

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

In the Matter of the Request for Amendment #2 of  
the Site Certificate for the Klamath Generation  
Facility

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FINAL ORDER ON  
AMENDMENT #2

Oregon Energy Facility Siting Council

May 15, 2009

KLAMATH GENERATION FACILITY:  
FINAL ORDER ON AMENDMENT #2

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**LIST OF ABBREVIATIONS**

BPA	Bonneville Power Administration
Council	Oregon Energy Facility Siting Council
dBa	The “A-weighted” sound pressure level. The sound pressure level in decibels as measured on a sound level meter using the A-weighted filter network. The A-weighted filter de-emphasizes the very low and very high frequency components of the sound in a manner similar to the frequency response of the human ear and correlates well with subjective reactions to noise.
Department	Oregon Department of Energy
KCP	Klamath Cogeneration Project
KG	Klamath Generation LLC (the certificate holder)
KGF	Klamath Generation Facility
MW	megawatt or megawatts
O&M	Operations and maintenance

**KLAMATH GENERATION FACILITY:  
FINAL ORDER ON AMENDMENT #2**

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**I. INTRODUCTION**

1 The Oregon Energy Facility Siting Council (Council) issues this order in accordance  
2 with ORS 469.405 and OAR 345-027-0070. This order addresses a request by the certificate  
3 holder, Klamath Generation LLC (KG), for amendment of the site certificate for the Klamath  
4 Generation Facility (KGF).

5 On September 27, 2005, the Council issued a site certificate for the KGF. The facility  
6 is a combined-cycle combustion turbine system fueled by natural gas, having a nominal  
7 electric generating capacity of approximately 500 megawatts (MW). The site certificate  
8 became effective on November 16, 2005, upon signing by the Council and the certificate  
9 holder.

10 On September 21, 2007, the Council approved a request by KG to extend the  
11 deadlines for beginning and completing construction of the facility. Construction of the  
12 facility has not begun.

13 The definitions in ORS 469.300 and OAR 345-001-0010 apply to terms used in this  
14 order.

**II. PROCEDURAL HISTORY AND AMENDMENT PROCESS**

15 On March 9, 2009, KG submitted to the Oregon Department of Energy (Department) a  
16 request for amendment of the site certificate (Request for Amendment #2).<sup>1</sup> On March 13,  
17 2009, the certificate holder sent copies of the amendment request to the reviewing agencies  
18 identified by the Department together with a memorandum from the Department requesting  
19 reviewing agency comments by April 6, 2009. The Department received no substantive  
20 comments from reviewing agencies.<sup>2</sup>

21 On March 13, 2009, the Department sent notice of the amendment request to all  
22 persons on the Council's general mailing list, to persons on the mailing list established for the  
23 facility and to an updated list of property owners supplied by the certificate holder. The  
24 Department requested public comments by April 6, 2009. The Department received no public  
25 comments.

26 By email dated March 12, 2009, the Department notified KG that the proposed order  
27 would be issued no later than May 11, 2009. The Department provided a draft of the Proposed  
28 Order to the certificate holder on April 8, 2009. The certificate holder responded with  
29 comments on April 10.

30 The Department issued the Proposed Order on April 13, 2009. On the same day, the  
31 Department issued a notice of the Proposed Order in accordance with OAR 345-027-0070

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<sup>1</sup> Second Request to Amend Site Certificate (Regarding Extension of Construction Start and Completion Deadline).

<sup>2</sup> The Department received a response from Jerry Sauter, Oregon Water Resources Department, March 18, 2009. The response identified applicable statutes and administrative rules but did not express any concerns about the proposed amendment.

1 specifying a deadline for public comments and requests for a contested case proceeding. No  
2 adverse comments or contested case requests were received in writing by the deadline of May  
3 13, 2009.

4 On May 15, 2009, the Council considered the Department’s Proposed Order at a  
5 public meeting in Baker City, Oregon, and approved this Final Order granting the amendment  
6 request subject to the revisions discussed herein.

### III. DESCRIPTION OF THE PROPOSED AMENDMENT

7 KG requests an amendment to the site certificate to extend by two years the deadlines  
8 for beginning and completing construction of the KGF. If approved, the amendment would  
9 extend the deadline for beginning construction from November 16, 2009, to November 16,  
10 2011. It would extend the deadline for completing construction from November 16, 2012, to  
11 November 16, 2014.

12 In its amendment request, KG explained the reason for the request as follows:

13 Despite its marketing efforts, KG has not yet secured the necessary power off-take  
14 commitments sufficient to secure construction financing. In 2007, KG was optimistic about  
15 investing in the development and meeting the November 16, 2009 construction start deadline.  
16 However, the downturn in the economy beginning in 2008 and expected to persist at least  
17 through 2009 has caused potential customers for project output to reevaluate their future  
18 power needs and delay discussions of power off-take agreements. At the same time, financial  
19 markets have been severely impacted and it is expected that access to construction financing  
20 will be very limited and carry high premiums at least through 2009. KG believes both the  
21 energy and financial markets will recover and construction can begin before November 16,  
22 2011. Therefore, even though this is KG’s second request for an extension of the construction  
23 start and completion deadlines, there are nonetheless sufficient reasons for the Council to  
24 grant this Second Amendment Request.

#### 1. Amendment Procedure

25 In accordance with ORS 469.370(12), the Council is required to “specify in the site  
26 certificate a date by which construction of the facility must begin.” OAR 345-027-0020(4)  
27 requires that the site certificate specify the dates by which the certificate holder must begin  
28 and complete construction of the facility. Under OAR 345-027-0030, the certificate holder  
29 may request extension of these deadlines.

##### **345-027-0030**

##### **Amendment to Extend Construction Beginning and Completion Deadlines**

30 *(1) The certificate holder may request an amendment to extend the deadlines for*  
31 *beginning or completing construction of the facility that the Council has specified*  
32 *in a site certificate or an amended site certificate. The certificate holder shall*  
33 *submit a request that conforms to the requirements of 345-027-0060 no later than*  
34 *six months before the date of the applicable deadline, or, if the certificate holder*  
35 *demonstrates good cause for the delay in submitting the request, no later than the*  
36 *applicable deadline.*

37 *(2) A request within the time allowed in section (1) to extend the deadlines for*  
38 *beginning or completing construction suspends those deadlines until the Council*  
39 *acts on the request.*  
40  
41

1           (3) *The Council shall review the request for amendment as described in OAR 345-*  
2           *027-0070.*

3           (4) *If the Council grants an amendment under this rule, the Council shall specify*  
4           *new deadlines for beginning or completing construction that are not more than*  
5           *two years from the deadlines in effect before the Council grants the amendment.*

6           (5) *To grant an amendment extending the deadline for beginning or completing*  
7           *construction of an energy facility subject to OAR 345-024-0550, 345-024-0590, or*  
8           *345-024-0620, the Council must find that the facility complies with the carbon*  
9           *dioxide standard in effect at the time of the Council's order on the amendment.*

10           Under paragraph (4) of this rule, the Council may grant an extension of no more than  
11           two years from the current deadlines. The Council rule requires the certificate holder to  
12           submit the request “no later than six months before the date of the applicable deadline, or, if  
13           the certificate holder demonstrates good cause for the delay in submitting the request, no later  
14           than the applicable deadline.” Under the *First Amended Site Certificate*, the current deadline  
15           to begin construction of the KGF is November 16, 2009 (Condition 46) and the deadline to  
16           complete construction is November 16, 2012 (Condition 47).

17           KG submitted its request to extend the deadline for beginning construction more than  
18           six months before the deadline to begin construction. The Council finds that the request to  
19           extend the construction deadlines was filed in a timely manner.

20           OAR 345-027-0070(10) provides:

21           (10) *In making a decision to grant or deny issuance of an amended site certificate,*  
22           *the Council shall apply the applicable substantive criteria, as described in OAR*  
23           *345-022-0030, in effect on the date the certificate holder submitted the request for*  
24           *amendment and all other state statutes, administrative rules, and local government*  
25           *ordinances in effect on the date the Council makes its decision. The Council shall*  
26           *consider the following:*

27           \* \* \*

28           (b) *For an amendment that extends the deadlines for beginning or completing*  
29           *construction, the Council shall consider:*

30           (A) *Whether the Council has previously granted an extension of the*  
31           *deadline;*

32           (B) *Whether there has been any change of circumstances that affects a*  
33           *previous Council finding that was required for issuance of a site certificate or*  
34           *amended site certificate; and*

35           (C) *Whether the facility complies with all Council standards, except that*  
36           *the Council may choose not to apply a standard if the Council finds that:*

37           (i) *The certificate holder has spent more than 50 percent of the*  
38           *budgeted costs on construction of the facility;*

39           (ii) *The inability of the certificate holder to complete the construction*  
40           *of the facility by the deadline in effect before the amendment is the result of*  
41           *unforeseen circumstances that are outside the control of the certificate holder;*

42           (iii) *The standard, if applied, would result in an unreasonable financial*  
43           *burden on the certificate holder; and*

1 (iv) *The Council does not need to apply the standard to avoid a*  
2 *significant threat to the public health, safety or the environment;*

3 \* \* \*

4 (d) *For all amendments, the Council shall consider whether the amount of the*  
5 *bond or letter of credit required under OAR 345-022-0050 is adequate.*

6 Under OAR 345-027-0070(10)(b), for an amendment that extends the deadlines for  
7 beginning or completing construction, the Council must consider whether the Council has  
8 previously granted an extension of the deadline, but the rule does not prohibit the Council  
9 from allowing more than one extension request. The Council has previously granted an  
10 extension of the construction deadlines for the KGF. The present amendment request is the  
11 certificate holder's second request for an extension.

12 The Council must also consider whether there has been any change of circumstances  
13 that affects a previous Council finding that was required for issuance of a site certificate or  
14 amended site certificate. The certificate holder proposes no change to the design or location of  
15 the facility at this time.

16 OAR 345-027-0070(10)(b) also requires that the Council consider whether the facility  
17 complies with all Council standards.<sup>3</sup> In Sections IV and V below, we discuss compliance of  
18 the facility with all Council standards.

19 Under OAR 345-027-0070(10)(d), for all amendments, the Council must consider  
20 whether the amount of the bond or letter of credit required under OAR 345-022-0050 is  
21 adequate. The Council discusses the financial assurance requirement in Section IV below.

## 2. Proposed Amendments to the Site Certificate

22 KG proposes the following amendments to the *First Amended Site Certificate*.  
23 Proposed additions are underlined and proposed deletions have a strikethrough.

24 *Page 17, lines 14-25:*

25 (46) The certificate holder shall begin construction of the facility by November 16, ~~2009~~2011.  
26 The Council may grant an extension of the deadline to begin construction in accordance  
27 with OAR 345-027-0030 or any successor rule in effect at the time the request for  
28 extension is submitted. [Amendment #1]

29 (47) The certificate holder shall complete construction of the facility by November 16,  
30 ~~2012~~2014. Construction is complete when: 1) the facility is substantially complete as  
31 defined by the certificate holder's construction contract documents, 2) acceptance testing  
32 has been satisfactorily completed and 3) the energy facility is ready to begin continuous  
33 operation consistent with the site certificate. The certificate holder shall promptly notify  
34 the Department of the date of completion of construction. The Council may grant an  
35 extension of the deadline for completing construction in accordance with OAR 345-027-  
36 0030 or any successor rule in effect at the time the request for extension is submitted.  
37 [Amendment #1]

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<sup>3</sup> The exception described in OAR 345-027-0070(1)(b)(C)(i) through (iv) does not apply because the certificate holder has not begun construction.

#### IV. THE COUNCIL'S SITING STANDARDS: FINDINGS AND CONCLUSIONS

1 The Council must decide whether the amendment complies with the facility siting  
2 standards adopted by the Council. In addition, the Council must impose conditions for the  
3 protection of the public health and safety, for the time of commencement and completion of  
4 construction, and for ensuring compliance with the standards, statutes and rules addressed in  
5 the project order. ORS 469.401(2).

6 The Council is not authorized to determine compliance with regulatory programs that  
7 have been delegated to another state agency by the federal government. ORS 469.503(3).  
8 Nevertheless, the Council may consider these programs in the context of its own standards to  
9 ensure public health and safety, resource efficiency and protection of the environment.

10 The Council has no jurisdiction over design or operational issues that do not relate to  
11 siting, such as matters relating to employee health and safety, building code compliance, wage  
12 and hour or other labor regulations, or local government fees and charges. ORS 469.401(4).

13 In making its decision on an amendment of a site certificate, the Council applies the  
14 applicable state statutes, administrative rules and local government ordinances that are in  
15 effect on the date the Council makes its decision, except when applying the Land Use  
16 Standard. In making findings on the Land Use Standard, the Council applies the applicable  
17 substantive criteria in effect on the date the certificate holder submitted the request for  
18 amendment. OAR 345-027-0070(9).

##### 1. General Standard of Review

###### **OAR 345-022-0000**

19 *(1) To issue a site certificate for a proposed facility or to amend a site certificate,*  
20 *the Council shall determine that the preponderance of evidence on the record*  
21 *supports the following conclusions:*  
22

23 *(a) The facility complies with the requirements of the Oregon Energy Facility*  
24 *Siting statutes, ORS 469.300 to ORS 469.570 and 469.590 to 469.619, and the*  
25 *standards adopted by the Council pursuant to ORS 469.501 or the overall public*  
26 *benefits of the facility outweigh the damage to the resources protected by the*  
27 *standards the facility does not meet as described in section (2);*

28 *(b) Except as provided in OAR 345-022-0030 for land use compliance and*  
29 *except for those statutes and rules for which the decision on compliance has been*  
30 *delegated by the federal government to a state agency other than the Council, the*  
31 *facility complies with all other Oregon statutes and administrative rules identified*  
32 *in the project order, as amended, as applicable to the issuance of a site certificate*  
33 *for the proposed facility. If the Council finds that applicable Oregon statutes and*  
34 *rules, other than those involving federally delegated programs, would impose*  
35 *conflicting requirements, the Council shall resolve the conflict consistent with the*  
36 *public interest. In resolving the conflict, the Council cannot waive any applicable*  
37 *state statute.*

38 \* \* \*

39 We address the requirements of OAR 345-022-0000 in the findings of fact, reasoning,  
40 conditions and conclusions of law discussed in the sections that follow. Upon consideration of

1 all of the evidence in the record, we state our general conclusion regarding the amendment  
2 request in Section VII.

## 2. Standards about the Applicant

### (a) Organizational Expertise

#### 3 OAR 345-022-0010

4 *(1) To issue a site certificate, the Council must find that the applicant has the*  
5 *organizational expertise to construct, operate and retire the proposed facility in*  
6 *compliance with Council standards and conditions of the site certificate. To*  
7 *conclude that the applicant has this expertise, the Council must find that the*  
8 *applicant has demonstrated the ability to design, construct and operate the*  
9 *proposed facility in compliance with site certificate conditions and in a manner*  
10 *that protects public health and safety and has demonstrated the ability to restore*  
11 *the site to a useful, non-hazardous condition. The Council may consider the*  
12 *applicant's experience, the applicant's access to technical expertise and the*  
13 *applicant's past performance in constructing, operating and retiring other*  
14 *facilities, including, but not limited to, the number and severity of regulatory*  
15 *citations issued to the applicant.*

16 *(2) The Council may base its findings under section (1) on a rebuttable*  
17 *presumption that an applicant has organizational, managerial and technical*  
18 *expertise, if the applicant has an ISO 9000 or ISO 14000 certified program and*  
19 *proposes to design, construct and operate the facility according to that program.*

20 *(3) If the applicant does not itself obtain a state or local government permit or*  
21 *approval for which the Council would ordinarily determine compliance but*  
22 *instead relies on a permit or approval issued to a third party, the Council, to issue*  
23 *a site certificate, must find that the third party has, or has a reasonable likelihood*  
24 *of obtaining, the necessary permit or approval, and that the applicant has, or has*  
25 *a reasonable likelihood of entering into, a contractual or other arrangement with*  
26 *the third party for access to the resource or service secured by that permit or*  
27 *approval.*

28 *(4) If the applicant relies on a permit or approval issued to a third party and the*  
29 *third party does not have the necessary permit or approval at the time the Council*  
30 *issues the site certificate, the Council may issue the site certificate subject to the*  
31 *condition that the certificate holder shall not commence construction or operation*  
32 *as appropriate until the third party has obtained the necessary permit or approval*  
33 *and the applicant has a contract or other arrangement for access to the resource*  
34 *or service secured by that permit or approval.*

### Findings of Fact

#### A. Certificate Holder's Expertise

35 KG is a limited liability company established in Oregon to develop, own and operate  
36 the KGF. In the *Final Order on Amendment #1*, the Council found that KG was a wholly  
37 owned subsidiary of PPM Energy, Inc. (PPM), an Oregon corporation. KG has been acquired  
38 by Iberdrola Renewables, Inc. (IBR) by virtue of IBR's acquisition of PPM. IBR is a part of

1 Iberdrola Renovables, S.A., a Spanish company described by KG as “a world leader in the  
2 renewable energy sector... [that] operates in 19 countries.” IBR is also the parent owner of  
3 the Klamath Cogeneration Project, located adjacent to the KGF site and operating under a site  
4 certificate.

5 In the *Final Order on the Application*, the Council found that PPM would provide its  
6 expertise to KG either directly or through Pacific Klamath Energy, Inc., a PPM subsidiary.  
7 The Council concluded that KG demonstrated that it has the organizational expertise to  
8 construct and operate the proposed facility. Other than the change in corporate structure and  
9 company name, there have been no changes that would affect the Council’s previous findings  
10 under this standard.

#### B. Third-Party Permits

11 The certificate holder would rely on the City of Klamath Falls for potable water  
12 supply, reclaimed water supply, disposal of cooling tower discharge water and disposal of  
13 wastewater. In the *Final Order on the Application*, the Council found that KG has a  
14 reasonable likelihood of entering into a contractual or other arrangement with the City of  
15 Klamath Falls for access to potable water. The Council, further, found that there is a  
16 reasonable likelihood that the necessary contractual agreements between KG, the City and  
17 South Suburban Sanitary District could be negotiated regarding a combined wastewater  
18 treatment system to supply a sufficient amount of water for evaporative cooling at the KGF.  
19 There has been no change of circumstances affecting these findings.

#### Conclusions of Law

20 Based on the findings discussed above, the Council concludes that KG would meet the  
21 Council’s Organizational Expertise Standard if Amendment #2 were approved.

#### **(b) Retirement and Financial Assurance**

##### **OAR 345-022-0050**

22 *To issue a site certificate, the Council must find that:*

23  
24 *(1) The site, taking into account mitigation, can be restored adequately to a useful,*  
25 *non-hazardous condition following permanent cessation of construction or*  
26 *operation of the facility.*

27 *(2) The applicant has a reasonable likelihood of obtaining a bond or letter of*  
28 *credit in a form and amount satisfactory to the Council to restore the site to a*  
29 *useful, non-hazardous condition.*

#### Findings of Fact

##### A. Site Restoration

30 In the *Final Order on the Application*, the Council made findings about the specific  
31 tasks that would need to be performed to restore the KGF site to a useful, non-hazardous  
32 condition. Because KG proposes no change to the facility structures or configuration in this  
33 amendment, site restoration would be done as described in the *Final Order on the*  
34 *Application*. Approval of Amendment #2 would not affect the Council’s previous finding that  
35 the site can be adequately restored to a useful, non-hazardous condition.

B. Estimated Cost of Site Restoration

1 Under OAR 345-027-0070(10)(d), the Council must consider whether the amount of  
 2 the bond or letter of credit required under OAR 345-022-0050 is adequate. In the *Final Order*  
 3 *on Amendment #1*, the Council found that the estimated cost of site restoration was \$4.160  
 4 million in 2006 dollars as shown in Table 1. The Council found this cost estimate to be  
 5 reasonable for both the evaporative cooling and dry cooling options. In the amendment  
 6 request, KG has not proposed any change to the estimated site restoration cost.

**Table 1: Site Restoration Cost Estimate (2006 dollars)**

<b>Cost Estimate Component</b>	<b>Estimated Cost</b>
<b><u>Preliminary Work</u></b>	
Cut and cap lines, remove fences and gates, drain tanks, evacuate sludge	\$47,386
<b><u>Site Grading</u></b>	
Backfill, topsoil application, seeding	\$233,731
<b><u>Underground Utility Removal</u></b>	
Remove firewater, sewer and gas lines, ductbank, vaults, tanks	\$68,242
<b><u>Concrete Wrecking</u></b>	
Slab on grade, foundations, superstructure	\$172,009
<b><u>Building Wrecking</u></b>	
Turbine generator building, control room and electrical equipment room, future warehouse and maintenance shop, water treatment building, cooling tower chemical building, fire protection pump house building, etc.	\$232,022
<b><u>Steel Wrecking</u></b>	
Superstructure and interiors	\$373,388
<b><u>Thermal Protection and Liners Wrecking</u></b>	
Pond liner and insulation	\$14,867
<b><u>Equipment Wrecking</u></b>	
Combustion turbine generators, inlet evaporative coolers, fuel heaters, HRSGs, turbine exhaust stacks, steam turbine generator, water-cooled surface condenser, feed water pumps, condensate pumps, miscellaneous pumps, air compressors, standby auxiliary boiler, gas metering station, raw water tank, demineralized water tank, condensate tank	\$246,570
<b><u>Mechanical Wrecking</u></b>	
Cooling water, gas, steam, raw water and fresh water piping	\$250,093
<b><u>Electrical Wrecking</u></b>	
Transformers, wiring, MCC, towers	\$82,303
<b><u>Load and Haul</u></b>	
Load and haul debris and scrap steel, tipping fees	\$550,931
<b><u>General Costs</u></b>	
Permits, mobilization, engineering, overhead, utility disconnects	\$515,695
<b><u>Subtotal</u></b>	
	<b>\$2,787,237</b>
Performance Bond	\$27,872

<b><u>Gross Cost</u></b>	<b>\$2,815,109</b>
Administration and Project Management (10%)	\$281,511
Future Developments Contingency (20%)	\$563,022
Environmental Assessment and Remediation	\$500,000
<b><u>Total</u></b>	<b>\$4,159,642</b>
<b>Total Site Restoration Cost</b> (rounded to nearest \$1,000)	<b>\$4,160,000</b>

C. Ability of KG to Obtain a Bond or Letter of Credit

1 In the *Final Order on Amendment #1*, the Council found that KG had demonstrated a  
2 reasonable likelihood of obtaining a bond or letter of credit, satisfactory to the Council, in an  
3 amount adequate to restore the site to a useful, non-hazardous condition. The Council based  
4 this finding on a letter from The Royal Bank of Scotland (Bank), which stated that PPM  
5 Energy had “sufficient available letter of credit capacity” to support a letter of credit of  
6 \$4.160 million (inflation adjusted on an annual basis) “under its existing uncommitted  
7 financing arrangements with the Bank.” The letter further stated: “There is a reasonable  
8 likelihood that the Bank would provide an annual letter of credit for this project, should one  
9 be required.”

10 Due to the acquisition of PPM by IBR, the certificate holder provided a financial  
11 assurance letter from Liberty Mutual Surety in support of the present amendment request.<sup>4</sup>  
12 The letter states Iberdrola Renewables Holdings, Inc. (IRHI), has “sufficient available  
13 bonding capacity” to support a request for \$5 million “adjusted on an annual basis according  
14 to the Gross Domestic Product Implicit Price Deflator Index.” The letter further states that  
15 there is a “reasonable likelihood” that Liberty Mutual would provide an annual bond for the  
16 KGF project. In addition, the certificate holder provided a letter confirming that KG is a  
17 wholly-owned subsidiary of Iberdrola Renewables, Inc., which is in turn a wholly-owned  
18 subsidiary of IRHI, and that IRHI would “provide or cause to be provided” financial  
19 assurance necessary under the site certificate for the KGF.<sup>5</sup>

20 The letter from Liberty Mutual does not constitute a firm commitment to issue a bond  
21 in the form and amount the Council determines necessary, but it is credible evidence that KG  
22 could obtain the financial assurance required under Condition 64 of the site certificate.

23 The Department has determined that Liberty Mutual Surety is a creditworthy business.  
24 The Council finds that Liberty Mutual is an acceptable issuer of the financial assurance  
25 required for the KGF. Liberty Mutual’s credit rating is considered investment grade, although  
26 the current rating is lower than the ratings of financial firms that have been approved by the  
27 Council in the past. The reason for this situation may be that financial institutions, including  
28 insurance companies, are being affected by the steep downturn in the financial sector that the  
29 nation has experienced in recent months.

Conclusions of Law

30 Based on the findings discussed above, the Council concludes that KG would meet the  
31 Council’s Retirement and Financial Assurance Standard if Amendment #2 were approved.

<sup>4</sup> Letter from Marino Demonte, Liberty Mutual Surety, March 10, 2009.

<sup>5</sup> Letter from Carlton Steele, April 10, 2009.

### 3. Standards about the Impacts of Construction and Operation

#### (a) Land Use

1           **OAR 345-022-0030**

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

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

6                 *(a) The applicant elects to obtain local land use approvals under ORS*  
7                 *469.504(1)(a) and the Council finds that the facility has received local land use*  
8                 *approval under the acknowledged comprehensive plan and land use regulations of*  
9                 *the affected local government; or*

10                *(b) The applicant elects to obtain a Council determination under ORS*  
11                *469.504(1)(b) and the Council determines that:*

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

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

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

24           *(3) As used in this rule, the “applicable substantive criteria” are criteria from the*  
25           *affected local government’s acknowledged comprehensive plan and land use*  
26           *ordinances that are required by the statewide planning goals and that are in effect*  
27           *on the date the applicant submits the application. If the special advisory group*  
28           *recommends applicable substantive criteria, as described under OAR 345-021-*  
29           *0050, the Council shall apply them. If the special advisory group does not*  
30           *recommend applicable substantive criteria, the Council shall decide either to make*  
31           *its own determination of the applicable substantive criteria and apply them or to*  
32           *evaluate the proposed facility against the statewide planning goals.*

33           *(4) The Council may find goal compliance for a proposed facility that does not*  
34           *otherwise comply with one or more statewide planning goals by taking an*  
35           *exception to the applicable goal. Notwithstanding the requirements of ORS*  
36           *197.732, the statewide planning goal pertaining to the exception process or any*  
37           *rules of the Land Conservation and Development Commission pertaining to the*  
38           *exception process, the Council may take an exception to a goal if the Council*  
39           *finds:*

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

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

5 (c) *The following standards are met:*

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

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

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

14 \* \* \*

### Findings of Fact

15 In the *Final Order on the Application*, the Council found that the KGF complies with  
16 the applicable substantive criteria from the affected local government’s acknowledged  
17 comprehensive plan and land use ordinances. Under the statute, however, a land use  
18 determination under ORS 469.504(1)(b)(A) also requires a finding that the facility complies  
19 with “any Land Conservation and Development Commission administrative rules and goals  
20 and any land use statutes that apply directly to the facility under ORS 197.646.” The Council  
21 found that amendments to Statewide Planning Goal 11 in 1998 added a specific prohibition on  
22 the “extension” of “sewer systems” outside of urban growth boundaries. Because Klamath  
23 County had not amended its County Comprehensive Plan to incorporate this provision, the  
24 Council found that the amended Goal 11 language is directly applicable to the land use  
25 decision in this case.

26 Goal 11 prohibits the “extension” of a sewer system outside an urban growth  
27 boundary. The Council found that the proposed sanitary wastewater and cooling water  
28 discharge lines and interconnections for the KGF are prohibited under Goal 11 and its  
29 implementing rules. Based on that finding, the Council considered whether an exception to  
30 Goal 11 was justified. The Council found that an exception was justified under the “reasons”  
31 analysis in ORS 469.504(2)(c).

32 In the *Final Order on Amendment #1*, the Council found that Klamath County had not  
33 amended its Comprehensive Plan or Land Development Code since 2002 in a manner that  
34 would affect the applicable substantive criteria for review of the KGF.<sup>6</sup> Klamath County has  
35 made revisions to its Land Development Code since 2007 (the date of the Council’s action on  
36 Amendment #1), but the revisions did not affect substantive criteria applicable to the KGF.<sup>7</sup>  
37 In the Request for Amendment #2, KG has not proposed any physical change to the proposed  
38 KGF facility. The Council finds that there have been no changes of facts or circumstances that  
39 would affect the Council’s previous land use findings.

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<sup>6</sup> The Council’s finding was based on an email from Alwin Turiel, Klamath County Planning Director, June 21, 2007.

<sup>7</sup> Email from David Filippi, April 6, 2009.

Conclusions of Law

1 Based on the findings stated above, the Council concludes that the KGF would comply  
2 with the Council’s Land Use Standard if Amendment #2 were approved.

**(b) Public Services**

**345-022-0110**

3 *(1) Except for facilities described in sections (2) and (3), to issue a site certificate,*  
4 *the Council must find that the construction and operation of the facility, taking*  
5 *into account mitigation, are not likely to result in significant adverse impact to the*  
6 *ability of public and private providers within the analysis area described in the*  
7 *project order to provide: sewers and sewage treatment, water, storm water*  
8 *drainage, solid waste management, housing, traffic safety, police and fire*  
9 *protection, health care and schools.*

10 \* \* \*  
11

Findings of Fact

12 In the *Final Order on the Application*, the Council found that the construction and  
13 operation of the facility, subject to the conditions of the site certificate, were not likely to  
14 result in significant adverse impact to the ability of public and private providers within the  
15 analysis area described in the project order to provide: sewers and sewage treatment, water,  
16 stormwater drainage, solid waste management, housing, traffic safety, police and fire  
17 protection, health care and schools. Extending the deadlines for beginning and completing  
18 construction, as requested in Amendment #2, would not change any of the facts about  
19 construction or operation on which the Council relied in making its previous findings.

Conclusions of Law

20 For the reasons discussed above, the Council concludes that the KGF would comply  
21 with the Public Services Standard if Amendment #2 were approved.

**(c) Waste Minimization**

**345-022-0120**

22 *(1) Except for facilities described in sections (2) and (3), to issue a site certificate,*  
23 *the Council must find that, to the extent reasonably practicable:*

24 *(a) The applicant’s solid waste and wastewater plans are likely to minimize*  
25 *generation of solid waste and wastewater in the construction and operation of the*  
26 *facility, and when solid waste or wastewater is generated, to result in recycling*  
27 *and reuse of such wastes;*

28 *(b) The applicant’s plans to manage the accumulation, storage, disposal*  
29 *and transportation of waste generated by the construction and operation of the*  
30 *facility are likely to result in minimal adverse impact on surrounding and adjacent*  
31 *areas.*

32 \* \* \*  
33

Findings of Fact

34 In the *Final Order on the Application*, the Council found that KG’s solid waste and  
35 wastewater plans would minimize generation of solid waste and wastewater to the extent

1 practicable during construction and operation of the facility. The Council found that KG’s  
2 solid waste and wastewater plans would result in recycling and reuse of such wastes. The  
3 Council found that KG’s plans to manage the accumulation, storage, disposal and  
4 transportation of waste generated by construction and operation of the facility are likely to  
5 result in minimal adverse impact on surrounding and adjacent areas. Extending the deadlines  
6 for beginning and completing construction, as requested in Amendment #2, would not change  
7 any of the facts about construction or operation on which the Council relied in making these  
8 previous findings.

#### Conclusions of Law

9 For the reasons discussed above, the Council concludes that the KGF would comply  
10 with the Waste Minimization Standard if Amendment #2 were approved.

#### **(d) Structural Standard**

##### **345-022-0020**

11  
12 *(1) Except for facilities described in sections (2) and (3), to issue a site certificate,*  
13 *the Council must find that:*

14 *(a) The applicant, through appropriate site-specific study, has adequately*  
15 *characterized the site as to Maximum Considered Earthquake Ground Motion*  
16 *identified at International Building Code (2003 edition) Section 1615 and*  
17 *maximum probable ground motion, taking into account ground failure and*  
18 *amplification for the site specific soil profile under the maximum credible and*  
19 *maximum probable seismic events; and*

20 *(b) The applicant can design, engineer, and construct the facility to avoid*  
21 *dangers to human safety presented by seismic hazards affecting the site that are*  
22 *expected to result from maximum probable ground motion events. As used in this*  
23 *rule “seismic hazard” includes ground shaking, ground failure, landslide,*  
24 *liquefaction, lateral spreading, tsunami inundation, fault displacement, and*  
25 *subsidence;*

26 *(c) The applicant, through appropriate site-specific study, has adequately*  
27 *characterized the potential geological and soils hazards of the site and its vicinity*  
28 *that could, in the absence of a seismic event, adversely affect, or be aggravated by,*  
29 *the construction and operation of the proposed facility; and*

30 *(d) The applicant can design, engineer and construct the facility to avoid*  
31 *dangers to human safety presented by the hazards identified in subsection (c).*

32 \* \* \*

#### Findings of Fact

33 In the *Final Order on the Application*, the Council found that KG had adequately  
34 characterized the proposed site of the KGF regarding “seismic zone and expected ground  
35 response during the maximum credible and reasonably probable seismic events.” The current  
36 Council standard does not refer to “seismic zone” as this method of site characterization is no  
37 longer used by the Oregon Department of Geology and Mineral Industries (DOGAMI). At the  
38 time of the application review, however, DOGAMI’s recommendations referred to the 2004  
39 Oregon Specialty Code, which is based on the 2003 International Building Code. The 2003  
40 International Building Code is the basis for the assessment required under the Council’s

1 current standard. Accordingly, the Council finds that its previous findings are consistent with  
2 the current standard.

3 In the *Final Order on the Application*, the Council also found that KG had shown that  
4 the KGF can be designed, engineered and constructed adequately to avoid potential dangers to  
5 human safety presented by seismic hazards affecting the proposed site, including  
6 amplification, that are expected to result from all reasonably probable seismic events. Site-  
7 specific geological and geotechnical work would be performed before construction, as  
8 required by Conditions 69 and 71.<sup>8</sup> Extending the deadlines for beginning and completing  
9 construction, as requested in Amendment #2, would not change any of the facts about  
10 construction or operation on which the Council relied in making these previous findings.

#### Conclusions of Law

11 For the reasons discussed above, the Council concludes that the KGF would comply  
12 with the Structural Standard if Amendment #2 were approved.

#### **(e) Soil Protection**

##### **OAR 345-022-0022**

13 *To issue a site certificate, the Council must find that the design, construction and*  
14 *operation of the facility, taking into account mitigation, are not likely to result in a*  
15 *significant adverse impact to soils including, but not limited to, erosion and*  
16 *chemical factors such as salt deposition from cooling towers, land application of*  
17 *liquid effluent, and chemical spills.*  
18

#### Findings of Fact

19 In the *Final Order on the Application*, the Council found that the design, construction  
20 and operation of the KGF, subject to conditions in the site certificate, are not likely to result in  
21 significant adverse impact to soils. In the Request for Amendment #2, KG does not propose  
22 any change in the location of facility components, and there would be no change in the  
23 potential impacts to soils. Approval of Amendment #2 would not change the facts on which  
24 the Council relied in its previous findings regarding impact to soils.

#### Conclusions of Law

25 For the reasons discussed above, the Council concludes that the KGF would comply  
26 with the Council's Soil Protection Standard if Amendment #2 were approved.

#### **(f) Protected Areas**

##### **OAR 345-022-0040**

27 *(1) Except as provided in sections (2) and (3), the Council shall not issue a site*  
28 *certificate for a proposed facility located in the areas listed below. To issue a site*  
29 *certificate for a proposed facility located outside the areas listed below, the*  
30 *Council must find that, taking into account mitigation, the design, construction*  
31 *and operation of the facility are not likely to result in significant adverse impact to*  
32 *the areas listed below. References in this rule to protected areas designated under*  
33

---

<sup>8</sup> These conditions also cite the 2003 International Building Code.

1 *federal or state statutes or regulations are to the designations in effect as of May*  
2 *11, 2007:*

3 *(a) National parks, including but not limited to Crater Lake National Park and*  
4 *Fort Clatsop National Memorial;*

5 *(b) National monuments, including but not limited to John Day Fossil Bed*  
6 *National Monument, Newberry National Volcanic Monument and Oregon Caves*  
7 *National Monument;*

8 *(c) Wilderness areas established pursuant to The Wilderness Act, 16 U.S.C.*  
9 *1131 et seq. and areas recommended for designation as wilderness areas pursuant*  
10 *to 43 U.S.C. 1782;*

11 *(d) National and state wildlife refuges, including but not limited to Ankeny,*  
12 *Bandon Marsh, Baskett Slough, Bear Valley, Cape Meares, Cold Springs, Deer*  
13 *Flat, Hart Mountain, Julia Butler Hansen, Klamath Forest, Lewis and Clark,*  
14 *Lower Klamath, Malheur, McKay Creek, Oregon Islands, Sheldon, Three Arch*  
15 *Rocks, Umatilla, Upper Klamath, and William L. Finley;*

16 *(e) National coordination areas, including but not limited to Government*  
17 *Island, Ochoco and Summer Lake;*

18 *(f) National and state fish hatcheries, including but not limited to Eagle Creek*  
19 *and Warm Springs;*

20 *(g) National recreation and scenic areas, including but not limited to Oregon*  
21 *Dunes National Recreation Area, Hell's Canyon National Recreation Area, and*  
22 *the Oregon Cascades Recreation Area, and Columbia River Gorge National*  
23 *Scenic Area;*

24 *(h) State parks and waysides as listed by the Oregon Department of Parks and*  
25 *Recreation and the Willamette River Greenway;*

26 *(i) State natural heritage areas listed in the Oregon Register of Natural*  
27 *Heritage Areas pursuant to ORS 273.581;*

28 *(j) State estuarine sanctuaries, including but not limited to South Slough*  
29 *Estuarine Sanctuary, OAR Chapter 142;*

30 *(k) Scenic waterways designated pursuant to ORS 390.826, wild or scenic*  
31 *rivers designated pursuant to 16 U.S.C. 1271 et seq., and those waterways and*  
32 *rivers listed as potentials for designation;*

33 *(L) Experimental areas established by the Rangeland Resources Program,*  
34 *College of Agriculture, Oregon State University: the Prineville site, the Burns*  
35 *(Squaw Butte) site, the Starkey site and the Union site;*

36 *(m) Agricultural experimental stations established by the College of*  
37 *Agriculture, Oregon State University, including but not limited to:*

38 *Coastal Oregon Marine Experiment Station, Astoria*  
39 *Mid-Columbia Agriculture Research and Extension Center, Hood River*  
40 *Agriculture Research and Extension Center, Hermiston*  
41 *Columbia Basin Agriculture Research Center, Pendleton*  
42 *Columbia Basin Agriculture Research Center, Moro*  
43 *North Willamette Research and Extension Center, Aurora*  
44 *East Oregon Agriculture Research Center, Union*  
45 *Malheur Experiment Station, Ontario*  
46 *Eastern Oregon Agriculture Research Center, Burns*

1 *Eastern Oregon Agriculture Research Center, Squaw Butte*  
2 *Central Oregon Experiment Station, Madras*  
3 *Central Oregon Experiment Station, Powell Butte*  
4 *Central Oregon Experiment Station, Redmond*  
5 *Central Station, Corvallis*  
6 *Coastal Oregon Marine Experiment Station, Newport*  
7 *Southern Oregon Experiment Station, Medford*  
8 *Klamath Experiment Station, Klamath Falls;*  
9 *(n) Research forests established by the College of Forestry, Oregon State*  
10 *University, including but not limited to McDonald Forest, Paul M. Dunn Forest,*  
11 *the Blodgett Tract in Columbia County, the Spaulding Tract in the Mary's Peak*  
12 *area and the Marchel Tract;*  
13 *(o) Bureau of Land Management areas of critical environmental concern,*  
14 *outstanding natural areas and research natural areas;*  
15 *(p) State wildlife areas and management areas identified in OAR chapter 635,*  
16 *Division 8.*  
17 \* \* \*

#### Findings of Fact

18 In the *Final Order on the Application*, the Council found that the design, construction  
19 and operation of the KGF, subject to the conditions of the site certificate, would not be likely  
20 to result in significant adverse impact to protected areas. Amendment #2 would not involve a  
21 change in the size or location of any KGF components. There has been no change of  
22 circumstances that would affect the Council's earlier findings regarding potential impact of  
23 the facility on protected areas.

#### Conclusions of Law

24 For the reasons discussed above, the Council concludes that the KGF would comply  
25 with the Council's Protected Areas Standard if Amendment #2 were approved.

#### **(g) Scenic Resources**

##### **345-022-0080**

26 *(1) Except for facilities described in section (2), to issue a site certificate, the*  
27 *Council must find that the design, construction and operation of the facility, taking*  
28 *into account mitigation, are not likely to result in significant adverse impact to*  
29 *scenic resources and values identified as significant or important in local land use*  
30 *plans, tribal land management plans and federal land management plans for any*  
31 *lands located within the analysis area described in the project order.*  
32 \* \* \*

#### Findings of Fact

34 In the *Final Order on the Application*, the Council found that the proposed facility  
35 would be located on a 25-acre parcel of industrial-zoned land that has sparse vegetation and  
36 no trees. The site is adjacent to and south of the Klamath Cogeneration Project and east of the  
37 Klamath Generation Peakers facility. The Council found that the design, construction and  
38 operation of the KGF, taking into account mitigation and subject to the conditions stated in  
39 the orders, were not likely to result in significant adverse impacts to the identified scenic

1 resources addressed by the standard. Because Amendment #2 would not involve any change  
2 in the size or location of any KGF components, the Council finds that there has been no  
3 change of circumstances that would affect the Council’s earlier findings regarding scenic  
4 resources.

Conclusions of Law

5 For the reasons discussed above, the Council concludes that the KGF would comply  
6 with the Council’s Scenic Resources Standard if Amendment #2 were approved.

**(h) Historic, Cultural and Archaeological Resources**

7 **345-022-0090**

8 *(1) Except for facilities described in sections (2) and (3), to issue a site certificate,*  
9 *the Council must find that the construction and operation of the facility, taking*  
10 *into account mitigation, are not likely to result in significant adverse impacts to:*

11 *(a) Historic, cultural or archaeological resources that have been listed on, or*  
12 *would likely be listed on the National Register of Historic Places;*

13 *(b) For a facility on private land, archaeological objects, as defined in ORS*  
14 *358.905(1)(a), or archaeological sites, as defined in ORS 358.905(1)(c); and*

15 *(c) For a facility on public land, archaeological sites, as defined in ORS*  
16 *358.905(1)(c).*

17 \* \* \*

Findings of Fact

18 All land within the analysis area for the KGF is within the boundaries of the Collins’  
19 Products (formerly Weyerhaeuser) property. In the *Final Order on the Application*, the  
20 Council found that the site had been surveyed for historic, cultural and archaeological  
21 resources in 1995 during the site assessment for the Klamath Cogeneration Project (KCP).  
22 That survey found that, although the Weyerhaeuser property might be eligible for listing on  
23 the National Register of Historic Places (NRHP), “construction and operation of the proposed  
24 KCP including the related or supporting facilities which are proposed to be located on the  
25 former Weyerhaeuser property would not adversely affect those qualities of the Weyerhaeuser  
26 site which make it eligible for listing on the NRHP.” The KGF site does not contain any  
27 historic structures. Site certificate conditions require training of construction personnel in the  
28 identification of cultural materials, cessation of ground-disturbing activity if archaeological  
29 resources are discovered during construction and locating the KGF to avoid impact on  
30 existing historical structures (Conditions 99, 100 and 101). The Council found that the  
31 construction and operation of the KGF, taking into account mitigation, were not likely to  
32 result in significant adverse impacts to historic, cultural or archaeological resources. Because  
33 Amendment #2 would not involve any change in the size or location of any KGF components,  
34 the Council finds that there has been no change of circumstances that would affect the  
35 Council’s earlier findings regarding historic, cultural and archaeological resources.

Conclusions of Law

36 For the reasons discussed above, the Council concludes that the KGF would comply  
37 with the Council’s Historic, Cultural and Archaeological Resources Standard if Amendment  
38 #2 were approved.

**(i) Recreation**

**OAR 345-022-0100**

*(1) Except for facilities described in section (2), to issue a site certificate, the Council must find that the design, construction and operation of a facility, taking into account mitigation, are not likely to result in a significant adverse impact to important recreational opportunities in the analysis area as described in the project order. The Council shall consider the following factors in judging the importance of a recreational opportunity:*

- (a) Any special designation or management of the location;*
- (b) The degree of demand;*
- (c) Outstanding or unusual qualities;*
- (d) Availability or rareness;*
- (e) Irreplaceability or irretrievability of the opportunity.*

\* \* \*

Findings of Fact

In the *Final Order on the Application*, the Council found that the proposed facility would have no direct impact on any important recreational facilities or opportunities in the analysis area. The Council found the design, construction and operation of the KGF, taking into account mitigation and subject to the conditions stated in the orders, were not likely to result in significant adverse impacts to recreational opportunities in the analysis area.

An extension of the construction deadlines for the KGF would not involve any change in the size, location or operation of the facility. The Council finds that there has been no change of facts or circumstances that would affect the Council’s earlier findings regarding the impacts of the KGF on recreational opportunities.

Conclusions of Law

For the reasons discussed above, the Council concludes that the KGF would comply with the Council’s Recreation Standard if Amendment #2 were approved.

**(j) Siting Standards for Transmission Lines**

**OAR 345-024-0090**

*To issue a site certificate for a facility that includes any transmission line under Council jurisdiction, the Council must find that the applicant:*

- (1) Can design, construct and operate the proposed transmission line so that alternating current electric fields do not exceed 9 kV per meter at one meter above the ground surface in areas accessible to the public;*
- (2) Can design, construct and operate the proposed transmission line so that induced currents resulting from the transmission line and related or supporting facilities will be as low as reasonably achievable.*

Findings of Fact

In the *Final Order on the Application*, the Council found that an electric transmission line approximately 1,630 feet in length would carry power from the KGF gas turbine and

1 steam turbine generators to the switchyard of the Klamath Cogeneration Project. The  
2 proposed transmission line would connect to the PacifiCorp Captain Jack to Meridian  
3 transmission line at the western edge of the switchyard. The transmission interconnection lies  
4 within the site boundaries of the KGF and the Klamath Cogeneration Project, and no occupied  
5 structures are located within 200 feet of the line. The Council found that the certificate holder  
6 could design and construct the transmission line components so that electric fields would not  
7 exceed 9 kV per meter at one meter above ground surface in areas accessible to the public and  
8 so that induced currents would be as low as reasonably achievable. Because Amendment #2  
9 would not involve any change in the design, size or location of transmission lines, the Council  
10 finds that there has been no change of circumstances that would affect the Council's earlier  
11 findings required under OAR 345-024-0090.

#### Conclusions of Law

12 For the reasons discussed above, the Council concludes that the KGF would comply  
13 with the Council's Siting Standards for Transmission Lines if Amendment #2 were approved.

### **4. Standards to Protect Wildlife**

#### **(a) Threatened and Endangered Species**

##### **OAR 345-022-0070**

14 *To issue a site certificate, the Council, after consultation with appropriate state*  
15 *agencies, must find that:*  
16

17 *(1) For plant species that the Oregon Department of Agriculture has listed as*  
18 *threatened or endangered under ORS 564.105(2), the design, construction and*  
19 *operation of the proposed facility, taking into account mitigation:*

20 *(a) Are consistent with the protection and conservation program, if any, that*  
21 *the Oregon Department of Agriculture has adopted under ORS 564.105(3); or*

22 *(b) If the Oregon Department of Agriculture has not adopted a protection and*  
23 *conservation program, are not likely to cause a significant reduction in the*  
24 *likelihood of survival or recovery of the species; and*

25 *(2) For wildlife species that the Oregon Fish and Wildlife Commission has listed*  
26 *as threatened or endangered under ORS 496.172(2), the design, construction and*  
27 *operation of the proposed facility, taking into account mitigation, are not likely to*  
28 *cause a significant reduction in the likelihood of survival or recovery of the*  
29 *species.*

#### Findings of Fact

30 In the *Final Order on the Application*, the Council found that no threatened or  
31 endangered plant species are known to exist within the site of the proposed facility. There are  
32 no protection and conservation programs adopted under ORS 564.105(3) for threatened or  
33 endangered plant species in the KGF area.

34 The applicant found records of sightings within the analysis area of four fish or  
35 wildlife species listed by ODFW as threatened or endangered. There has been only one  
36 recorded sighting of the kit fox (the sighting was possibly of an escaped or released pet). The  
37 observed location was outside the expected range of the species in Oregon. Accordingly, the

1 Council found that the KGF was not likely to affect kit fox. The other species with recorded  
2 sightings are two endangered fish species (shortnose and Lost River suckers) and the bald  
3 eagle.

4 In addition to the species listed above, the Western snowy plover (*Charadrius*  
5 *alexandrinus nivosus*) and the American peregrine falcon (*Falco peregrinus anatum*) might  
6 occasionally migrate through the area in fall or winter. The Western snowy plover is listed by  
7 ODFW as a threatened species. The Council found that the snowy plover was unlikely to  
8 occur in the analysis area, because it is a shorebird that prefers coastal dune ecosystems or,  
9 inland, the shorelines of alkaline lakes. Alkaline lakes do not exist in the analysis area. The  
10 American peregrine falcon was formerly a State-listed endangered species. It was removed  
11 from the State list on April 13, 2007. No known peregrine falcon nest sites are located within  
12 the analysis area, but these birds regularly visit the Klamath Basin in winter. The Council  
13 found that the potential risk to peregrine falcons would be adequately mitigated by measures  
14 to avoid bald eagle collisions, and therefore construction and operation of the KGF were not  
15 likely to have a significant adverse effect on the species.

16 The bald eagle is a State-listed threatened species. It was a federally-listed threatened  
17 species until the USFWS removed it from the list on June 28, 2007. The Council found that  
18 bald eagles are present year-round in the analysis area. The KGF would be located away from  
19 high-risk areas such as primary flyways, nesting territories and areas of dense fog. No  
20 potential roost trees would be removed during construction. The nearest known nest site is  
21 several miles away. KGF transmission structures would be confined to the heavily  
22 industrialized area in the immediate vicinity. There would be no new transmission lines  
23 extending away from the energy facility site. By “clustering” the proposed KGF with the  
24 existing Klamath Cogeneration Project and Klamath Generation Peakers and minimizing the  
25 need for overhead transmission lines, the three facilities together should present a highly  
26 visible obstruction that birds would recognize and avoid. For these reasons, the Council found  
27 that construction and operation of the KGF were not likely to have any significant direct  
28 impact on bald eagles or their habitat.

29 The Council found that the shortnose and Lost River suckers are both state-listed and  
30 federally-listed endangered species and that both species have been observed in the Klamath  
31 River and its tributaries in the analysis area. The Council found that the KGF would have no  
32 effect on the breeding habitat used by the shortnose and Lost River suckers. The Council  
33 found that the potential reduction in habitat quantity (water flow) below Keno dam caused by  
34 evaporative cooling at the proposed KGF was not expected to reduce the likelihood of the  
35 survival or recovery of the endangered Lost River and shortnose suckers.

36 In the *Final Order on the Application*, the Council found that the design, construction  
37 and operation of the KGF, taking into account mitigation, did not have the potential to  
38 significantly reduce the likelihood of the survival or recovery of any threatened or endangered  
39 plant or wildlife species listed under Oregon law. Because Amendment #2 would not involve  
40 any change in the design, size or location of the KGF facilities, the Council finds that there  
41 has been no change of facts or circumstances that would affect the Council’s earlier findings.

## Conclusions of Law

1 For the reasons discussed above, the Council concludes that the KGF would comply  
2 with the Council's Threatened and Endangered Species Standard if Amendment #2 were  
3 approved.

### **(b) Fish and Wildlife Habitat**

#### **OAR 345-022-0060**

4 *To issue a site certificate, the Council must find that the design, construction and*  
5 *operation of the facility, taking into account mitigation, are consistent with the fish*  
6 *and wildlife habitat mitigation goals and standards of OAR 635-415-0025 in effect*  
7 *as of September 1, 2000.*  
8

## Findings of Fact

9 In the *Final Order on the Application*, the Council found habitat directly affected by  
10 the construction and operation of the proposed facility is Category 6. The land is currently  
11 zoned for industrial use and few wildlife species use the area. All temporarily disturbed areas  
12 would be restored (Condition 11). The permanent footprint of the KGF would be limited to 25  
13 acres, consistent with the ODFW goal of minimizing impacts on Category 6 habitat. The  
14 certificate holder must revegetate the facility site after construction (Condition 91).

15 The Council found that potentially affected segments of the Klamath River are  
16 Category 3 habitat. Under the evaporative cooling option, the facility would use reclaimed  
17 wastewater for cooling. Consequently, there would be a reduction in the quantity of  
18 wastewater effluent that otherwise would flow into the Klamath River from the outfall of the  
19 wastewater treatment facilities. During operation, evaporation of water in the cooling tower  
20 would reduce the amount of this effluent by an average 3.6 cfs (2.3 mgd) and an estimated  
21 maximum of 4.8 cfs (3.1 mgd). After extensive discussion of this issue between the  
22 Department, ODFW and the applicant during the site certificate review process, the applicant  
23 proposed a water supply mitigation plan. Under the plan, the City would supply backup  
24 (potable) water to substitute for the use of reclaimed water in the cooling tower whenever the  
25 evaporative loss of reclaimed water could result in a significant loss of habitat quantity. If the  
26 evaporative cooling option is chosen, the certificate holder would negotiate a detailed  
27 agreement with the City of Klamath Falls, subject to the approval of the Department before  
28 beginning construction of the KGF. A refined operations plan, detailing the communications  
29 protocol and decision-making for activation and deactivation, would be developed before  
30 beginning of construction. The refined operations plan would be subject to approval by the  
31 Department and ODFW. The Council approved the water supply mitigation plan and  
32 incorporated the plan in Condition 76, subject to certain understandings that are discussed at  
33 page 94 of the *Final Order on the Application*.<sup>9</sup>

---

<sup>9</sup> The understandings relate to the flow of the Klamath River below Keno Dam and are as follows:

- The requirement to activate the mitigation plan would apply only when the KGF is operating and only to the extent that the KGF is using cooling water.
- Flows in the Klamath River are greatly influenced by human intervention, primarily the operation of Upper Klamath Lake (to maintain water levels) and diversion of water from Upper Klamath Lake by Reclamation Project water users.
- Upper Klamath Lake and irrigation diversions have generally been regulated such that ODFW's applied-

1 The Council found that the design, construction and operation of the KGF were  
2 consistent with ODFW’s fish and wildlife habitat mitigation goals and standards (OAR 635-  
3 415-0025). Amendment #2 would not involve any change in the design, size or location of the  
4 KGF facilities. Therefore, the Council finds that approval of an extension of the construction  
5 deadlines as requested in Amendment #2 is consistent with the ODFW habitat mitigation  
6 goals and standards.

Conclusions of Law

7 For the reasons discussed above, the Council concludes that the KGF would comply  
8 with the Council’s Fish and Wildlife Habitat Standard if Amendment #2 were approved.

**5. Carbon Dioxide Standard for Base Load Gas Plants**

**OAR 345-024-0550**

9 *To issue a site certificate for a base load gas plant, the Council must find that the*  
10 *net carbon dioxide emissions rate of the proposed facility does not exceed 0.675*  
11 *pounds of carbon dioxide per kilowatt-hour of net electric power output, with*  
12 *carbon dioxide emissions and net electric power output measured on a new and*  
13 *clean basis. For a base load gas plant designed with power or augmentation*  
14 *technology as defined in OAR 345-001-0010, the Council shall apply the standard*  
15 *for a non-base load power plant, as described in OAR 345-024-0590, to the*  
16 *incremental carbon dioxide emissions from the designed operation of the power*  
17 *augmentation technology. The Council shall determine whether the base load*  
18 *carbon dioxide emissions standard is met as follows:*

19  
20 *(1) The Council shall determine the gross carbon dioxide emissions that are*  
21 *reasonably likely to result from the operation of the proposed energy facility. The*  
22 *Council shall base such determination on the proposed design of the energy*  
23 *facility. The Council shall adopt site certificate conditions to ensure that the*  
24 *predicted carbon dioxide emissions are not exceeded on a new and clean basis;*

25 *(2) For any remaining emissions reduction necessary to meet the applicable*  
26 *standard, the applicant may elect to use any of the means described in OAR 345-*  
27 *024-0560, or any combination thereof. The Council shall determine the amount of*  
28 *carbon dioxide emissions reduction that is reasonably likely to result from the*  
29 *applicant's offsets and whether the resulting net carbon dioxide emissions meet the*  
30 *applicable carbon dioxide emissions standard;*

31 *(3) If the applicant elects to comply with the standard using the means described*  
32 *in OAR 345-024-0560(2), the Council shall determine the amount of carbon*

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for instream water right levels have been met.

- There have been several periods in recent years when flows at Keno dam have dropped below the ODFW levels. The applicant’s analysis shows that this has occurred an average of 9.4 days per year over the 12-year period from 1993 to 2004.
- If average flows or water quality in the Klamath River decline significantly below current expectations for reasons beyond the control of the KGF, the site certificate may be amended to address the changed circumstances. In such an amendment proceeding, the Council may consider whether the affected area of the Klamath River remains Category 3 habitat and whether continued implementation of the mitigation plan remains necessary to comply with the Council’s habitat standard.

1 *dioxide emissions reduction that is reasonably likely to result from each of the*  
2 *proposed offsets. In making this determination, the Council shall not allow credit*  
3 *for offsets that have already been allocated or awarded credit for carbon dioxide*  
4 *emissions reduction in another regulatory setting. The fact that an applicant or*  
5 *other parties involved with an offset may derive benefits from the offset other than*  
6 *the reduction of carbon dioxide emissions is not, by itself, a basis for withholding*  
7 *credit for an offset. The Council shall base its determination of the amount of*  
8 *carbon dioxide emission reduction on the following criteria and as provided in*  
9 *OAR 345-024-0680:*

10 (a) *The degree of certainty that the predicted quantity of carbon dioxide*  
11 *emissions reduction will be achieved by the offset;*

12 (b) *The ability of the Council to determine the actual quantity of carbon*  
13 *dioxide emissions reduction resulting from the offset, taking into consideration any*  
14 *proposed measurement, monitoring and evaluation of mitigation measure*  
15 *performance;*

16 (c) *The extent to which the reduction of carbon dioxide emissions would occur*  
17 *in the absence of the offsets;*

18 (4) *Before beginning construction, the certificate holder shall notify the*  
19 *Department of Energy in writing of its final selection of a gas turbine vendor and*  
20 *shall submit a written design information report to the Department sufficient to*  
21 *verify the facility's designed new and clean heat rate and its nominal electric*  
22 *generating capacity at average annual site conditions for each fuel type. In the*  
23 *report, the certificate holder shall include the proposed limits on the annual*  
24 *average number of hours of facility operation on distillate fuel oil, if applicable. In*  
25 *the site certificate, the Council may specify other information to be included in the*  
26 *report. The Department shall use the information the certificate holder provides in*  
27 *the report as the basis for calculating, according to the site certificate, the amount*  
28 *of carbon dioxide emissions reductions the certificate holder must provide under*  
29 *OAR 345-024-0560.*

### Findings of Fact

30 In the *Final Order on the Application*, the Council found that the KGF would be a  
31 base load gas plant as defined in ORS 469.503(2)(e).<sup>10</sup> As required under OAR 345-024-  
32 0550, the Council found that the net carbon dioxide (CO<sub>2</sub>) emissions rate of the KGF would  
33 not exceed 0.675 pounds of carbon dioxide per kilowatt-hour of net electric power output (lb  
34 CO<sub>2</sub>/kWh), with carbon dioxide emissions and net electric power output measured on a new  
35 and clean basis. The Council approved the use of power augmentation (duct burning), which  
36 uses additional natural gas. Under OAR 345-024-0590, the Council applies the CO<sub>2</sub> emissions  
37 standard for non-base load power plants to the incremental CO<sub>2</sub> emissions from the designed  
38 operation of power augmentation. The Council found that the incremental emissions for the  
39 KGF with power augmentation would not exceed 0.675 lb CO<sub>2</sub>/kWh, with CO<sub>2</sub> emissions and  
40 net electric output measured on a new and clean basis.

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<sup>10</sup> A more detailed discussion of the Council's findings regarding the Carbon Dioxide Emissions Standard is included in the *Final Order on the Application*, pp. 96-106, incorporated herein by this reference except to the extent it is changed by the analysis here.

1 The certificate holder must comply with the CO<sub>2</sub> emissions standards of OAR 345-  
2 024-0550 and OAR 345-024-0590 by making payments in compliance with the monetary path  
3 payment requirement of OAR 345-024-0710. The certificate holder must provide the offset  
4 funds, plus selection and contracting funds, to The Climate Trust as allowed by OAR 345-  
5 024-0560(3) and OAR 345-024-0600(3). Conditions 30 through 45 implement the  
6 requirements in OAR 345-024-0550 through OAR 345-024-0710.

7 The Council approved a site certificate that allows the certificate holder to choose  
8 between two designs for the KGF. One would use evaporative cooling and the other would  
9 use dry cooling. The Council's previous findings regarding the Carbon Dioxide Emissions  
10 Standard addressed both designs.

11 Before beginning construction of the KGF, the certificate holder must submit to the  
12 Department an affidavit with the final design parameters that are necessary to calculate the  
13 CO<sub>2</sub> emissions from the KGF, as described in OAR 345-024-0550 and -0590. Those  
14 parameters determine the specific amount of the monetary path payment for offset funds and  
15 for selection and contracting funds. The *Final Order on the Application* included tables  
16 illustrating the calculation of these payments (Tables 6 and 7 at pages 98 and 99).

17 To illustrate the method of calculation, Table 6 of the *Final Order on the Application*  
18 shows an example for the KGF evaporative cooling option. The gross CO<sub>2</sub> emissions of  
19 102,659 million pounds over 30 years are shown in Section F of the table ("Combined CO<sub>2</sub>  
20 Emissions"). The gross CO<sub>2</sub> emissions rate is expressed as pounds of CO<sub>2</sub> per kilowatt-hour  
21 of net electric power output and is calculated by dividing gross CO<sub>2</sub> emissions by the  
22 combined output. As illustrated in Table 6, the gross CO<sub>2</sub> emissions rate for the KGF  
23 evaporative cooling option is 0.797 lb CO<sub>2</sub>/kWh.

24 ORS 469.503(2)(e) defines "net carbon dioxide emissions" as "gross carbon dioxide  
25 emissions of the proposed energy facility, less carbon dioxide emissions avoided, displaced or  
26 sequestered by any combination of cogeneration or offsets." To determine the amount of CO<sub>2</sub>  
27 that the certificate holder must offset under the standard, the Council must determine the  
28 excess CO<sub>2</sub> emissions rate of the energy facility. "Excess CO<sub>2</sub> emissions" are those in excess  
29 of the net CO<sub>2</sub> emissions allowed under the standard (0.675 lb CO<sub>2</sub>/kWh). As illustrated in  
30 Table 6, the excess CO<sub>2</sub> emissions rate for the KGF under the evaporative cooling option  
31 would be 0.122 lb CO<sub>2</sub>/kWh. The excess CO<sub>2</sub> emissions over 30 years are calculated by  
32 multiplying the combined output by the excess emissions rate, resulting in 7.882 million tons  
33 over 30 years.

34 Under OAR 345-027-0070(10) and OAR 345-027-0030(5), the Council applies the  
35 rules in effect on the date the Council makes its decision on a request to amend a site  
36 certificate. Effective May 15, 2007, the Council amended OAR 345-024-0580 and established  
37 the current monetary offset rate of \$1.27 per ton. This rate was in effect when the Council  
38 approved Amendment #1. The Council found that the offset funds needed for the monetary  
39 path payment would be \$10.01 million (in 2007 dollars), based on the data in the example  
40 shown in Table 6 of the *Final Order on the Application*. The Council found that the selection  
41 and contracting funds for the base load plant would be \$0.458 million (in 2007 dollars) for the  
42 evaporative cooling option.<sup>11</sup> The initial monetary path payment is the combination of offset

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<sup>11</sup> OAR 345-024-0710 requires the certificate holder to pay the qualified organization an amount equal to 10 percent of the first \$500,000 of the offset funds and 4.286 percent of any offset funds in excess of \$500,000.

1 funds and the selection and contracting funds. The initial monetary path payment requirement  
2 for the proposed KGF, based on the estimated parameters of the facility with power  
3 augmentation, is \$10.468 million (in 2007 dollars) for the evaporative cooling option.

4 Before beginning construction, the certificate holder must determine the actual  
5 monetary path payment according to the site certificate conditions (Conditions 32 through  
6 35). The Department will verify the monetary path payment. Before beginning construction,  
7 the certificate holder must provide to The Climate Trust a letter of credit for the offset funds  
8 (Condition 38). It must also pay the selection and contracting funds to The Climate Trust  
9 before beginning construction (Condition 40).

10 When construction of the plant is complete, the certificate holder must perform tests  
11 (“100-hour tests”) to ensure that the plant complies with the CO<sub>2</sub> standard on a new and clean  
12 basis. For power augmentation, the Council may modify the parameters of the new and clean  
13 basis to accommodate average conditions at the times when the facility is intended to operate  
14 or to accommodate technical limitations, including operational considerations (OAR 345-024-  
15 0590(1)). Because modification of the testing parameters is an engineering issue, the *Final*  
16 *Order on the Application* authorized the Department to approve modification of the  
17 parameters if circumstances warrant.

18 To ensure adequate selection and contracting funds, the Council found that, if there are  
19 excess emissions identified by the 100-hour tests, the payment for selection and contracting  
20 funds should be 20 percent of the first \$250,000 in offset funds and 4.286 percent of any  
21 offset funds over \$250,000.

22 In the *Final Order on the Application*, the Council found that if the site certificate  
23 holder is required to provide supplemental offset funds following a 5-year reporting period  
24 (OAR 345-024-0590(6)), the selection and contracting funds would be calculated based on the  
25 supplemental offset funds alone. The Council found that in each 5-year reporting period in  
26 which supplemental offset funds are required, the payment for supplemental selection and  
27 contracting funds should be 20 percent of the first \$250,000 in offset funds and 4.286 percent  
28 of any offset funds in excess of \$250,000.

#### Conclusions of Law

29 For the reasons discussed above, the Council concludes that the KGF would comply  
30 with Carbon Dioxide Emissions Standard if Amendment #2 were approved.

### **V. OTHER APPLICABLE REGULATORY REQUIREMENTS: FINDINGS AND CONCLUSIONS**

#### **1. Requirements under Council Jurisdiction**

31 Under ORS 469.503(3) and under the Council’s General Standard of Review (OAR  
32 345-022-0000), the Council must determine that a facility complies with “all other Oregon  
33 statutes and administrative rules identified in the project order, as amended, as applicable to  
34 the issuance of a site certificate for the proposed facility.” In the *Final Order on the*  
35 *Application*, the Council found that the other applicable Oregon statutes and administrative  
36 rules were the Department of Environmental Quality noise control regulations, the regulations  
37 adopted by the Department of State Lands for removal or fill of material affecting waters of

1 the state and the Council’s statutory authority to consider protection of public health and  
2 safety.

**(a) Noise Control Regulations**

3 The applicable noise control regulations are as follows:

4 **OAR 340-035-0035**

5 **Noise Control Regulations for Industry and Commerce**

6 *(1) Standards and Regulations:*

7 \* \* \*

8 *(b) New Noise Sources:*

9 *(A) New Sources Located on Previously Used Sites. No person owning or*  
10 *controlling a new industrial or commercial noise source located on a previously*  
11 *used industrial or commercial site shall cause or permit the operation of that noise*  
12 *source if the statistical noise levels generated by that new source and measured at*  
13 *an appropriate measurement point, specified in subsection (3)(b) of this rule,*  
14 *exceed the levels specified in Table 8, except as otherwise provided in these rules.*  
15 *For noise levels generated by a wind energy facility including wind turbines of any*  
16 *size and any associated equipment or machinery, subparagraph (1)(b)(B)(iii)*  
17 *applies.*

18 \* \* \*

Findings of Fact

19 The KGF is subject to the noise control requirements of OAR 340-035-0035(1)(b)(A)  
20 as a new industrial or commercial noise source located on a previously used site. In the *Final*  
21 *Order on the Application*, the Council found that, to meet the standard, the noise radiating  
22 from the KGF equipment must not exceed an hourly L<sub>50</sub> noise level of 50 dBA at the  
23 appropriate measurement point. Based on an analysis of predicted noise levels for the KGF  
24 for both evaporative and dry cooling, the Council found that the facility would comply with  
25 the standard.

26 To ensure compliance with the noise standard, Condition 106 requires the certificate  
27 holder to install silencers on short-duration noise sources to reduce the noise impact of short-  
28 duration noise events. Under Condition 107, the certificate holder must measure actual noise  
29 levels when the facility is operating and report the results to the Department. If the results  
30 show that noise from the facility exceeds the standard, the certificate holder must implement  
31 additional noise-reducing measures.

32 Amendment #2 would not involve any change in the design, size or location of KGF  
33 components. The Council finds that there has been no change of facts or circumstances that  
34 would affect the Council’s earlier findings.

Conclusions of Law

35 Based on the findings discussed above, the Council finds that the KGF would comply  
36 with the applicable noise control regulations if Amendment #2 were approved.

**(b) Removal-Fill Law**

1 The Oregon Removal-Fill Law (ORS 196.795 through 196.990) and regulations (OAR  
2 141-085-0500 through 141-085-0785) adopted by the Department of State Lands require a  
3 permit if 50 cubic yards or more of material is removed, filled or altered within any “waters of  
4 the state” at the proposed site.<sup>12</sup>

Findings of Fact

5 The applicant identified five wetlands that are potentially jurisdictional waters of the  
6 state.<sup>13</sup> Condition 93 requires the certificate holder to locate the KGF and any temporary  
7 laydown and parking areas so as to avoid direct impact to any of the identified wetlands. In  
8 the *Final Order on the Application*, the Council found that a Removal/Fill Permit would not  
9 be needed for construction of the facility. The applicant would mitigate potential indirect  
10 impact by erosion control measures and revegetation (Conditions 89, 90 and 91) and would  
11 take steps to avoid contamination of wetlands and waterways by hazardous substances  
12 (Condition 92).

13 Amendment #2 would not involve any change in the size or location of facility  
14 components. The Council finds that there has been no change of facts or circumstances that  
15 would affect the Council’s earlier findings regarding the Removal/Fill Law.<sup>14</sup>

Conclusions of Law

16 Based on the findings discussed above, the Council concludes that a Removal/Fill  
17 Permit would not be required for the KGF if Amendment #2 were approved.

**(c) Public Health and Safety**

18 Under ORS 469.310, the Council is charged with ensuring that the “siting,  
19 construction and operation of energy facilities shall be accomplished in a manner consistent  
20 with protection of the public health and safety....” State law further provides that “the site  
21 certificate shall contain conditions for the protection of the public health and safety....” ORS  
22 469.401(2).

Findings of Fact

23 In the *Final Order on the Application*, the Council made findings and adopted  
24 conditions regarding cooling tower fogging and icing (Condition 112), potential adverse  
25 public health effects from cooling tower drift (Condition 111), magnetic field effects  
26 (Condition 58) and coordination with the Oregon Pubic Utility Commission (Condition 56).  
27 In addition, several of the conditions set forth in OAR 345-027-0020 and OAR 345-027-0023  
28 and incorporated in the KGF site certificate address matters of public health and safety.

29 In the *Final Order on the Application*, the Council found that the siting, construction  
30 and operation of the proposed facility, subject to the conditions stated in the order, were  
31 consistent with protection of public health and safety. An extension of the construction  
32 deadlines would not involve any change in the design, size, location or operation of the KGF.

---

<sup>12</sup> ORS 196.800(14) defines “Waters of this state.” The term includes wetlands and certain other water bodies.

<sup>13</sup> *Final Order on the Application*, p. 109.

<sup>14</sup> DSL amended OAR Chapter 141, Division 85, effective March 1, 2009. The amendments did not change the substantive requirements for a Removal/Fill Permit.

1 Because Amendment #2 would not involve a change in the size or location of any KGF  
2 components, the Council finds that there has been no change of facts or circumstances that  
3 would affect the Council’s earlier findings regarding public safety.

Conclusions of Law

4 Based on the findings discussed above, the Council concludes that the KGF would  
5 comply with requirements to protect public health and safety if Amendment #2 were  
6 approved.

**2. Requirements That Are Not Under Council Jurisdiction**

**(a) Federally-Delegated Programs**

7 Under ORS 469.503(3), the Council does not have jurisdiction for determining  
8 compliance with statutes and rules for which the federal government has delegated the  
9 decision on compliance to a State agency other than the Council. Nevertheless, the Council  
10 may rely on the determinations of compliance and the conditions in the federally-delegated  
11 permits issued by these State agencies in deciding whether the proposed facility meets other  
12 standards and requirements under its jurisdiction.

13 In the *Final Order on the Application*, the Council found that the certificate holder  
14 must obtain a federal Air Contaminant Discharge Permit (ACDP) from the Oregon  
15 Department of Environmental Quality (DEQ) before beginning construction of the proposed  
16 facility. The certificate holder must also comply with requirements of DEQ’s 1200-C General  
17 National Pollutant Discharge Elimination System (NPDES) Stormwater Discharge permit and  
18 an Erosion and Sediment Control Plan (ESCP) to minimize erosion at the site during  
19 construction operations.

**(b) Requirements That Do Not Relate to Siting**

20 Under ORS 469.401(4), the Council does not have authority to preempt the  
21 jurisdiction of any State agency or local government over matters that are not included in and  
22 governed by the site certificate or amended site certificate. Such matters include  
23 design-specific construction or operating standards and practices that do not relate to siting.  
24 Nevertheless, the Council may rely on the determinations of compliance and the conditions in  
25 the permits issued by these State agencies and local governments in deciding whether the  
26 facility meets other standards and requirements under its jurisdiction.

**VI. GENERAL APPLICATION OF CONDITIONS**

27 The conditions referenced in this order include conditions that are specifically required  
28 by OAR 345-027-0020 (Mandatory Conditions in Site Certificates), OAR 345-027-0023 (Site  
29 Specific Conditions), OAR 345-027-0028 (Monitoring Conditions) or OAR Chapter 345,  
30 Division 26 (Construction and Operation Rules for Facilities). The conditions referenced in  
31 this order include conditions based on representations in the Request for Amendment #2 and  
32 the supporting record. The Council deems these representations to be binding commitments  
33 made by the certificate holder. Also included are conditions the Council finds necessary to  
34 ensure compliance with the siting standards of OAR Chapter 345, Divisions 22 and 24, or to  
35 protect public health and safety.

1 In addition to all other conditions referenced or included in this order, the site  
2 certificate holder is subject to all conditions and requirements contained in the rules of the  
3 Council and in local ordinances and State law in effect on the date the amended site certificate  
4 is executed.<sup>15</sup> Under ORS 469.401(2), upon a clear showing of a significant threat to the  
5 public health, safety or the environment that requires application of later-adopted laws or  
6 rules, the Council may require compliance with such later-adopted laws or rules.

7 The Council recognizes that many specific tasks related to the design, construction,  
8 operation and retirement of the facility will be undertaken by the certificate holder's agents or  
9 contractors. Nevertheless, the certificate holder is responsible for ensuring that all agents and  
10 contractors comply with all provisions of the site certificate.

## VII. GENERAL CONCLUSION

11 The proposed amendment would extend the construction beginning and completion  
12 dates for the KGF. The Council adopts revisions to Conditions 46 and 47 and other site  
13 certificate revisions related to this action as discussed below.

14 Based on the findings and conclusions discussed above regarding the proposed  
15 amendment, the Council makes the following findings:

- 16 1. The proposed Amendment #2 complies with the requirements of the Oregon  
17 Energy Facility Siting statutes, ORS 469.300 to ORS 469.570 and 469.590 to  
18 469.619.
- 19 2. The proposed Amendment #2 complies with the applicable standards adopted by  
20 the Council pursuant to ORS 469.501.
- 21 3. The proposed Amendment #2 complies with all other Oregon statutes and  
22 administrative rules applicable to the amendment of the site certificate for the KGF  
23 that are within the Council's jurisdiction.

24 Accordingly, the Council finds that the facility complies with the General Standard of  
25 Review (OAR 345-022-0000). The Council concludes, based on a preponderance of the  
26 evidence on the record, that the site certificate may be amended as requested by the certificate  
27 holder subject to the revisions recommended by the Department and set forth below.

### 1. The Department's Recommended Revisions

28 New text proposed by the Department is shown below with single underline. New text  
29 proposed by KG with concurrence by the Department is shown with double underline.  
30 Deletions are shown with a strikethrough. The parenthetical references in square brackets  
31 follow standard practice and provide a historical reference of when changes were made to the  
32 Site Certificate. Page references are to the *First Amended Site Certificate* (September 21,  
33 2007).

---

<sup>15</sup> With regard to land use, the applicable local criteria are those in effect on the date the certificate holder submitted the request for amendment.

### Revision 1

1 *Page 2, lines 6-14:*

2 The findings of fact, reasoning and conclusions of law underlying the terms and conditions of  
3 this site certificate are set forth in the following documents, incorporated herein by this  
4 reference: (a) the Council’s Final Order in the Matter of the Application for a Site Certificate  
5 for the Proposed Klamath Generation Facility (“Final Order on the Application”) issued on  
6 September 27, 2005, ~~and~~ (b) the Council’s Final Order on Amendment #1 and (c) the  
7 Council’s Final Order on Amendment #2. [Amendments#1 and #2]

8 In interpreting this site certificate, any ambiguity will be clarified by reference to the  
9 following, in order of priority: (1) this ~~First~~Second Amended Site Certificate, (2) the Final  
10 Order on Amendment #2, (23) the Final Order on Amendment #1, (34) the Final Order on the  
11 Application and (45) the record of the proceedings that led to the Final Orders on the  
12 Application and Amendments #1 and #2. [Amendments #1 and #2]

### Explanation

13 This revision adds a reference in the site certificate to the findings of fact, reasoning  
14 and conclusions in support of the present amendment. The revision establishes the order of  
15 priority in which the underlying documents should be considered in resolving any ambiguity.

### Revision 2

16 *Page 2, lines 25-32:*

17 3. This site certificate does not address, and is not binding with respect to, matters that were  
18 not addressed in the Council’s Final Orders on the Application and Amendments #1 and  
19 #2. These matters include, but are not limited to: building code compliance, wage, hour  
20 and other labor regulations, local government fees and charges and other design or  
21 operational issues that do not relate to siting the facility (ORS 469.401(4)) and permits  
22 issued under statutes and rules for which the decision on compliance has been delegated  
23 by the federal government to a state agency other than the Council. ORS 469.503(3).  
24 [Amendments #1 and #2]

### Explanation

25 The revision includes the Final Order on Amendment #2 in the scope of matters  
26 addressed in the site certificate.

### Revision 3

27 *Page 17, lines 14-17:*

28 (46) The certificate holder shall begin construction of the facility by November 16, ~~2009~~2011.  
29 The Council may grant an extension of the deadline to begin construction in accordance  
30 with OAR 345-027-0030 or any successor rule in effect at the time the request for  
31 extension is submitted. [Amendments #1 and #2]

### Explanation

32 This revision modifies Condition 46 to extend the deadline for beginning construction  
33 to November 16, 2011. This is a two-year extension as requested by the certificate holder in  
34 Amendment #2. A two-year extension is the maximum extension that may be granted under  
35 OAR 345-027-0030(4).

Revision 4

Page 17, lines 18-25:

(47) The certificate holder shall complete construction of the facility by November 16, ~~2012~~2014. Construction is complete when: 1) the facility is substantially complete as defined by the certificate holder's construction contract documents, 2) acceptance testing has been satisfactorily completed and 3) the energy facility is ready to begin continuous operation consistent with the site certificate. The certificate holder shall promptly notify the Department of the date of completion of construction. The Council may grant an extension of the deadline for completing construction in accordance with OAR 345-027-0030 or any successor rule in effect at the time the request for extension is submitted. [Amendments #1 and #2]

Explanation

This revision modifies Condition 47 to extend the deadline for completing construction to November 16, 2014. This is a two-year extension as requested by the certificate holder in Amendment #2. A two-year extension is the maximum extension that may be granted under OAR 345-027-0030(4).

**VIII. ORDER**

The Council approves Amendment #2 and issues an amended site certificate for the Klamath Generation Facility subject to the terms and conditions set forth above.

Issued this \_\_\_\_ day of May, 2009.

THE OREGON ENERGY FACILITY SITING COUNCIL

By: \_\_\_\_\_  
Robert Shiprack, Chair  
Oregon Energy Facility Siting Council

**Notice of the Right to Appeal**

*You have the right to appeal this order to the Oregon Supreme Court pursuant to ORS 469.403. To appeal you must file a petition for judicial review with the Supreme Court within 60 days from the day this order was served on you. If this order was personally delivered to you, the date of service is the date you received this order. If this order was mailed to you, the date of service is the date it was mailed, not the day you received it. If you do not file a petition for judicial review within the 60-day time period, you lose your right to appeal.*