Case No. 2022-ABC-05140 - Umatilla County's Exceptions to Proposed Order**

Sarah Mitchell &lt;sm@klgpc.com&gt;

Mon 6/12/2023 4:08 PM

To: jesse.d.ratcliffe@state.or.us <jesse.d.ratcliffe@state.or.us>; OED\_OAH\_REFERRAL \* OED <oed\_oah\_referral@oregon.gov>; WEBSTER Alison G \* OAH <alison.g.webster@employ.oregon.gov>; Fossum, Linnea <Linnea.Fossum@tetrattech.com>; mmartin@capitalpower.com <mmartin@capitalpower.com>; tim.mcmahan@stoel.com <tim.mcmahan@stoel.com>; ESTERSON Sarah \* ODOE <sarah.esterson@energy.oregon.gov>; SLOAN Kathleen \* ODOE <kathleen.sloan@energy.oregon.gov>; CORNETT Todd \* ODOE <Todd.CORNETT@energy.oregon.gov>; Rowe Patrick G <patrick.g.rowe@doj.state.or.us>; Gulevkin Svetlana M <svetlana.m.gulevkin@doj.state.or.us>  
Cc: Wendie Kellington <wk@klgpc.com>; Doug Olsen <doug.olsen@umatillacounty.gov>; robert.waldher@umatillacounty.gov <robert.waldher@umatillacounty.gov>; Carol.johnson@umatillacounty.gov <carol.johnson@umatillacounty.gov>

📎 1 attachments (544 KB)

Umatilla County's Exceptions to Proposed Contested Case Order.pdf;

Good afternoon,

Please find attached for filing and service Limited Party Umatilla County's Exceptions to the Proposed Order in the matter of Nolin Hills Wind Power Project, OAH Case No. 2022-ABC-05140. Thank you for your courtesies.

Best,  
Sarah**Sarah C. Mitchell | Associate Attorney**

P.O. Box 159

Lake Oswego, OR 97034

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1 **BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**  
2 **STATE OF OREGON**  
3 **for the**  
4 **OREGON DEPARTMENT OF ENERGY, ENERGY FACILITY SITING DIVISION**  
5

IN THE MATTER OF: ) **LIMITED PARTY UMATILLA**  
) **COUNTY’S EXCEPTIONS TO**  
**NOLIN HILLS WIND POWER** ) **PROPOSED CONTESTED CASE**  
**PROJECT** ) **ORDER**  
)

OAH Case No. 2022-ABC-05140

6  
7 **I. INTRODUCTION**  
8

9 On May 12, 2023, the Administrative Law Judge (“ALJ”) issued “Rulings on Motions for  
10 Summary Determination and Proposed Contested Case Order” (“PCCO”). The PCCO states the  
11 ALJ’s findings of fact and conclusions of law, denies limited party Umatilla County’s  
12 (“County’s”) Amended Motion for Summary Determination, grants the applicant Nolin Hills  
13 LLC’s (“Applicant’s”) and Oregon Department of Energy’s (“ODOE’s” or “Department’s”)  
14 motions for summary determination, and proposes that the Energy Facility Siting Council  
15 (“EFSC” or “Council”) “issue a Final Order granting the requested site certificate consistent with  
16 the Department’s Proposed Order dated August 4, 2022[.]” PCCO, p. 32.  
17

18 The PCCO at p. 33 provides that, pursuant to OAR 345-015-0085(5), parties and limited  
19 parties may file exceptions to the PCCO by no later than 5:00pm on June 12, 2023. In this  
20 regard, OAR 345-015-0085(5) provides:  
21

22 “Parties and limited parties may file exceptions to the proposed order within the  
23 time set by the hearing officer, not to exceed 30 days after the hearing officer issues  
24 the proposed order. A party filing exceptions shall serve a copy of the exceptions  
25 on all other parties and limited parties. In an exception, the party shall specifically  
26 identify the finding of fact, conclusion of law or, in contested case proceedings on  
27 an application for a site certificate or a proposed site certificate amendment,  
28 recommended site certificate condition to which the party excepts and shall state  
29 the basis for the exception.”  
30

31 Pursuant to the PCCO and OAR 345-015-0085(5), the County files Exceptions as stated  
32 below.  
33

34 The County disagrees with many of the PCCO’s findings of fact, conclusions of law and  
35 recommended site certificate conditions. The County Amended Motion for Summary  
36 Determination and responses demonstrate that the ALJ’s findings of factual and legal  
37 conclusions in the PCCO are either inaccurate, unsupported by substantial evidence in the  
38 record, misinterpret applicable law, or are beyond the Council’s authority (jurisdiction) to  
39 decide.  
40

1 The County does not waive any issue that it raised in its Amended Motion for Summary  
2 Determination and responses to the Motions for Summary Determination filed by ODOE and the  
3 applicant. The County notes that the filing of the exceptions herein is not required to preserve an  
4 argument that is already before the Council for an appeal to the Oregon Supreme Court. In this  
5 regard, in *Wolff v. Bd. of Psychologist Examiners*, 284 Or App 792 (2017), the Oregon Court of  
6 Appeals explained that “where, as here, the applicable statutes and rules do not make the filing of  
7 exceptions a mandatory prerequisite to judicial review, ‘filing exceptions is not necessary to  
8 preserve an argument that is already before the board.’ *Watts v. Board of Nursing*, 282 Or.App.  
9 705, 709, 386 P.3d 34 (2016). Rather, it is sufficient that the petitioner raised the issues before  
10 the ALJ. *Id.*” 284 Or App at 802-03.

11  
12 **II. SPECIFIC EXCEPTIONS**

13  
14 **A. Erroneous Findings of Fact**

- 15  
16 *i. The Proposed Facility would not pass through more than three zones, including*  
17 *Umatilla County’s Agri-Business zone. The PCCO, p. 6, Finding of Fact #12 to the*  
18 *contrary is wrong and is not supported by substantial evidence. The record does not*  
19 *support the PCCO findings (PCCO, p. 30-31) that conclude that the UEC*  
20 *Cottonwood transmission line is a related or supporting facility (a “facility”)<sup>1</sup> to the*  
21 *proposed wind and solar energy facilities.*

22  
23 PCCO Finding of Fact #12 states:

24  
25 “The proposed facility would be located in an Exclusive Farm Use (EFU) zone,  
26 with a grid-interconnection transmission line (the proposed UEC Cottonwood  
27 transmission line) that would intersect three additional zones: Rural Tourist  
28 Commercial, Agri-Business, and Light Industrial. (NHWAPPDoc2-10 ASC  
29 Exhibit K Land Use 2022-01-31 at 8-9 of 158, and attached Figure K-2; *see also*  
30 NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 123.)” PCCO, p. 6.

31  
32 The County also takes exception to the PCCO findings at PCCO p 30-31:

33  
34 “Second, the County has not established that the Department erred evaluating the Project  
35 against the statewide planning goals under the third scenario of ORS 469.504(5). The  
36 County’s contention that the UEC Cottonwood transmission line is not a related or  
37 supporting facility is untenable. As set out in ORS 469.300(24) “related or supporting  
38 facilities” means:

39  
40 *“[A]ny structure, proposed by the applicant, to be constructed or*  
41 *substantially modified in connection with the construction of an energy*  
42 *facility, including associated transmission lines, 18 reservoirs, storage*

---

<sup>1</sup> In order to be a “facility” there must be an “energy facility” and a “related or supporting facility”. ORS 469.300(14). The PCCO refers to the Cottonwood line as a “facility” but it cannot be a “facility” because it fails to meet the definition of a “related or supporting facility” as a matter of fact and law, as is demonstrated below.

1 facilities, intake structures, road and rail access, pipelines, barge basins,  
2 office or public buildings, and commercial and industrial structures. \* \* \*.

3  
4 “Emphasis added. In OAR 345-001-0010(27), the Department explained as follows:

5  
6 “Related or supporting facilities” as defined in ORS 469.300. The Council  
7 interprets the terms “proposed to be constructed in connection with” to mean  
8 that *a structure is a related or supporting facility if it would not be built but*  
9 *for construction or operation of the energy facility.* “Related or supporting  
10 facilities” does not include any structure existing prior to construction of the  
11 energy facility, unless such structure must be substantially modified solely to  
12 serve the energy facility.

13  
14 “Emphasis added.

15  
16 “In the Proposed Order, the Department found that although the proposed facility  
17 will almost entirely be located in the EFU zone, the proposed UEC Cottonwood  
18 transmission line route would pass through more than three zones.  
19 NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93, n. 30. In its motion,  
20 the County argues that the UEC Cottonwood transmission line is not a “related  
21 or supporting facility” because it will be upgraded regardless of the Project and  
22 will serve a variety of energy facilities and projects. UC Amended Motion at 7.  
23 However, the County has not presented evidence to support this contention.  
24 Further, the County does not dispute the Proposed Order’s findings that the  
25 proposed UEC Cottonwood route would include construction of a new segment  
26 and substantial modifications to existing segments.<sup>19</sup> Therefore, the County has  
27 not established that the Department erred in evaluating the UEC Cottonwood  
28 transmission line as a related or supporting facility, or that the Department erred  
29 in finding that the proposed facility or a related or supporting facility will pass  
30 through more than three zones within Umatilla County.”

31  
32 Basis for Exception

33  
34 This exception focuses on the PCCO’s factual errors, but necessarily involves mixed  
35 questions of fact and law. The PCCO’s finding that the proposed UEC Cottonwood transmission  
36 line is part of the “proposed facility” apparently as a “related or supporting facility” is not  
37 supported by substantial evidence in the record. The PCCO’s conclusion that the Cottonwood  
38 line is a “related or supporting facility” (as a “facility”), is wrong and misconstrues applicable  
39 law, as explained below.

40  
41 As explained below under “Erroneous Conclusions of Law”, section (B)(iii), the  
42 proposed energy facility is a proposed wind energy and solar energy facility. “Related or  
43 supporting facilities” for the Nolin Hills energy facility *could potentially* consist of 230 kV high  
44 voltage transmission line facilities, but the proposal does not seek any particular transmission  
45 facility for the energy facility that will be built “but for” the energy facilities connecting to them.  
46 Moreover, the applicant proposes no location or route for any potential related or supporting  
47 transmission facilities. Instead, the proposal that the PCCO recommends be approved seeks



1 approval for two different possibilities – two *alternative* high voltage transmission lines.  
2 Proposed Order (“PO”), p. 20-21. One of the *alternative* high voltage transmission lines runs  
3 from the wind and solar energy facilities to the Stanfield Substation to intertie with BPA  
4 facilities. PO, p. 21; NHWAPPDoc2-2 ASC Exhibit C. Project Location\_2022-01-31, p. 16.  
5 The other potential alternative (the Cottonwood Line) ties into a 230 kV line and evidence in the  
6 record supports that UEC will construct that Cottonwood line regardless of whether the proposed  
7 wind or solar energy facilities are constructed. NHWAPPDoc2-1 ASC Exhibit B. Project  
8 Desc\_2022-01-31, p. 7. Potential alternative transmission lines are not “related or supporting  
9 facilities” because they are not built, or substantially modified, “but for” connecting to or to  
10 necessarily be connected to proposed energy facilities at all, as is explained in greater detail  
11 below. Considering the Cottonwood line to be a related or supporting facility here, is  
12 particularly suspect, where the late added “Cottonwood line” that may or may not be used by the  
13 proposed energy facilities, is the *only* potential facility that *could* pass through “more than three  
14 zones” and is the *only* basis for the applicant and ODOE’s claim to have the right to ignore the  
15 County’s Criterion (3) under ORS 469.504(5)’s “three or more zones” analysis (discussed later  
16 below). The truth is that the record does not support the PCCO’s conclusion that there are *any*  
17 related or supporting facilities as that term is defined in state law, that passes through more than  
18 three zones. The PCCO errs in concluding otherwise as a matter of law and fact.  
19

20 If the Cottonwood transmission line can theoretically be said to be a related or supported  
21 facility to the proposed wind and solar “energy facility” if it otherwise met the statutory  
22 definition of a related or supporting facility (a point the County does not concede), the PCCO’s  
23 finding that the Cottonwood line would cross four zones within the County, including the Agri-  
24 Business (“AB”) Zone, is wrong and is not supported by substantial evidence in the record. This  
25 is because the evidence the PCCO relies upon to conclude that the Cottonwood line is a related  
26 or supporting facility does not establish that it is a “related or supporting facility” as those terms  
27 are defined in state law, in fact.  
28

29 ORS 469.300(24)<sup>2</sup> expressly states that “related or supporting facilities” are “any  
30 *structure*” “constructed” in connection with a proposed energy facility. The statute makes clear  
31 that a “related or supporting facility” is a physical feature that is “constructed” and then “in  
32 connection with the proposed energy facility.” The PCCO erroneously relies upon an “analysis  
33 area”<sup>3</sup> that is not physical and is not constructed, to conclude that the Cottonwood transmission  
34 line is a “related or supporting facility” that passes through more than three zones to trigger the  
35 “third scenario” of ORS 469.504(5). An “analysis area” is not a physical feature and there is no  
36 dispute that an “analysis area” is not constructed. The PCCO errs in deciding that the fact that

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<sup>2</sup> ORS 469.300(24) defines “related or supporting facilities” as follows: “any structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures. “Related or supporting facilities” does not include geothermal or underground gas storage reservoirs, production, injection or monitoring wells or wellhead equipment or pumps.”

<sup>3</sup> The “analysis area” is “[t]he area within the Site Boundary and 0.5 miles from the Site Boundary.” OAR 345-001-0010(31), defines “site boundary” to mean: “the *perimeter* of the site of a proposed energy facility, *its related or supporting facilities, all temporary laydown and staging areas and all corridors and micrositing corridors proposed by the applicant.*” (Emphases supplied).

1 the Cottonwood transmission line’s analysis area passes through more than three zones, means  
2 that it is a related or supporting facility as defined in state law that passes through more than  
3 three zones. There is no evidence to support the PCCO’s determination that there is a related or  
4 supporting facility for the Nolin Hills “energy facility” that passes through more than three  
5 zones.  
6

7 The applicant itself in its application in the record acknowledged that the UEC  
8 Cottonwood transmission line would only pass through *three* County zones – EFU, Light  
9 Industrial and Rural Tourist Commercial – and that the *site boundary*, but not the transmission  
10 line itself, would be located within the Agri-Business zone. A “site boundary” is not a structure,  
11 it is not a physical feature, and it is not constructed. Therefore, the PCCO errs in concluding that  
12 it is a “related or supporting facility” that will pass through four zones. In this regard, the  
13 applicant’s revised Preliminary Application for Site Certificate (“revised pASC”) at p. 1086-87,  
14 states that “[m]ost of the UEC transmission line (25 miles) is in the EFU zone \* \* \* [A] small  
15 portion of the UEC transmission line is located in Light Industrial (0.4 mile), and Rural Tourist  
16 Commercial (0.3 mile). NHWAPPDoc6 Revised pASC 2020-11-06, p. 1086-87 of 2228. In  
17 addition, *a portion of the Site Boundary* associated with the UEC Cottonwood transmission line  
18 (0.35 acre) *is located within the Agri-Business Zone.*” (Emphases supplied.) Substantial  
19 evidence does not support the conclusion that the “analysis area”, including the “site boundary”,  
20 is a related or supporting facility in the first place, or that the proposed facility passes through  
21 more than three zones, or specifically that it passes through four zones and the PCCO errs in  
22 concluding otherwise.  
23

24 The PCCO’s finding that the Cottonwood line passes through four zones is pivotally  
25 important and relates to the “third scenario” described in ORS 469.504(5).<sup>4</sup> The ORS  
26 469.504(5) “third scenario” provides the Council a specific way to evaluate the proposed  
27 facility’s compliance with the “applicable substantive criteria” recommended by the local  
28 governing body that includes essentially not applying it at all, in the limited circumstance where

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<sup>4</sup> ORS 469.504(5) provides, in relevant part:

“\* \* \* If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300(11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. \* \* \*”

1 the proposed *energy facility*<sup>5</sup> is one that is defined in ORS 469.300(11)(a)(C) to (E)<sup>6</sup> or if a  
2 *related or supporting facility*<sup>7</sup> passes through more than three zones in any one jurisdiction.<sup>8</sup>

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<sup>5</sup> “(a) “Energy facility” means any of the following:

- “(A) An electric power generating plant with a nominal electric generating capacity of 25 megawatts or more, including but not limited to:
  - “(i) Thermal power;
  - “(ii) Combustion turbine power plant; or
  - “(iii) Solar thermal power plant.
- “(B) A nuclear installation as defined in this section.
- “(C) A high voltage transmission line of more than 10 miles in length with a capacity of 230,000 volts or more to be constructed in more than one city or county in this state, but excluding:
  - “(i) Lines proposed for construction entirely within 500 feet of an existing corridor occupied by high voltage transmission lines with a capacity of 230,000 volts or more;
  - “(ii) Lines of 57,000 volts or more that are rebuilt and upgraded to 230,000 volts along the same right of way; and
  - “(iii) Associated transmission lines.
- “(D) A solar photovoltaic power generation facility using more than:
  - “(i) 160 acres located on high-value farmland as defined in ORS 195.300 (Definitions for ORS 195);
  - “(ii) 1,280 acres located on land that is predominantly cultivated or that, if not cultivated, is predominantly composed of soils that are in capability classes I to IV, as specified by the National Cooperative Soil Survey operated by the Natural Resources Conservation Service of the United States Department of Agriculture; or
  - (iii) 1,920 acres located on any other land.
- (E) A pipeline that is:
  - “(i) At least six inches in diameter, and five or more miles in length, used for the transportation of crude petroleum or a derivative thereof, liquefied natural gas, a geothermal energy form in a liquid state or other fossil energy resource, excluding a pipeline conveying natural or synthetic gas;
  - “(ii) At least 16 inches in diameter, and five or more miles in length, used for the transportation of natural or synthetic gas, but excluding:
    - “(I) A pipeline proposed for construction of which less than five miles of the pipeline is more than 50 feet from a public road, as defined in ORS 368.001 (Definitions); or
    - “(II) A parallel or upgraded pipeline up to 24 inches in diameter that is constructed within the same right of way as an existing 16-inch or larger pipeline that has a site certificate, if all studies and necessary mitigation conducted for the existing site certificate meet or are updated to meet current site certificate standards; or
  - “(iii) At least 16 inches in diameter and five or more miles in length used to carry a geothermal energy form in a gaseous state but excluding a pipeline used to

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The statute only permits the Council to use the third scenario if the proposed ORS 469.300(11)(a)(C) to (E) *facility* or a related or supporting *facility* passes through more than three zones. There is no “*facility*” as that term is defined in state law that passes through more than three zones and the PCCO’s conclusion that there is one that passes through four zones is not supported by substantial evidence or in fact any evidence, in the record.

The PCCO relies on statements in the applicant’s Exhibit K, Land Use at pages 8-9 and Figure K-2 for its conclusion that the *Proposed Facility* (which relevant here refers to a “related

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distribute heat within a geothermal heating district established under ORS chapter 523.

- “(F) A synthetic fuel plant which converts a natural resource including, but not limited to, coal or oil to a gas, liquid or solid product intended to be used as a fuel and capable of being burned to produce the equivalent of two billion Btu of heat a day.
- “(G) A plant which converts biomass to a gas, liquid or solid product, or combination of such products, intended to be used as a fuel and if any one of such products is capable of being burned to produce the equivalent of six billion Btu of heat a day.
- “(H) A storage facility for liquefied natural gas constructed after September 29, 1991, that is designed to hold at least 70,000 gallons.
- “(I) A surface facility related to an underground gas storage reservoir that, at design injection or withdrawal rates, will receive or deliver more than 50 million cubic feet of natural or synthetic gas per day, or require more than 4,000 horsepower of natural gas compression to operate, but excluding:
  - “(i) The underground storage reservoir;
  - “(ii) The injection, withdrawal or monitoring wells and individual wellhead equipment; and
  - “(iii) An underground gas storage reservoir into which gas is injected solely for testing or reservoir maintenance purposes or to facilitate the secondary recovery of oil or other hydrocarbons.
- “(J) An electric power generating plant with an average electric generating capacity of 50 megawatts or more if the power is produced from geothermal or wind energy at a single energy facility or within a single energy generation area.

“(b) “Energy facility” does not include a hydroelectric facility or an energy facility under paragraph (a)(A)(iii) or (D) of this subsection that is established on the site of a decommissioned United States Air Force facility that has adequate transmission capacity to serve the energy facility.

<sup>6</sup> There is no dispute that the proposal does not involve an energy facility as defined in ORS 469.300(11)(a)(C) to (E).

<sup>7</sup> “‘Related or supporting facilities’ means any structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures. ‘Related or supporting facilities’ does not include geothermal or underground gas storage reservoirs, production, injection or monitoring wells or wellhead equipment or pumps.” ORS 469.300(24).

<sup>8</sup> The first scenario of ORS 469.504(5) does not apply because it is triggered when the special advisory group fails to identify any applicable substantive criteria. The second scenario of ORS 469.504(5) applies where, as here, the special advisory group recommends applicable substantive criteria. In that case, the Council “shall” apply those criteria. We discuss the PCCO’s erroneous legal conclusion otherwise below.

1 or supporting facility”), passes through more than three zones, including the County’s Agri-  
2 Business (“AB”) zone. However, Exhibit K, pages 8-9 refer to the County zones in the  
3 “Analysis Area”, which is very different from and encompasses vastly more area than the  
4 Cottonwood Line “related or supporting facility” (if it is one). In this regard, the Analysis Area  
5 is “the minimum area[] that the applicant must study for potential impacts from the construction  
6 and operation of the proposed facility.” NHWNOIDoc7-1 Amended Project Order 2021-08-02,  
7 p. 28 of 30; OAR 345-001-0010(1) (the “analysis area” is the area described in the project order  
8 containing resources that the proposed facility may significantly affect). For Land Use, the  
9 analysis area is “[t]he area within the Site Boundary and 0.5 miles from the Site Boundary.” *Id.*  
10 at p. 30 of 33. Figure K-2 also does not provide substantial evidence to support the PCCO’s  
11 conclusion that the proposed *transmission line* itself or any other *structure* or identified facility  
12 crosses more than three zones either; rather, it shows only that a very small portion of the  
13 *Analysis Area* and “Proposed Site Boundary”<sup>9</sup> potentially cross more than three zones. Neither  
14 the “Analysis area” nor the “Site Boundary are structures, physical features or constructed.  
15 Nothing in Figure K-2 demonstrates that any related or supporting facility as defined in state law  
16 will be sited on more than three zones as is required to trigger the third scenario of ORS  
17 469.504(5). Moreover, as explained above, the applicant itself in its revised pASC  
18 acknowledged that the UEC Cottonwood transmission line would only pass through *three*  
19 County zones. NHWAPPDoc6 Revised pASC 2020-11-06, p. 1086-87 of 2228. The PCCO errs  
20 in concluding substantial evidence supports that the third scenario applies. It does not.

21  
22 *ii. The UEC Cottonwood Transmission Line Alternative is not a “related or supporting*  
23 *facility” to the proposed wind energy facility or solar energy facility and the County*  
24 *did cite evidence in the record establishing this fact. PCCO Finding of Fact #16*

25  
26 PCCO, p. 30 of 35 states:

27  
28 “The County’s contention that the UEC Cottonwood transmission line is not a related or  
29 supporting facility is untenable. As set out in ORS 469.300(24) ‘related or supporting  
30 facilities’ means:

31  
32 *“[A]ny structure, proposed by the applicant, to be constructed or substantially*  
33 *modified in connection with the construction of an energy facility, including*  
34 *associated transmission lines,<sup>18</sup> reservoirs, storage facilities, intake structures,*  
35 *road and rail access, pipelines, barge basins, office or public buildings, and*  
36 *commercial and industrial structures. \* \* \*.*

37  
38 “[<sup>18</sup> ‘Associated transmission lines’ is defined in ORS 469.300(3) as “new  
39 transmission lines constructed to connect an energy facility to the first point of  
40 junction of such transmission line or lines with either a power distribution system  
41 or an interconnected primary transmission system or both or to the Northwest  
42 Power Grid.”]

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<sup>9</sup> “Site boundary” means “the *perimeter* of the site of a proposed energy facility, *its related or supporting facilities, all temporary laydown and staging areas and all corridors and micrositing corridors proposed by the applicant.*” OAR 345-001-0010(31) (Emphases supplied).

1  
2 “Emphasis added. In OAR 345-001-0010(27), the Department explained as follows:  
3

4 “‘Related or supporting facilities’ as defined in ORS 469.300. The Council  
5 interprets the terms ‘proposed to be constructed in connection with’ to mean that  
6 *a structure is a related or supporting facility if it would not be built but for*  
7 *construction or operation of the energy facility.* ‘Related or supporting facilities’  
8 does not include any structure existing prior to construction of the energy facility,  
9 unless such structure must be substantially modified solely to serve the energy  
10 facility.  
11

12 “\* \* \* In its motion, the County argues that the UEC Cottonwood transmission line is not  
13 a ‘related or supporting facility’ because it will be upgraded regardless of the Project and  
14 will serve a variety of energy facilities and projects. UC Amended Motion at 7. However,  
15 the County has not presented evidence to support this contention. Further, the County  
16 does not dispute the Proposed Order’s findings that the proposed UEC Cottonwood route  
17 would include construction of a new segment and substantial modifications to existing  
18 segments.<sup>19</sup> Therefore, the County has not established that the Department erred in  
19 evaluating the UEC Cottonwood transmission line as a related or supporting facility[.]  
20

21 “[<sup>19</sup> As set out in the Proposed Order, the UEC Cottonwood route alternative would be  
22 approximately 25.3 miles in length, and consist of approximately 8.4 miles of new single-  
23 circuit 230-kV transmission line, approximately 9.6 miles of replacing an existing 12.47-  
24 kV with a 230-kV line, and approximately 7.3 miles of upgrading an existing 115-kV line  
25 to a double-circuit 230/115-kV line. NHWAPPDoc1 Proposed Order on ASC 2022-08-04  
26 at 29.]”  
27

#### 28 Basis for Exception 29

30 Substantial evidence does not support the PCCO’s conclusion that the Cottonwood line is  
31 a “related or supporting facility” to either the wind energy facility or solar energy facility. ORS  
32 469.300(24) defines a related or supporting facility to mean “any *structure*” that is “to be  
33 constructed or substantially modified in connection with the construction of an energy facility”  
34 and includes “associated transmission lines” as well as “storage facilities” and “road access.” As  
35 explained above, this would not include the 230 kV “Cottonwood” transmission line alternative  
36 that UEC will construct, because it is not proposed to be “constructed or substantially modified  
37 in connection with” either the wind or solar energy facility that is proposed here, but rather UEC  
38 will construct the Cottonwood line (or at least the segment of the line “[f]rom the UEC  
39 Cottonwood Substation to the corner of White House Road and County Road 1348” that  
40 purportedly passes through more than three zones), regardless of whether the Nolin Hills energy  
41 facility is ever built.  
42

43 In this regard, the PCCO determination that the County did not provide evidence that the  
44 UEC Cottonwood line will be built anyway regardless of the Nolin Hills project and so cannot be  
45 a related or supported facility for Nolin Hills, is wrong and is not supported by substantial  
46 evidence. The County cited the Nolin Hills application Exhibit K that says that UEC will be

1 upgrading its transmission line regardless: “[T]his section of the transmission line will address  
2 UEC’s general utility needs by providing an upgrade to UEC’s existing utility system and may  
3 also be available to other generation facilities and for ongoing capacity needs” and so was  
4 analyzed by the applicant as a “utility facility necessary for public service” under ORS 215.275.  
5 NHWAPPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31, p. 44.  
6

7 Summary determination is only appropriate where there are no genuine issues of fact.  
8 OAR 137-003-0580(6)(a). There is little evidence in the record about the UEC Cottonwood line  
9 at all since it was added late.<sup>10</sup> The burden of producing evidence that it is a related or  
10 supporting facility, is on the applicant. OAR 345-021-0100(2). Moreover, EFSC must find by a  
11 preponderance of the evidence that all relevant standards are met. ORS 469.503. Thus, the  
12 claim that the Cottonwood line is a related or supporting facility for the wind energy facility  
13 proposed here, has been undermined by the evidence cited by the County and there is no other  
14 evidence that demonstrates that the line meets the definition of a related or supporting facility,  
15 which is the applicant’s burden to prove. The only evidence in this proceeding on the topic  
16 demonstrates that there is no physical structure or other physical part of the Cottonwood line to  
17 be constructed that passes through more than three zones, the Cottonwood line may or may not  
18 be used by the proposed energy facility and it is at the least unclear whether the UEC  
19 Cottonwood line will be built regardless of whether the wind energy facility or solar energy  
20 facility proposed here is ever built or if either are ever connected to it. That means that  
21 substantial evidence does not support the conclusion that the UEC Cottonwood line is a related  
22 or supporting facility as a matter of law because there is at the least a material issue of fact  
23 regarding whether it will be constructed regardless of whether the Nolin Hills wind energy or  
24 solar energy facilities are ever constructed. And in any case, a reasonable decisionmaker could

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<sup>10</sup> Compare Nolin Hills’ Notice of Intent, dated September 7, 2017 (NHWNOIDoc1 Notice of Intent 2017-09-07, p. 23 of 125) (proposing new 18-mile long 230-kV transmission line to connect to BPA Stanfield Substation; no UEC Cottonwood line) and Project Order, dated January 10, 2018 (NHWNOIDoc7 Project Order 2018-01-10, p. 3 of 25) (describing proposed BPA Stanfield transmission line; no UEC Cottonwood line) with Nolin Hills’ revised Preliminary Application for Site Certificate (pASC), dated November 6, 2020 (NHWAPPDoc6 Revised pASC 2020-11-06, p. 5 of 2228) (now proposing “publicly owned and operated transmission lines to be constructed locally by the Umatilla Electric Cooperative” as part of the project) and Amended Project Order, dated August 2, 2021 (NHWNOIDoc7-1 Amended Project Order 2021-08-02, p. 3 of 33) (“On November 6, 2020, the applicant submitted a revised preliminary application for site certificate that added solar energy generation, battery storage, and an additional transmission line corridor option for the BPA Stanfield route to its proposal.”).

ODOE’s December 20, 2020 request for additional information on the pASC questioned whether the UEC Cottonwood line was a “related or supporting facility” to the proposed energy facility. ODOE cited the language of ORS 469.300[(24)] that “a related or supporting facility means any structure, proposed by the applicant, to be constructed or substantially modified in connection with construction of the energy facility” and requested that the applicant “confirm (within Exhibit B) that the UEC Cottonwood route is proposed by the applicant as a related or supporting facility to the proposed Nolin Hills Wind Power project.” NHWAPPDoc5 ODOE Second RAI Batch 1 2020-12-20, p. 3 of 10. ODOE pointed out that Section 1.0 of the pASC stated that “[t]he Project will interconnect to the regional grid via either publicly owned and operated transmission lines to be constructed locally by the Umatilla Electric Cooperative (UEC)...”; that Section 1.4 stated that “However, as a potential supporting facility for the Project, the UEC transmission line is subject to EFSC review pursuant to applicable EFSC standards”; and that ODOE “assumes the applicant uses the word ‘potential’ because the BPA Stanfield route may ultimately be selected over the UEC Cottonwood route.” *Id.* at p. 3-4. The applicant responded not by explaining how the UEC Cottonwood line met the definition of “related or supporting facility”, but rather simply replaced the word “potential” with “proposed” in Section 1.4. NHWAPPDoc5-5 Applicant RAI Batch 1\_Response Matrix with Attach 2021-06-24, p. 3.

1 not conclude based upon the evidence in the record that the Cottonwood line is a related or  
2 supporting facility for these wind or solar energy facilities.

3  
4 **B. Erroneous Conclusions of Law**

5  
6 *i. Related to the exception to the erroneous finding of fact described in section*  
7 *(II)(A)(ii) immediately above, the PCCO misconstrues applicable law by shifting the*  
8 *burden of proof to the County. The applicant carries the burden of proof. The PCCO*  
9 *misconstrues applicable law by deciding that the County did not show that the UEC*  
10 *Cottonwood line is not a related or supporting facility. The burden of proving that*  
11 *fact belongs to the applicant. There is at the least a genuine issue of material fact*  
12 *regarding whether the Cottonwood line is a related or supporting facility. That*  
13 *means as a matter of law that summary determination on that issue misconstrued*  
14 *applicable law. OAR 137-003-0580(6)(a).*

15  
16 **Basis for Exception**

17  
18 In a contested case proceeding, the applicant carries the burden of proving, by a  
19 preponderance of evidence in the record, that the proposed facility complies with all applicable  
20 statutes, administrative rules, and applicable local government ordinances. OAR 345-021-  
21 0100(2). ORS 469.503(4) provides that “[i]n order to issue a site certificate, the Energy Facility  
22 Siting Council shall determine that the preponderance of the evidence on the record” supports a  
23 conclusion that “the facility complies with the statewide planning goals[.]” “Facility” means “an  
24 energy facility together with any related or supporting facilities.” ORS 469.300(14).  
25 Accordingly, the applicant has the burden of proving, by a preponderance of evidence in the  
26 record, that the UEC Cottonwood transmission line is a “related or supporting facility” that is  
27 part of the larger “facility” that must comply with the goals. *See Forelaws on Bd. v. EFSC*, 306  
28 Or 205, 209 (1988) (zirconium manufacturer, as applicant for site certificate, had burden of  
29 proving that its waste was not “radioactive waste” as defined by ORS 469.300(17)(a), citing  
30 *Teledyne Wah Chang v. EFSC*, 298 Or 240, 248-50 (1984)). The applicant here did not meet its  
31 burden. Therefore, the PCCO errs in awarding the applicant and ODOE summary determination.

32  
33 The PCCO at p. 30 states:

34  
35 “In its motion, the County argues that the UEC Cottonwood transmission line is  
36 not a ‘related or supporting facility’ because it will be upgraded regardless of the  
37 Project and will serve a variety of energy facilities and projects. UC Amended  
38 Motion at 7. However, the County has not presented evidence to support this  
39 contention. Further, the County does not dispute the Proposed Order’s findings  
40 that the proposed UEC Cottonwood route would include construction of a new  
41 segment and substantial modifications to existing segments. Therefore, the  
42 County has not established that the Department erred in evaluating the UEC  
43 Cottonwood transmission line as a related or supporting facility[.]” (Footnote  
44 omitted.)  
45



1 This conclusion impermissibly shifts the burden of proving that the UEC Cottonwood  
2 line is not a “related or supporting facility” to the County, because the applicant has the burden  
3 of proving that the Cottonwood line is a related or supporting facility in the first place, and the  
4 applicant has not met that burden. In this regard, the only information provided by the applicant  
5 about the UEC Cottonwood line supports the conclusion that it is not a related or supporting  
6 facility. As explained above, ORS 469.300(24) provides that “related or supporting facilities”  
7 means “*any structure, proposed by the applicant, to be constructed or substantially modified in*  
8 *connection with the construction of an energy facility, including associated transmission lines,*  
9 *reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office*  
10 *or public buildings, and commercial and industrial structures. \* \* \*.*” (Emphasis supplied).  
11 “Associated transmission lines” means “new transmission lines constructed to connect an energy  
12 facility to the first point of junction of such transmission line or lines with either a power  
13 distribution system or an interconnected primary transmission system or both or to the Northwest  
14 Power Grid.” ORS 469.300(3). EFSC interprets the terms “proposed to be constructed in  
15 connection with” in ORS 469.300(24) to mean that “a structure is a related or supporting facility  
16 if it would not be built *but for* construction or operation of the energy facility. ‘Related or  
17 supporting facilities’ does not include any structure existing prior to construction of the energy  
18 facility, unless such structure must be substantially modified solely to serve the energy facility.”  
19 OAR 345-001-0010(27) (Emphasis supplied).

20  
21 For one, the UEC Cottonwood line is proposed as a potential *alternative* route for  
22 connecting the proposed wind and solar energy facilities to the power grid. Potential alternative  
23 transmission line locations are not related or supporting facilities. “Related or supporting  
24 facilities” refer to a “*structure*” that is “*to be constructed or substantially modified in connection*  
25 *with the construction of an energy facility, including associated transmission lines[.]*” ORS  
26 469.300(24). This plainly means that to be a related or supporting facility the Cottonwood line  
27 must be actually proposed to be constructed “in connection with” the proposed Nolin Hills wind  
28 and solar energy facilities. It is not and there is no evidence to support the conclusion otherwise.  
29 In this regard, it is not the County’s burden to prove the Cottonwood line does not meet that  
30 definition; rather it is the applicant’s burden to prove it does meet the state law definition of a  
31 related or supporting facility and the Council’s burden to find that a preponderance of the  
32 evidence supports such a determination. Neither is the case here and the PCCO errs in  
33 concluding otherwise.

34  
35 Second, the applicant’s Exhibit K says that UEC will be upgrading its transmission line  
36 regardless of whether the proposed facility is constructed: “[T]his section of the transmission line  
37 will address UEC’s general utility needs by providing an upgrade to UEC’s existing utility  
38 system and may also be available to other generation facilities and for ongoing capacity needs”.  
39 NHWAPPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31, p. 44. The applicant’s pASC also  
40 stated that the proposed facility would connect to the regional grid via “publicly owned and  
41 operated transmission lines to be constructed locally by the Umatilla Electric Cooperative[.]”  
42 NHWAPPDoc6 Revised pASC 2020-11-06, p. 5 of 2228. The applicant has not met its burden  
43 of proving that the UEC Cottonwood line would “not be built but for construction or operation of  
44 the [proposed] energy facility” or that it must be “substantially modified solely to serve the  
45 [proposed] energy facility.”  
46

1 Accordingly, there is at least a genuine issue of material fact regarding whether the UEC  
2 Cottonwood line is a related or supporting facility, and the PCCO's decision to award summary  
3 determination to the applicant and ODOE was contrary to law. OAR 137-003-0580(6)(a)  
4 (summary determination only appropriate where "there is no genuine issue as to any material fact  
5 that is relevant to resolution of the legal issue as to which a decision is sought"); *Watts v. Bd. of*  
6 *Nursing*, 282 Or App 705, 714 (2016) ("If there is evidence creating a relevant fact issue, then no  
7 matter how 'overwhelming' the moving party's evidence may be, or how implausible the  
8 nonmoving party's version of the historical facts, the nonmoving party, upon proper request, is  
9 entitled to a hearing.").

10  
11 ii. *UCDC 152.616(HHH)(6)(a)(3) ("Criterion (3)) is an "applicable substantive*  
12 *criterion" under ORS 469.504 and OAR 345-022-0030(3) and the PCCO erroneously*  
13 *asserts that it is not an "applicable substantive criterion" because it is not required*  
14 *by the statewide planning goals. PCCO, p. 14.*

15  
16 The PCCO erroneously concludes that:

17  
18 **"Issue 1:** The Criterion(3) is not an applicable substantive criterion under OAR  
19 345-022-0030(3) because it is not required by the statewide planning goals.  
20 Therefore, Criterion (3) does not apply to the Project." PCCO, p. 14.

21  
22 "[A]s a matter of law, Criterion (3) is not an applicable substantive criterion under  
23 ORS 469.504 and OAR 345-022-0030(3) because it is not required by the  
24 statewide planning goals." PCCO, p. 23.

25  
26 "[Nothing in Goal specifically requires a local government to enact regulations  
27 establishing setbacks for wind turbines. Thus, while Criterion (3) is a land use  
28 regulation enacted to implement Umatilla County's acknowledged comprehensive  
29 plan, and the County's plan is consistent with and in compliance with Goal 2, the  
30 County has not shown that Criterion (3) is required by Goal 2." PCCO, p. 28.

31  
32 Basis for Exception

33  
34 This conclusion misconstrues applicable law.

35  
36 The PCCO erroneously concludes that "required" by the goals means that a local  
37 standard identified by the special advisory group as applicable to the proposed facility must  
38 duplicate a specific state goal requirement, (i.e., that a goal must expressly and specifically  
39 require the County to adopt a two-mile setback between wind turbines and rural residences in  
40 order for Criterion (3) to be "required" by the goal and therefore be an "applicable substantive  
41 criterion"). That is wrong. If that were the case, the Council could ignore all local government  
42 land use regulations because none of the state goals impose any specific requirements on energy  
43 facilities. Rather, the Goals are general policy expressions that are implemented by  
44 acknowledged local land use regulations. In other words, local land use rules that are  
45 acknowledged by the Land Conservation and Development Department (LCDC) become the  
46 expression of the state Goals. Acknowledgement means that local land use rules comply with

1 and reflect the requirements expressed in the statewide planning goals. ORS 197.015(1); ORS  
2 197.250, 197.251; OAR 660-031-0010(1); *Foland v. Jackson County*, 311 Or 167, 171-73, 807  
3 P2d 801 (1991).

4  
5 In *Save Our Rural Oregon v. EFSC*, the Oregon Supreme Court explained how goal  
6 compliance is achieved in energy site certificate proceedings:

7  
8 “In short, the statewide land use planning goals establish broad policy objectives,  
9 while the ‘applicable substantive criteria’ *provide specific ways of implementing*  
10 *those objectives through local regulation*. Because the local criteria often are  
11 more specific than the goals, an [application for site certificate] may fail to meet  
12 the local criteria but still meet the goals. ORS 469.504(1)(b)(B) allows a  
13 comprehensive inquiry that *requires the council to determine compliance with the*  
14 *most specific criteria that it can: local ‘applicable substantive criteria’ where*  
15 *possible; findings of compliance with the statewide planning goals in the*  
16 *alternative; and exceptions to the goals if necessary. That scheme is consistent*  
17 *with the overall land use planning structure in Oregon.” (Emphasis supplied.)*  
18 339 Or 353, 368-69, 121 P3d 1141(2005).

19  
20 Criterion (3) is the expression of statewide planning goal requirements for Umatilla  
21 County for wind energy facilities and there is no dispute that it is acknowledged by LCDC as  
22 such. That means that the County’s acknowledged land use rules are the expression of state goal  
23 requirements because complying with them is how state goal compliance is achieved. *Foland*,  
24 311 Or at 171-73. Which in turn means that they are properly identified as applicable  
25 substantive criteria by the County governing body. At this point on the Oregon land use program  
26 spectrum, the requirements of the state planning goals in Umatilla County are met only by  
27 applying the County’s acknowledged rules. *Byrd v. Stringer*, 295 Or 311, 316-17, 318-19, 666  
28 P.2d 1332 (1983) (goals are necessarily met after local government obtains “acknowledgement”  
29 of their land use regulations.) That can only mean that the mirror image of that principal also  
30 pertains (viz.), that after acknowledgement, the requirements of the County’s acknowledged plan  
31 are the expression of the requirements of the goals.

32  
33 Further, compliance with Criterion (3) is directly required of the Council by at least Goal  
34 2. The Oregon Department of Land Conservation and Development (DLCD) correctly views  
35 Criterion (3) as implementing “Statewide Goals: 2,<sup>[11]</sup> 5,<sup>[12]</sup> 9,<sup>[13]</sup> 13<sup>[14]</sup>” and no one in this  
36 proceeding has ever claimed otherwise. County’s MSD, Exhibit 3 (T-10-039 DLCD PAPA  
37 Tracking Sheet).

38  
39 Goal 2 contains the clear requirement that state “actions related to land use” “shall be  
40 consistent” with city and county comprehensive plans. Criterion (3) is a county comprehensive

---

<sup>11</sup> Goal 2 is titled “Land Use Planning” and governed by OAR 660-004-0000 et seq.

<sup>12</sup> Goal 5 is titled “Natural Resources, Scenic and Historic Areas, and Open Spaces”.

<sup>13</sup> Goal 9 is titled “Economy of the State”.

<sup>14</sup> Goal 13 is titled “Energy Conservation”.

1 planning measure. These proceedings will determine whether EFSC will issue a site certificate  
2 for a proposed wind energy facility – a state “action related to land use”. Therefore, Goal 2  
3 requires that the Proposed Facility comply with Criterion (3). Accordingly, Criterion (3) is  
4 required to be applied to the proposed facility by ODOE by, at the least, state Goal 2. The PCCO  
5 errs in concluding otherwise.  
6

7 *iii. ODOE and EFSC do not have jurisdiction to review or reverse the special advisory*  
8 *group’s identification of Criterion (3) as an applicable substantive criterion.*  
9

10 The PCCO at p. 29-30 erroneously states:

11  
12 “I reject the County’s claim that the Department and Council have no jurisdiction  
13 to review or reverse the SAG’s identification of Criterion (3) as an applicable  
14 substantive criterion. The legislature, in ORS 469.504(1)(b), set the standard for  
15 applicable substantive criteria for purposes of Council review for compliance with  
16 statewide planning goals. To the extent the local government/special advisory  
17 group recommends local criteria not required by statewide planning goals,  
18 Council has no obligation to apply the criteria under ORS 469.504(5).”  
19

20 Basis for Exception  
21

22 The County special advisory group identified UCDC 152.616(HHH)(6)(a)(3) as an  
23 applicable substantive criterion. NHWNOIDoc3-5 SAG Comment 2017-11-06; NWAPPDoc3-9  
24 pASC Umatilla County comment 2020-04-15. As the County explained in its MSD, the Council  
25 has no authority to review the special advisory group’s determination; only the Oregon Supreme  
26 Court has authority to review the correctness of the County’s identification of the applicable  
27 substantive criteria. County MSD, p. 14; ORS 469.504(8); *see also Hatley v. Umatilla County*,  
28 68 Or LUBA 264, 270-71 (2013) (“ORS 469.504(8) provides for direct review by the Oregon  
29 Supreme Court of ‘\* \* \* the special advisory group’s recommendation of applicable substantive  
30 criteria under [ORS 469.504(5)].’ *See Thomas v. City of Turner*, 42 Or LUBA 39, 44-45 (2002)  
31 (so noting).”). ORS 469.504(8) provides that “the special advisory group’s recommendation of  
32 applicable substantive criteria \* \* \* shall be subject to judicial review only as provided in ORS  
33 469.403”, which vests exclusive jurisdiction over such determinations with the Oregon Supreme  
34 Court.  
35

36 The PCCO fails to address the County’s position that ORS 469.504(8) divests the  
37 Council of the authority to review and independently determine whether a local criterion, duly  
38 identified by the special advisory group as an applicable substantive criterion, is an “applicable  
39 substantive criterion.” As a matter of law, the PCCO errs in purporting to review and overturn  
40 the special advisory group’s determination that Criterion (3) is an applicable substantive  
41 criterion. The PCCO, and by extension the Council, has no authority or jurisdiction to undertake  
42 such review and make such a determination. Once the special advisory group identifies the  
43 applicable substantive criteria that apply, the Council’s only statutory choice is to apply them  
44 unless the applicant carries its burden and the Council finds by a preponderance of the evidence  
45 that the facility or a related or supporting facility passes through more than three zones – which  
46 is not the case here, as explained above.

1  
2 Accordingly, the Council may not review, and then disagree with, the special advisory  
3 group's recommendation of applicable substantive criteria.  
4

5 *iv. Relatedly, the ALJ in their Order on Petitions for Party Status and Issues for*  
6 *Contested Case Order ("Issues Order") has already decided that whether Criterion*  
7 *(3) is an applicable substantive criterion is not within the Council's authority. There*  
8 *is a specific seven (7)-day period of time for filing objections to the Issues Order and*  
9 *none were filed. OAR 345-015-0016(6). That means, as a matter of law, the PCCO*  
10 *misconstrues applicable law by deciding that Criterion (3) is not an applicable*  
11 *substantive criterion.*  
12

13 ORS 469.504(1)(b)(A) provides that "applicable substantive criteria" are criteria "from  
14 the affected local government's acknowledged comprehensive plan and land use regulations that  
15 are required by the statewide planning goals and in effect on the date the application is  
16 submitted[.]" See also OAR 345-022-0030(3) (providing same definition).  
17

18 The Issues Order at p. 9 states:

19  
20 "[A]n evaluation of whether the land use ordinances passed by the County are  
21 required by statewide planning goals is not within in the Council's jurisdiction."  
22

23 In spite of that ruling, the PCCO at p. 29-30 states:

24  
25 "I reject the County's claim that the Department and Council have no jurisdiction  
26 to review or reverse the SAG's identification of Criterion (3) as an applicable  
27 substantive criterion. The legislature, in ORS 469.504(1)(b), set the standard for  
28 applicable substantive criteria for purposes of Council review for compliance with  
29 statewide planning goals. To the extent the local government/special advisory  
30 group recommends local criteria not required by statewide planning goals,  
31 Council has no obligation to apply the criteria under ORS 469.504(5)."  
32

### 33 Basis for Exception 34

35 The PCCO misconstrues applicable law by deciding that Criterion (3) is not an  
36 "applicable substantive criterion", notwithstanding that the ALJ's Issues Order already ruled that  
37 deciding whether the land use ordinances passed by the County are "required by the statewide  
38 planning goals", which informs, in part, whether those land use ordinances, including Criterion  
39 (3), are "applicable substantive criteria", was not within the Council's jurisdiction. To  
40 determine, as the PCCO does, to the contrary that Criterion (3) is not required by the goals, is an  
41 unlawful collateral attack of the ALJ's Issues Order, which became final when no appeal of that  
42 order was filed within seven (7) days, as required by OAR 345-015-0016(6).  
43

44 Pursuant to ORS 469.370(5) and OAR 345-015-0016, the ALJ's Issues Order granted  
45 Umatilla County limited party status and limited the issues in which the County could participate  
46 in the contested case hearing to those raised by the County on the record of the public hearing.

1 In so ruling, the Issues Order correctly determined that “an evaluation of whether the land use  
2 ordinances passed by the County are required by statewide planning goals is not within in the  
3 Council’s jurisdiction.” Issues Order, p. 9.

4  
5 OAR 345-015-0016(6) provides that the ALJ’s determination on a request to participate  
6 as a part or limited party in a contested case proceeding (*i.e.*, Issues Order) is final unless the  
7 requesting person submits an appeal to the Council within seven (7) days of the order. No party  
8 filed an appeal of the Issues Order to the Council. Accordingly, the ALJ’s determination in the  
9 Issues Order that “an evaluation of whether the land use ordinances passed by the County are  
10 required by statewide planning goals is not within in the Council’s jurisdiction”, is final. The  
11 PCCO’s conclusions otherwise are an impermissible collateral attack on the correctness of that  
12 determination.

13  
14 *v. The UEC Cottonwood transmission line is not a “related or supporting facility” that*  
15 *passes through more than three zones, as a matter of law.*

16  
17 The County took this issue up in preceding sections of these exceptions under the hearing  
18 of factual errors. As a precaution the County makes the exception again under this segment  
19 regarding errors of law.

20  
21 The PCCO at p. 30-31 erroneously states:

22  
23 “The County’s contention that the UEC Cottonwood transmission line is not a  
24 related or supporting facility is untenable. As set out in ORS 469.300(24) ‘related  
25 or supporting facilities’ means:

26  
27 *“[A]ny structure, proposed by the applicant, to be constructed or*  
28 *substantially modified in connection with the construction of an energy*  
29 *facility, including associated transmission lines,<sup>18</sup> reservoirs, storage*  
30 *facilities, intake structures, road and rail access, pipelines, barge basins,*  
31 *office or public buildings, and commercial and industrial structures. \* \* \**

32  
33 [18 “Associated transmission lines” is defined in ORS 469.300(3) as “new  
34 transmission lines constructed to connect an energy facility to the first  
35 point of junction of such transmission line or lines with either a power  
36 distribution system or an interconnected primary transmission system or  
37 both or to the Northwest Power Grid.”]

38  
39 “Emphasis added. In OAR 345-001-0010(27), the Department explained as  
40 follows:

41  
42 ““Related or supporting facilities” as defined in ORS 469.300. The  
43 Council interprets the terms “proposed to be constructed in connection  
44 with” to mean that *a structure is a related or supporting facility if it would*  
45 *not be built but for construction or operation of the energy facility.*

46 “Related or supporting facilities” does not include any structure existing

1 prior to construction of the energy facility, unless such structure must be  
2 substantially modified solely to serve the energy facility.

3  
4 “Emphasis added.

5  
6 “In the Proposed Order, the Department found that although the proposed facility  
7 will almost entirely be located in the EFU zone, the proposed UEC Cottonwood  
8 transmission line route would pass through more than three zones.  
9 NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93, n. 30. In its motion,  
10 the County argues that the UEC Cottonwood transmission line is not a “related or  
11 supporting facility” because it will be upgraded regardless of the Project and will  
12 serve a variety of energy facilities and projects. UC Amended Motion at 7.  
13 However, the County has not presented evidence to support this contention.  
14 Further, the County does not dispute the Proposed Order’s findings that the  
15 proposed UEC Cottonwood route would include construction of a new segment  
16 and substantial modifications to existing segments.<sup>19</sup> Therefore, the County has  
17 not established that the Department erred in evaluating the UEC Cottonwood  
18 transmission line as a related or supporting facility, or that the Department erred  
19 in finding that the proposed facility or a related or supporting facility will pass  
20 through more than three zones within Umatilla County.

21  
22 [19 As set out in the Proposed Order, the UEC Cottonwood route  
23 alternative would be approximately 25.3 miles in length, and consist of  
24 approximately 8.4 miles of new single-circuit 230-kV transmission line,  
25 approximately 9.6 miles of replacing an existing 12.47-kV with a 230-kV  
26 line, and approximately 7.3 miles of upgrading an existing 115-kV line to  
27 a double-circuit 230/115-kV line. NHWAPPDoc1 Proposed Order on  
28 ASC 2022-08-04 at 29.]”

29  
30 Basis for Exception

31  
32 The PCCO misconstrues applicable law in concluding that the UEC Cottonwood  
33 transmission line is a “related or supporting facility” that passes through more than three zones  
34 and so ORS 469.504(5)’s “third scenario applies.” It does not apply.

35  
36 The UEC Cottonwood line is not properly characterized as a “related or supporting  
37 facility” for the proposed wind energy facility or the proposed solar energy facility, because it  
38 will be built by UEC regardless of the proposal. The PCCO erroneously concluded that the  
39 County did not present evidence to support this contention. But as explained above, the County  
40 cited the representation of the applicant itself from the ASC that the segment of the Cottonwood  
41 transmission line “[f]rom the UEC Cottonwood Substation to the corner of White House Road  
42 and County Road 1348”, “will address UEC’s general utility needs by providing an upgrade to  
43 UEC’s existing utility system and may also be available to other generation facilities and for  
44 ongoing capacity needs.” NHWAPPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31, p. 44. To  
45 be a “related or supporting facility”, the Cottonwood transmission line must be “constructed or  
46 substantially modified *in connection with the construction of an energy facility*” (ORS

1 469.300(24) (Emphasis supplied)), which has been interpreted by EFSC to mean that the  
2 structure “would not be built but for construction or operation of the energy facility” and “does  
3 not include any structure existing prior to construction of the energy facility, unless such  
4 structure must be substantially modified solely to serve the energy facility.” OAR 345-001-  
5 0010(27). The evidence establishes that the UEC Cottonwood line “will address UEC’s general  
6 utility needs” and would be available to other generation facilities for ongoing capacity needs”.  
7 The evidence shows that it will “not be built *but for* construction of operation of the” proposed  
8 energy facilities.” There is also no evidence that the existing portion of the UEC Cottonwood  
9 line (“[f]rom the UEC Cottonwood Substation to the corner of White House Road and County  
10 Road 1348”), “must be substantially modified solely to serve the [Proposed Facility].”  
11 Accordingly, the Cottonwood line cannot be a “related or supporting facility” for the proposed  
12 wind energy or solar energy facility, as a matter of law. The PCCO conclusion that the  
13 Cottonwood line is a “related or supporting facility” misconstrues applicable law. As explained  
14 above under the exception to PCCO Finding #12, and the PCCO findings at p. 30-31, there is no  
15 related or supporting facility, and no energy facility, and so no “facility” that will pass through  
16 more than three zones. The PCCO errs in concluding otherwise.

17  
18 *vi. The PPCO determination that even if Criterion (3) is an applicable substantive*  
19 *criterion, that the Council is authorized to ignore it and approve the proposal anyway*  
20 *under ORS 469.504(1)(b)(B) notwithstanding that the Proposed Facility does not*  
21 *comply with Criterion (3), misconstrues applicable law.*  
22

23 The PCCO erroneously concludes that:

24  
25 “[E]ven if Criterion (3) was applicable to Council’s evaluation, the County has  
26 not established that the Department erred in its evaluation under ORS  
27 469.504(1)(b)(B) and (5). Council has no obligation to require that the Project  
28 comply with Criterion (3), because the Project otherwise complies with the  
29 applicable statewide planning goals.” PCCO, p 31.

30  
31 Basis for Exception

32  
33 This conclusion misconstrues applicable law.

34  
35 The short answer is that Goal 2 unequivocally requires state agency activities respecting  
36 land use to comply with the County’s land use regulations and there is no dispute that the  
37 proposal fails to comply with those regulations – Criterion (3). In this regard, Goal 2 contains  
38 the clear requirement that state “actions related to land use” “shall be consistent” with city and  
39 county comprehensive plans. There is no dispute that Criterion (3) is a county comprehensive  
40 planning measure. There is also no dispute that at issue is a proposal for a state “action related to  
41 land use” for a proposed wind energy facility. Therefore, Goal 2 requires that the Council to  
42 comply with Criterion (3) in its consideration of the proposal. There should be little doubt that  
43 the Council is required to comply with Criterion (3).  
44



1 More to the point, the PCCO misconstrues the applicable state statutes. ORS  
2 469.504(1)(b) provides the circumstances where a proposed facility shall be deemed to comply  
3 with the state goals:

4  
5 “(b)(A) The facility complies with applicable substantive criteria from the  
6 affected local government’s acknowledged comprehensive plan and land use  
7 regulations that are required by the statewide planning goals and in effect on the  
8 date the application is submitted, and with any Land Conservation and  
9 Development Commission administrative rules and goals and any land use  
10 statutes that apply directly to the facility under ORS 197.646.

11  
12 “(b)(B) For an energy facility or a related or supporting facility that must  
13 be evaluated against the applicable substantive criteria pursuant to subsection (5)  
14 of this section, that the proposed facility does not comply with one or more of the  
15 applicable substantive criteria but does otherwise comply with the applicable  
16 statewide planning goals, or that an exception to any applicable statewide  
17 planning goal is justified under subsection (2) of this section; or

18  
19 “(b)(C) For a facility that the council elects to evaluate against the  
20 statewide planning goals pursuant to subsection (5) of this section, that the  
21 proposed facility complies with the applicable statewide planning goals or that an  
22 exception to any applicable statewide planning goal is justified under subsection  
23 (2) of this section.”

24  
25 Thus, ORS 469.504(1)(b) posits three discrete situations where required state goal  
26 compliance is demonstrated. In ORS 469.504(1)(b)(A), goal compliance is demonstrated when  
27 the proposed facility complies with the applicable substantive criteria. In ORS 469.504(1)(b)(B),  
28 goal compliance is demonstrated if the facility “must be evaluated against the applicable  
29 substantive criteria *pursuant to subsection (5) of this section*” and the proposed facility “does not  
30 comply with one or more of the applicable substantive criteria” but otherwise complies with the  
31 goals or a goal exception is approved. In ORS 469.504(1)(b)(C) if the “council elects to  
32 evaluate” the proposed facility under the state planning goals “pursuant to subsection (5) of this  
33 section, that the facility complies with the goals or takes an exception.

34  
35 In turn, ORS 469.504(5) (“subsection (5) of this section”) provides:

36  
37 “Upon request by the State Department of Energy, the special advisory group  
38 established under ORS 469.480 (Local government advisory group) shall  
39 recommend to the council, within the time stated in the request, the applicable  
40 substantive criteria under subsection (1)(b)(A) of this section. If the special  
41 advisory group does not recommend applicable substantive criteria within the  
42 time established in the department’s request, the council may either determine and  
43 apply the applicable substantive criteria under subsection (1)(b) of this section or  
44 determine compliance with the statewide planning goals under subsection  
45 (1)(b)(B) or (C) of this section. If the special advisory group recommends  
46 applicable substantive criteria for an energy facility described in ORS 469.300

1 (Definitions) or a related or supporting facility that does not pass through more  
2 than one local government jurisdiction or more than three zones in any one  
3 jurisdiction, the council shall apply the criteria recommended by the special  
4 advisory group. If the special advisory group recommends applicable substantive  
5 criteria for an energy facility as defined in ORS 469.300 (Definitions) (11)(a)(C)  
6 to (E) or a related or supporting facility that passes through more than one  
7 jurisdiction or more than three zones in any one jurisdiction, the council shall  
8 review the recommended criteria and determine whether to evaluate the proposed  
9 facility against the applicable substantive criteria recommended by the special  
10 advisory group, against the statewide planning goals or against a combination of  
11 the applicable substantive criteria and statewide planning goals. In making its  
12 determination, the council shall consult with the special advisory group and shall  
13 consider:

- 14
- 15 “(a) The number of jurisdictions and zones in question;
  - 16
  - 17 “(b) The degree to which the applicable substantive criteria reflect local  
18 government consideration of energy facilities in the planning  
19 process; and
  - 20
  - 21 “(c) The level of consistency of the applicable substantive criteria from  
22 the various zones and jurisdictions.”
  - 23

24 At issue is the relationship between ORS 469.504(1)(b)(B) and ORS 469.504(5). The  
25 PCCO incorrectly interprets ORS 469.504(1)(b)(B) to obliterate the requirement in ORS  
26 469.504(5) that if the special advisory group timely identifies the applicable substantive criteria,  
27 then EFSC “shall” apply them. However, the County interprets ORS 469.504(1)(b)(B) and (5) in  
28 a manner that gives effect to all of the legislature’s commands – those in ORS 469.504(1)(b)(B)  
29 and ORS 469.504(5). Under well-established principles of statutory interpretation, the County’s  
30 interpretation should prevail.

31

32 The interpretation of ORS 469.504(1)(b)(B) and ORS 469.504(5) must follow the  
33 familiar framework of *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). “First, the court  
34 examines the text and context of the statute.” *Id.* at 164. “When examining the text, \* \* \* courts  
35 are not to insert what has been omitted, or to omit what has been inserted.” *AAA Or./Idaho Auto*  
36 *Source, LLC v. State ex rel. Dep’t of Rev.*, 363 Or 411, 418, 423 P3d 71 (2018) (citation and  
37 internal quotation marks omitted). Context, meanwhile, “includes other provisions of the same  
38 statute and other related statutes, as well as the preexisting common law and the statutory  
39 framework within which the law was enacted.” *State ex rel. Dep’t of Transp. v. Stallcup*, 341 Or  
40 93, 99, 138 P3d 9 (2006) (citation omitted). Moreover, “the legislature sometimes expresses  
41 itself in unusual ways” and so “the broader context of a provision” can point “to a different  
42 meaning than the text, read in isolation, might otherwise suggest.” *Lake Oswego Preservation*  
43 *Society v. City of Lake Oswego*, 360 Or 115, 130 (2016). The latter is particularly important to  
44 this case where ORS 469.504(5) unequivocally requires the applicable substantive criteria be  
45 applied in the one of three situations it describes and ORS 469.504(1)(b)(B) says that for  
46 facilities reviewed under ORS 469.504(5) that EFSC can decide otherwise.

1  
2 In examining text and context, courts follow longstanding rules of statutory construction.  
3 As pertinent here, the court “will not construe a statute in a way that renders its provisions  
4 superfluous.” *Keller v. SAIF*, 175 Or App 78, 82, 27 P3d 1064 (2001) (citing ORS 174.010).  
5 Instead, if “a statute contains multiple provisions,” then courts “read those provisions, if  
6 possible, in a way that will give effect to all of them.” *Vsetecka v. Safeway Stores, Inc.*, 337 Or  
7 502, 510, 98 P3d 1116 (2004) (citing ORS 174.010). The rules against surplusage, and in favor  
8 of giving effect to all provisions, control. *See Beaver v. Pelett*, 299 Or 664, 669, 705 P2d 1149  
9 (1985) (quoting ORS 174.010 and 174.020).

10  
11 Second, the court examines any pertinent legislative history. *Gaines*, 346 Or at 171-72.  
12 A court must “consider proffered legislative history only for whatever it is worth. *Id.* (citing  
13 ORS 174.020). Finally, “[i]f the legislature’s intent remains unclear after” examining a statute’s  
14 text, context, and legislative history, then “the court may resort to general maxims of statutory  
15 construction to aid in resolving the remaining uncertainty.” *Id.* at 172.

16  
17 Here, as discussed below, ORS 469.504(1)(b)(B) must be read together with ORS  
18 469.504(5) because that is what the provision expressly states and because there is a *specific part*  
19 of ORS 469.504(5) that expressly states that it applies in tandem with ORS 469.504(1)(b)(B) and  
20 (C)<sup>15</sup> and no other section of ORS 469.504(5) says that. Where parts of the same statutory  
21 section expressly say they work together and omit other sections of the same scheme from that  
22 parallelism, it simply cannot be correct that ORS 469.504(1)(b)(B) not only applies where ORS  
23 469.504(5) says it does, but also applies to cancel out separate commands in the part of ORS  
24 469.504(5) that does not reference ORS 469.504(1)(b)(B).

25  
26 Rather, the proper interpretation gives effect to all parts of ORS 469.504(1)(b)(B) and to  
27 all parts of ORS 469.504(5). In this regard, ORS 469.504(5) outlines a *specific scenario* that  
28 applies ORS 469.504(1)(b)(B) and immediately follows that with a *different scenario* for which  
29 EFSC “shall” apply the timely identified applicable substantive criteria, in a part that does not  
30 refer to ORS 469.504(1)(b)(B). That structure evidences the legislature’s intent that ORS  
31 469.504(1)(b)(B) is limited to the specific scenario in ORS 469.504(5) that expressly references  
32 ORS 469.504(1)(b)(B). And contrary to the PCCO, that structure evidences the legislature’s  
33 intent that EFSC not use ORS 469.504(1)(b)(B) to cancel out the entirety of ORS 469.504(5)’s  
34 scenarios and commands that do not refer to ORS 469.504(1)(b)(B).

35  
36 ORS 469.504(5) posits three scenarios:

- 37  
38
- 39 • The first is where the special advisory group “does not [timely] recommend  
40 applicable substantive criteria” after EFSC asks for the same. For this scenario,  
41 and this scenario alone, ORS 469.504(5) authorizes the Council to “either  
42 determine and apply the applicable substantive criteria” under ORS 469.504(1)(b)  
43 “or determine compliance with the statewide planning goals under subsection  
44 (1)(b)(B) or (C) of this section.” There is no dispute that this scenario does not  
apply because the special advisory group timely identified the applicable

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<sup>15</sup> The PO does not claim that ORS 469.504(1)(b)(C) applies and it does not. Therefore, for ease of reading, it is not referenced again.

1 substantive criteria. This is the *only part* of ORS 469.504(5) that references ORS  
2 469.504(1)(b)(B).  
3

- 4 • The next ORS 469.504(5) scenario immediately follows the first explained above;  
5 in fact, it follows in the very next sentence. This scenario is the *only* one relevant  
6 here. This second scenario unequivocally states it applies where the special  
7 advisory group timely “recommends applicable substantive criteria for an energy  
8 facility described in ORS 469.300 or a related or supporting facility that does not  
9 pass through more than one local government jurisdiction or more than three  
10 zones in any one jurisdiction.” In this second scenario, the statute is clear: “*the*  
11 *council shall apply the criteria recommended by the special advisory group.*”  
12 (Emphasis supplied.) This part of ORS 469.504(5) *does not* refer back to ORS  
13 469.504(1)(b)(B), contrary to the sentence and scenario that immediately precedes  
14 it. The legislature was clearly aware of ORS 469.504(1)(b)(B), having directed  
15 its application in the immediately preceding sentence as being applicable to *only*  
16 *the first scenario*. That evidences the legislature’s intent to apply ORS  
17 469.504(1)(b)(B) *only* to the scenario that ORS 469.504(5) expressly says it  
18 applies to and not others.  
19
- 20 • The last scenario in ORS 469.504(5) also does not apply in this case, as is  
21 explained in detail in prior sections of this motion. The last ORS 469.504(5)  
22 scenario expressly says that it applies only to specifically enumerated types of  
23 energy facilities (not at issue here) or “related or supporting facilities that pass  
24 through more than one jurisdiction or more than three zones in any one  
25 jurisdiction.” In this scenario, ORS 469.504(5) says that the council can decide  
26 whether to apply the applicable substantive criteria, the state goals, or a  
27 combination of them, but that the decision must be made based upon EFSC’s  
28 consideration of certain expressly required and enumerated factors. Here again,  
29 the third scenario does not mirror or refer to ORS 469.504(1)(b)(B) which does  
30 not require a factors analysis to decide to apply the state goals instead of the  
31 applicable substantive criteria. ORS 469.504(1)(b)(B) cannot be used to excuse  
32 the express requirement to apply certain limited factors to certain types of  
33 facilities, any more than it can be used to excuse compliance with the second  
34 scenario outlined in ORS 469.504(5).  
35

36 Therefore, the reference in ORS 469.504(1)(b)(B) to ORS 469.504(5) and ORS  
37 469.504(5)’s limited reference back, must be intended to be meaningful, no other inference is  
38 possible. Similarly, the express and only reference in ORS 469.504(5) to ORS 469.504(1)(b)(B)  
39 must also be intended to be meaningful. The legislature’s omission of any reference to ORS  
40 469.504(1)(b)(B) in any other scenario but the first in ORS 469.504(5) must also be intended to  
41 be meaningful. From the express words used in the two sections of the same statute and their  
42 structure, it is plain that if the special advisory group timely identifies substantive applicable  
43 criteria as here, EFSC “shall” apply them. Nothing about that scheme suggests the legislature  
44 intended EFSC to use ORS 469.504(1)(b)(B) to reduce the command of ORS 469.504(5)’s  
45 second scenario that EFSC “shall” apply the applicable substantive criteria to proposed facilities,  
46 to a mere suggestion to be ignored for the convenience of a major energy facility developer.

1  
2 a. The Text and Context of ORS 469.504(5) are Unambiguous.  
3

4 The text and context of ORS 469.504(5) are unambiguous. ORS 469.504(5) requires  
5 EFSC to apply the applicable substantive criteria recommended by the special advisory group in  
6 the second of the three scenarios that statute postulates. ORS 459.504(5) contemplates different  
7 possibilities for two *other* scenarios that do not apply here<sup>16</sup> as explained above. The first  
8 scenario of ORS 469.504(5) expressly authorizes the Council to trigger ORS 469.504(1)(b)(B) if  
9 the special advisory group does not timely identify applicable substantive criteria. In the third  
10 ORS 469.504(5) scenario, in limited circumstances also inapplicable here, the Council may  
11 apply the state goals rather than applicable substantive criteria, but only if that result reasonably  
12 follows EFSC’s demonstration that it has considered certain limited statutory factors.  
13

14 In that context of three different ORS 469.504(5) scenarios in which only one refers back  
15 to ORS 469.504(1)(b)(B), the ORS 469.504(1)(b)(B) reference to ORS 469.504(5) can only refer  
16 to that first scenario of ORS 469.504(5) that expressly refers to ORS 469.504(1)(b)(B). Reading  
17 ORS 469.504(1)(b)(B) as the PCCO does, impermissibly renders ORS 469.504(5)’s second  
18 scenario requirement that EFSC “shall” apply the applicable substantive criteria where the  
19 special advisory group timely recommends them to having no effect. It reduces the specific  
20 reference of ORS 469.504(5) to ORS 469.504(1)(b)(B) to surplusage (why bother?). And  
21 renders the factors’ analysis for the third scenario of ORS 469.504(5) as an effectively  
22 meaningless suggestion. It is respectfully submitted that there could not be a more erroneous  
23 construction of a statute than evidenced in the PCCO. In fact, the PCCO’s construction violates  
24 every principle of ORS 174.010 as well as *State v. Gaines*, 346 Or 160, 171-72, 206 P.3d 1042  
25 (2009) and *Lake Oswego Preservation Society v. City of Lake Oswego*, 360 Or 115, 129-30, 379  
26 P3d 462, 470-71 (2016): It is contrary to the express words used in ORS 469.504(5), it is  
27 contrary to the context of the relevant provisions, it fails to give effect to all parts of the statute,  
28 and renders the express words used in ORS 469.504(5) as mere surplusage.  
29

30 The text of ORS 469.504(1)(b)(B) and ORS 469.504(5) relate to one another by their  
31 plain terms. In subsection (5), the legislature’s carefully created special advisory group is given  
32 the right to timely provide to EFSC with a list of the applicable substantive criteria and, having  
33 done so, the SAG is given the right to expect that EFSC “shall” apply those criteria to the  
34 proposed energy facility. When the special advisory group timely performs its statutory function  
35 as occurred here, subsection (5) is clear that EFSC “shall” apply those identified applicable  
36 substantive criteria. ORS 469.504(5) contains three scenarios and only one of them refers to  
37 ORS 469.504(1)(b)(B). ORS 469.504(1)(b)(B) cannot properly be interpreted to deprive the  
38 parts of ORS 469.504(5) that *do not refer* to ORS 469.504(1)(b)(B) of their plain, express  
39 meaning and instead reduce them to surplusage. Rather, ORS 469.504(1)(b)(B) is simply a part  
40 of the general ORS 469.504(1) framework for proposed facilities to demonstrate that they  
41 comply with the state planning goals. One way to do that is for a facility to comply with  
42 acknowledged local land use rules that the special advisory group timely identifies. ORS

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<sup>16</sup> They are that the special advisory group fails to make a timely recommendation or an applicable substantive criteria applies to types of energy facilities not at issue here or to related or supporting facilities that pass through more than one jurisdiction or more than three zones.

1 469.504(1)(b)(A) and ORS 469.504(5). Another is under the first scenario of ORS 469.504(5),  
2 that expressly contemplates that a facility that would otherwise be required to comply with the  
3 applicable substantive criteria had they been timely identified may instead demonstrate direct  
4 goal compliance as provided by ORS 469.504(1)(b)(B). ORS 469.504(5) includes a third  
5 scenario that pertains to a class of energy facilities not at issue here and to related or supporting  
6 facilities not at issue here. In that third scenario, if it applies, then after considering certain  
7 factors EFSC may decide not to apply the applicable substantive criteria in whole or part. But  
8 there can be no dispute that ORS 469.504(5) identifies only one scenario that expressly refers  
9 back to ORS 469.504(1)(b)(B).

10  
11 Moreover, the related statute of ORS 469.480 further supports that the legislature enacted  
12 ORS 469.504 to constrain siting “facilities” that do not comply with the special advisory group’s  
13 timely identified local acknowledged land use rules. ORS 469.480 became an important part of  
14 the detailed energy facility siting program that was introduced by the legislature in 1993 after the  
15 Oregon land use program had matured and local governing bodies had land use planning rights  
16 and obligations after going through the arduous process of gaining “acknowledgement.”  
17 County’s MSD, Exhibit 5 (Legislative History), p. 33; *and see* County’s MSD, Exhibit 5, p. 263.  
18 ORS 469.480 and 504 were developed to ensure that local governing bodies – the special  
19 advisory group - had a meaningful role in the siting of “facilities” in Oregon. County’s MSD,  
20 Exhibit 5, p. 61; *and see* County’s MSD, Exhibit 5, p. 173. If the special advisory group timely  
21 identified applicable substantive criteria, the legislature required that they be applied in adopting  
22 ORS 469.504(5). The important role of the special advisory group was certainly not developed  
23 to give mere lip service to acknowledged land use plans and provide EFSC authority to ignore  
24 them. Under the now well-developed Oregon land use program, the time to challenge local land  
25 use regulations is before they are acknowledged. Once they are acknowledged, no applicant for  
26 any land use has the right to merely decide not to comply – to effectively collaterally attack  
27 acknowledged local land use rules. *Central Oregon Landwatch v. Deschutes County*, 79 Or  
28 LUBA 253, 261, *aff’d*, 298 Or App 375, 449 P3d 534 (2019).

29  
30 It is undeniable that ORS 469.504(5) vests the special advisory committee with important  
31 rights and duties in “facility” siting decisions. Under ORS 469.504(5), the special advisory  
32 group is charged with the responsibility to identify the applicable substantive criteria that apply  
33 to the proposed facility. And ORS 469.504(5) assures the special advisory group that if they go  
34 to the trouble of convening, and combing their acknowledged land use rules and timely  
35 identifying applicable substantive criteria that apply, that EFSC “shall” apply those criteria. The  
36 PO interpretation of ORS 469.504(1)(b)(B) is an improper “tail wag the dog one” that renders  
37 the entire participatory process and role of the special advisory group, nugatory.

38  
39 Finally, the statutory framework in which ORS 469.504 was enacted confirms that, as  
40 stated in the statute’s plain text, the legislature intended to create a significant right in county  
41 governing bodies to affect the land use siting of “facilities” within their political boundaries.  
42 ORS 469.504 is a part of the overall statewide land use planning program that provides detailed  
43 responsibilities to all governing bodies of this state to adopt comprehensive plans that reflect a:

44  
45 “generalized, coordinated land use map and policy statement of the governing  
46 body of a local government that interrelates all functional and natural systems and

1 activities relating to the use of lands, including but not limited to sewer and water  
2 systems, transportation systems, educational facilities, recreational facilities, and  
3 natural resources and air and water quality management programs.  
4 ‘Comprehensive’ means all-inclusive, both in terms of the geographic area covered  
5 and functional and natural activities and systems occurring in the area covered by  
6 the plan. ‘General nature’ means a summary of policies and proposals in broad  
7 categories and does not necessarily indicate specific locations of any area, activity  
8 or use. A plan is ‘coordinated’ when the needs of all levels of governments,  
9 semipublic and private agencies and the citizens of Oregon have been considered  
10 and accommodated as much as possible. “Land” includes water, both surface and  
11 subsurface, and the air.” ORS 197.015.  
12

13 There is no dispute that Umatilla County has adopted such a planning program or that the  
14 applicable substantive criteria are an expression of that. Further, it is a basic principle of the  
15 Oregon land use program that no person can violate the County’s adopted local land use rules.  
16 Nothing suggests that wind energy developers are exempt from this statutory requirement. In  
17 this regard, ORS 215.190 provides:  
18

19 “No person shall locate, construct, maintain, repair, alter, or use a building or  
20 other structure or use or transfer land in violation of an ordinance or regulation  
21 authorized by ORS 215.010 to 215.190 and 215.402 to 215.438.”  
22

23 There is no dispute that the applicable substantive criteria are an ordinance authorized by  
24 these statutes.  
25

26 Far from evidencing an intent to broadly exempt “facility” siting decisions from this  
27 program, ORS 469.504 reflects the legislature intended that “facility” siting decisions would  
28 comply with those local land use rules that the special advisory group that EFSC is required to  
29 appoint, timely identifies as the applicable substantive criteria.  
30

31 b. Legislative History Confirms the Plain Text.  
32

33 As an initial matter, legislative history is of limited utility here. The text and context of  
34 ORS 469.504(1)(b)(B) and (5) “must be given primary weight in the analysis.” *Gaines*, 346 Or  
35 at 171. Courts “are bound by what the legislature actually did, not by what it might have thought  
36 it was doing (or not doing).” *McLaughlin v. Wilson*, 292 Or App 101, 111, 423 P3d 133 (2018),  
37 *aff’d*, 365 Or 535, 449 P3d 492 (2019). As a result, “a party seeking to overcome seemingly  
38 plain and unambiguous text with legislative history has a difficult task before it.” *Gaines*, 346  
39 Or at 172. For the reasons discussed above, the text and context of ORS 469.504(1)(b)(B) and  
40 (5) unambiguously preclude the applicant and PCCO from simply presuming they are permitted  
41 to ignore the special advisory group’s identified applicable substantive criteria.  
42

43 The legislative history behind the legislature’s enactment of ORS 469.504, however,  
44 confirms that the Oregon legislature intended to make the energy facility siting program a part of  
45 the fabric of the Oregon land use planning program, which relies upon all land uses complying  
46 with acknowledged local legislation. ORS 215.190.

1  
2           Until the adoption of ORS 469.504 (initially as ORS 469.503 and then later renumbered  
3 to ORS 469.504) in 1993 and ORS 469.480 in 1991, the energy facility siting program first  
4 established in 1973, had no role for the then-nonexistent Oregon comprehensive land use  
5 program (“The Siting Act has not been revised significantly since its enactment in the late 1970s.  
6 It was designed to address siting large coal and nuclear power plants at a time when land use  
7 planning and energy planning were in their infancy.”) Exhibit 5 (Legislative History), p. 33; *and*  
8 *see* Exhibit 5, p. 263.  
9

10           In 1991 when ORS 469.480 was first adopted, the legislature intended to give governing  
11 bodies of jurisdictions where energy facilities were proposed, a role in the siting of energy  
12 facilities. 1991 SB 861. However, other than requiring EFSC to appoint a “special advisory  
13 group”, the 1991 legislation lacked any meaningful participatory mechanisms for the special  
14 advisory group.  
15

16           Hence, ORS 469.503 (later renumbered to ORS 469.504) was adopted to ensure that the  
17 local governing bodies of the jurisdictions where energy facilities were proposed to be sited, had  
18 a meaningful role. A lawyer for the energy industry, Gale Achterman, testified about the 1993  
19 legislation, explaining that “County land use provisions are completely preempted currently by  
20 the state energy facility siting process, but city land use provisions are not preempted. This  
21 change provides a process that treats cities and counties equally and *assures the application of*  
22 *the substantive criteria of the acknowledged land use plan.*” (Emphasis supplied.) County’s  
23 MSD, Exhibit 5, p. 14. She testified that the then-existing “Energy Facility Siting Act needs to  
24 be updated to assure that it works in the context of today’s land use, environmental, and energy  
25 planning systems.” County’s MSD, Exhibit 5, p. 60; *and see* County’s MSD, Exhibit 5, p. 172,  
26 *and* 299. She went on to explain that the 1993 legislation is “critically important” in order “to  
27 assure” that energy facilities are sited “in a manner that will \* \* \* comply with \* \* \* land use  
28 laws.” County’s MSD, Exhibit 5, p. 61; *and see* County’s MSD, Exhibit 5, p. 173.  
29

30           Importantly, she explained that “[t]imes have changed” since the first Oregon energy  
31 facility siting statutes were adopted. County’s MSD, Exhibit 5, p. 263. She explained the need  
32 for the 1993 legislation regarding land use, that “[t]he existing Act does not correlate energy  
33 facility siting with acknowledged local land use plans. *SB 1016 allows the EFSC to find*  
34 *compliance with the statewide planning goals if the facility has received local land use approval*  
35 *or if the EFSC determines that the facility complies with applicable substantive criteria from the*  
36 *affected local plan.* EFSC also is authorized to take exceptions from the statewide goals, if  
37 necessary.” (Emphasis supplied.) County’s MSD, Exhibit 5, p. 265. Nothing about that  
38 suggests that acknowledged local rules could simply be ignored if they proved inconvenient to an  
39 applicant.  
40

41           EFSC’s testimony was similar. In its 1993 position paper concerning the 1993  
42 legislation, EFSC testified that “EFSC should consider local land use plans. EFSC should retain  
43 the authority to determine compliance with state and local land use requirements and to resolve  
44 any inconsistencies.” County’s MSD, Exhibit 5, p. 122.  
45



1 In 1997, EFSC reflected upon the role that local land use standards had been given in the  
2 1991-1995 legislatures: “The current process works well because it considers issues of state  
3 significance (e.g. global climate change and state wildlife consideration) and issues of local  
4 significance (e.g. land use standards) by using the substantive standards for the local plans and  
5 zoning.” County’s MSD, Exhibit 5, p. 310.  
6

7 In a May 5, 1993 letter, the wind industry acknowledged the value of local land use  
8 regulations stating the industry sought “state and local land use policies which account for wind  
9 energy’s unique benefits and impacts.” County’s MSD, Exhibit 5, p. 125.  
10

11 The League of Oregon Cities weighed in to state its understanding of the new 1993  
12 legislation to impose “requirements that proposed energy facilities meet all affected local  
13 government’s land use regulations.” County’s MSD, Exhibit 5, p. 199. The Association of  
14 Oregon Counties similarly weighed in regarding their understanding of the effect of the proposed  
15 amendments to “obtain recognition and acknowledgement” of County land use rules “in the  
16 energy facility siting process and “[r]equirements that the proposed facilities meet all applicable  
17 local government land use regulations.” County’s MSD, Exhibit 5, p. 200.  
18

19 In an exchange between Representative Dell and industry lawyer Achterman,  
20 Representative Dell posited the following inquiry: “EFSC can just find the facility in compliance  
21 if the local land use says it is, or they can find it in compliance if they find that it satisfies the  
22 substantive part of the local plan. Are we putting EFSC in a position to interpret the land use  
23 plan? Is that regardless of local action having been taken?” County’s MSD, Exhibit 5, p. 254.  
24 Ms. Achterman responded that “regardless of local action” that “the Council” would have  
25 authority “to interpret the plan.” *Id.* Nothing about that exchange suggests that the legislature  
26 understood that the Council could simply ignore the local plan at the outset, as here. Senator  
27 Joyce Cohen wrote in favor of the 1993 legislation explaining that in the beginning that EFSC  
28 “was put into place by the legislature in the mid-1970s to provide a preemption of siting of  
29 energy facilities in the state.” County’s MSD, Exhibit 5, p. 257. She went on to explain how the  
30 1993 legislation “improved” on that existing paradigm, explaining: “One of the major  
31 improvements over the current law is a provision that clarifies land use language. It takes into  
32 account how far local jurisdictions have come since the mid-1970’s in terms of their siting  
33 process. In the bill *we have made sure that the local governments comprehensive plans will be*  
34 *considered by the siting Council.* The Department of Energy will also assist local jurisdictions  
35 develop energy siting model ordinances. Local jurisdictions are very supportive of what we’ve  
36 done in this land use bill.” (Emphasis supplied.) County’s MSD, Exhibit 5, p. 260.  
37

38 The legislative history confirms that it intended that the important role that local  
39 government played in the Oregon land use planning program would be reflected in energy siting  
40 process. Nothing supports an energy facility applicant simply deciding that it does not wish to  
41 apply the special advisory group’s identified applicable substantive criteria and the Council  
42 simply acceding to that request, without at the least making any effort to demonstrate that  
43 compliance for the energy facility is not possible.  
44

45 The purpose of the 1993 amendments was to give governing bodies of jurisdictions  
46 where major energy facilities were to be sited the right to require those facilities to comply with

1 local applicable substantive criteria. Nothing suggests that the legislature intended EFSC to  
2 excuse applicants from complying with the applicable substantive criteria because they would  
3 rather not do so.

4  
5 The PCCO makes no effort to demonstrate that the wind energy facility “cannot” comply  
6 with the applicable substantive criteria, only that the applicant does not think it has to and  
7 apparently does not want to. The legislative history does not support in any way the PCCO’s  
8 conclusion that EFSC can excuse compliance in such circumstances. “[L]egislative history is  
9 most useful when it is able to uncover the manifest general legislative intent behind an  
10 enactment.” *Gaines*, 346 Or at 172 n 9 (citation omitted). Here, the manifest legislative intent  
11 confirms the plain text: EFSC “shall” apply the applicable substantive criteria. ORS 469.504(5).

12  
13 *vii. The PCCO misconstrues applicable law in determining that MSD is appropriate in*  
14 *favor of ODOE and the applicant. MSD is only appropriate if there are no genuine*  
15 *issues of fact and the applicant has carried its burden to demonstrate compliance*  
16 *with all applicable standards. Neither is the case here.*

17  
18 PCCO, p. 16, states:

19  
20 “[S]ummary determination may only be granted when there are no relevant facts  
21 in dispute and the question(s) to be resolved are purely legal. In this contested  
22 case, all parties/limited parties concede that there are no material facts in dispute  
23 and the question to be resolved, specifically, whether Council may find the  
24 Project in compliance with the Land Use standard despite the Project’s lack of  
25 compliance with County Criterion (3), is a purely legal one. Therefore, this case is  
26 appropriate for resolution on summary determination.”

27  
28 However, the PCCO goes on to acknowledge that the County argued “the Department  
29 erred in characterizing the UEC Cottonwood transmission line as a related or supporting facility,  
30 and erred in concluding that the proposed facility or a related or supporting facility would pass  
31 through more than three zones. UC Amended Motion at 6.” PCCO, p. 29. This argument is  
32 essentially that there are genuine issues of material fact to be determined – whether the UEC  
33 Cottonwood line is a “related or supporting facility” and, if so, whether it passes through more  
34 than three zones.

35  
36 Basis for Exception

37  
38 Summary determination is appropriate only where:

39  
40 “(a) The pleadings, affidavits, supporting documents (including any  
41 interrogatories and admissions) and the record in the contested case show that  
42 there is no genuine issue as to any material fact that is relevant to resolution of the  
43 legal issue as to which a decision is sought; and

44  
45 “(b) The agency or party filing the motion is entitled to a favorable ruling as a  
46 matter of law.” OAR 137-003-0580(6).

1  
2 In *Watts v. Bd. of Nursing*, 282 Or App 705, 714 (2016), the Oregon Court of Appeals  
3 stated:

4  
5 “The board can grant a motion for summary determination only if the relevant  
6 documents, including affidavits, create ‘no genuine issue as to any material fact  
7 that is relevant to resolution of the legal issue.’ OAR 137-003-0580(6)(a) \* \* \*. If  
8 there is evidence creating a relevant fact issue, then no matter how  
9 ‘overwhelming’ the moving party’s evidence may be, or how implausible the  
10 nonmoving party’s version of the historical facts, the nonmoving party, upon  
11 proper request, is entitled to a hearing.” (Emphasis in original).  
12

13 In *Wolff v. Bd. of Psychologist Examiners*, 284 Or App 792, (2017), the Oregon Court of  
14 Appeals concluded that genuine issues of material fact existed as to whether a psychologist  
15 associate’s use of the terms “PsyA,” “Master of Arts Clinical Psychology” and “practicing  
16 psychology” when describing his practice was “misleading” or “deceiving to the public”, which  
17 precluded summary determination in favor of the Board as to whether the associate’s conduct  
18 violated the statutes governing the practice of psychology. In that case, the associate argued in  
19 his response to the board’s motion for summary determination that although he has used those  
20 terms, their usage was not necessarily “misleading”, essentially contending that the record left  
21 genuine issues of material fact to be determined. The ALJ ruled in favor of the board on its  
22 motion for summary determination, concluding that the associate violated the applicable statutes,  
23 which required a factual finding that associate’s conduct would have misled the public into  
24 believing that petitioner was a licensed psychologist with a doctorate in psychology. The Court  
25 of Appeals concluded that that factual finding was a disputed issue of material fact which was  
26 inappropriate to resolve at the summary determination part of the proceedings.  
27

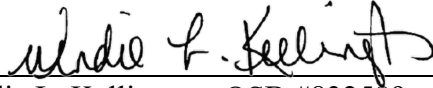
28 The same circumstances in *Wolff* are present here. The PCCO makes factual findings  
29 that the UEC Cottonwood transmission line is a “related or supporting facility” and that it passes  
30 through more than three zones, even though the County demonstrated that it is not and does not  
31 and presented evidence from the applicant’s materials that the Cottonwood line would be  
32 constructed regardless of whether the proposed wind or solar facilities are built and that it does  
33 not pass through more than three zones. Moreover, the applicant itself acknowledges that the  
34 Cottonwood line is not a related or supporting facility that passes through more than three zones,  
35 but rather only the “analysis area” or “site boundary” would be in more than three zones but  
36 neither the analysis area nor site boundary are relevant to the determination of the “related or  
37 supporting facilities” under the third scenario of ORS 469.504(5). In this circumstance where  
38 there are no genuine issues of material fact that the Cottonwood line cannot be a related or  
39 supporting facility that passes through more than three zones summary determination on that  
40 topic was not lawfully awarded to the applicant and ODOT. Moreover, where there are genuine  
41 issues of material fact to be determined with respect to whether the Cottonwood line would be  
42 built regardless of whether the Nolin Hills energy facility ever connects to it or is constructed,  
43 summary determination in favor of the applicant and the Department was also unlawful as a  
44 matter of law.  
45  
46

1 **III. CONCLUSION**

2  
3 For the foregoing reasons, Umatilla County requests that the Council modify the PCCO  
4 to conform to the County’s exceptions presented herein or reject the PCCO. OAR 345-015-  
5 0085(7).  
6

7 DATED this 12th day of June, 2023.  
8

9 KELLINGTON LAW GROUP, PC

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 12, 2023, I filed the foregoing Limited Party Umatilla County's Exceptions to Proposed Contested Case Order in OAH Case No. 2022-ABC-05140 with the Office of Administrative Hearings by email to OED\_OAH\_Referral@oregon.gov.

I further certify that on June 12, 2023, I served a true and correct copy of said document on following persons by email:

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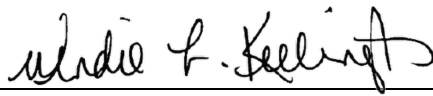
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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY**

**IN THE MATTER OF:**

**NOLIN HILLS WIND POWER  
PROJECT**

**NOLIN HILLS LLC'S RESPONSE TO  
UMATILLA COUNTY'S EXCEPTIONS  
TO PROPOSED CONTESTED CASE  
ORDER**

OAH Case No. 2022-ABC-05140

## **I. INTRODUCTION**

Umatilla County (the County) has filed exceptions to the Administrative Law Judge's (ALJ) Rulings on Motions for Summary Determination. The exceptions are a whole cloth reiteration of flawed arguments set forth in the County's Summary Determination briefs. Throughout these proceedings, the County has expressed its disregard for the statutes, administrative rules, and Supreme Court cases that have for decades guided and bounded the Energy Facility Siting Council's (EFSC) consideration of jurisdictional facilities. The County's exceptions have little to do with accusations of actual error made by the ALJ under EFSC's guiding statutes, rules and precedential Supreme Court authority. Instead, the County contrives novel but flawed interpretations of the law, and opposes EFSC's reliance on such statutes, rules, and precedential Supreme Court decisions.

## **II. RESPONSE TO EXCEPTIONS**

Nolin Hills LLC responds generally to the exceptions, choosing not to rehash the Summary Determination briefs (nine were filed and reviewed by the ALJ), which are available for the Council's consideration. If oral argument on the exceptions is requested, Nolin Hills will respond.

OAR 345-015-0085 establishes the process for contested case orders, including the process for filing and acceptance of exceptions, with key provisions highlighted below:

- (1) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions that the party believes are necessary or appropriate to implement the policy of [ORS 469.310 \(Policy\)](#) or to meet the requirements of any other applicable statute, administrative rule or local government ordinance. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer.
- (2) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party's

proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.

(3) After the hearing in a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, and recommended site certificate conditions on the issues in the contested case. The hearing officer shall serve the proposed order on all parties and limited parties. In the proposed order, the hearing officer shall include recommended resolutions of objections to the local land use record, if any. The hearing officer's recommendations are part of the decision record for the application but are not part of the Council's order.

(4) After the hearing in a contested case proceeding on any matter other than an application for a site certificate or proposed site certificate amendment, the hearing officer shall issue a proposed order stating the hearing officer's findings of fact and conclusions of law. The hearing officer shall serve the proposed order on all parties and limited parties.

(5) Parties and limited parties **may file exceptions** to the proposed order within the time set by the hearing officer, not to exceed 30 days after the hearing officer issues the proposed order. A party filing exceptions shall serve a copy of the exceptions on all other parties and limited parties. In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.

(6) Parties and limited parties **may file responses to exceptions** within the time set by the hearing officer, not to exceed 15 days after the time set for filing exceptions. A party filing responses to exceptions shall serve a copy of the responses to exceptions on all other parties and limited parties.

(7) After the period for filing responses to exceptions, the Council shall issue a final order. The Council may adopt, modify or reject the hearing officer's proposed order.

(8) Following a contested case proceeding on an application for a site certificate, the Council, in its final order, shall either grant or deny issuance of a site certificate. If the Council grants issuance of a site certificate, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

(9) Following a contested case proceeding on a proposed site certificate amendment, the Council, in its final order, shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site



certificate, the Council shall issue an amended site certificate. The amended site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

**(10)** The Council shall issue a site certificate or amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.

(Emphasis added.)

Filing exceptions is not mandatory to proceed with an appeal to the Oregon Supreme Court. As highlighted above, parties “may file responses to exceptions” but need not do so.

The County continues to dispute the application of EFSC’s longstanding statutory and regulatory standards, affirmed by the Oregon Supreme Court, and routinely applied in addressing the role of local substantive criteria in permitting energy facilities. The County continues to disregard the fundamental requirement and process for EFSC’s authorization of jurisdictional energy facilities.

To determine whether and how an energy facility satisfies “applicable substantive criteria,” the criteria consists of “the affected local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals \* \* \*.” ORS 469.504(1)(b)(A) (emphasis added). OAR 345-022-0030(3) clearly defines “applicable substantive criteria” as “criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application.” (Emphasis added.) The Supreme Court has fully resolved this issue, holding:

“The phrase ‘applicable substantive criteria’ also is used in ORS 469.504(1)(b)(A) and (1)(b)(B). Subparagraph (1)(b)(A) clarifies that the legislature understood that phrase to denote criteria ‘from the affected local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application [was] submitted.’ Because ‘use of the same term throughout a statute indicates that the term has the same meaning throughout the statute,’ we determine that the references to ‘applicable substantive criteria’ in ORS 469.504(1)(b)(B) and (5) also denote those local regulations.”

*Save Our Rural Oregon v. Energy Facility Siting Council*, 339 Or 353, 364 n 7, 121 P3d 1141 (2005) (“*Save Our Rural Oregon*” or “*SORO*”) (emphasis added; original brackets, internal quotation marks and citation omitted. The Supreme Court has expressly applied these definitions and limitations in the context of ORS 469.504(1)(b)(B):

“Under the first part of ORS 469.504(1)(b)(A), the council must determine that the facility complies with substantive criteria—derived from the local government’s ‘acknowledged comprehensive plan and land use regulations’—that

are (1) required by statewide planning goals; and (2) ‘in effect’ on the certificate or amendment application date.”

*Blue Mountain All. v. Energy Facility Siting Council*, 353 Or 465, 473-74, 300 P3d 1203 (2013).

The County continues to disregard eight key words—“*that are required by the statewide planning goals*”—exposing its flawed arguments. The County continues to make no effort to explain this blatant omission made over and over in the briefs and now in the exceptions as well. Instead, the County obfuscates and misrepresents Oregon law. We emphasize below the statutory provisions that allow the Nolin Hills Project to proceed with Site Certification, without adherence to the County’s setback code. The ALJ also quoted this foundational statute governing authorization of jurisdictional EFSC facilities (ALJ Decision, pp. 16–19), with emphasis added in an apparent effort to punctuate the plainly clear law. We again emphasize the obvious as clearly as we can below:

#### **ORS 469.504 Facility compliance with statewide planning goals**

**(1)** A proposed facility **shall be found in compliance with the statewide planning goals** under ORS 469.503 (Requirements for approval of energy facility site certificate) (4) if:

**(a)** The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or **(b)** The Energy Facility Siting Council determines that:

(A) The facility complies with applicable substantive criteria from the affected local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646 (Implementation of new requirement in goal, rule or statute);

(B) For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section; **or**

(C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section.

(2) The council may find goal compliance for a facility that does not otherwise comply with one or more statewide planning goals by taking an exception to the applicable goal. Notwithstanding the requirements of ORS 197.732 (Goal exceptions), the statewide planning goal pertaining to the exception process or any rules of the Land Conservation and Development Commission pertaining to an exception process goal, the council may take an exception to a goal if the council finds:

(a) The land subject to the exception is physically developed to the extent that the land is no longer available for uses allowed by the applicable goal;

(b) The land subject to the exception is irrevocably committed as described by the rules of the Land Conservation and Development Commission to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

(c) The following standards are met:

(A) Reasons justify why the state policy embodied in the applicable goal should not apply;

(B) The significant environmental, economic, social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the council applicable to the siting of the proposed facility; and

(C) The proposed facility is compatible with other adjacent uses or will be made compatible through measures designed to reduce adverse impacts.

(3) If compliance with applicable substantive local criteria and applicable statutes and state administrative rules would result in conflicting conditions in the site certificate or amended site certificate, the council shall resolve the conflict consistent with the public interest. A resolution may not result in a waiver of any applicable state statute.

(4) An applicant for a site certificate shall elect whether to demonstrate compliance with the statewide planning goals under subsection (1)(a) or (b) of this section. The applicant shall make the election on or before the date specified by the council by rule.

(5) Upon request by the State Department of Energy, the special advisory group established under ORS 469.480 (Local government advisory group) shall recommend to the council, within the time stated in the request, the applicable substantive criteria under subsection (1)(b)(A) of this section. If the special advisory group does not recommend applicable substantive criteria within the time established in the department's request, **the council may either determine**

**and apply the applicable substantive criteria under subsection (1)(b) of this section or determine compliance with the statewide planning goals under subsection (1)(b)(B) or (C) of this section.** If the special advisory group recommends **applicable substantive criteria** for an energy facility described in ORS 469.300 (Definitions) or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group. **If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300 (Definitions) (11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals.** In making its determination, the council shall consult with the special advisory group **and shall consider:**

(a) The number of jurisdictions and zones in question;

(b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and

(c) The level of consistency of the applicable substantive criteria from the various zones and jurisdictions.

(6) The council is not subject to ORS 197.180 (State agency planning responsibilities) and a state agency may not require an applicant for a site certificate to comply with any rules or programs adopted under ORS 197.180 (State agency planning responsibilities).

(7) On or before its next periodic review, each affected local government shall amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate.

(8) Notwithstanding ORS 34.020 (Who may obtain review) or 197.825 (Jurisdiction of board) or any other provision of law, the affected local government's land use approval of a proposed facility under subsection (1)(a) of this section and the special advisory group's recommendation of applicable substantive criteria under subsection (5) of this section shall be subject to judicial review only as provided in ORS 469.403 (Rehearing on approval or rejection of application for site certificate or amendment). If the applicant elects to comply with subsection (1)(a) of this section, the provisions of this subsection shall apply only to proposed projects for which the land use approval of the local government occurs after the date a notice of intent or an application for expedited processing is submitted to the State Department of Energy.

(9) The State Department of Energy, in cooperation with other state agencies, shall provide, to the extent possible, technical assistance and information about the siting process to local governments that request such assistance or that anticipate having a facility proposed in their jurisdiction. [1997 c.428 §5; 1999 c.385 §10; 2001 c.134 §11; 2003 c.186 §79; 2005 c.829 §12]

(Emphasis added.)

In summary, this statutory language is plain. It is unambiguous. It applies to Nolin Hills. And it has been affirmed and upheld by the Oregon Supreme Court.

### III. CONCLUSION

Under ORS 469.504(5), the Council “shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals.” (Emphasis added.) There is nothing in ORS 469.504(5) that would require EFSC to adhere to the County’s setback requirement given its detachment from statewide planning goals. Statewide planning goal findings are especially applicable here, where there is simply no statewide planning goal to compel the setback requirement, and the local setback code in no way is intended to protect Goal 3 (agricultural) resources.

Respectfully submitted this 27<sup>th</sup> day of June 2023.

Stoel Rives LLP



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By: Timothy L. McMahan, OSB No. 984624

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I hereby certify that I filed the foregoing RESPONSE BRIEF in OAH Case No. 2022-ABC-05140 with the Energy Facility Siting Counsel by mailing one correct copy by first-class mail via the U.S. Postal Service and emailing one correct copy to:

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I also certify that I served the foregoing RESPONSE BRIEF in OAH Case No. 2022-ABC-05140 by mailing one correct copy by first-class mail via the U.S. Postal Service, and emailing one correct copy to the parties with email addresses listed to:

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DATED: June 27, 2023.

Respectfully submitted,

STOEL RIVES LLP



Timothy L. McMahan, OSB No. 984624

*Attorneys for Nolin Hills Wind LLC*

**BEFORE THE  
ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF:  
NOLIN HILLS WIND POWER PROJECT**

**OREGON DEPARTMENT OF  
ENERGY’S RESPONSE TO UMATILLA  
COUNTY EXCEPTIONS TO THE  
PROPOSED CONTESTED CASE  
ORDER**

**OAH Case No. 2022-ABC-05140**

**I. SUMMARY OF ODOE POSITION**

The contested case in this matter addressed the Application for Site Certificate (“ASC”) that Nolin Hills Wind, LLC (“Applicant”) submitted to the Energy Facility Siting Council (“EFSC” or “Council”), for a wind and solar power facility proposed to be constructed in Umatilla County, Oregon. The primary issue in the contested case was whether the Applicant must comply with an Umatilla County ordinance that imposes a two-mile setback between wind turbines and rural residences (“Criterion (3)” or the “setback”). The Oregon Department of Energy (“Department” or “ODOE”) believes the County’s setback is an example of a situation the legislature sought to avoid by giving EFSC comprehensive authority over the siting of energy facilities – a local government making it more difficult to locate an energy facility within their jurisdiction by imposing a requirement that does not further any statewide land use planning goal.

Under statute and rule, EFSC determines whether a proposed energy facility complies with local land use criteria *that are required by statewide planning goals*. The Administrative Law Judge (“ALJ”) overseeing the contested case correctly ruled that Umatilla County’s Criterion (3) is not required by statewide land use planning goals, therefore, even though the County recommended applying the setback, the Applicant does not need to comply with it for EFSC to issue a site certificate.

## II. PROCEDURAL HISTORY

In ASC Exhibit K, Applicant states that there may be turbines less than 2 miles from up to eight rural residences, thus not meeting the County’s setback.<sup>1</sup> On April 19, 2022, the Department issued a Draft Proposed Order on the ASC (“DPO”), in which the Department noted that although some of the proposed turbines would not comply with the County’s two-mile setback, it recommended that Council not require Applicant to comply with the setback because the setback is not required by statewide land use planning goals. At its June 2022 meeting, Council reviewed the DPO, including a comment from Umatilla County about proposed wind turbines not complying with its two-mile setback and a request that the applicant adjust the location of the turbines to comply with the setback.<sup>2</sup> At the June meeting, one Council member expressed support for the Department’s recommendation that the two-mile setback is not required by statewide land use planning goals.<sup>3</sup> On August 4, 2022 the Department issued a Proposed Order on the ASC, in which it recommended that EFSC approve the ASC. Umatilla County requested a contested case regarding the Department’s recommendation that the Council find the Applicant has complied with the Council’s Land Use standard. Specifically, Umatilla County raised, and the ALJ serving as the Hearing Officer for the contested case granted Umatilla County limited party status to address the following issues:

**Issue 1:** Whether the County’s land use regulation UCDC [Umatilla County

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<sup>1</sup> NHWAPPDoc2-10 ASC Exhibit K. Land Use\_2022-02-31, Section 4.3.1.5, p. 14.

<sup>2</sup> See Draft Proposed Order, Attachment B: Reviewing Agency Comments on preliminary/complete ASC, bates stamped in the contested case as NHWAPPDoc1, Draft Proposed Order with Attachments 2022-04-19 Pages 364-368 of 627.

<sup>3</sup> NHWAPPDoc6-3 June 24 2022 EFSC Meeting Final Approved Minutes Page 19 of 22 (“Council Member Jenkins advised that Council has received additional comments earlier on the record concerning the two-mile setback from Umatilla County. However, Council should recognize their land use evaluation needs to be of the applicable substantive criteria that are required by the statewide planning goals and he feels the Council’s position should be consistent with the staff recommendation that the two-mile setback is not required by statewide planning goals and is therefore not applicable substantive criteria”).

Development Code] 152.616(HHH)(6)(a)(3) (requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land) are “applicable substantive criteria” within the meaning of OAR 345-022-0020(3) that apply to the Project.

**Issue 1.1:** If so, whether the Project complies with UCDC 152.616(HHH)(6)(a)(3).

**Issue 2:** Whether the Project is required to obtain a conditional use permit from the County.

The Department, Applicant and Umatilla County each filed a Motion for Summary Determination (“MSD”). On May 12, 2023, the ALJ issued a Proposed Contested Case Order (“PCCO”), granting the MSDs brought by ODOE and the Applicant and denying the County’s MSD. The ALJ ruled as follows:

**Issue 1:** The Criterion (3) [the County’s setback ordinance] is not an applicable substantive criterion under OAR 345-022-0030(3) because it is not required by the statewide planning goals. Therefore, Criterion (3) does not apply to the Project.

**Issue 1.1:** The Project does not comply with Criterion (3) but otherwise complies with applicable statewide planning goals.

**Issue 2:** The Project is required to obtain a conditional use permit from the County, but pursuant to ORS 469.401(3), the County cannot require Applicant to comply with Criterion (3) as a requirement of the conditional use permit.

On June 12, 2023, the County filed numerous exceptions to the PCCO, in which the County largely makes the same arguments it presented to the ALJ in its MSD briefs. While the Department addresses the County’s exceptions below, if Council finds the setback is not required by statewide land use planning goals, the County’s myriad arguments, including those about whether the proposed Umatilla Electric Cooperative (“UEC”) Cottonwood transmission line is a related and supporting facility or whether the UEC transmission line is located in the Agri-Business (“AB”) zone, are irrelevant.

### III. OVERVIEW OF RELEVANT LAWS

Per ORS 469.503(4), to issue a site certificate EFSC must determine that a preponderance of evidence supports a conclusion that the proposed facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission (“LCDC”).

ORS 469.504(1) establishes that a proposed facility shall be found in compliance with statewide planning goals if:

- (a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or
- (b) The Energy Facility Siting Council determines that:
  - (A) The facility complies with applicable substantive criteria from the affected local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646;
  - (B) For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section; or
  - (C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section.

ORS 469.504(1) provides two primary paths for a proposed facility to demonstrate compliance with statewide land use planning goals – obtain land use approval from the affected local jurisdiction or EFSC. For this ASC, Applicant elected to have EFSC (rather than Umatilla County) determine whether the proposed facility complies with statewide planning goals.<sup>4</sup> Therefore, rather than consider ORS 469.504(1)(a) we must look at ORS 469.504(1)(b), which sets out three different ways for EFSC to determine compliance with the statewide land use

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<sup>4</sup> See the Application for Site Certificate Exhibit K – NHWAPPDoc2-10 ASC Exhibit K Land Use\_2022-01-31 Page 8 of 158; see also NHWAPPDoc1 - Proposed Order on ASC 2022-08-04 Page 74 of 904.

planning goals. First, pursuant to ORS 469.504(1)(b)(A), EFSC can determine that the facility complies with the “applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations *that are required by the statewide planning goals* and in effect on the date the application is submitted” and complies with any directly applicable LCDC rules, goals, or state statutes. Similarly, Council’s land use standard defines “applicable substantive criteria” as “criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances *that are required by the statewide planning goals* and that are in effect on the date the applicant submits the application.” OAR 345-022-0030(3) (emphasis added).

Second, pursuant to ORS 469.504(1)(b)(B), EFSC can determine that the proposed facility does not comply with applicable substantive criteria identified by a county, but it complies with the applicable statewide planning goals or an exception is justified. Third, pursuant to ORS 469.504(1)(b)(C), EFSC can determine that a facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified.

In the Proposed Order, the Department recommended Council find, pursuant to ORS 469.504(1)(b)(A), that the proposed facility complies with all the applicable substantive criteria from Umatilla County’s acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals, but UCDC 152.616(HHH)(6)(a)(3), requiring a two-mile setback between wind turbines and rural residences on Exclusive Farm Use (“EFU”)-

zoned land (“Criterion (3)”) is not an applicable substantive criterion because it is not required by the statewide planning goals.<sup>5</sup>

Although not required to do so, the Department also analyzed whether Council could make a finding of compliance with statewide planning goals pursuant to ORS 469.504(1)(b)(B) and 459.504(5), stating “Although the Department recommends Council find Criterion (3) is not ‘applicable substantive criteria required by the statewide planning goals,’ because that Criterion was recommended by the Special Advisory Group (“SAG”) and the proposed facility would not comply with that criterion, the Department still recommends Council consider . . . whether the proposed facility would otherwise comply with statewide planning goals.”<sup>6</sup> After walking through this analysis, the Department recommended “Council conclude, as authorized under ORS 469.504(1)(b)(B), that while some turbine locations will not comply with Criterion (3), the entire proposed facility nevertheless complies with applicable Statewide Planning Goals.”<sup>7</sup>

Many of the County’s exceptions focus on findings of fact and conclusions of law in the PCCO related to ORS 469.504(1)(b)(B) and ORS 469.504(5), including whether the proposed UEC Cottonwood transmission line is a related or supporting facility, and whether the proposed transmission line is located in the AB zone. While the Department addresses them below, those exceptions are not relevant to and do not impact the ALJ’s conclusion that, because the County’s setback/Criterion (3) is not required by statewide planning goals, it does not preclude Council from finding, under ORS 469.504(1)(b)(A) that the proposed facility complies with statewide

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<sup>5</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 95-100 of 904, analyzing “Question 1” - whether Criterion (3) qualifies as ‘applicable substantive criteria’ under ORS 469.504(1)(b)(A) and OAR 345-022-0030(3). In this section of the Proposed Order the Department analyzed Criterion (3) and recommended Council find it is not required by Goal 3 (*Id.*, p. 98 of 904), by Goal 14 (*Id.*, p. 100 of 904), nor any of the statewide planning goals (*Id.*).

<sup>6</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 93-95 and 100 – 106 of 904, analyzing “Question 2.”

<sup>7</sup> *Id.*, Page 106 of 904.

planning goals.<sup>8</sup> Nor do those exceptions impact the ALJ’s conclusion that “[b]ecause Criterion (3) is not required by statewide planning goals, it is not an applicable criterion under ORS 469.504(1)(b) and (5), even though the SAG recommended it as such. . . . To the extent the local government/special advisory group recommends local criteria not required by statewide planning goals, Council has no obligation to apply the criteria under ORS 469.504(5).”<sup>9</sup> Put another way, if Council finds the setback is not required by statewide planning goals, it may find compliance with the goals under ORS 469.504(1)(A); or, under ORS 469.504(1)(b)(B) and ORS 469.504(5) without requiring the applicant to comply with the setback.

#### **IV. DEPARTMENT RESPONSES TO COUNTY EXCEPTIONS**

The County filed nine exceptions to the PCCO, most of which are related to the evaluation of ORS 469.504(1)(b)(A) and/or ORS 469.504(1)(b)(B) and ORS 469.504(5). The Department provides the following summary table to identify the statutes to which the individual exceptions relate.

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<sup>8</sup> “I find that, as a matter of law, Criterion (3) is not an applicable substantive criterion under ORS 469.504 and OAR 345-022-0030(3) because it is not required by the statewide planning goals. And, because Criterion (3)’s two-mile setback does not constitute “applicable substantive criteria” under OAR 345-022-0030(3) it is not applicable to the Project and does not preclude Council from finding that the Project complies with statewide planning goals and approving a site certificate. I also agree with the Department and Applicant that, even if Criterion (3) were applicable to the Project, the Project otherwise complies with statewide planning goals under ORS 469.504(1)(b)(B).” PCCO, Page 23 of 35. “Because Criterion (3) is not a land use regulation that is required by the statewide planning goals, it is not an applicable substantive criterion within the meaning of ORS 469.504(1)(b)(A) and OAR 345-022-0030(3) that applies to the Project. Consequently, Issue 1 herein must be answered in the negative. The Department did not err in recommending that Council find that the Project need not comply with Criterion (3) to satisfy the Land Use Standard.” PCCO, Page 29 of 35.

<sup>9</sup> PCCO, Page 29 of 35.



### Exception Summary Table

*Notes: Cells shaded “gray” indicate arguments raised in exceptions are similar/related to same statute(s).		
No.	Exception	Related to - ORS
1	The Proposed Facility would not pass through more than three zones, including Umatilla County’s <b>Agri-Business zone</b> . The PCCO, p. 6, Finding of Fact #12 to the contrary is wrong and is not supported by substantial evidence. The record does not support the PCCO findings (PCCO, p. 30-31) that conclude that the UEC Cottonwood transmission line is a related or supporting facility (a “facility”) to the proposed wind and solar energy facilities.	469.504(1)(b)(B); 469.504(5)
2	The UEC Cottonwood Transmission Line Alternative is not a “ <b>related or supporting facility</b> ” to the proposed wind energy facility or solar energy facility and the County did cite evidence in the record establishing this fact. PCCO Finding of Fact #16.	469.504(1)(b)(B); 469.504(5)
3	Related to the exception to the erroneous finding of fact described in section (II)(A)(ii) immediately above, the PCCO misconstrues applicable law by shifting the burden of proof to the County. The applicant carries the burden of proof. The PCCO misconstrues applicable law by deciding that the County did not show that the UEC Cottonwood line is not a related or supporting facility. The burden of proving that fact belongs to the applicant. There is at the least a genuine issue of material fact regarding whether the Cottonwood line is a <b>related or supporting facility</b> . That means as a matter of law that summary determination on that issue misconstrued applicable law. OAR 137-003-0580(6)(a).	469.504(1)(b)(B); 469.504(5)
4	UCDC 152.616(HHH)(6)(a)(3) (“Criterion (3)”) is an “applicable substantive criterion” under ORS 469.504 and OAR 345-022-0030(3) and the PCCO erroneously asserts that it is not an “applicable substantive criterion” because it is not required by the statewide planning goals. PCCO, p. 14.	469.504(1)(b)(A); 469.504(1)(b)(B); 469.504(5)
5	ODOE and EFSC do not have jurisdiction to review or reverse the special advisory group’s identification of Criterion (3) as an applicable substantive criterion.	469.504(1)(b)(A); 469.504(1)(b)(B); 469.504(5)
6	Relatedly, the ALJ in their Order on Petitions for Party Status and Issues for Contested Case Order (“Issues Order”) has already decided that whether Criterion (3) is an applicable substantive criterion is not within the Council’s authority. There is a specific seven (7)-day period of time for filing objections to the Issues Order and none were filed. OAR 345-015-0016(6). That means, as a matter of law, the PCCO misconstrues applicable law by deciding that Criterion (3) is not an applicable substantive criterion	Other

### Exception Summary Table

\*Notes: Cells shaded “gray” indicate arguments raised in exceptions are similar/related to same statute(s).

No.	Exception	Related to - ORS
7	The UEC Cottonwood transmission line is not a “ <b>related or supporting facility</b> ” that passes through more than three zones, as a matter of law.	469.504(1)(b)(B); 469.504(5)
8	The PCCO determination that even if Criterion (3) is an applicable substantive criterion, that the Council is authorized to ignore it and approve the proposal anyway under <b>ORS 469.504(1)(b)(B)</b> notwithstanding that the Proposed Facility does not comply with Criterion (3), misconstrues applicable law.	469.504(1)(b)(B); 469.504(5)
9	The PCCO misconstrues applicable law in determining that MSD is appropriate in favor of ODOE and the applicant. MSD is only appropriate if there are no genuine issues of fact and the applicant has carried its burden to demonstrate compliance with all applicable standards. Neither is the case here.	Other

## **A. Response to Exceptions to Findings of Fact**

Exception (i). *The Proposed Facility would not pass through more than three zones, including Umatilla County's Agri-Business zone. The PCCO, p. 6, Finding of Fact #12 to the contrary is wrong and is not supported by substantial evidence. The record does not support the PCCO findings (PCCO, p. 30-31) that conclude that the UEC Cottonwood transmission line is a related or supporting facility (a "facility") to the proposed wind and solar energy facilities.*

Exception (ii). *The UEC Cottonwood Transmission Line Alternative is not a "related or supporting facility" to the proposed wind energy facility or solar energy facility and the County did cite evidence in the record establishing this fact. PCCO Finding of Fact #16.*

Department Response. These exceptions relate to whether the proposed UEC Cottonwood transmission line is located in the AB zone, and whether the proposed transmission line is a related or supporting facility, under ORS 469.504(1)(b)(B) and ORS 469.504(5). They are not relevant to the ALJ's conclusion that the County's setback/Criterion (3) does not preclude Council from finding, under ORS 469.504(1)(b)(A) that the proposed facility complies with statewide planning goals and approving a site certificate.

The PCCO correctly found that the proposed facility would be located in an EFU-zone, with a grid-interconnection line (the proposed UEC Cottonwood transmission line) that is a related or supporting facility that would intersect three additional zones, including the AB zone, when accounting for the development actions necessary for construction and operation of the line. Therefore, the Department correctly applied the "more than three zones" rule in ORS 469.504(5). Please see the Department's analysis of this argument in its Response to Umatilla County's Motion for Summary Determination, pp. 5-13, which the Department incorporates here. The Department also provides the following brief summary and analysis.

### *Background and analysis*

As discussed above, per ORS 469.504(1)(b)(B), Council shall find a proposed facility in compliance with statewide planning goals if it determines that:

For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section

ORS 469.504(5) provides, in relevant part:

“\* \* \* If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300 (11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. \* \* \*”.

In the Proposed Order, the Department noted that, although it recommends Council find Criterion (3) is not applicable substantive criteria required by the statewide planning goals, because the SAG recommended applying the setback, the Council still consider whether the proposed facility could be approved under ORS 469.504(1)(b)(B) because it would “otherwise comply with applicable statewide planning goals”.<sup>10</sup> The Department noted that, because the proposed facility would be in an EFU zone, and the additions and upgrades to the UEC Cottonwood transmission line route would pass through three additional zones, Council has discretion under ORS 469.504(1)(b)(B) and ORS 469.504(5) to evaluate the proposed facility against the statewide planning goals or a combination of the statewide planning goals and criteria recommended by the County, rather than just against the criteria recommended by the County.<sup>11</sup>

The County has argued that the discretion afforded Council in ORS 469.504(5) is not triggered here for two reasons. They argue the record does not support the PCCO finding that the UEC Cottonwood transmission line is a related or supporting facility because the line will be

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<sup>10</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, p. 100 of 904, “Question 2.”

<sup>11</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, p. 93 of 904, including fn. 130.

upgraded regardless of the proposed facility and will serve a variety of energy facilities and projects. This argument is incomplete and inaccurate. As the Department pointed out to the ALJ, per Council rule OAR 345-001-0010(27), a structure is a related or supporting facility if it would not be built but for construction or operation of the energy facility. Evidence in the record shows the applicant proposes to build an 8.4-mile addition to the UEC Cottonwood Route to serve the proposed energy facility<sup>12</sup>, thus this addition to the line would not be built for but for construction or operation of the energy facility. Further, the fact that UEC, and other facilities utilizing UEC's transmission system, may benefit from Applicant's proposed upgrades to sections of the existing line does not mean the upgrades would be constructed in the absence of the proposed facility. The Department analyzed this argument in more detail in its Response to Umatilla County's Motion for Summary Determination, Section III.B, pp. 5 - 9 ("The new and substantially modified transmission lines proposed as the UEC Cottonwood Route were correctly identified as related or supporting facilities"), which it incorporates here.

Second, the County argues that, even if the UEC Cottonwood transmission line is a related or supporting facility, the PCCO's finding that the Cottonwood line would cross four zones within the County, including the AB zone, is wrong and is not supported by substantial evidence in the record. The County argues the Department and the PCCO erred by including the AB zone when concluding the proposed UEC Cottonwood transmission line is a related or supporting facility that passes through more than three zones because the transmission line structure itself will not be locate in the AB zone.<sup>13</sup> The Department disagrees. While the County is correct that the transmission line itself is proposed to be located in three zones but not the AB

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<sup>12</sup> NHWAPPDoc2-2 ASC Exhibit C. Project Location\_2022-01-31. See also discussion in the Proposed Order, NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 123.

<sup>13</sup> Umatilla County Exceptions to the PCCO, Pages 4 – 8.

zone, actions associated with development of the transmission line would be authorized to occur within the AB zone (e.g., site preparation, including grading and clearing, and storage of equipment) because it is within the site boundary/micrositing corridor associated with the UEC Cottonwood transmission line that would be covered by the site certificate.<sup>14</sup> The County’s argument would disassociate the development actions necessary for construction and operation of the proposed UEC Cottonwood transmission line in a manner that is inconsistent with EFSC’s definition of site boundary, as well as UCDC’s definitions of use, structure and development. The Department incorporates here its’ analysis of this argument in the Department’s Response to Umatilla County’s Motion for Summary Determination Section III.C., pp. 9-10 (“The Department correctly applied the ‘more than three zones’ rule in ORS 469.504(5)”) and Section III.D., pp. 11-13 (“The UEC Cottonwood line is a related or supporting facility that passes through more than three zones”), enclosed at Attachment 2.

## **B. Response to Exceptions to Conclusions of Law**

*Exception (i) Related to the exception to the erroneous finding of fact described in section (II)(A)(ii) immediately above, the PCCO misconstrues applicable law by shifting the burden of proof to the County. The applicant carries the burden of proof. The PCCO misconstrues applicable law by deciding that the County did not show that the UEC Cottonwood line is not a related or supporting facility. The burden of proving that fact belongs to the applicant. There is at the least a genuine issue of material fact regarding whether the Cottonwood line is a related or supporting facility. That means as a matter of law that summary determination on that issue misconstrued applicable law. OAR 137-003-0580(6)(a).*

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<sup>14</sup> ASC Exhibit K Section 4.3.2 “UEC Cottonwood Transmission Line” (“In addition, a portion of the Site Boundary associated with the UEC Cottonwood transmission line (0.35 acres) is located within the Agri-Business Zone”) NHWAPPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31, Pages 43-44 of 158 (emphasis added). A site certificate authorizes “the applicant to construct and operate a facility on an approved site” ORS 469.300(26). A “site boundary” is “the perimeter of the site of a proposed energy facility, its related or supporting facilities, all temporary laydown and staging areas and all corridors and micrositing corridors proposed by the applicant.” OAR 345-001-0010(31).

Department Response. The PCCO correctly described the Applicant’s overall burden of proof and the County’s burden as a participant in a contested case. The County disregards the burden it bears as a participant in the contested case.

*Background and analysis*

Oregon law governing contested cases states “[t]he burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.” ORS 183.450(2).

For EFSC to issue a site certificate, an applicant must demonstrate that a preponderance of evidence on the record supports a conclusion that the facility complies with applicable standards adopted by the Council. ORS 469.503(1); OAR 345-022-0000(1).

EFSC rule OAR 345-021-0100(2) provides, “[t]he applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.” This rule simply repeats the burden that an applicant bears to present a preponderance of evidence that a proposed facility complies with the applicable laws, Council standards, etc. Nothing in this rule purports to remove the statutory burden of a party in a contested case, as established in ORS 183.450(2), to present evidence to support a fact or position they take in a contested case.

Nevertheless, the County contends the PCCO impermissibly shifts the burden from the applicant to the County. The basis for the County’s exception arises from the following statement in the PCCO:

“In its motion, the County argues that the UEC Cottonwood transmission line is not a ‘related or supporting facility’ because it will be upgraded regardless of the Project and will serve a variety of energy facilities and projects. UC Amended Motion at 7. *However, the County has not presented evidence to support this contention.* Further, the County does not dispute the Proposed Order’s findings that the proposed UEC Cottonwood route would include construction of a new

segment and substantial modifications to existing segments. Therefore, the County has not established that the Department erred in evaluating the UEC Cottonwood transmission line as a related or supporting facility[.]” , PCCO p. 30 (emphasis added).

The County contends “[t]his conclusion impermissibly shifts the burden of proving that the UEC Cottonwood line is not a “related or supporting facility” to the County, because the applicant has the burden of proving that the Cottonwood line is a related or supporting facility in the first place.” That argument completely disregards the County’s burden under ORS 183.450(2) to present evidence to support the positions it takes in the contested case. The County’s argument is tantamount to saying that a party in a contested case does not need to present evidence to support any of the allegations it makes because the applicant bears the overall burden to demonstrate compliance with the applicable laws and Council rules. That is not correct. As the ALJ stated in the PCCO:

Applicant bears the burden of proving that the proposed facility complies with all applicable statutes, administrative rules, and local government ordinances. OAR 345-021-0100(2). The party/limited party raising an issue in this contested case by challenging the Department’s Proposed Order bears the burden of producing evidence in support of the facts alleged and/or positions taken on any properly raised issue. ORS 183.450(2). That party/limited party also bears the burden of persuading the trier of fact that the alleged facts are true or the proffered position on the issue is correct. *Neither Applicant nor the Department is required to disprove an opposing party/limited party’s allegations and argument that Applicant has not met a particular statutory/regulatory requirement or Council siting standard. Rather, the party/limited party asserting a deficiency in the findings and/or conclusions in the Department’s Proposed Order on the ASC bears the burden of establishing the claim or alleged facts.* PCCO, p. 3 (emphasis added).

In the contested case, the County alleged the Proposed Order was wrong to recommend Council find the UEC Cottonwood transmission line is a related or supporting facility; the County argued the line is not a ‘related or supporting facility’ because it will be upgraded regardless of whether



the proposed facility is built and will serve a variety of energy facilities and projects.<sup>15</sup> The ALJ pointed out the County failed to provide any evidence to support this allegation. That is not an impermissible shifting of the burden. To the contrary, the ALJ was holding the County to the burden it bears under ORS 183.450(2).

The County further asserts “there is at least a genuine issue of material fact regarding whether the UEC Cottonwood line is a related or supporting facility, and the PCCO’s decision to award summary determination to the applicant and ODOE was contrary to law.” In making this argument, the County cites to *Watts v. Bd. of Nursing*, 282 Or App 705, 714 (2016) (“*If there is evidence creating a relevant fact issue*, then no matter how ‘overwhelming’ the moving party’s evidence may be, or how implausible the nonmoving party’s version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing”) (emphasis added). As discussed above, and as held by the ALJ, the County did not provide evidence to support its allegation that the proposed UEC Cottonwood transmission line will be upgraded regardless of whether the proposed facility is built. Therefore, there was no “evidence creating a relevant fact issue” as required to preclude summary determination. The Department further addresses this argument below, in response to the County’s last exception.

Exception (ii). *UCDC 152.616(HHH)(6)(a)(3) (“Criterion (3)”) is an “applicable substantive criterion” under ORS 469.504 and OAR 345-022-0030(3) and the PCCO erroneously asserts that it is not an “applicable substantive criterion” because it is not required by the statewide planning goals. PCCO, p. 14.*

Department Response. The PCCO correctly held the County’s Criterion (3) is not an applicable substantive criterion. Criterion (3) does not meet the definition of applicable substantive criteria because it is not required by statewide planning goals. Under ORS 469.504

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<sup>15</sup> Umatilla County Amended Motion for Summary Determination, p. 7 (“There can be no dispute that the UEC Cottonwood line will be upgraded regardless of the proposed energy facilities and serve a variety of energy facilities and projects”).

and OAR 345-022-0030(3), to be an applicable substantive criterion, the criterion must be required by statewide planning goals. No statewide planning goal requires a setback between turbines and rural residences. The County’s argument that Goal 2 requires EFSC to apply Criterion (3) to the proposed facility disregards and directly conflicts with statutes governing the EFSC process, which establish that counties must amend their comprehensive plans and regulations to be consistent with EFSC decisions.

The County contends “the PCCO erroneously concludes that ‘required’ by the goals means that a local standard identified by the special advisory group as applicable to the proposed facility must duplicate a specific state goal requirement.”<sup>16</sup> The PCCO did not hold that a local standard must “duplicate” a specific state goal requirement to meet the definition of applicable substantive criteria. Rather, the PCCO notes the County asserted that Criterion (3) is required by Goal 2, Land Use Planning and explains:

Other than arguing that LCDC has acknowledged Umatilla County’s comprehensive plan, the County offers no explanation or analysis as to how Goal 2 requires that the County adopt a two-mile setback between wind turbines and rural residences. Indeed, Goal 2 requires cities and counties to adopt comprehensive plans and to enact land use regulations to implement those plans. Goal 2 further requires that all comprehensive plans and adopted land use regulations comply with the statewide planning goals. ORS 197.175; 197.250, 215.050. While Goal 2 requires that comprehensive plans and local land use regulations be consistent with statewide goals, nothing in Goal 2 specifically requires a local government to enact regulations establishing setbacks for wind turbines. Thus, while Criterion (3) is a land use regulation enacted to implement Umatilla County’s acknowledged comprehensive plan, and the County’s plan is consistent with and in compliance with Goal 2, the County has not shown that Criterion (3) is required by Goal 2.<sup>17</sup>

Contrary to the County’s allegation, this conclusion did not misconstrue the applicable law, it correctly interprets it.

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<sup>16</sup> Umatilla County Exceptions to PCCO, p. 13.

<sup>17</sup> PCCO, Page 28 of 35.

Further, the County continues to argue that because Goal 2 requires state “actions related to land use” to be consistent with city and county comprehensive plans, EFSC must conform any site certificate it issues to be consistent with the County’s regulations.<sup>18</sup> This argument disregards 469.504(6), which exempts EFSC from the requirement that state agencies ensure their actions are consistent with local comprehensive plans and regulations, and it conflicts with ORS 469.504(7), which states “each affected local government shall amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate.” Thus, contrary to the County’s argument, it is the County that must amend its comprehensive plans and regulations to be consistent with the EFSC decision.

See also the Department’s analyses of these arguments in its Motion for Summary Determination, pp. 9-14 (Attachment 1), Response to Umatilla County’s MSD, pp. 20-23 (Attachment 2) and Reply to Umatilla County’s Response to the Department’s MSD, pp. 3-5 (Attachment 3), which the Department incorporates by reference.

Exception (iii). *ODOE and EFSC do not have jurisdiction to review or reverse the special advisory group’s identification of Criterion (3) as an applicable substantive criterion.*

Department Response. EFSC has jurisdiction to determine if a SAG’s recommended criteria are required by statewide planning goals. The PCCO correctly held: “The legislature, in ORS 469.504(1)(b), set the standard for applicable substantive criteria for purposes of Council review for compliance with statewide planning goals. To the extent the local government/special advisory group recommends local criteria not required by statewide planning goals, Council has no obligation to apply the criteria under ORS 469.504(5).”<sup>19</sup>

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<sup>18</sup> Umatilla County Exceptions to PCCO, pp. 14-15.

<sup>19</sup> PCCO at pp. 29-30

The County notes the PCCO did not address “the County’s position that ORS 469.504(8) divests the Council of the authority to review and independently determine whether a local criterion, duly identified by the special advisory group as an applicable substantive criterion, is an ‘applicable substantive criterion.’”<sup>20</sup> ORS 469.504(8) does not prohibit EFSC review of a SAG’s recommended applicable substantive criteria, it establishes that *judicial review* of recommended applicable substantive criteria lies in the Supreme Court, not the Land Use Board of Appeals (“LUBA”) or lower courts. See the Department’s analysis of this argument in its Response to Umatilla County’s MSD, pp.17-19 (Attachment 2), which the Department incorporates here.

Exception (iv). *Relatedly, the ALJ in their Order on Petitions for Party Status and Issues for Contested Case Order (“Issues Order”) has already decided that whether Criterion (3) is an applicable substantive criterion is not within the Council’s authority. There is a specific seven (7)-day period of time for filing objections to the Issues Order and none were filed. OAR 345-015-0016(6). That means, as a matter of law, the PCCO misconstrues applicable law by deciding that Criterion (3) is not an applicable substantive criterion.*

Department Response. The ALJ’s statement in the November 2, 2022 *Order on Petitions for Party Status and Issues for Contested Case Order*, does not constitute a “decision” on the primary issue in this case. An *Order on Petitions for Party Status and Issues for Contested Case Order* does not serve to address and resolve the issues in the contested case. Rather, the purposes of these Orders are: 1) to determine if a petitioner seeking to participate in a contested case has met the eligibility requirements for party or limited party status and, if so, 2) whether the issues they seek to raise in the contested case are appropriate for a contested case and 3) to confirm the framing of the issues for the contested case.

The County did not seek to raise as an issue in the contested case whether Council has jurisdiction to assess if the land use ordinances identified by a SAG meet the definition of

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<sup>20</sup> Umatilla County Exceptions to PCCO, p. 15.

applicable substantive criteria. Rather, it sought a contested case to address whether Criterion (3) is applicable substantive criteria within the meaning of OAR 345-022-0030(3). The statement in the ALJ's November 2, 2022 *Order on Petitions for Party Status and Issues for Contested Case Order* that EFSC does not have jurisdiction to evaluate whether Criterion (3) is required by statewide planning goals is dictum – a comment made by a judge in an opinion that is not necessary to resolve matters before the judge, and therefore is not binding. See also the Department's analysis of this argument in its Response to Umatilla County's MSD, pp.15-17 (Attachment 2), which the Department incorporates here.

Contrary to the County's apparent allegation, OAR 345-015-0016(6) does not establish that all statements a hearing officer makes in an *Order on Petitions for Party Status and Issues for Contested Case Order* become the law of the case if not objected to within 7 days.

OAR 345-015-0016(6) states:

“The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer's determination.”

Thus, the rule addresses the time for appealing a hearing officer's decision on whether a petitioner may participate in the contested case *as a limited party or party*. The rule does not purport to bind the participants to all statements made in an *Order on Petitions for Party Status and Issues for Contested Case Order* if not appealed to Council within 7 days.

Exception (v.) *The UEC Cottonwood transmission line is not a “related or supporting facility” that passes through more than three zones, as a matter of law.*

Department Response. See the Department's above Response to Exceptions to Findings of Fact (ii), in which the Department addresses the County's exception to PCCO Finding of Fact #16, that the UEC Cottonwood transmission line is not a “related or supporting facility” to the proposed wind energy facility or solar energy facility.

Exception (vi.) *The PCCO determination that even if Criterion (3) is an applicable substantive criterion, that the Council is authorized to ignore it and approve the proposal anyway under ORS 469.504(1)(b)(B) notwithstanding that the Proposed Facility does not comply with Criterion (3), misconstrues applicable law.*

Department Response. Here, the County repeats arguments it made in the contested case, alleging that, under ORS 469.504(1)(b)(B) and ORS 469.504(5), if a SAG timely identifies what it considers to be applicable substantive criteria, EFSC “shall” apply those criteria, without considering whether they are required by statewide planning goals. The crux of the County’s argument, as the Department understands it, is that these statutes only give the Council discretion to decide whether to apply criteria recommended by a SAG, the state goals, or a combination of them, if the proposed facility includes “related or supporting facilities that pass through more than one jurisdiction or more than three zones in any one jurisdiction.” The County contends there are no such related or supporting facilities here, so the Council must apply Criterion (3) because the County has identified it as an applicable substantive criterion.

As discussed above, the Department considers the proposed UEC Cottonwood transmission line to be a related or supporting facility that passes through more than three zones, when accounting for the development actions necessary for construction and operation of the line.

Exception (vii.) *The PCCO misconstrues applicable law in determining that MSD is appropriate in favor of ODOE and the applicant. MSD is only appropriate if there are no genuine issues of fact and the applicant has carried its burden to demonstrate compliance with all applicable standards. Neither is the case here.*

The County contends there is a dispute over two issues of material fact, both of which pertain to its argument that the PCCO erred in finding Council may find compliance with statewide planning goals under ORS 469.504(1)(b)(B) and ORS 469.504(5). First, the County contends there is a dispute over whether the UEC Cottonwood transmission line will be upgraded regardless of whether the proposed facility is built. However, there is not a genuine issue of fact

because the County has not presented evidence to support its contention that the line would be upgraded even if the proposed facility were not built. As the County notes, the “evidence” it provided is from ASC Exhibit K.<sup>21</sup> But the County selectively quotes that Exhibit.<sup>22</sup> When read in its entirety, it does not support the County’s position that the UEC Cottonwood transmission line would be upgraded regardless of whether the proposed facility is built. The passage states:

**“From the UEC Cottonwood Substation to the corner of White House Road and County Road 1348 (UEC Transmission Network Junction), approximately 8 miles, the Applicant would partner with UEC to upgrade the existing distribution line to a 230-kV transmission line. The existing 12.47-kV distribution line may be maintained as-is next to the new 230-kV line; may be buried; or may be restrung on the new 230-kV transmission line poles.**

Because this section of the transmission line will address UEC’s general utility needs by providing an upgrade to UEC’s existing utility system and may also be available to other generation facilities and for ongoing capacity needs, this segment will be analyzed under ORS 215.275 (utility facility is necessary for public service in EFU zone).”<sup>23</sup>

The County does not quote the language in bold. That language states the Applicant would partner with UEC to upgrade the existing line. It does not create a genuine issue of fact over whether the UEC Cottonwood transmission line will be upgraded regardless of whether the proposed facility is built. The PCCO correctly ruled that the County has not presented evidence to support its contention that the UEC Cottonwood transmission line would be upgraded regardless of whether the proposed facility is built. A party opposing a motion for summary judgment has the burden of producing evidence on any issue raised in the motion as to which the nonmoving party would have the burden of persuasion at trial. ORCP 47 C; *Two Two v. Fujitec Am., Inc.* 355 Or 319, 324-25, 325 P.3d 707 (2014). Here, the County alleges the UEC Cottonwood transmission line would be upgraded even if the proposed facility

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<sup>21</sup> Umatilla County Exceptions to PCCO, pp. 9-10, 29-30.

<sup>22</sup> *Id.*, pp. 9-10.

<sup>23</sup> NHWAPPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31, Page 44 of 158.

were not built. But it has not provided evidence to support that contention, hence summary determination was appropriate. Second, the County contends there is a factual dispute over whether the UEC Cottonwood transmission line passes through more than three zones. There is no dispute that the UEC Cottonwood transmission line itself passes through three zones and that the micro-siting corridor for the line includes a fourth zone, the AB zone. The dispute is not factual but legal - the County argues that under ORS 469.504(5), when assessing whether a related or supporting facility passes through “more than three zones in any one jurisdiction” it is only appropriate to consider the physical structure of the facility. The Department, on the other hand, believes that the actions associated with development of the facility must also be considered and must demonstrate compliance and consistency with the applicable code provisions within the zone. Therefore, because actions associated with the transmission line would be authorized to occur and be required to comply with the applicable substantive criteria within the AB zone (for actions such as grading and clearing, storage of equipment), it is appropriate to consider the UEC transmission line as passing through more than three zones.

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## V. CONCLUSION

For the reasons discussed above, the Department respectfully requests that the Council reject Umatilla County's exceptions and affirm the PCCO findings of fact and conclusions of law.

DATED this 27<sup>th</sup> day of June, 2023.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*

Patrick Rowe, OSB #072122  
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## CERTIFICATE OF FILING

I certify that on June 27, 2023, the foregoing OREGON DEPARTMENT OF ENERGY'S RESPONSE TO UMATILLA COUNTY EXCEPTIONS TO THE PCCO, was electronically filed via email with Jesse Ratcliffe and Alia Miles, Senior Assistant Attorneys General with the Oregon Department of Justice, the latter of which is serving as legal counsel to EFSC for this contested case.

DATED this 27<sup>th</sup> day of June 2023.

*/s/ Svetlana Gulevkin*

---

Svetlana Gulevkin  
Legal Secretary  
Natural Resources Section  
Oregon Department of Justice

## CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2023, the foregoing OREGON DEPARTMENT OF ENERGY'S RESPONSE TO UMATILLA COUNTY EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER, was served by mailing or e-mailing a true copy of the above-listed document as set forth below:

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DATED this 27<sup>th</sup> day of June, 2023.

*/s/ Svetlana Gulevkin*

---

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## **Attachment 1: ODOE Motion for Summary Determination**

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE:**

**NOLIN HILLS WIND POWER PROJECT**

**OREGON DEPARTMENT OF  
ENERGY'S MOTION FOR SUMMARY  
DETERMINATION**

**OAH Case No. 2022-ABC-05140**

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1           **I. INTRODUCTION**

2           This contested case involves an Application for Site Certificate (ASC) that Nolin Hills  
3 Wind, LLC (applicant) submitted to the Energy Facility Siting Council (Council or EFSC) for a  
4 wind and solar energy facility proposed to be constructed and operated in Umatilla County,  
5 Oregon. On August 4, 2022 the Oregon Department of Energy (ODOE or Department) issued a  
6 Proposed Order on the ASC, in which it recommended that EFSC approve the ASC. Umatilla  
7 County requested a contested case regarding the Department’s recommendation that EFSC find  
8 the proposed facility complies with the Council’s Land Use standard (OAR 345-022-0030).  
9 Specifically, Umatilla County raised, and the Administrative Law Judge (ALJ) granted it party  
10 status to address the following issues in this contested case:

11           1.       Whether the County’s land use regulations UCDC [Umatilla County  
12           Development Code] 152.616(HHH)(6)(a)(3) (requiring a two-mile setback  
13           between wind turbines and rural residences on EFU-zoned land) are “applicable  
14           substantive criteria” within the meaning of OAR 345-022-0030(3) that apply to  
15           the Project.

16           1.1      If so, whether the Project complies with UCDC 152.616(HHH)(6)(a)(3).

17           2.       Whether the Project is required to obtain a conditional use permit from the  
18           County.

19           **II. MOTION**

20           The Department moves for summary determination. Based on the pleadings, evidence in  
21 the record and the arguments set forth herein, this motion should be granted because there are no  
22 genuine issues as to any material facts that are relevant to resolution of the legal issues for which  
23 a decision is sought, and ODOE is entitled to a favorable ruling as a matter of law. Under statute  
24 and rule, EFSC determines whether a facility complies with local land use criteria *that are*  
25 *required by statewide planning goals*. The County’s two-mile wind turbine setback is not  
26 required by statewide planning goals; therefore, the applicant does not need to comply with the  
27 setback for EFSC to issue a site certificate for the proposed facility. Indeed, the County’s

1 setback is an example of a situation the legislature sought to avoid by giving EFSC  
2 comprehensive authority over the siting of energy facilities – a local government making it more  
3 difficult to locate an energy facility within their jurisdiction by imposing a requirement that does  
4 not further any statewide goal.

### 5 **III. STANDARD OF REVIEW**

6 The ALJ’s December 15, 2022 Order on Case Management Matters and Contested Case  
7 Schedule, Section III. E. states that Motions for Summary Determination will be allowed. Although  
8 not a requirement expressly stated in EFSC’s contested case procedures,<sup>1</sup> OAR 137-003-0580  
9 provides criteria for reviewing motions for summary determination in a contested case.  
10 OAR 137-003-0580 provides, in pertinent part:

- 11 (6) The administrative law judge shall grant the motion for a summary  
12 determination if:  
13 (a) The pleadings, affidavits, supporting documents (including any  
14 interrogatories and admissions) and the record in the contested case show that  
15 there is no genuine issue as to any material fact that is relevant to resolution of the  
16 legal issue as to which a decision is sought; and  
17 (b) The agency or party filing the motion is entitled to a favorable ruling as a  
18 matter of law.

### 16 **IV. EFSC OVERVIEW**

#### 17 **A. The legislature’s purpose in creating EFSC was to centralize the regulatory review 18 process for new energy facilities.**

19 When Oregon’s legislature created EFSC, its stated purpose was “to establish \* \* \* a  
20 comprehensive system for the siting, monitoring, and regulating of the location, construction,  
21 and operation of all energy facilities in this state.” ORS 469.310 (“Policy”). The Oregon  
22 Supreme Court has stated that EFSC’s statutory scheme “reflects a legislative policy to centralize  
23 [energy facility siting] responsibilities in the council.” *Marbet v. Portland Gen. Elec. Co.*, 277  
24 Or 447, 450, 561 P2d 154 (1977).

25 To that end, the legislature granted EFSC “wide discretion over many facets of the  
26 construction of energy facilities.” *Id.* at 462-63. The legislature directed EFSC to “set its own

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27 <sup>1</sup> EFSC procedures for motions are identified in OAR 345-015-0054.



1 standards” for the siting, construction, operation, and retirement of facilities, authorizing EFSC  
2 “to exercise its own judgment” in setting those standards in accordance with legislatively  
3 identified policy objectives. ORS 469.501; *Marbet*, 277 Or at 458, 459.

4 If EFSC grants a site certificate, the site certificate “shall bind the state and all counties  
5 and cities . . . as to the approval of the site and the construction and operation of the facility.”  
6 ORS 469.401(3). Further, after EFSC issues a site certificate “any affected state agency, county,  
7 city and political subdivision” must promptly issue any permits contemplated by the site  
8 certificate “without hearings or other proceedings” and “subject only to conditions set forth in  
9 the site certificate.” ORS 469.401(3); *see Marbet*, 277 Or at 450 (so noting). After EFSC issues  
10 the site certificate, “the only issue to be decided in an administrative or judicial review” of an  
11 agency’s permitting decision “shall be whether the permit is consistent with the terms of the site  
12 certificate[.]” ORS 469.401(3); *Marbet*, 277 Or at 450.

13 That does not mean counties are excluded from the EFSC process. To the contrary, the  
14 legislature provided for EFSC consultation with affected local governments. *See*  
15 ORS 469.330(3) (preapplication conference with local governments following notice of intent);  
16 ORS 469.350(2) (copies of notice of intent and ASC to affected counties); ORS 469.480 (EFSC  
17 designation of local government as a Special Advisory Group, discussed further in the following  
18 section); *see also Marbet*, 277 Or at 450 (noting that, under the EFSC statutory scheme, the  
19 “concerns previously pursued” through separate agency action now “find expression” through  
20 EFSC consultation). But it is EFSC that decides whether a preponderance of evidence supports  
21 granting the site certificate, and that decision binds and may compel action by other state  
22 agencies, counties and political subdivisions. ORS 469.401(3); *Marbet*, 277 Or at 450.

### 23 **B. Site Certificate Process**

24 An applicant for a site certificate begins the application process by submitting a Notice of  
25 Intent (NOI) that provides information about the proposed site and the characteristics of the  
26 proposed facility. ORS 469.330(1). After receiving the NOI, the Department (acting as staff to  
27 the Council) notifies the public, providing information regarding the site and the facility.

1 ORS 469.330(2). The Department then prepares a project order that establishes the legal  
2 requirements for the ASC, establishing the statutes, rules, Council standards and local ordinances  
3 with which an applicant must comply. ORS 469.330(3).

4 The ASC is submitted to the Council. ORS 469.350(1). The Council designates as a  
5 special advisory group (SAG) the governing body of any local government in whose jurisdiction  
6 the facility is proposed to be located. ORS 469.480. The NOI and the ASC are sent for  
7 comment and recommendation to various state agencies, the SAG and any other affected cities  
8 and counties. ORS 469.350(2). Upon request by the Department, the SAG shall recommend to  
9 the Council applicable substantive criteria from the affected local government's acknowledged  
10 comprehensive plan and land use regulations that are required by the statewide planning goals  
11 and in effect on the date the ASC is submitted. ORS 469.504(5); ORS 469.504(1)(b)(A).

12 Per OAR 345-022-0030(3), "applicable substantive criteria" are "criteria from the affected local  
13 government's acknowledged comprehensive plan and land use ordinances *that are required by*  
14 *the statewide planning goals* and that are in effect on the date the applicant submits the  
15 application" (emphasis added).

16 Based on its review of the ASC and the comments and recommendations that it receives,  
17 the Department prepares and issues a Draft Proposed Order (DPO). ORS 469.370(1). The Council  
18 then holds one or more public hearings regarding the ASC and the DPO in the area affected by the  
19 ASC and elsewhere, as the Council considers necessary. ORS 469.370(2).

20 The Department then reviews the written comments, testimony from the public hearing or  
21 hearings, input from other agencies and input from the Council on the DPO and issues a  
22 Proposed Order (which typically includes revisions and additions based on the comments,  
23 testimony, etc.), notifies the public of the Proposed Order and that the Council will hold a  
24 contested case hearing to consider adoption of the Proposed Order as its Final Order.

25 ORS 469.370(4). A contested case hearing is conducted following the procedures outlined in  
26  
27

1 ORS 183.413 to 183.470, model rules and Council rules. ORS 469.370(5)<sup>2</sup>. Following the  
2 contested case, the Council issues a Final Order approving or rejecting the ASC.  
3 ORS 469.370(7).

4 To issue a site certificate, EFSC must determine that a preponderance of evidence  
5 supports a conclusion that a proposed facility (among other items) “complies with the statewide  
6 planning goals adopted by the Land Conservation and Development Commission.”  
7 ORS 469.503(4).

8 ORS 469.504(1) establishes that a proposed facility shall be found in compliance with  
9 statewide planning goals if:

- 10
- 11 (a) The facility has received local land use approval under the acknowledged  
12 comprehensive plan and land use regulations of the affected local government; *or*
  - 13 (b) The Energy Facility Siting Council determines that:
    - 14 (A) The facility complies with *applicable substantive criteria* from the affected  
15 local government’s acknowledged comprehensive plan and land use regulations *that*  
16 *are required by the statewide planning goals* and in effect on the date the  
17 application is submitted, and with any Land Conservation and Development  
18 Commission administrative rules and goals and any land use statutes that apply  
19 directly to the facility under ORS 197.646; [or]
    - (B) For an energy facility or a related or supporting facility that must be evaluated  
against the applicable substantive criteria pursuant to subsection (5) of this section,  
*that the proposed facility does not comply with one or more of the applicable*  
*substantive criteria but does otherwise comply with the applicable statewide*  
*planning goals*, or that an exception to any applicable statewide planning goal is  
justified under subsection (2) of this section; \* \* \* (Emphasis added).

20 ORS 469.504(4) allows the applicant to choose whether to have EFSC or a local  
21 government determine compliance with the statewide planning goals, stating:

22

23 An applicant for a site certificate shall elect whether to  
24 demonstrate compliance with the statewide planning goals under  
25 subsection (1)(a) or (b) of this section. The applicant shall make  
26 the election on or before the date specified by the council by rule.

27 <sup>2</sup> See also OAR 345-001-0005 adopting contested case model rules and OAR 345-015-0012, *et*  
28 *seq.*, the EFSC contested case rules.

1       **V. STATEMENT OF FACTS**

2       The following facts are not in dispute<sup>3</sup>.

- 3       1. On January 28, 2022 the Department determined the ASC for the Nolin Hills Wind  
4       Power Project (the facility) submitted by Nolin Hills Wind, LLC to be complete.  
5       NHWAPPDoc1 ASC Determination of Complete Application Letter\_2022-01-28 Pages  
6       2-3 of 3.
- 7       2. The proposed facility, to be located in Umatilla County, Oregon, includes wind and solar  
8       energy generating components with a nominal generating capacity of 600 megawatts  
9       (MW), approximately 340 MW from wind and 260 MW from solar. NHWAPPDoc1 -  
10      Proposed Order on ASC 2022-08-04 Page 9 of 904.
- 11      3. Pursuant to ORS 469.504(4), the applicant elected to have EFSC (rather than Umatilla  
12      County) determine whether the proposed facility complies with statewide planning goals.  
13      See the Final Application for Site Certificate Exhibit K – NHWAPPDoc2-10 ASC  
14      Exhibit K Land Use\_2022-01-31 Page 8 of 158; see also NHWAPPDoc1 - Proposed  
15      Order on ASC 2022-08-04 Page 74 of 904.
- 16      4. The proposed facility would be located in an Exclusive Farm Use (EFU) zone, with a  
17      grid-interconnection transmission line (the proposed UEC Cottonwood transmission line)  
18      that would intersect three additional zones: Rural Tourist Commercial, Agri-Business,  
19      and Light Industrial. NHWAPPDoc2-10 ASC Exhibit K Land Use 2022-01-31 Pages 8-9  
20      of 158, and attached Figure K-2; see also NHWAPPDoc1 Proposed Order on  
21      ASC 2022-08-04 Page 123 of 904.
- 22      5. The proposed facility would, therefore, pass through more than three zones in a single  
23      jurisdiction. *Id.*

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<sup>3</sup> All documents referenced in this Statement of Facts are included in the Department’s Administrative Record for the Nolin Hills Wind Power Project. As noted in the Department’s October 5, 2022 email correspondence, the Department provided the Administrative Record to the Service List via USB/thumb drive and to OAH via OneDrive. It is the Department’s understanding that the entire Administrative Record has been admitted into evidence in this contested case.

- 1 6. Pursuant to ORS 469.480, on October 19, 2017, the Council appointed the Umatilla  
2 County Board of Commissioners as the Special Advisory Group (SAG) for the proposed  
3 facility. NHWNOIDoc5 Order Appointing Special Advisory Group 2017-10-19.
- 4 7. Umatilla County Development Code (UCDC) Section 152.616 (HHH)(6)(a)(3) requires a  
5 2-mile setback between wind turbines and rural residences (hereinafter “criterion (3)” or  
6 “the County’s setback”).
- 7 8. As planned, up to 12 of 112 proposed wind turbines would be less than two miles from a  
8 rural residence and would not, therefore, comply with criterion (3). NHWAPPDoc6-3  
9 June 24 2022 EFSC Meeting Final Approved Minutes Page 16 of 22 .
- 10 9. Umatilla County recommended that the proposed facility be required to comply with  
11 UCDC criteria, including criterion (3), in letters to the Department dated November 6,  
12 2017, April 15, 2020 and January 20, 2021. See Notice of Intent and preliminary  
13 Application for Site Certificate documents NHWNOIDoc3-5 SAG Comment 2017-11-06  
14 Page 1 of 4, NHWAPPDoc3-9 pASC Umatilla County comment 2020-04-15 Pages 1-2  
15 of 4 and NWHAPPDoc3-9 pASC Umatilla County Comment 2021-01-20 Page 1 of 1,  
16 respectively.
- 17 10. In the ASC, the applicant asserted that criterion (3) does not qualify as applicable  
18 substantive criteria as defined in OAR 345-022-0030(3) because it is not required by the  
19 statewide planning goals and, therefore, the applicant need not comply with it.  
20 NHWAPPDoc2-10 ASC Exhibit K Land Use 2022-01-31 Pages 20-24 of 158.
- 21 11. In the DPO, issued on April 19, 2022, the Department agreed and recommended EFSC  
22 find that criterion (3) does not apply because it is not required by statewide planning Goal  
23 3, Goal 14 nor any other statewide planning goal, therefore, the applicant need not  
24 comply with it. NHWAPPDoc1 Draft Proposed Order with Attachments 2022-04-19  
25 Pages 80-86 of 627.

1 12. The Department is not aware of any other county in Oregon that has adopted a setback  
2 requirement between wind turbines and residences as Umatilla County has in criterion  
3 (3). *Id.*, Page 84 of 627.

4 13. On May 26, 2022 Umatilla County commented on the DPO; the County acknowledged  
5 that criterion (3) “is not explicitly ‘required’ by the statewide planning goals” but took  
6 the position that because it is part of their acknowledged comprehensive plan and land  
7 use ordinances, criterion (3) constitutes “applicable substantive criteria” that Umatilla  
8 County identified as the SAG and that Council must, therefore, apply it to the proposed  
9 facility “rather than evaluating the proposed facility against the statewide planning  
10 goals.” NHWAPPDoc3-12 DPO SAG Comment Umatilla County 2022-05-26  
11 Pages 1-2 of 2.

12 14. Umatilla County did not assert or attempt to explain how criterion (3) is required by  
13 statewide planning goals in its May 26, 2022 comments on the DPO nor in its November  
14 6, 2017, April 15, 2020 or January 20, 2021 letters to the Department. See  
15 NHWAPPDoc3-12 DPO SAG Comment Umatilla County 2022-05-26 Pages 1-2 of 2;  
16 NHWNOIDoc3-5 SAG Comment 2017-11-06 Page 1 of 4; NHWAPPDoc3-9 pASC  
17 Umatilla County comment 2020-04-15 Pages 1-2 of 4 and NWHAPPDoc3-9 pASC  
18 Umatilla County Comment 2021-01-20 Page 1 of 1, respectively.

19 15. In the January 20, 2021 letter, the County commented:

20 “The county’s two-mile setback for rural residences was adopted by Umatilla County  
21 through Ordinance 2012-13. *The original intent of the standard was to mitigate noise and*  
22 *visual impacts to rural residences caused by wind towers.* Umatilla County requests that  
23 the applicant adjust the location of the turbines in order to meet the required standard.”

24 NWHAPPDoc3-9 pASC Umatilla County Comment 2021-01-20 Page 1 of 1. (Emphasis  
25 added).

26 16. In the Proposed Order, the Department again recommended Council conclude that  
27 criterion (3) is not required by any of the statewide planning goals, therefore it does not

1 constitute applicable substantive criteria. NHWAPPDoc1 Proposed Order on ASC 2022-  
2 08-04 Pages 95-100 of 904.

3 **VI. ANALYSIS – Issues 1 and 1.1**

4 Issues 1 and 1.1, again presented below, focus on the definition of “applicable substantive  
5 criteria” in EFSC rules.

6 Issue 1: Whether the County’s land use regulations UCDC [Umatilla County  
7 Development Code] 152.616(HHH)(6)(a)(3) (requiring a two-mile setback between wind  
8 turbines and rural residences on EFU-zoned land) are “applicable substantive criteria” within the  
9 meaning of OAR 345-022-0030(3) that apply to the Project.

10 Issue 1.1: If so, whether the Project complies with UCDC 152.616(HHH)(6)(a)(3).

11 As presented in subsections (A) and (B) below, UCDC 152.616(HHH)(6)(a)(3) is not  
12 “applicable substantive criteria” within the meaning of OAR 345-022-0030(3) because it is not  
13 required by a statewide planning goal. The language of Goal 3 (the goal most relevant to this  
14 analysis) does not address separation distances necessary for non-farm uses, such as a wind  
15 power generation facility or commercial utility facility, and subsequently there are no EFU-zone  
16 related statutes or Land Conservation and Development (“LCDC”) rules that address or establish  
17 related setback distances. These arguments are presented in detail below.

18 **A. Criterion (3) does not meet the definition of applicable substantive criteria because  
19 it is not required by statewide planning goals.**

20 One way that EFSC may analyze whether a proposed facility complies with statewide  
21 planning goals is by assessing whether “[t]he facility complies with *applicable substantive*  
22 *criteria* from the affected local government’s acknowledged comprehensive plan and land use  
23 regulations *that are required by the statewide planning goals*” ORS 469.504(1)(b)(A) (emphasis  
24 added).

25 Per OAR 345-022-0030(3), “applicable substantive criteria” are:

26 “criteria from the affected local government’s acknowledged comprehensive plan  
27 and land use ordinances *that are required by the statewide planning goals* and

1 that are in effect on the date the applicant submits the application. If the special  
2 advisory group recommends applicable substantive criteria, as described under  
3 OAR 345-021-0050 (Distribution of a Preliminary Application), the Council  
4 shall apply them.” (Emphasis added).

5 In considering a prior challenge involving criterion (3), the Oregon Supreme Court also  
6 observed that applicable substantive criteria must be required by statewide planning goals,  
7 stating:

8 Under the first part of ORS 469.504(1)(b)(A), the council must determine that the  
9 facility complies with substantive criteria—derived from the local government's  
10 “acknowledged comprehensive plan and land use regulations”— **that are (1)**  
11 **required by statewide planning goals; and (2)** “in effect” on the certificate or  
12 amendment application date.

13 Blue Mountain All. v. Energy Facility Siting Council, 353 Or. 465, 473–74, 300 P.3d 1203,  
14 1208 (2013) (Emphasis in bold added).<sup>4</sup>

15 In the Proposed Order, the Department analyzed whether criterion (3) meets the  
16 definition of “applicable substantive criteria” and recommended Council conclude that it does  
17 not because criterion (3) is not required by any of the statewide planning goals.<sup>5</sup> The Department  
18 incorporates that analysis here and offers the following additional analysis.

19 There are 19 statewide planning goals.<sup>6</sup> County comprehensive plans and land use  
20 regulations must comply with the statewide planning goals. See ORS 197.175(2), requiring local  
21 governments to “(a) . . . adopt, amend and revise comprehensive plans *in compliance with* goals  
22 approved by the commission; (b) Enact land use regulations to implement their comprehensive  
23 plans . . .” (emphasis added). However, simply because a comprehensive plan and local land use  
24 regulations *comply* with statewide planning goals does not mean that all criteria in a comp plan  
25 and local regulations are *required* by statewide planning goals nor that a proposed energy facility

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26 <sup>4</sup> In *Blue Mountain*, the Supreme Court upheld EFSC’s decision to not require the applicant to comply with criterion  
27 (3) because the County had not yet adopted the ordinance when the applicant submitted its application. The focus of  
28 that case was whether, pursuant to ORS 469.401(2), Council correctly declined to require compliance with criterion  
29 (3) because it constituted a land use regulation that was not in effect on the date the application was submitted.  
30 Neither the Council nor the Court analyzed whether criterion (3) is required by statewide land use planning goals.

31 <sup>5</sup> Statement of Facts (“SOF”) 16 - NHWAPPDoc1 Proposed Order on ASC 2022-08-04 Pages 95-100 of 904  
32 (analysis of “Question 1”).

33 <sup>6</sup> [Department of Land Conservation and Development : Oregon's Statewide Land Use Planning Goals : Oregon  
34 Planning : State of Oregon 9](#) (“The foundation of statewide program for land use planning in Oregon is a set of 19  
35 Statewide Land Use Planning Goals”).



1 must meet all such local regulations for EFSC to grant a site certificate. As the Oregon Supreme  
2 Court has explained:

3 the statewide land use planning goals establish broad policy objectives, while the  
4 “applicable substantive criteria” provide specific ways of implementing those  
5 objectives through local regulation. *Because the local criteria often are more  
6 specific than the goals, an ASC may fail to meet the local criteria but still meet  
7 the goals. . . .*

8 Save Our Rural Oregon v. Energy Facility Siting Council, 339 Or. 353, 368–69,  
9 121 P.3d 1141, 1150 (2005). (Emphasis added).

10 **B. Goal 3 and related statutes and rules focus on protecting ag land; they do not  
11 require setbacks between wind energy facilities and rural residences.**

12 The proposed facility is a non-farm use on EFU-zoned land. SOF 4. Because the  
13 proposed facility would be in an EFU zone, statewide planning Goal 3, which addresses  
14 Agricultural lands, must be analyzed to determine if it establishes setback or separation distance  
15 requirements, such as criterion (3), for non-farm uses, such as a commercial utility facility or  
16 wind energy generation facility, that must be adopted by local governments.

17 The purpose of Goal 3 is to “preserve and maintain agricultural lands.”<sup>7</sup> To achieve the  
18 purpose, in part, the goal requires that non-farm uses be prohibited from resulting in a significant  
19 impact to accepted farm practices or the cost thereof. OAR 660-015-0000(3)) states, “Counties  
20 may authorize. . . nonfarm uses. . . that will not have significant adverse effects on accepted farm  
21 or forest practices.”<sup>8</sup>

22 LCDC has the authority to adopt EFU rules that every county must apply consistent with  
23 Goal 3. For example, OAR 660-033-0130(a)(D) was adopted consistent with the language of  
24 Goal 3, establishing a requirement for “utility facilities necessary for public service” that:

25 The governing body of the county or its designee shall impose clear and objective  
26 conditions on an application for utility facility siting to mitigate and minimize the  
27 impacts of the proposed facility, if any, on surrounding lands devoted to farm use  
28 in order to prevent a *significant change in accepted farm practices or a significant*

29 <sup>7</sup> OAR 660-015-0000(3), see [goal03.PDF \(oregon.gov\)](#)

30 <sup>8</sup> *Id.*

1           *increase in the cost of farm practices on surrounding farmlands* [emphasis  
2           added].

3           This rule establishes that the focus of county rules under Goal 3 must be to protect farm  
4           practices.

5           LCDC has adopted rules that every county must apply to ensure land uses comply with  
6           statewide planning goals. In OAR 660-033-0130, LCDC has adopted minimum standards  
7           applicable to permitted and conditional uses on agricultural land. OAR 660-033-0130(37)  
8           establishes the provisions that a local government must apply to a proposal for a wind energy  
9           facility, stating that a “proposal for a wind power generation facility *shall* be subject to the  
10          following provisions: . . .” (emphasis added). None of the provisions listed state a wind power  
11          facility must be subject to a setback or separation distance from rural residences, let alone a  
12          setback of 2 miles. Rather, the provisions focus on protecting the land for farm use by, *e.g.*,  
13          requiring the governing body or its designate to find that a proposed wind power facility on  
14          arable lands will not: “create unnecessary negative impacts on agricultural operations conducted  
15          on the subject property,” “result in unnecessary soil erosion or loss that could limit agricultural  
16          productivity on the subject property” or “result in the unabated introduction or spread of noxious  
17          weeds and other undesirable weed species.” OAR 660-033-0130(37)(b)(A), (B) and (D),  
18          respectively.

19          Separation distances are included in Goal 3 rules; however, they are specific to  
20          agricultural lands, not rural residences. Consistent with Goal 3, LCDC’s EFU rules include  
21          setbacks between campgrounds and youth camps and adjacent agricultural lands (OAR 660-033-  
22          0130(19)(e)(F) and –660-033-0130(40)(b)(G), respectively). But there is no requirement in Goal  
23          3, any other statewide planning goal or LCDC rule that wind energy facilities be separated or set  
24          back from rural residences.

25          Despite the express requirement that applicable substantive criteria be “required by  
26          statewide planning goals” Umatilla County has not asserted nor attempted to explain how  
27          criterion (3) is required by statewide planning goals. SOF 14. Umatilla County explained only

1 that criterion (3) was adopted “to mitigate noise and visual impacts to rural residences caused by  
2 wind towers.” SOF 15. And, in its comments on the DPO, the County acknowledged that the 2-  
3 mile setback / criterion (3) “is not explicitly ‘required’ by the statewide planning goals” but took  
4 the position that because it is part of their acknowledged comprehensive plan and land use  
5 ordinances, criterion (3) constitutes “applicable substantive criteria” the County provided  
6 through the SAG process and that Council must, therefore, apply it to the proposed facility  
7 “rather than evaluating the proposed facility against the statewide planning goals.” SOF 13.

8 Thus, the County took the position that EFSC is bound to apply all the criteria identified  
9 by a SAG without considering whether the criteria are required by the statewide planning goals.  
10 In other words, the County would have EFSC disregard the language in ORS 469.504(1)(b)(A)  
11 and OAR 345-022-0030(3) requiring Council to find a proposed facility “complies with  
12 applicable substantive criteria from the affected local government’s acknowledged  
13 comprehensive plan and land use regulations *that are required by the statewide planning goals.*”  
14 The County’s position conflicts with fundamental principles of statutory interpretation, which  
15 require all provisions be considered when applying or interpreting a statute (or rule). *See, e.g.,*  
16 ORS 174.010 (“In the construction of a statute, the office of the judge is simply to ascertain and  
17 declare what is, in terms or in substance, contained therein, not to insert what has been omitted,  
18 *or to omit what has been inserted; . . .*”). (Emphasis added).

19 In summary, contrary to the County’s position, EFSC is not obligated to require a  
20 proposed facility to comply with all criteria that a County contends constitute “applicable  
21 substantive criteria” without conducting any further analysis of its own. As discussed above,  
22 under ORS 469.504(1)(b)(A), EFSC is charged with determining that the facility complies  
23 with substantive criteria from the local government's “acknowledged comprehensive plan and  
24 land use regulations *that are required by statewide planning goals. . .*” Consistent with that  
25 statutory provision, OAR 345-022-0030(3) defines “applicable substantive criteria” as criteria  
26 that are “*required by statewide planning goals.*” Thus, to constitute applicable substantive  
27 criteria, the criteria must not only be in a comprehensive plan and land use ordinances, they must

1 be required by a statewide planning goal. As discussed above and in detail in the Proposed  
2 Order, Umatilla County’s criterion (3) is not required by any statewide planning goal, therefore it  
3 does not constitute applicable substantive criteria and Council does not need to find the proposed  
4 facility complies with it to approve the ASC.

5 **C. Even if criterion (3) were an applicable substantive criterion, Council would not be**  
6 **obligated to require the applicant to abide by it.**

7 Even if criterion (3) were an applicable substantive criterion, Council would not be  
8 obligated to apply it to the proposed facility because ORS 469.504(1)(b)(B) states that a  
9 proposed facility shall be found in compliance with the statewide planning goals if the Council  
10 determines that:

11 For an energy facility or a related or supporting facility that must be evaluated  
12 against the applicable substantive criteria *pursuant to subsection (5) of this*  
13 *section, that the proposed facility does not comply with one or more of the*  
14 *applicable substantive criteria but does otherwise comply with the applicable*  
*statewide planning goals, or that an exception to any applicable statewide*  
*planning goal is justified under subsection (2) of this section.*

15 ORS 469.504(5) addresses the role of the SAG in the EFSC application review process,  
16 stating:

17 Upon request by the State Department of Energy, the special advisory group  
18 established under ORS 469.480 shall recommend to the council, within the time  
19 stated in the request, the applicable substantive criteria *under subsection (1)(b)(A)*  
20 *of this section. \* \* \* If the special advisory group recommends applicable*  
21 *substantive criteria for an energy facility as defined in ORS 469.300 (11)(a)(C) to*  
22 *(E) or a related or supporting facility that passes through more than one*  
23 *jurisdiction or more than three zones in any one jurisdiction, the council shall*  
*review the recommended criteria and determine whether to evaluate the proposed*  
*facility against the applicable substantive criteria recommended by the special*  
*advisory group, against the statewide planning goals **or against a combination of***  
***the applicable substantive criteria and statewide planning goals.** . . . (Emphasis*  
*added).*

24 The proposed facility would be located in an EFU zone, with a related transmission line  
25 (the proposed UEC Cottonwood transmission line) that would intersect three additional zones.

26 SOF 4. Therefore, in the Proposed Order, because Umatilla County in its role as the SAG  
27

1 recommended criterion (3) as an applicable substantive criterion and the proposed facility would  
2 not comply with it, the Department, as authorized under ORS 469.504(1)(b)(B), also analyzed  
3 whether the proposed facility would otherwise comply with each of the statewide planning  
4 goals.<sup>9</sup> The Department recommended Council conclude that, while some of the proposed wind  
5 turbine locations will not comply with criterion (3), the entire proposed facility nevertheless  
6 complies with Statewide Planning Goals.<sup>10</sup> The Department incorporates that analysis here.

7 The Oregon Supreme Court has confirmed the validity of this approach, holding that  
8 ORS 469.504(1)(b)(B):

9 “unlike subparagraphs (A) and (C), refers *both* to ‘applicable substantive criteria’  
10 *and* to ‘statewide planning goals.’ Specifically, subparagraph (B) provides that the  
11 council may find that a proposed facility meets the requirements of ORS 469.504  
12 if it determines ‘that the proposed facility does not comply with one or more of  
13 the applicable substantive criteria but does otherwise comply with the statewide  
14 planning goals’ or that an exception to those goals is justified. Because  
15 subparagraph (B) permits the council to review for compliance with statewide  
16 planning goals only if it first determines that the proposed facility does not  
17 comply with the applicable substantive criteria – the local standards – that  
18 subparagraph necessarily contemplates the same review that the council  
19 undertook here. In its 393-page order, the council evaluated the ASC under the  
20 applicable substantive criteria and, when it determined that the proposed facility  
21 did not comply with one or more of those criteria, it determined whether the  
22 proposed facility nonetheless complied with the statewide planning goals. Thus,  
23 the council’s review was substantially the same as the review that ORS  
24 469.504(1)(b)(B) contemplated.

19 Save Our Rural Oregon v. Energy Facility Siting Council, 339 Or. 353, 367–68, 121 P.3d  
20 1141, 1149 (2005).

21 To summarize, pursuant to ORS 469.504(1)(b)(A), the Department recommended  
22 Council not require the applicant to comply with criterion (3) based on a finding that criterion (3)  
23 is not an applicable substantive criterion because it is not required by statewide planning goals.  
24 However, as explicitly authorized under ORS 469.504(1)(b)(B) and ORS 469.504(5), the  
25 Department also analyzed the proposed facility against a combination of the applicable  
26

27 <sup>9</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04 Pages 93-95 and 100-106 of 904 (analysis of “Question 2”).

<sup>10</sup> *Id.* p. 106 of 904.

1 substantive criteria and statewide planning goals – and recommended Council conclude that,  
2 while some of the proposed wind turbine locations will not comply with criterion 3, the entire  
3 proposed facility nevertheless complies with Statewide Planning Goals.

4 In conclusion, as to Issues 1 and 1.1 in this contested case, although a portion of the  
5 proposed facility would not comply with the County’s criterion (3), the setback in criterion (3) is  
6 not required by any statewide planning goal, therefore it does not constitute applicable  
7 substantive criteria and Council does not need to find the proposed facility complies with it to  
8 approve the ASC. Further, even if criterion (3) were an applicable substantive criterion, although  
9 the facility does not comply with it, EFSC may still approve the facility pursuant to ORS  
10 469.504(1)(b)(B), because the facility otherwise complies with the applicable statewide planning  
11 goals.

12 **VII. ANALYSIS – Issue 2**

13 Issue 2 asks “whether the Project is required to obtain a conditional use permit from the  
14 County.” To the extent the County believes it can impose criterion (3) in a conditional use  
15 permit, even if the Council does not require compliance with criterion (3) in a site certificate, the  
16 Department disagrees.”<sup>11</sup>

17 In the Proposed Order, the Department recognizes that a conditional use permit is  
18 required for the proposed facility within EFU-zoned land and recommends EFSC impose Land  
19 Use Condition 3 in the site certificate to ensure a conditional use permit is obtained from the  
20 County, prior to construction.<sup>12</sup> The Department, therefore, does not dispute that the applicant  
21 will need to obtain a conditional use permit from Umatilla County. However, as established in  
22 ORS 469.401(3), after EFSC issues a site certificate the County must issue the conditional use  
23 permit (and all other county permits contemplated by the site certificate) “without hearings or  
24 other proceedings” and “*subject only to conditions set forth in the site certificate.*” ORS  
25 469.401(3). Therefore, consistent with that statute, if Council agrees with the Department’s

26 \_\_\_\_\_  
27 <sup>11</sup> NHWAPPDoc2-1 Pre-Hearing Conference 2022-10-04. Minutes 45:00-46:00)

<sup>12</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04 Pages 80-82 of 904.

1 analysis that the facility does not need to meet criterion (3) and does not include criterion (3) as a  
2 condition in the site certificate, the County cannot require the applicant to comply with criterion  
3 (3) in order to issue the conditional use permit.

4 **VIII. CONCLUSION**

5 The contested case issues raised by Umatilla County should be resolved via summary  
6 determination because there are no genuine issues as to any material facts and ODOE is entitled  
7 to a favorable ruling as a matter of law. As discussed above, under statute and rule, EFSC  
8 determines whether a facility complies with local land use criteria that are required by statewide  
9 planning goals. The County’s two-mile setback / criterion (3) is not required by statewide  
10 planning goals and subsequently is not reflected in any statute or LCDC rule, therefore it does  
11 not constitute “applicable substantive criteria” and the applicant does not need to comply with it  
12 for EFSC to issue a site certificate. Indeed, the County’s setback is the type of situation the  
13 legislature sought to avoid when it gave EFSC comprehensive authority over the siting of energy  
14 facilities – a local government making it more difficult to locate an energy facility within its’  
15 jurisdiction by imposing a requirement that does not advance any statewide goal. Further, even  
16 if criterion (3) were an applicable substantive criterion, EFSC may still approve the facility  
17 pursuant to ORS 469.504(1)(b)(B), because the facility otherwise complies with the applicable  
18 statewide planning goals. The Department acknowledges that the applicant will need to obtain a  
19 conditional use permit for the proposed facility from Umatilla County, but the County cannot  
20 require the applicant to comply with criterion (3) in order to issue the conditional use permit.

21 DATED this 23rd day of February, 2023

22 Respectfully submitted,

23 ELLEN F. ROSENBLUM  
24 Attorney General

25 /s/ Patrick Rowe  
26 Patrick Rowe, OSB #072122  
27 Senior Assistant Attorney General  
Counsel for the Oregon Department of Energy

## CERTIFICATE OF FILING

I certify that on February 23, 2023, the foregoing OREGON DEPARTMENT OF ENERGY'S MOTION FOR SUMMARY DETERMINATION, was electronically filed to the Office of Administrative Hearings.

DATED this 23<sup>rd</sup> day of February, 2023.

*/s/ Svetlana Gulevkin*

---

Svetlana Gulevkin  
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Natural Resources Section  
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## CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2023, the foregoing OREGON DEPARTMENT OF ENERGY'S MOTION FOR SUMMARY DETERMINATION, was served by e-mailing a true copy of the above-listed document as set forth below:

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DATED this 23<sup>rd</sup> day of February 2023.

*/s/ Svetlana Gulevkin*

---

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**Attachment 2: ODOE Response to Umatilla County's  
Motion for Summary Determination**

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE ENERGY FACILITY SITING COUNCIL OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE:**

**NOLIN HILLS WIND POWER PROJECT**

**OREGON DEPARTMENT OF ENERGY  
RESPONSE TO UMATILLA COUNTY'S  
MOTION FOR SUMMARY  
DETERMINATION**

**OAH Case No. 2022-ABC-05140**

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## **I. INTRODUCTION**

The fundamental question being evaluated in this contested case is whether a two-mile setback for wind turbines (to rural residences) proposed to be located in Exclusive Farm Use (EFU) zoned land, adopted as a conditional use requirement in the Umatilla County Development Code (UCDC), is required by statewide planning goals. Umatilla County’s Motion for Summary Determination (MSD) fails to demonstrate that the two-mile setback is required by statewide planning goals.<sup>1</sup> The County devotes most of its MSD to matters that are ancillary to this fundamental question. To the extent it addresses this question, the County does so only briefly, contending that its setback “implements” certain goals and “is the expression of statewide planning goal requirements,” but at no point does the County adequately explain how or why it is required by any goal. While the Oregon Department of Energy (ODOE or Department) addresses the County’s myriad arguments below, the County’s failure to demonstrate that its setback is required by statewide planning goals should always be borne in mind.

## **II. THE DEPARTMENT’S RECOMMENDATIONS IN THE PROPOSED ORDER**

ORS 469.504(1) establishes that a proposed facility shall be found in compliance with statewide planning goals if:

- (a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; *or*
- (b) The Energy Facility Siting Council determines that:
  - (A) The facility complies with *applicable substantive criteria* from the affected local government’s acknowledged comprehensive plan and land use

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<sup>1</sup> On February 23, 2023, Umatilla County timely filed “Limited Party Umatilla County’s Motion for Summary Determination.” On February 24, 2023, Umatilla County filed “Limited Party Umatilla County’s Amended Motion for Summary Determination.” References herein are to the County’s Amended MSD. Although the County’s Amended MSD was filed after the February 23, 2023 deadline established in the ALJ’s December 15, 2022 Order on Case Management Matters and Contested Case Schedule, the Department does not object to the Amended MSD because there are only three parties in this contested case (thus, the need to strictly adhere to deadlines for case management purposes is not the same here as in contested cases with multiple parties), the applicant did not file a motion to strike, and the Department considers the amendments to the MSD to be non-substantive, scrivener error corrections.

regulations *that are required by the statewide planning goals* and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646; [or]

- (B) For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, *that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals*, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section; \* \* \* (Emphasis added).
- (C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section.

Thus, ORS 469.504(1) provides two primary paths for a proposed facility to demonstrate compliance with statewide planning goals – obtain local land use approval or obtain approval from EFSC. For this Application for Site Certificate (ASC), Nolin Hills Wind, LLC (applicant) elected to have EFSC (rather than Umatilla County) determine whether the proposed facility complies with statewide planning goals.<sup>2</sup> Therefore, rather than consider ORS 469.504(1)(a) we must look at ORS 469.504(1)(b), which sets out three different ways for EFSC to determine compliance with the statewide planning goals. First, pursuant to ORS 469.504(1)(b)(A), EFSC can determine that the facility complies with the “applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations *that are required by the statewide planning goals* and in effect on the date the application is submitted”, and complies with any directly applicable LCDC rules, goals, or state statutes. Second, pursuant to ORS 469.504(1)(b)(B), EFSC can determine that the proposed facility does not comply with the county's applicable substantive criteria, but it complies with the applicable statewide planning goals. Third, pursuant to ORS 469.504(1)(b)(C), EFSC can determine that an exception to any statewide planning goals a proposed facility does not comply with is justified.

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<sup>2</sup> See the Final Application for Site Certificate Exhibit K – NHWAPPDoc2-10 ASC Exhibit K Land Use\_ 2022-01-31 Page 8 of 158; see also NHWAPPDoc1 - Proposed Order on ASC 2022-08-04 Page 74 of 904.

In the Proposed Order, the Department recommended Council find, pursuant to ORS 469.504(1)(b)(A), that the proposed facility complies with all the applicable substantive criteria from Umatilla County’s acknowledged comprehensive plan and land use regulations *that are required by the statewide planning goals*, but UCDC 152.616(HHH)(6)(a)(3), requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land (“Criterion (3)”) is *not* an applicable substantive criterion because it is not required by the statewide planning goals.<sup>3</sup>

The Department then went on to conduct an alternative analysis pursuant to ORS 469.504(1)(b)(B) and 459.504(5), stating “Although the Department recommends Council find Criterion (3) is not ‘applicable substantive criteria required by the statewide planning goals’, because that Criterion was recommended by the SAG and the proposed facility would not comply with that criterion, the Department still recommends Council consider . . . whether the proposed facility would otherwise comply with statewide planning goals.”<sup>4</sup> After walking through this analysis, the Department recommended “Council conclude, as authorized under ORS 469.504(1)(b)(B), that while some turbine locations will not comply with Criterion (3), the entire proposed facility nevertheless complies with applicable Statewide Planning Goals.”<sup>5</sup>

In its’ MSD, the County focuses on the Department’s second recommendation in the Proposed Order under ORS 469.504(1)(b)(B). In this Response, the Department explains why the County’s arguments regarding ORS 469.504(1)(b)(B) are not valid. But, even if those arguments had merit, it still would not justify granting the County’s MSD (and denying the Department’s) because those arguments do not impact the Department’s recommendation that EFSC find the proposed facility complies with statewide planning goals under ORS 469.504(1)(b)(A).

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<sup>3</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 95-100 of 904, analyzing “Question 1” - whether Criterion (3) qualifies as ‘applicable substantive criteria’ under ORS 469.504(1)(b)(A) and OAR 345-022-0030(3). In this section of the Proposed Order the Department analyzed Criterion (3) and recommended Council find it is not required by Goal 3 (*Id.*, p. 98 of 904), by Goal 14 (*Id.*, p. 100 of 904), nor any of the statewide planning goals (*Id.*).

<sup>4</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 93-95 and 100 – 106 of 904, analyzing “Question 2.”

<sup>5</sup> *Id.*, Page 106 of 904.

### **III. RESPONSE TO COUNTY’S ARGUMENTS RE: ISSUE 1**

Issue 1 in this case asks: “[w]hether the County’s land use regulations UCDC [Umatilla County Development Code] 152.616(HHH)(6)(a)(3) (requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land) are ‘applicable substantive criteria’ within the meaning of OAR 345-022-0030(3) that apply to the Project.”

#### **A. The County inappropriately attempts to treat the wind energy component separately from the overall facility.**

Per ORS 469.320(1) “no facility shall be constructed or expanded unless a site certificate has been issued for the site thereof . . .”

ORS 469.300(14) defines “facility” as “an energy facility with any related or supporting facilities.”

ORS 469.300(11)(a) defines different types of energy facilities, including wind energy facilities with an average electric generating capacity of 50 megawatts or more and solar photovoltaic power generation facilities based on the number of acres and type of land on which they are located.

ORS 469.300(24) defines “related or supporting facilities” as “any structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures.”

As discussed in Section III.C. below, the County mistakenly suggests that the pathway afforded to Council under ORS 469.504(5) for facilities, including the energy facility or a related or supporting facility, that pass through more than three zones can only apply to either the energy



facility or related or supporting facility, specific to the components that pass through more than three zones.

**B. The new and substantially modified transmission lines proposed as the UEC Cottonwood Route were correctly identified as related or supporting facilities.**

Umatilla County asserts that the “[t]he PO incorrectly characterizes the UEC Cottonwood line as a ‘related or supporting facility’” because the line “will be built regardless of the proposal.”<sup>6</sup> As described below, the County’s assertion that Umatilla Electric Cooperative (UEC) will build the Cottonwood line “regardless of whether the wind or solar energy facilities are constructed” is erroneous and not supported by evidence in the record.

For the purposes of the Council’s review of an ASC, a “facility” consists of an energy facility together with any related or supporting facilities. ORS 469.300(14).

As noted above, ORS 469.300(24) defines “related or supporting facilities” as:

“any structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures. \* \* \* ”

The Council interprets this definition in OAR 345-001-0010(27), stating: “[t]he Council interprets the terms ‘proposed to be constructed in connection with’ to mean that a structure is a related or supporting facility if it would not be built but for construction or operation of the energy facility. ‘Related or supporting facilities’ does not include any structure existing prior to construction of the energy facility, unless such structure must be substantially modified solely to serve the energy facility.”

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<sup>6</sup> Umatilla County’s Amended MSD, page 6.

There is not an existing high-voltage transmission line that could connect the proposed wind and solar energy facilities to the regional transmission grid. In the ASC, the applicant proposed two potential routes for the transmission line needed to transmit the energy produced by the wind and solar energy facilities to the regional transmission grid: (1) the “BPA Stanfield Route” that involves construction of 4.5 miles of new 230-kilovolt (kV) transmission line extending north from the project substation located at the energy facility site to the existing Bonneville Power Administration (BPA) Stanfield Substation; and (2) the “UEC Cottonwood Route” which would involve construction of approximately 8.4 miles of new 230-kV transmission line, replacement of approximately 9.6 miles of existing 12.47-kV distribution line with a 230-kV transmission line and distribution underbuild, and upgrading approximately 7.3 miles of an existing 115-kV transmission line with a double-circuit 230/115-kV line with distribution underbuild.<sup>7</sup>

The applicant provided a more detailed description of the UEC Cottonwood Route in ASC Exhibit B:

“The total length of the Cottonwood route, including both the new and upgraded segments, will be approximately 25.3 miles, constructed in segments as follows:

- From the northern Project substation to the corner of White House Road and County Road 1348 (labeled on Figure C.4-11 in Exhibit C), the UEC Cottonwood route will be approximately 8.4 miles of new transmission corridor and construction. This new transmission corridor is shown on Figures C-4.11, C-4.14, C-4.15, and C-4.16 in Exhibit C.
- From the corner of White House Road and County Road 1348 to the UEC Butter Creek Substation, an approximately 9.6-mile portion of the UEC Cottonwood route would replace an existing 12.47-kV distribution line with the proposed 230-kV transmission line with 12.47-kV underbuilt distribution. This segment of the UEC route, following the existing distribution line, is shown on Figures C-4.6, C-4.7, C-4.8, C-4.10, and C-4.11 in Exhibit C.

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<sup>7</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Page 29 of 904.

- Continuing from the UEC Butter Creek Substation, the route will follow an existing 115-kV UEC transmission line, to be upgraded to incorporate a 230-kV line and carry power generated by the Project approximately another 7.3 miles north to the UEC Cottonwood Substation. The line replacement will consist of replacing the existing support poles with new structures that can support restringing the existing 115-kV transmission line and adding a 230-kV transmission line (double-circuit), with 12.47-kV underbuilt distribution. The route segments following the existing 115-kV transmission line are shown on Figures C-4.1 through C-4.6 in Exhibit C.

After the Cottonwood Substation, power from the Project will be transmitted over an existing 230-kV line north to the BPA McNary Substation.”<sup>8</sup>

In Umatilla County’s EFU Zone, “utility facilities necessary for public service, including associated transmission lines as defined in ORS 469.300” are outright permitted uses, only requiring administrative review prior to approval.<sup>9</sup> In the Proposed Order, the Department evaluated the components of the UEC Cottonwood Route to determine whether they qualified as utility facilities necessary for public service.

The first, newly constructed segment, was evaluated as an “associated transmission line” subject to the criteria in UCDC 152.617(II)(7)(B) and ORS 215.274.<sup>10</sup> Under ORS 469.300(3), “associated transmission lines” are “new transmission lines constructed to connect an energy facility to the first point of junction of such transmission line or lines with either a power distribution system or an interconnected primary transmission system or both or to the Northwest Power Grid.”

The remaining two segments, which would utilize existing rights-of-way and upgrade existing transmission and distribution facilities owned and operated by UEC, were evaluated as

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<sup>8</sup> NHWAPPDoc2-1 ASC Exhibit B. Project Desc\_2022-02-31 Pages 23-24 of 51.

<sup>9</sup> UCDC 152.059, as evaluated in the Proposed Order, NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 80-81 of 904.

<sup>10</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 127-131 of 904.

general utility facilities necessary for public service, subject to the criteria in UCDC 152.617(II)(7)(A) and ORS 215.275.<sup>11</sup>

The County correctly points out that the applicant represented that the segments that would upgrade existing UEC transmission and distribution facilities “will address UEC’s general utility needs” and “may also be available to other generation facilities and for ongoing capacity needs.”<sup>12</sup> Based on these representations, the County erroneously concludes “[t]here can be no dispute that the UEC Cottonwood line will be upgraded regardless of the proposed energy facilities and serve a variety of energy facilities and projects.”<sup>13</sup> The fact that UEC, and other facilities utilizing UEC’s transmission system, may benefit from the proposed upgrades does not indicate that the upgrades would be constructed in the absence of the proposed facility. To the contrary, even if approved the applicant has proposed another alternative route which, if selected, would mean that the upgrades proposed as part of the UEC Cottonwood Route would not move forward. The County has not provided evidence demonstrating that UEC has any intention of completing the upgrades except in connection with the construction of the proposed energy facility.

In addition, the County does not dispute that the 8.4 mile segment of the UEC Cottonwood Route that was evaluated as an “associated transmission line” would solely serve the energy facility, and would not be built for but for construction or operation of the energy facility.

Because the County has not provided evidence that the UEC Cottonwood Route, including the segments that may “be available to other generation facilities,” will be built if the

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<sup>11</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 123-127 of 904.

<sup>12</sup> Umatilla County Amended MSD, page 6 citing ASC, Exhibit K, page 44.

<sup>13</sup> Umatilla County Amended MSD, page 7.

UEC Cottonwood Route is not constructed to interconnect the energy facility with the northwest power grid, the Hearing Officer may find that the applicant correctly proposed, and the Department correctly evaluated, the UEC Cottonwood Route as a “related or supporting facility” because it is proposed in the ASC, by the applicant, as a component that would be constructed or substantially modified in connection with the construction of the energy facility.

**C. The Department correctly applied the “more than three zones” rule in ORS 469.504(5).**

The County asserts that the Proposed Order erred in its application of the “more than three zones rule” in ORS 469.504(5).<sup>14</sup>

ORS 469.504(5) provides, in relevant part:

“\* \* \* If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300 (11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. \* \* \*”.

The County argues that the “more than three zones rule” must be applied separately to the energy facility and the related or supporting facilities, and that because a wind energy facility is not an “energy facility as defined in ORS 469.300(11)(a)(C) to (E),”<sup>15</sup> the rule cannot be used to “ignore the identified applicable substantive criteria that applies only to the wind energy facility in UCDC 152.616(HHH)(6)(a)(3).”<sup>16</sup>

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<sup>14</sup> Umatilla County Amended MSD, page 9.

<sup>15</sup> ORS 469.300(a)(C), (D), and (E) define the state jurisdictional thresholds for high-voltage transmission lines, solar photovoltaic power generation facilities, and pipelines, respectively. The Council’s jurisdiction over wind energy facilities is defined under ORS 469.300(a)(J).

<sup>16</sup> Umatilla County Amended MSD, page 9.

The Department agrees that the “more than three zones rule” may only be utilized when an energy facility as defined in ORS 469.300(11)(a)(C) to (E) *or a related or supporting facility* crosses more than three zones; however, once triggered, ORS 469.504(5) requires the Council to determine “whether to evaluate *the proposed facility* against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals.” (Emphasis added). As defined in ORS 469.300(14), the term “facility” means “an energy facility together with any related or supporting facilities.

In the Proposed Order, the Department provided an “in the alternative” analysis for Council’s consideration. If Council were to determine Criterion (3) to be “applicable substantive criteria”, ORS 469.504(5) may be reviewed and applied. For this alternative legal argument, the Department recommended the Council find that because the proposed UEC Cottonwood Route, as a related or supporting facility, crosses more than three zones, ORS 469.504(5) allows for Council to review “the proposed facility,” including both the energy facility and the related or supporting facilities, against a combination of the applicable substantive criteria and statewide planning goals.<sup>17</sup>

Considering that the Department’s interpretation is consistent with the plain text of the statute, the Hearing Officer may find that the Department correctly applied the “more than three zones” test in ORS 469.504(5).

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<sup>17</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 94-95 of 904.

**D. The UEC Cottonwood line is a related or supporting facility that passes through more than three zones.**

The County asserts that, even if the Department correctly construed ORS 469.504(5) to mean that the Council may choose to evaluate both an energy facility and its related or supporting facilities against a combination of the applicable substantive criteria and statewide planning goals when a related or supporting facility crosses more than three zones, the more than three zones rule is not triggered because while the site boundary of the UEC Cottonwood Route crosses four zones (AB – Agri-business, RTC – Rural Tourist Commercial, LI – Limited Industrial, and EFU – Exclusive Farm Use zones), the transmission line itself would only be located in three zones: RTC, LI and EFU.<sup>18</sup>

The Department disagrees. The County’s argument would disassociate the development actions necessary for construction and operation of the UEC Cottonwood Route in a manner that is inconsistent with EFSC’s definition of site boundary and micrositing corridor, as well as UCDC’s definitions of use, structure and development.

ASC Exhibit C Figure C-4.1<sup>19</sup> presents the location of the proposed UEC Cottonwood Route, including the extent of the applicant’s proposed micrositing corridor and site boundary. Micrositing corridor and site boundary are specific terms defined in EFSC rules. As defined in OAR 345-001-0010(21), “micrositing corridor” means a continuous area of land within which construction of facility components may occur, subject to site certificate conditions. As defined in OAR 345-001-0010(31), “site boundary” means the perimeter of the site of a proposed energy facility, its related or supporting facilities, all temporary laydown and staging areas and all corridors and micrositing corridors proposed by the applicant. For this ASC, the site boundary

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<sup>18</sup> Umatilla County’s Amended MSD, Section II.D.1.d., p. 11.

<sup>19</sup> NHWAPPDoc2-2 ASC Exhibit C. Project Location 2022-01-31. Page 18 of 60.

area and micro-siting corridor for the proposed UEC Cottonwood Route are the same. For the proposed UEC Cottonwood Route, the site boundary/micro-siting corridor extends the length of the route (approx. 25.3 miles), including new and replacement segments, and ranges in width from 300 to 1,600 feet.<sup>20</sup>

Proposed Order Figure 3<sup>21</sup> presents the location of the site boundary and land use zones. ASC Exhibit C Figure C-4.1 and Proposed Order Figure 3 show that a small portion of the site boundary crosses Tax Lot 4N28300002400, which is zoned as Agri-Business (AB Zone).<sup>22</sup> While the County is correct in its assertion that the transmission line itself is not proposed to be located on this tax lot, the actions associated with development of the transmission line will be located within the AB Zone.

UCDC requirements for permissible and conditionally permissible *uses* are established in 152.290-294. UCDC 152.292(N) establishes that a “utility facility” is a permissible *use* within the AB Zone, subject to compliance with the requirement under UCDC 152.616 (CCC). UCDC definitions provide clarity on the issue. UCDC’s definitions under 152.003 for “use”, “site” and development are as follows: “use” is “the purpose for which land or a structure is designed, arranged or intended, or for which it is occupied *or maintained*;” “site” is “. . . the ground or area on which development occurs;” and “development” any man-made change. . . including but not limited to, construction . . . of a structure . . . site alteration such as land surface grading . . . excavation or clearing.” While the transmission line itself would not be located in the AB Zone, land within the AB zone would be used to serve the use, including development of the structure, such as site preparation (e.g., grading and clearing) and temporary storage of equipment; and

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<sup>20</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04 Page 36 of 904.

<sup>21</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04. Page 76 of 904.

<sup>22</sup> See ASC Exhibit F, Figure F-1.1 (NHWAPPDoc2-5 ASC Exhibit F. Property Owners 2022-03 Page 10 of 34 and Exhibit K, Figure K-2 (NHWAPPDoc2-10 ASC Exhibit K. Land Use\_2022-01-31 Page 112 of 158).



would be authorized to be used during operational maintenance activities, all of which are consistent with the County’s own definitions of use, development and site.<sup>23</sup> These definitions, and application thereof, are consistent with the Department’s application of UCDC requirements within the AB Zone to the UEC Cottonwood Route, based on the extent of the site boundary/micrositing area that crosses into the zone.

For these reasons, it is appropriate to consider the UEC Cottonwood Route to include AB Zoned Land and, thus as passing through more than three zones in one jurisdiction.

**E. The Proposed Order complies with 469.504(5) by considering the consultation factors.**

In contending that the Proposed Order applied consultation factors in ORS 469.504(5) “incorrectly” and “the factors do not yield any right not to apply” Criterion (3)<sup>24</sup> the County misinterprets what the statute requires. ORS 469.504(5) states that when a related or supporting facility passes through more than three zones in any one jurisdiction:

the council shall review the recommended criteria and determine whether to evaluate the *proposed facility* against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of applicable substantive criteria and statewide planning goals. In making *its determination*, the council shall *consult with* the special advisory group and shall *consider*:

- (a) The number of jurisdictions and zones in question;
- (b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and
- (c) The level of consistency of the applicable substantive criteria from the various zones and jurisdictions. (Emphasis added).

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<sup>23</sup> As presented in ASC Exhibit K Section 4.1 *Siting and Analysis Approach*, the applicant requests micrositing flexibility for related and supporting facilities. This approach applies a “worst-case” scenario for due-diligence to evaluate whether impacts anywhere within the micrositing corridor, associated with the development of the use, would comply with the applicable criteria within the zone. NHWAPPDoc2-10 ASC Exhibit K Land Use 2022-01-31 Page 10 of 158.

<sup>24</sup> Umatilla County’s Amended MSD, Section II.D.1.e., pp. 12-13.

The statute requires Council to “consider” the listed factors. In compliance with this requirement, the Proposed Order considers each of these factors, concluding (a) one of the proposed 230 kv transmission line route options would intersect more than three zones, (b) the County adopted the setback specifically to consider the impact of wind energy facilities in the planning process and (c) Criterion (3) and the County standards of which it is a part appear consistent from the various zones.<sup>25</sup>

There are two flaws in the County’s allegations that the Proposed Order “incorrectly” applies these factors and that “the factors do not yield any right not to apply” Criterion (3). First and most importantly, the statute does not require the Council to apply recommended applicable substantive criteria or take any particular course of action based on the results of its consideration of the listed factors. It only requires Council to consider the factors, which the Proposed Order has done. Second, the statute does not establish a “correct” way to interpret these factors. For example, as to factor (b), it’s not clear what “the degree to which the applicable substantive criteria reflect local government consideration of energy facilities” means. While Criterion (3) certainly reflects the County’s consideration of energy facilities, the County hasn’t shown that an ordinance prohibiting an energy facility in a certain area constitutes the type of “consideration of energy facilities” anticipated by factor (b) versus an ordinance that would facilitate or allow for an energy facility.

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<sup>25</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 93-95 of 904.

**F. EFSC has jurisdiction to determine if a SAG’s recommended criteria are required by statewide planning goals.**

Umatilla County mistakenly contends EFSC does not have authority to review the County’s identification of applicable substantive criteria.<sup>26</sup> They offer two arguments in an attempt support this assertion.

First, the County contends that, “in this proceeding it has already been decided that EFSC lacks jurisdiction to review the correctness of the County’s identification of the applicable substantive criteria that apply to the proposed wind energy facility.”<sup>27</sup> In support of this argument, the County references a statement, quoted fully below, from the Order on Petitions for Party Status and Issues for Contested Case (“Issues Order”). As is apparent from the title, there are two purposes of such orders – 1) to determine if a petitioner seeking to participate in a contested case has met the eligibility requirements for party or limited party status and, if so, 2) whether the issues they seek to raise in the contested case are appropriate for a contested case. See OAR 345-015-0016(4): “To raise an issue in a contested case proceeding, *the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing.* If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer shall not consider the issue in the contested case proceeding. . .” (emphasis added). See also OAR 345-015-0016(5), requiring that petitions seeking party status in a contested case include, among other items, “a short and plain statement *of the issues the person desires to raise in the contested case proceeding*” (emphasis added).

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<sup>26</sup> Umatilla County’s Amended MSD, Section II.D.1.f., pp. 13-14.

<sup>27</sup> *Id.*, p. 14.

In its Petition for Party Status, the County requested a contested case to address two issues, first, whether the County’s acknowledged land use regulations and specifically the two-mile setback/Criterion (3) “are ‘applicable substantive criteria’ within the meaning of OAR 345-022-0030(3) that apply to the Project” and second, whether the Project is required to obtain a conditional use permit from the County.<sup>28</sup> The County did not seek to raise as an issue in the contested case whether Council has jurisdiction to assess if the land use ordinances identified by a SAG meet the definition of applicable substantive criteria.

Nevertheless, the County quotes the following statement from Issues Order: “Issues related to Applicant’s compliance with the state and/or land use provisions are within the Council’s jurisdiction pursuant to OAR 345-022-0000 and OAR 345-022-0030. However, an evaluation of whether the land use ordinances passed by the County are required by statewide planning goals in not within in (sic) the Council’s jurisdiction.”<sup>29</sup> The Department agrees that the first sentence was relevant to assessing the first issue raised by the County. As noted above, under OAR 345-015-0016(4), in determining whether the issues a petitioner raises are appropriate for a contested case, a hearing officer must assess, among other items, whether *the issue raised* is within Council’s jurisdiction. However, the County did not seek a contested case to determine if Council has jurisdiction to evaluate whether Criterion (3) is required by statewide planning goals addressed in the contested case. Rather, it sought a contested case to address whether Criterion (3) is applicable substantive criteria within the meaning of OAR 345-022-0030(3). Thus, the statement in the Issues Order that EFSC does not have jurisdiction to evaluate whether Criterion (3) is required by statewide planning goals is dictum and does not constitute the “law of the case.” *Hayes Oyster Co. v. Dulcich*, 199 Or App 43, 53

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<sup>28</sup> Umatilla County August 22, 2022 Petition for Party Status, p. 4.

<sup>29</sup> Issues Order, p. 9.

(2005) (the “law of the case” doctrine applies only to the portions of a prior appellate opinion that were necessary to the disposition of the appeal but does not apply to “every statement about the law or the facts that the court happens to venture in the course of rendering its decisions,” quoting *Blanchard v. Kaiser Foundation Health Plan*, 136 Or. App. 466 470 (1995)). See also *Allen v. Cty of Jackson*, 191 Or. App. 185, 203 (2003) (a court’s statement that is unnecessary to the disposition of an appeal is dictum and the court is not bound by it).

Second, the County argues that only the Oregon Supreme Court has jurisdiction to review the County’s identification of applicable substantive criteria, citing ORS 469.504(8) and *Hatley v. Umatilla County*, 68 Or LUBA 264, 270-271 as “so stating.”<sup>30</sup> ORS 469.504(8) does not prohibit EFSC review of a SAG’s recommended applicable substantive criteria, it establishes that *judicial review* of recommended applicable substantive criteria lies in the Supreme Court, not LUBA or lower courts. ORS 469.504(8) states:

Notwithstanding ORS 34.020 or 197.825 or any other provision of law, the affected local government’s land use approval of a proposed facility under subsection (1)(a) of this section and the special advisory group’s recommendation of applicable substantive criteria under subsection (5) of this section *shall be subject to judicial review only as provided in ORS 469.403*. . . . (Emphasis added).

ORS 469.403(3) states: “[j]urisdiction for judicial review *of the council’s approval or rejection of an application for a site certificate or amended site certificate is conferred upon the Supreme Court*. . .” (Emphasis added). Thus, ORS 469.504(8) establishes that, after EFSC has approved or rejected an application, that decision is appealable to the Oregon Supreme Court. It does not prohibit EFSC from analyzing whether applicable substantive criteria recommended by a county are required by statewide planning goals. But if EFSC does so as part of its approval or rejection of an application, that determination is subject to judicial review by the Supreme Court.

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<sup>30</sup> Umatilla County’s Amended MSD, Section II.D.1.f., p. 14.

The County's reliance on *Hatley* is similarly misplaced. First, EFSC is not bound by LUBA decisions because, pursuant to ORS 469.504(8), EFSC's decisions are directly appealable to the Oregon Supreme Court, not LUBA nor any lower court. Second, *Hatley* does not stand for the proposition that EFSC lacks authority to review a SAG's recommendation of applicable substantive criteria. LUBA quoted part of ORS 469.504(5) stating EFSC shall apply the applicable substantive criteria recommended by a SAG.

Pursuant to ORS 469.480(1), when an energy facility is proposed to EFSC, EFSC must designate as a "special advisory group" the governing body of the local government within whose jurisdiction the facility is proposed to be located. Under ORS 469.504(5), the special advisory committee determines the applicable substantive criteria. ORS 469.504(5) provides that "[i]f the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 [EFSC] shall apply the criteria recommended by the [local governing body]." ORS 469.504(8) provides for direct review by the Oregon Supreme Court of "the affected local government's land use approval of a proposed facility under [ORS 469.504(1)(a)] and the special advisory group's recommendation of applicable substantive criteria under [ORS 469.504(5)]." See *Thomas v. City of Turner*, 42 Or LUBA 39, 44-45 (2002) (so noting).

*Hatley v. Umatilla County*, 68 Or LUBA 264, 2013 WL 5888200, at \*4 (2013). LUBA did not address the provision in ORS 469.504(5) stating the SAG "shall recommend to the council . . . the applicable substantive criteria under subsection (1)(b)(A) of this section." And LUBA did not hold (nor would it have any authority to hold) that EFSC may not evaluate whether applicable substantive criteria recommended by a SAG are "required by statewide planning goals" as they must be for EFSC to make a finding of compliance with statewide planning goals under ORS 469.504(1)(b)(A). To the contrary, LUBA acknowledged that EFSC had previously rejected the County's recommendation of the two-mile setback as applicable substantive criteria and that the Supreme Court had reviewed that decision:

Finally, the two-mile setback adopted by Ordinance 2012-04 was an issue in an Energy Facility Siting Council (EFSC) site certificate appeal to the Oregon

Supreme Court. *Blue Mountain Alliance v. EFSC*, 353 Or 465, 300 P3d 1203 (2013) was an appeal of an EFSC determination to issue an amended site certificate to a wind “energy facility” as defined in ORS 469.300(11)(a)(J), located in the county. As we explain in more detail below, ORS 469.504(1)(b) required EFSC to determine that the amended site certificate application complied with the “applicable substantive criteria from the [county's] acknowledged comprehensive plan and land use regulations that *are required by the statewide planning goals and in effect on the date the application is submitted*[.]” (Emphasis in the *Hatley* decision.) *EFSC determined that the setback provisions were not part of the “applicable substantive criteria” because the setback provisions were not “in effect on the date the application [was] submitted [.]”*

*Hatley v. Umatilla County*, 68 Or LUBA 264, 2013 WL 5888200, at \*2 (2013) (emphasis added). As LUBA acknowledged, in the *Blue Mountain* case EFSC reviewed Umatilla County’s recommendation that it apply Criterion (3) as applicable substantive criteria and determined it need not require the applicant in that matter to comply with it because it was not in effect on the date the application was submitted. The Supreme Court upheld that decision.<sup>31</sup> In this instance, the Department has recommended EFSC not require the applicant to comply with it because it is not “required by the statewide planning goals.” EFSC has jurisdiction in this matter to review whether Criterion (3) is “required by the statewide planning goals” just as it had jurisdiction in *Blue Mountain* to review whether Criterion (3) was “in effect on the date the application was submitted.” Accordingly, the *Hatley* decision does not support the County’s position, rather it confirms EFSC has jurisdiction to determine whether the applicant must comply with Criterion (3) and that only the Supreme Court has authority to review that decision.

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<sup>31</sup> *Blue Mountain All. v. Energy Facility Siting Council*, 353 Or. 465, 467, 300 P.3d 1203, 1205 (2013) “The central question on review is whether, in approving the amended site certificate, the council correctly declined to require compliance with a recently adopted county ordinance requiring a two-mile setback between wind turbines and rural residences pursuant to ORS 469.401(2). For the reasons set out in this opinion, we conclude that the council did not err in not requiring compliance with the ordinance.”

**G. The County fails to demonstrate Criterion (3) is required by statewide planning goals.**

The County devotes two pages in its 31-page MSD addressing the fundamental question in this case – whether Criterion (3) is required by statewide planning goals and thus meets the definition of applicable substantive criteria in OAR 345-022-0030(3). The County makes a few limited arguments in an attempt to refute the Department’s recommendation that Criterion (3) is not required by statewide planning goals, which the Department addresses here one by one.<sup>32</sup>

First, the County alleges “[t]he Oregon Department of Land Conservation and Development (DLCD) correctly views [Criterion (3)] as implementing “Statewide Goals: 2, 5, 9, 13.” As purported support for this claim, the County attaches a “Plan Amendment Tracking Sheet” attached as Exhibit 3 to the County’s MSD. Putting aside that the County provides no foundation for this document whatsoever, on its face it does not, as the County contends, demonstrate DLCD views Criterion (3) as “implementing” these goals. Among other items, the document summarizes the Umatilla County proposal to amend its Development Code Section 152.616, lists the Umatilla County Local Contact person, and by the line item “Statewide Goals” lists “2, 5, 9, 13.” Nothing in the document indicates that DLCD believes Criterion (3) “implements” those Goals let alone that Criterion (3) is “required by” those Goals, which, of course, it must be to meet the definition of applicable substantive criteria. The County doesn’t even allege that this document demonstrates Criterion (3) is required by those Goals. Thus, neither the document itself, nor the County’s interpretation of it support a ruling that Criterion (3) is required by statewide planning goals and meets the definition of applicable substantive criteria.

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<sup>32</sup> Umatilla County Amended MSD, Section II.D.1.g., pp. 14-15.



Next, the County argues that Goal 2 requires state “actions related to land use” to “be consistent” with city and county comprehensive plans and that, because Criterion (3) is a county comprehensive planning measure and the Proposed Order proposes a state “action related to land use,” “Goal 2 requires that the PO comply with” Criterion (3).<sup>33</sup> In other words, the County is again arguing that, once a local government adopts a land use provision (and, presumably, a SAG recommends it as applicable substantive criteria) EFSC must require an applicant to abide by it, without evaluating whether it is required by statewide planning goals per ORS 469.504(1)(b)(A). The County is referring to a general statement in Goal 2 that “City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268.”<sup>34</sup> Nothing in this statement justifies EFSC ignoring the explicit requirement in ORS 469.504(1)(b)(A) that it find a proposed facility in compliance with statewide planning goals if it determines “[t]he facility complies with applicable substantive criteria from the affected local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals . . .”

Finally, the County argues that Criterion (3) “is the expression of statewide planning goal requirements for Umatilla County and there is no dispute that it is acknowledged by LCDC as such.”<sup>35</sup> To the contrary, while the Department does not dispute that Criterion (3) has been acknowledged by LCDC, the Department does not agree that LCDC’s acknowledgement means LCDC has taken the position that Criterion (3) is an applicable substantive criterion that is

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<sup>33</sup> *Id.*, p. 14.

<sup>34</sup> OAR 660-015-0000(2), Part I; see [goal02.PDF \(oregon.gov\)](#)

<sup>35</sup> Umatilla County Amended MSD, Section II.D.1.g., p. 15.

“*required* by statewide planning goals.” The County alleges “[a]cknowledgment means that a local land use rule complies with and reflects the requirements of the statewide planning goals.”<sup>36</sup> That is partially correct. While acknowledgement does mean the local rules comply with the goals, it does not mean they are required by the goals.

“Acknowledgment” means a commission order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment *complies with* the goals. . . . ORS 197.015(1). (Emphasis added).

See also OAR 660-031-0010(1):

“Acknowledged Comprehensive Plan” means a comprehensive plan and implementing ordinances that have been adopted by a city or county and have been found by the Land Conservation and Development Commission *to be in compliance with* the Statewide Planning Goal pursuant to ORS 197.251.” (Emphasis added).

These definitions establish that acknowledgement means a local land use regulation complies with one or more goals, not that it is required by the goals. Local governments may choose to be more restrictive than the requirements to be implemented for consistency with the goals, as Umatilla County has done when adopting Criterion (3). But that does not mean an applicant for a site certificate that has chosen to have EFSC determine compliance with statewide planning goals under ORS 469.504(1)(b), rather than the local government under ORS 469.504(1)(a), must comply with the more restrictive criteria. There would be little purpose in the legislature having created two paths for applicants under ORS 469.504(1) – the sub (a) option to obtain local land use approval and the sub (b) option to have EFSC determine compliance with statewide

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<sup>36</sup> *Id.*, pp. 14-15.

planning goals if EFSC is simply obligated to rubber stamp the local government’s recommended applicable substantive criteria. As the Department and County have both noted, in *Save Our Rural Oregon*, the Supreme Court held: “[b]ecause the local criteria often are more specific than the goals, an ASC [application for site certificate] may fail to meet the local criteria but still meet the goals.” 339 Or. 353, 368 (2005).

In short, LCDC’s acknowledgement does not mean LCDC has taken the position that Criterion (3) is an applicable substantive criterion that is “*required by* statewide planning goals”; by definition, it means only that LCDC has determined Criterion (3) complies with the goals. An applicant can fail to meet local criteria, even if the criteria have been acknowledged by LCDC, and still meet the goals if EFSC determines the criteria an applicant doesn’t meet are not required by the goals.

**H. The County’s arguments regarding ORS 469.504(1)(b)(B) are unavailing and irrelevant to a Council finding under ORS 469.504(1)(b)(A).**

The County’s argument that nothing in the record suggests the proposed wind energy facility “cannot” comply with Criterion (3)<sup>37</sup> misunderstands the Department’s position and selectively quotes the Proposed Order.

An applicant does not have to demonstrate it cannot comply with criteria a SAG recommends that do not meet the definition of applicable substantive criteria. As discussed in Section II above, in the Proposed Order, the Department recommended Council find, pursuant to ORS 469.504(1)(b)(A), that the proposed energy facility complies with all the applicable substantive criteria from Umatilla County’s acknowledged comprehensive plan and land use regulations *that are required by the statewide planning goals*, but Criterion (3) is *not* an

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<sup>37</sup> Umatilla County Amended MSD, Section II.D.1.h., p. 16.

applicable substantive criterion because it is not required by the statewide planning goals.<sup>38</sup> Under ORS 469.504(1)(b)(A), there is no need to assess whether the proposed facility can or cannot comply with Criterion (3) because Criterion (3) is not an applicable substantive criterion in the first place.

However, if Criterion (3) were an applicable substantive criterion, under ORS 469.504(1)(b)(B) and 469.504(5), Council may still find the proposed facility in compliance with statewide planning goals by evaluating the facility against the statewide planning goals or a combination of the applicable substantive criteria and the statewide planning goals. The statute does not require Council to find that the proposed facility “cannot comply” with applicable substantive criteria. In the Proposed Order, the Department recommended “Council conclude, as authorized under ORS 469.504(1)(b)(B), that while some turbine locations *will not* comply with Criterion (3), the entire proposed facility nevertheless complies with applicable Statewide Planning Goals.”<sup>39</sup> The County disregards that recommendation and instead quotes a passage from the Proposed Order in which the Department states ORS 469.504(1)(b)(B) “allows for Council to find that an applicant has satisfied the requirements of the Land Use standard, even if the proposed facility cannot comply with one or more ‘applicable substantive criteria’ if the proposed facility otherwise complies with the statewide planning goals . . .”<sup>40</sup> Use of the word “cannot” rather than “will not” is a scrivener’s error that the Council may correct in its Final Order if it agrees with the Department’s recommendation. As noted above, the statute does not require Council to find that the proposed

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<sup>38</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 95-100 of 904, analyzing “Question 1”

<sup>39</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Page 106 of 904 (emphasis added).

<sup>40</sup> Umatilla County Amended MSD, Section II.D.1.h., p. 16, quoting the Proposed Order, p. 69 (NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Page 77 of 904).

facility “cannot comply” with applicable substantive criteria and, accordingly, the Department did not analyze in the Proposed Order whether the facility can or cannot comply with Criterion (3). Rather, as it does with all applications, the Department reviewed the facility as proposed by the applicant. There is no statute or rule that requires EFSC to consider if alternatives to an applicant’s proposal might allow the applicant to comply with Criterion (3).

Next, the County misleadingly argues the Proposed Order “interprets ORS 469.504(1)(b)(B) to obliterate the requirement in ORS 469.504(5) that if the special advisory group timely identifies applicable substantive criteria, that EFSC ‘shall’ apply them.”<sup>41</sup> The Department agrees that ORS 469.504(5) describes three scenarios.

First, where the SAG “does not recommend applicable substantive criteria . . .”.

Second, where the SAG “recommends applicable substantive criteria for an energy facility described in ORS 469.300 or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction”.

Third, where the SAG “recommends applicable substantive criteria for an energy facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals . . .”

It is this third scenario that the Department assessed in the Proposed Order.<sup>42</sup> As discussed above, the UEC Cottonwood transmission line with its micrositing corridor passes through more than three zones in a single jurisdiction. Therefore, pursuant to the third scenario

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<sup>41</sup> Umatilla County Amended MSD, Section II.D.1.h., p. 17.

<sup>42</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 93-95 and 100-106 of 904 (analyzing “Question 2”).

described in ORS 469.504(5), Council is not required to apply the criteria recommended by the SAG, rather it may evaluate the proposed facility against a combination of the applicable substantive criteria and statewide planning goals, as the Department recommended it do.<sup>43</sup>

The County contends that the UEC Cottonwood transmission line does not pass through more than three zones in any one jurisdiction, therefore under the second scenario described in ORS 469.504(5), the Council “shall apply the criteria recommended by the special advisory group” and may not conduct the evaluation under ORS 469.504(1)(b)(B).<sup>44</sup> In a strawman argument, the County conducts an extensive analysis of the second scenario under ORS 469.504(5) and contends the analysis of ORS 469.504(1)(b)(B) in the Proposed Order “renders ORS 469.504(5)’s second scenario requirement that EFSC ‘shall’ apply the applicable substantive criteria where the special advisory group timely recommends them to having no effect.”<sup>45</sup>

The Department did not analyze the second scenario in the Proposed Order because it does not believe that scenario to apply to the circumstances of this matter for the reasons discussed above. If EFSC does not agree with the Department’s analysis of why the third scenario (more than three zones) applies to the circumstances of this case, it is free to disregard that analysis and the recommendation in the Proposed Order that it may find compliance with statewide planning goals under ORS 469.504(1)(b)(B).

However, it is important to bear in mind that it is not necessary to analyze ORS 469.504(1)(b)(B) and ORS 469.504(5) because Criterion (3) is not required by statewide planning goals. As the Department discusses above and in its MSD, in the Proposed Order it recommends Council find, pursuant to ORS 469.504(1)(b)(A), that the proposed energy facility

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<sup>43</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04, Pages 78, 95 and 100-106 of 904.

<sup>44</sup> Umatilla County Amended MSD, Section II.D.1.h., pp. 19-20.

<sup>45</sup> Umatilla County Amended MSD, Section II.D.1.i., p. 21.

complies with all the applicable substantive criteria from Umatilla County’s acknowledged comprehensive plan and land use regulations *that are required by the statewide planning goals*, but the County’s Criterion (3) is *not* an applicable substantive criterion because it is not required by the statewide planning goals. Because the County has not demonstrated Criterion (3) is required by statewide planning goals, if Council chooses, it may adopt the Department’s recommendation to find the facility in compliance under ORS 469.504(1)(b)(A), without conducting an analysis of ORS 469.504(1)(b)(B) and 469.504(5).

**I. Counties have an important role in the EFSC process but there is no requirement in ORS 469.504 or any other statute that EFSC defer to a county’s recommendations that do not meet the definition of applicable substantive criteria.**

The County argues that other statutes demonstrate EFSC must apply local land use rules that a SAG identifies, citing to ORS 469.480, ORS 197.015 and ORS 215.190.<sup>46</sup> ORS 469.480 establishes that EFSC shall designate as a SAG the governing body of a local government within whose jurisdiction the facility is proposed to be located. That is an important role in the EFSC process, as local governments are in the best position to recommend which of their land use rules the Council treat as applicable substantive criteria, the responsibility they are charged with under ORS 469.504(5). However, “recommend” is the key word. None of the statutes the County cites purport to mandate that EFSC adopt all criteria recommended by a local government if EFSC concludes one or more of the recommended criteria are not required by statewide planning goals. That determination is left to EFSC.

ORS 469.504(1)(b)(A) states EFSC shall find a facility to be in compliance with the statewide planning goals if it determines that “[t]he facility complies with applicable substantive criteria from the affected local government’s acknowledged comprehensive plan and land use

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<sup>46</sup> Umatilla County Amended MSD Section II.D.1.i., pp. 22-24.

regulations *that are required by the statewide planning goals* and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply direct to the facility under ORS 197.646.”

The County continuously disregards the phrase “required by statewide planning goals.” The County would read ORS 469.504(1)(b)(A) to state EFSC shall find a facility to be in compliance with the statewide planning goals if it determines “[t]he facility complies with applicable substantive criteria from the affected local government’s acknowledged comprehensive plan and land use regulations ~~that are required by the statewide planning goals and~~ in effect on the date the application is submitted . . .” Similarly, the County would read ORS 469.504(5) to state: “the special advisory group established under ORS 469.480 shall recommend to the council . . . the applicable substantive criteria ~~under subsection (1)(b)(A) of this section.~~” And the County would read the definition of “applicable substantive criteria” in OAR 345-022-0030(3) to state they are “criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances ~~that are required by the statewide planning goals and that are~~ in effect on the date the application is submitted . . .” Such readings defy the requirements of statutory interpretation. As the County itself has pointed out, when examining the text of a statute courts are “not to insert what has been omitted, or to omit what has been inserted.”<sup>47</sup>

**J. The legislative history the County cites does not support their position.**

The County acknowledges that legislative history is of limited utility in this matter.<sup>48</sup> The

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<sup>47</sup> ORS 174.010. *See also AAA Or./Idaho Auto Source, LLC v. State es rel. Dep’t of Rev.*, 363 Or 411, 418, 423 P3d 71 (2018), to which the County cites at p. 18 of its Amended MSD.

<sup>48</sup> Umatilla County Amended MSD Section II.D.1.j., p. 24.



Department agrees. The Department does not believe it necessary to address each of the pieces of legislative history that the County cites because, ultimately, the County concludes “the manifest legislative intent confirms the plain text: EFSC ‘shall’ apply the applicable substantive criteria.” As discussed throughout this Response, the Department has recommended EFSC do just that – apply the applicable substantive criteria but not Criterion (3) because it is not applicable substantive criteria as it is not required by statewide planning goals. Nothing in the legislative history the County cites supports a proposition that EFSC is bound to apply whatever criteria a County recommends, even if the criteria are not required by statewide planning goals. By its plain language, the purpose of ORS 469.504 is to determine whether a proposed facility is “in compliance with statewide planning goals under ORS 469.503(4).” ORS 469.503(4) requires EFSC to find “[t]he facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.” The County would have EFSC apply its Criterion (3) even though it is not required by any statewide planning goals adopted by the Land Conservation and Development Commission.

**K. The County mischaracterizes the Department’s analysis of ORS 469.504(5) and (1)(b)(B)**

In Section II.D.1.k of its MSD, the County continues its mischaracterization of the Proposed Order. The Department has not recommended EFSC not apply Criterion (3) because “the applicant does not wish to comply with it,” nor does the Department’s recommendation render the role of the SAG a nullity. The Department is recommending EFSC expect the SAG to do what it is charged with doing under statute and rule – recommend applicable substantive criteria required by statewide planning goals. The Department did not analyze the second scenario in ORS 469.504(5)(b) that states Council “shall” apply applicable substantive criteria recommended by a SAG for an energy facility or related or supporting facility that does not pass

through more than three zones in any one jurisdiction because the Department considers the proposed UEC transmission line, when accounting for the actions associated with development of the line, as passing through more than three zones.

#### **IV. RESPONSE TO COUNTY'S ARGUMENTS RE: ISSUE 2**

Issue 2 asks “whether the Project is required to obtain a conditional use permit from the County.” To the extent the County believes it can impose Criterion (3) in a conditional use permit, even if the Council does not require compliance with Criterion (3) in a site certificate, the Department disagrees.”<sup>49</sup>

In the Proposed Order, the Department recognizes that a conditional use permit is required for the proposed facility within EFU-zoned land and recommends EFSC impose Land Use Condition 3 in the site certificate to ensure a conditional use permit is obtained from the County, prior to construction.<sup>50</sup> However, as established in ORS 469.401(3), after EFSC issues a site certificate the County must issue the conditional use permit (and all other county permits contemplated by the site certificate) “without hearings or other proceedings” and “*subject only to conditions set forth in the site certificate.*” ORS 469.401(3). Consistent with that statute, if Council agrees with the Department’s analysis that the facility does not need to meet Criterion (3) because it is not required by statewide planning goals, and Council does not include Criterion (3) as a condition in the site certificate, the County cannot require the applicant to comply with criterion (3) in order to issue the conditional use permit.

#### **V. CONCLUSION**

For the reasons discussed in this Response, the Hearing Officer should deny the County’s MSD. To constitute applicable substantive criteria within the meaning of ORS 469.504(1)(b)(A)

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<sup>49</sup> NHWAPPDoc2-1 Pre-Hearing Conference 2022-10-04. Minutes 45:00-46:00)

<sup>50</sup> NHWAPPDoc1 Proposed Order on ASC 2022-08-04 Pages 80-82 of 904.

and OAR 345-022-0030(3) Criterion (3) must be required by a statewide planning goal. The County has not demonstrated that it is. Rather, it makes myriad other arguments not relevant to the fundamental question in this case.

DATED this 21<sup>st</sup> day of March 2023

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*

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Patrick Rowe, OSB #072122  
Senior Assistant Attorney General  
Counsel for the Oregon Department of Energy

**CERTIFICATE OF FILING**

I certify that on March 21, 2023, the foregoing OREGON DEPARTMENT OF ENERGY RESPONSE TO UMATILLA COUNTY’S MOTION FOR SUMMARY DETERMINATION, was electronically filed to the Office of Administrative Hearings.

DATED this 21st day of March 2023.

*/s/ Svetlana Gulevkin*

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Svetlana Gulevkin  
Legal Secretary  
Natural Resources Section  
Oregon Department of Justice

## CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2023, the foregoing OREGON DEPARTMENT OF ENERGY RESPONSE TO UMATILLA COUNTY'S MOTION FOR SUMMARY DETERMINATION, was served by e-mailing a true copy of the above-listed document as set forth below:

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DATED this 21st day of March 2023.

*/s/ Svetlana Gulevkin*

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Svetlana Gulevkin  
Legal Secretary  
Natural Resources Section  
Oregon Department of Justice

**Attachment 3: ODOE Reply to Umatilla County's Response to  
Motion for Summary Determination**

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**  
**FOR THE ENERGY FACILITY SITING COUNCIL OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE:  
  
NOLIN HILLS WIND POWER PROJECT**

**OREGON DEPARTMENT OF ENERGY  
REPLY TO UMATILLA COUNTY'S  
RESPONSE TO MOTION FOR  
SUMMARY DETERMINATION**

**OAH Case No. 2022-ABC-05140**

**I. INTRODUCTION**

Pursuant to the December 15, 2022 Order on Case Management Matters and Contested Case Schedule, the Oregon Department of Energy (“ODOE” or “Department”) files this Reply to Umatilla County’s Response to ODOE’s Motion for Summary Determination (“MSD”).

As discussed below:

- The Energy Facility Siting Council (“EFSC” or “Council”) has express authority to determine if a facility must comply with applicable substantive criteria recommended by a County; the Supreme Court has jurisdiction to review EFSC’s decision.
- The County’s argument that Goal 2 requires EFSC actions to be consistent with the County’s land use rules is directly contradicted by the governing statutes. *Pursuant to ORS 469.504(6) and (7), that requirement does not apply to EFSC, and the County is required to amend its’ rules to make them consistent with EFSC’s decision.*
- The County’s criticism of the *Marbet* decision as outdated and not consistent with current regulations is misguided, as is evident from a March 2023 Oregon Supreme Court decision that cites to *Marbet*. The Department’s recommendation that EFSC does not need to apply the County’s setback/Criterion (3) is supported by the current laws and rules governing the EFSC process. The County’s attempt to impose its setback runs afoul of those laws and rules.

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## II. REPLY

### A. EFSC has express authority to determine if a facility must comply with applicable substantive criteria recommended by a County.

The County ignores explicit statutory language and case law when it asserts that only the Supreme Court has the authority to review the County's identification of applicable substantive criteria. Per ORS 469.503(4), a proposed facility must comply with statewide planning goals adopted by the Land Conservation and Development Commission. Per ORS 469.504(1)(b)(A) a proposed facility shall be found in compliance with the goals if “the *Energy Facility Siting Council determines* that: (A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted.” (emphasis added). This language explicitly establishes that EFSC determines whether the facility complies with criteria from a local government's comprehensive plan and regulations that are required by the statewide planning goals and in effect on the date the application is submitted.

In 2012, EFSC determined that, because the County's setback ordinance was not in effect on the date an application for a site certificate amendment was submitted, the setback “did not apply to the Council's determination whether the facility complied with statewide planning goals under ORS 469.504(1)” and EFSC “adopted an ODOE staff recommendation to not require compliance with [the setback ordinance].” *Blue Mountain Alliance v. EFSC*, 353 Or 465, 469 300 P3d 1203, 1206 (2013). The Oregon Supreme Court upheld EFSC's decision, explaining:

Under the first part of ORS 469.504(1)(b)(A), the council must determine that the facility complies with substantive criteria—derived from the local government's “acknowledged comprehensive plan and land use regulations”—that are (1) **required by statewide planning goals**; and (2) “in effect” on the certificate or amendment application date. . . .



**We agree with the council and Helix that the council was not required to consider the ordinance in its determination whether the facility complied with statewide planning goals** because the ordinance was not ‘in effect’ on the Amendment #2 application date. . .

*Id.*, 353 Or at 473–74, 300 P.3d at 1208 (Emphasis in bold added). Thus, in *Blue Mountain*, the Court reviewed and agreed with the Council’s decision that the setback did not apply because it was not in effect at the time the amendment application was submitted. Similarly, in this matter, if the Council adopts the Department’s recommendation to not require compliance with Criterion (3) because it is not required by statewide planning goals, and that decision is appealed, the Supreme Court will review Council’s decision and determine if it agrees with that decision, just as it reviewed Council’s decision in *Blue Mountain*.

Finally, as the Department pointed out in its Response to the County’s MSD,<sup>1</sup> ORS 469.504(8) establishes that judicial review of recommended applicable substantive criteria lies in the Supreme Court, not the Oregon Land Use Board of Appeals or lower courts. It does not mean EFSC is prohibited from reviewing a Special Advisory Group’s recommended applicable substantive criteria and determining whether to apply them to a proposed facility, as is clear from the *Blue Mountain* decision.

**B. The County’s setback / Criterion (3) is not required by Goal 2; contrary to the County’s allegation, EFSC is not required to demonstrate compatibility with the County’s regulations, the County is required to amend its regulations to make them consistent with EFSC’s decision.**

In its MSD and again in its Response to the Department’s MSD, the County argues that its’ setback / Criterion (3) is required by Goal 2, but *the County does not explain how Goal 2 requires the County to adopt the setback*. That’s because there is nothing in Goal 2 or any other statewide planning goal that requires a setback between turbines and rural residences, let alone a

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<sup>1</sup> ODOE Response to Umatilla County’s MSD, pp. 17-18.  
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two-mile setback.<sup>2</sup> The fact that the statewide goals don't require Umatilla County to adopt setbacks such as Criterion (3) is also evident from the County's own Response to Nolin Hills' MSD, in which the County states it adopted the setback to address concerns about the impact of turbines on residential property values and possible noise and sleep disturbance caused by the turbines.<sup>3</sup> The County does not contend that any of these purposes even relate to statewide planning goals let alone mean that the setback is required by a goal.

Rather than attempt to explain how Goal 2 requires the County to adopt Criterion (3), the County instead mistakenly argues that because it adopted the setback, Goal 2 requires EFSC to apply Criterion (3) to site certificate applications. In seeking to support this allegation, the County points to language in Goal 2 that states "City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268."<sup>4</sup> This Goal 2 language mirrors language in ORS 197.180, which states:

(1) Except as provided in ORS 197.277 or subsection (2) of this section or unless expressly exempted by another statute from any of the requirements of this section, *state agencies shall* carry out their planning duties, powers and responsibilities and *take actions* that are authorized by law *with respect to programs affecting land use*:

- (a) In compliance with the goals, rules implementing the goals and rules implementing this section; and
- (b) *In a manner compatible with acknowledged comprehensive plans and land use regulations. . . .* (Emphasis added).<sup>5</sup>

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<sup>2</sup> See the Department's discussion in the Proposed Order, including extensive analysis of Goal 3, the Goal most relevant because the project is proposed on agricultural land - NHWAPPDoc1 Proposed Order on ASC 2022-08-04 Pages 95-100 of 904 (analysis of "Question 1").

<sup>3</sup> Umatilla County's Response to Nolin Hills Wind, LLC's Motion for Summary Determination, pp. 6-7.

<sup>4</sup> OAR 660-015-0000(2), Part I, cited in the County MSD, p. 14 and Exhibit 1, page 1 of 61.

<sup>5</sup> The Land Conservation and Development Commission (LCDC) establishes statewide land use planning goals pursuant to authority in ORS 197 - *see* ORS 197.040(2), 197.015(8); *see also Cent. Oregon Landwatch v. Deschutes Cnty.*, 301 Or. App. 701, 703, 457 P.3d 369, 371 (2020) (stating same).

However, the legislature has expressly stated in statute that the requirement for state agencies to take actions consistent with local comprehensive plans and regulations does not apply to EFSC. Under the laws governing the EFSC process, to achieve consistency between EFSC actions and local comprehensive plans, it is not EFSC that is required to demonstrate its site certificate decisions are consistent or compatible with acknowledged comprehensive plans and land use regulations, rather, *local governments are required to amend their comprehensive plans and land use regulations to make them consistent with the Council's site certificate decision.* Per ORS 469.504:

6) The council is not subject to ORS 197.180 and a state agency may not require an applicant for a site certificate to comply with any rules or programs adopted under ORS 197.180.

7) On or before its next periodic review, each affected local government shall amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate.

Thus, EFSC is exempt from the requirement that state agencies ensure their actions related to land use are consistent with the comprehensive plans of cities and counties. Rather, in the context of EFSC decisions, the consistency sought by ORS 197.180 and Goal 2 between agency decisions and local government comprehensive plans is achieved through the local government amending their comprehensive plans and regulations to be consistent with the EFSC decision.<sup>6</sup>

**C. The County's criticism of *Marbet* is misguided - the Department's recommendation that EFSC does not need to apply the County's setback/Criterion (3) is supported by current laws governing the EFSC process; it is the County's position that runs afoul of those laws.**

The County contends that the *Marbet* decision is outdated, and current rules don't support

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<sup>6</sup> See also the Oregon Department of Land Conservation and Development rule OAR 660-023-0190(2)(a) addressing Goal 5, which states: "For proposals involving energy sources under the jurisdiction of EFSC or FERC, the local government shall comply with Goal 5 by amending its comprehensive plan and land use regulations to implement the EFSC or FERC decision on the proposal as per ORS 469.504 (Facility compliance with statewide planning goals)."

the Department’s recommendation that EFSC need not apply Criterion (3) because it is not required by statewide planning goals.<sup>7</sup> As the County notes, the Department cited *Marbet* for the proposition that under the EFSC statutory scheme, concerns previously pursued through separate agency action now find expression through EFSC consultation. That proposition is as true today as it was when *Marbet* was decided, as is evident from a March 9, 2023 Oregon Supreme Court decision, in which the Court quotes *Marbet* when summarizing the EFSC site certificate process:

The stated purpose of this statutory scheme is to establish ‘a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state.’ ORS 469.310. As part of this ‘comprehensive system,’ the statute provides that a site certificate ‘shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility.’ ORS 469.401(3). State agencies and local political subdivisions must issue any permits, license, and certificates required by the site certificate. *Id.* On administrative or judicial review of any permitting decision, the only issue is whether the permit is consistent with the site certificate. *Id.*

We examined this statutory scheme in *Marbet v. Portland Gen. Elect.*, 277 Or 447, 449, 561 P2d 154 (1977), ‘the first contested proceeding under the energy facility siting act’ after its enactment in 1971. There, we pointed out that the statute ‘assigns the council a wide range of duties relating to power facilities in this state.’ *Id.* at 450. The statute ‘reflects a legislative policy to centralize these responsibilities in the council.’ *Id.* Regulatory concerns ‘previously pursued through \* \* \* separate agencies are now to find expression through special advisory groups, \* \* \* interagency coordination, \*\*\* and in the council’s procedures.

*Stop B2H Coalition v. Oregon Department of Energy*, 370 Or 792, 797 (2023).

The County contends that in 1993 “the legislature created a significant role for affected local governments in siting of facilities by giving them the right to identify and expect compliance with acknowledged local land use rules.”<sup>8</sup> The Department acknowledges that local

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<sup>7</sup> Umatilla County’s Response to ODOE’s Motion for Summary Determination, pp. 2-3.

<sup>8</sup> Umatilla County’s Response to ODOE’s Motion for Summary Determination, p. 3.

governments have an important role in the EFSC process but that does not mean EFSC is required to apply local rules that a local government recommends if the rules are not required by statewide planning goals. In the Proposed Order, the Department's MSD and in its' Response to the County's MSD, the Department has explained the bases for its' position that EFSC does not need to apply Criterion (3) if EFSC determines such a setback is not required by any statewide planning goal. The Department will not repeat those analyses here; rather, it again notes that the following current statutes and rules support the Department's position (as do other statutes and rules and the case law discussed above, in the Proposed Order and the Department's prior MSD briefs):

**469.504 Facility compliance with statewide planning goals; exception; amendment of local plan and land use regulations; conflicts; technical assistance; rules.**

(1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503 (4) if:

(a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or

(b) *The Energy Facility Siting Council determines that:*

(A) *The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646;*

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(7) *On or before its next periodic review, each affected local government shall amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate.*

**OAR 345-022-0030(3)**, which defines "applicable substantive criteria" as:

"criteria from the affected local government's acknowledged comprehensive plan and land use ordinances *that are required by the statewide planning goals* and that are in effect on the date the applicant submits the application."

(Emphasis added).

As discussed above, in the Proposed Order and the Department’s prior MSD briefs, the County’s Criterion (3) is not required by any statewide planning goals. It is an example of a “not in my backyard” (“NIMBY”) regulation adopted by a local government that serves to make it more difficult to locate an energy facility within their jurisdiction without advancing any statewide planning goal.

### **III. CONCLUSION**

The contested case issues raised by Umatilla County should be resolved via summary determination because there are no genuine issues as to any material facts and ODOE is entitled to a favorable ruling as a matter of law.

Issue 1 asks “[w]hether the County’s land use regulations UCDC [Umatilla County Development Code] 152.616(HHH)(6)(a)(3) (requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land) are ‘applicable substantive criteria’ within the meaning of OAR 345-022-0030(3) that apply to the Project.” Pursuant to OAR 345-022-0030(3), to constitute applicable substantive criteria, the criteria must be required by statewide planning goals. The County has not identified any goal that requires setbacks between wind turbines and rural residences. It has only pointed to Goal 2 but, rather than attempt to explain how Goal 2 requires the County to adopt Criterion (3) (which it does not), the County alleges that because it adopted the setback, language in Goal 2 requiring state agency actions to be consistent with local comprehensive plans requires EFSC to apply Criterion (3) to site certificate applications. This position conflicts with ORS 469.504(1)(a)(A), which establishes that EFSC determines if a facility complies with criteria recommended by a County that are required by statewide planning goals. The County’s position also conflicts with ORS

469.504(6), which exempts EFSC from the requirement that state agencies ensure their actions are consistent with local comprehensive plans and regulations, and it conflicts with ORS 469.504(7), which states “each affected local government shall amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate.”

Issue 2 asks “[w]hether the Project is required to obtain a conditional use permit from the County.” The Department acknowledges that the applicant will need to obtain a conditional use permit for the proposed facility from Umatilla County, but the County cannot require the applicant to comply with Criterion (3) in order to issue the conditional use permit because the setback is not required by any statewide planning goal. Rather, assuming Council agrees with the Department and does not require the applicant to comply with Criterion (3) in the site certificate, the County “shall, upon submission by the applicant of the proper applications and payment of the proper fees, but without hearings or other proceedings, *promptly issue the permits, licenses and certificates addressed in the site certificate . . . subject only to the conditions set forth in the site certificate . . .*” ORS 469.401(3) (emphasis added).

For the reasons discussed above, in the Department’s MSD and Response to the County’s MSD, the Department requests the Hearing Officer grant its’ MSD and deny the County’s MSD.

DATED this 11th day of April, 2023

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*  
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**CERTIFICATE OF FILING**

I certify that on April 11, 2023, the foregoing OREGON DEPARTMENT OF ENERGY'S REPLY TO UMATILLA COUNTY'S RESPONSE TO THE DEPARTMENT'S MOTION FOR SUMMARY DETERMINATION, was electronically filed to the Office of Administrative Hearings.

DATED this 11<sup>th</sup> day of April 2023.

*/s/ Svetlana Gulevkin*

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Svetlana Gulevkin  
Legal Secretary  
Natural Resources Section  
Oregon Department of Justice



## CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2023, the foregoing OREGON DEPARTMENT OF ENERGY'S REPLY TO UMATILLA COUNTY'S RESPONSE TO THE DEPARTMENT'S MOTION FOR SUMMARY DETERMINATION, was served by e-mailing a true copy of the above-listed document as set forth below:

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DATED this 11<sup>th</sup> day of April 2023.

*/s/ Svetlana Gulevkin*

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Svetlana Gulevkin  
Legal Secretary  
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Oregon Department of Justice