

**Minutes
Energy Facility Siting Council Meeting
Klamath County Fairgrounds
Exhibit Room A
Klamath Falls, Oregon
November 3 – November 4, 2004**

*Approved without revision by the Energy Facility Siting Council
January 28, 2005*

Oregon Energy Facility Siting Council

Karen Green, Chair
Hans Neukomm, Vice Chair
Martha Dibblee
Robert Shiprack
David Tegart

Department of Energy:

David Stewart-Smith, Assistant Director
Adam Bless, Project Officer
Catherine Van Horn, Project Officer
John White, Project Officer
Sisily Fleming, Administrative Assistant

Oregon Department of Justice:

Shannon O'Fallon, Assistant Attorney General
Janet L. Prewitt, Assistant Attorney General
Richard Whitman, Assistant Attorney General

Stoel Rives, LLP:

Tim McMahan
Peter Mostow
Ellen Hawes-Grover

Peoples Energy Resource:

Paul Turner
John Beduse
Zane Tartere
Mark Bricker, CH2M Hill

SORO:

Ed Sullivan, representing SORO
Lynn Brock, Officer
Bill Brock

Water For Life:

Cortney Duke, representing WFL
Glen Barrett
Gail Whitsett

Other Contested Case Party:

Margaret Tenold

Chair Karen Green called the meeting to order at 1 p.m.

I. Consent Calendar:

- A. Approval of the July 23, 2004 EFSC meeting minutes.**
- B. Approval of the September 24, 2004 EFSC meeting minutes.**

David Stewart-Smith asked the Council to defer approval of the meeting minutes to a later meeting. The Council agreed.

II. Action Items:

- A. Request for approval of the issuer of the retirement letter of credit for Hermiston Power Project.**

David Stewart-Smith noted that the Hermiston Power Project is changing its bank. The letter of credit for which approval is requested is identical to the one currently in force; only the issuer has changed to Bayerische Landesbank. Mr. Stewart-Smith said the Department of Energy has reviewed the credit rating and recommends that the Council approve the request.

Hans Neukomm moved to approve the request for the new retirement letter of credit to be issued by Bayerische Landesbank for the Hermiston Power Project. Martha Dibblee seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

- B. Request Council's authorization to initiate rulemaking on approval of Trojan Final Site Survey.**

Adam Bless introduced Steve Nichols, Trojan Plant manager. Mr. Bless noted that PGE's petition for rulemaking is offered pursuant to OAR 137-01-070, which allows any interested person to submit a petition for rulemaking. PGE is asking to modify OAR 345-026-0300 *et seq*, which governs the review and implementation of the Trojan decommissioning plan and includes requirements for monitoring and surveillance of the site during decommissioning.

Mr. Bless outlined the process in the decommissioning plan, which starts with the Council's approval of the petition so that the rulemaking can be finished around March 2005. Hans Neukomm asked about the steps involved in making a rule. Mr. Bless explained the procedure.

Martha Dibblee moved to approve the rulemaking petition to commence the process. David Tegart seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

C. COB Energy Facility: Hearing and final action on the application for a site certificate.

Chair Karen Green explained the procedures and guidelines for the hearing and requested only relevant testimony. She clarified that the only issues under discussion would be those issues that had been raised within the contested case process.

Jan Prewitt, Department of Justice, clarified the difference between the COB Energy Facility hearing (Action Item C) and the rulemaking petition for Promulgation of New Rules by Save Our Rural Oregon (Action Item D). Ms. Prewitt said the two action items are separate decisions, and the decisions made by the Council during the contested case hearing does not necessarily drive the separate decision for rulemaking.

Catherine Van Horn, Department of Energy, offered an overview of the proposed facility and the review process thus far. Virginia Gustafson, hearing officer, then began reviewing the issues requiring Council discussion and decision.

ISSUES FOR COUNCIL DETERMINATION

LAND USE STANDARD

a. Request for Rulemaking

Save Our Rural Oregon (SORO) has requested additional rulemaking, saying such rulemaking is necessary before applying numerous standards applicable in this case. SORO asserted that the standards in effect are too vague, unconstitutional and lack due process. Ms. Gustafson disagreed but pointed out that the Council has the authority to conduct rulemaking to further define standards or terms. Terms discussed included: “notwithstanding the requirements of ORS 197.732”; “reasons”; and “ESEE.”

“Notwithstanding”

Ms. Gustafson determined there is no need for additional rulemaking. In the context written in the Order, “notwithstanding” meant that even though 197.732 requires an alternative site analysis, the siting process does not.

“Reasons” & “ESEE”

SORO requested additional rulemaking for the use of “reasons” for the reasons analysis required under the Council’s land use laws for a Goal 3 exception because the “reasons” weren’t defined sufficiently. Ms. Gustafson concluded that, to the extent that the Council’s “reasons” language is identical to LCDC

rules, the Council could look for guidance to those rules. She said the same applied for use of the "ESEE" term.

Chair Green offered a summary of the issues: The Order concludes that no additional rulemaking would be required to clarify the terms in question because they are clear enough in context or by resorting to interpretation of identical language in other bodies of law. The Order's recommendation is that no rulemaking is required to apply the terms.

Ed Sullivan, representing SORO, argued that the "Marbett Case" requires EFSC to undertake rulemaking before the contested case proceeding. He said SORO is asking the Council to stop the proceedings to undertake rulemaking. Mr. Sullivan continued by discussing rulemaking in general.

Courtney Duke, representing Water for Life, deferred to SORO on the issue.

Tim McMahan, Stoel Rives lawyer representing COB, introduced Peter Mostow and Ellen Hawes-Grover from Stoel Rives and also introduced applicant representatives: Paul Turner, John Beduse and Zane Tartere from People's Energy Resources Corporation, and Mark Bricker, a consultant with CH2M Hill.

Mr. McMahan and Ms. Hawes-Grover presented COB's argument against rulemaking and against the need for any alternatives analysis for a Goal 3 exception land use proceeding under EFSC rules. Mr. McMahan said that the Legislature deliberately removed for the EFSC process the alternative site requirement found in LCDC rules for a Goal 3 exception.

Ms. Prewitt, Department of Justice, noted that the Department agreed in general with COB's presentation of the issue. She explained that the Marbett Case required the Council to adopt standards on very specific issues and not on general terms. She also reinforced the fact that the Council has the discretion -- but is not required -- to make rules and adopt standards.

Richard Whitman, Department of Justice, said the issue could be separated into two parts: 1) Can the Council adopt rules to further define or explain the standard for granting an exception and 2) Legally, whether the Council is required to do this. Mr. Whitman also posed the question of whether the Council should stop the proceedings for rulemaking.

Council members Bob Shiprack, Martha Dibblee, Hans Neukomm and David Tegart each expressed their desire to continue with the Council's review of the Recommended Order without conducting rulemaking. The Council and the Department of Justice further discussed the issue.

b. **Applicable Requirements**

Requirements of ORS 469.504.

Ms. Gustafson said parties had questioned the requirements of ORS 469.504, and whether the Department had adequately applied those requirements. Ms. Gustafson explained that the Council's normal practice, and what the Proposed Order recommends at page 15, is evaluating a facility for compliance with the Council's land use standard under "a" and "b." That means the Council first evaluates the proposed facility under the applicable substantive criteria of Klamath County's land use regulations, and then evaluates whether the facility complies with Land Conservation and Development Commission's administrative rules and goals and any land use statutes directly applicable to the facility.

Chair Green asked for comments. Mr. Sullivan stated SORO's belief that the Department of Justice was in error in selectively and inconsistently choosing which land use criteria applied.

Mr. McMahan supported the Department of Justice's method of evaluation.

Dr. Van Horn verified that a request was made to the Klamath County Commissioners to submit applicable standards from the county land use code to be applied to the COB application, but there was no response by the deadline set. Chair Green referred to Subsection 5, which says if a local advisory group doesn't make a recommendation by the deadline, the Council can choose the criteria and apply them.

Mr. Whitman noted that the Department of Justice has historically advised the Department of Energy and the Siting Council that it has the authority under Subsection 5 to use a combination of the paragraphs under 469.504 (1) (b) when a local government fails to provide the criteria by the deadline.

Chair Green confirmed that the Department of Justice is advising that there is a legal basis to apply paragraphs (a) (b) and (c), and the applicant has argued that it is good policy because the Council is going through each and every potentially applicable standard.

Chair Green asked for comments from Council members. Martha Dibblee said she felt it was very clear that, when the special advisory group doesn't respond, the Council could make the decisions. Bob Shiprack said he was confident with DOJ's advice. Hans Neukomm, David Tegart and Chair Green also supported DOJ's view.

Application of ORS 469.504 (1) (b) to Klamath County Plan & LDC § 54.030 and Goal 3 Exception.

Ms. Gustafson noted the issue raised of whether the Proposed Order properly applied the provisions of LDC §54.030 and whether the Council must apply the

exceptions criteria contained in OAR Chapter 660-004 instead of the exceptions criteria contained in OAR 345-022-0030(4). She argued that the Energy Facility Siting Council statutes have primacy over local exceptions criteria, and that no alternative sites analysis is required notwithstanding the requirement in 54.030. She noted SORO's argument that the local code provision is applicable, as is LCDC Chapter 660 rules, regardless of what Council statutes impose. Ms. Gustafson further explained SORO's argument and her response on this issue.

Mr. Sullivan elaborated on SORO's argument, including SORO's stance that rulemaking is needed to clarify terms and that the Recommended Order inappropriately and selectively applies land use criteria.

Chair Green asked if any other parties raised the same exception as SORO. There were none.

Mr. McMahan reiterated COB's argument that the Recommended Order contains a correct land use analysis and that no alternative sites analysis is required.

Chair Green asked for comments from the Department of Justice.

Mr. Whitman explained in more detail the Department of Justice's land use analysis of the proposed COB facility and its use of the Council's exceptions process.

Hans Neukomm asked about the LCDC Goal 3 exception for the size of the facility. Mr. Whitman replied that LCDC has a rule that limits the acreage that power plants can use on farmland. Klamath County has adopted an ordinance that mirrors that LCDC rule. He further explained that if an applicant doesn't meet the acreage limit, the project would not comply with Statewide Goal 3, which protects agricultural land. The only means to get approval for the project is to take an exception to Goal 3. The question under debate isn't whether an exception is needed, but whether the Council should apply the exceptions criteria as set forth in the county's code and LCDC rules, or the exceptions criteria the Legislature set out for the Siting Council in the siting of energy facilities. The Department of Justice and the Hearing Officer recommend the latter.

Chair Green asked for comments from Council members. Ms. Dibblee, Mr. Shiprack, Mr. Neukomm and Mr. Tegart noted their agreement with the Hearing Officer's recommendation.

Substantive Analysis (Reasons) OAR 345-022-0030(4)(c)(A)

Ms. Gustafson noted that the Recommended Order points out that COB needs an exception to Goal 3 not because of the proposed use but because of the proposed size. Ms. Gustafson said her understanding is that SORO's opposition on this issue is premised on the need for an alternative sites analysis, that there are better locations that could better suit the use. However, SORO's exception document

states that Ms. Gustafson misunderstood, and that SORO is using the alternative sites analysis argument as a way to “debunk” the applicant’s reasons for saying the COB site is a unique location. Ms. Gustafson said SORO prepared an alternative sites analysis that outlines seven or eight different possible locations where the COB project could be sited.

Ms. Gustafson said the Recommended Order finds that the applicant justified the size-based Goal 3 exception. She also said that she did not find in SORO’s Briefing on the Contested Case any specific challenge to the premise that the size of the facility, not the use, is at issue.

Chair Green asked for questions for the Hearing Officer. There were none.

Mr. Sullivan noted the connection between this issue and the previous issue of the applicable exceptions process. He discussed a similar exceptions provision relating to forest lands under OAR 660.04.

Mr. Sullivan said that it wasn’t possible to separate the size of the project from the proposed use. He proceeded to explain SORO’s position on the “reasons” issue. Mr. Sullivan said that the applicant’s reasons for justifying the proposed site requires a look at whether the same resources the applicant relies upon for choosing the site are available elsewhere. He also noted that the state’s policy for locating such uses within industrial areas should apply here.

Chair Green asked for questions from Council members. There were none.

Chair Green questioned Mr. Sullivan about the relationship between an alternative sites analysis, and the applicant’s reasons for locating at the proposed site. Chair Green then asked for comments from parties to the contested case.

Mr. McMahan explained COB’s efforts to minimize the amount of acreage needed for the project, and reiterated reasons that would justify the proposed location. He noted that no party had contested evidence in the record about the amount of acres needed for the facility.

Chair Green asked for questions from Council members. There were none.

Chair Green asked for clarification of the basis for a Goal 3 exception. Mr. McMahan discussed the confluence of factors that made the proposed site an appropriate site.

Chair Green asked for questions from Council members. There were none.

Chair Green took a moment to review procedural issues. She then asked for comments from parties. Mr. Sullivan and Mr. McMahan debated references to “market judgment” or “market demand.”

Mr. Whitman, Department of Justice, noted that the question on the Goal 3 exception is – What are the reasons why the policies embodied in the statewide planning goal (Goal 3) should not apply? The policies embodied in Goal 3 are that agricultural lands should be preserved and maintained for farm use, consistent with existing and future needs for agricultural products for an open space and with the state’s agricultural land use policy expressed in ORS 215.243 and 215.700. Also, Goal 3, in its implementation provisions, specifically says that non-farm use is permitted within farm-use zones under ORS 215.213, and that the uses should be minimized to allow for maximum agricultural production. So even though uses other than agricultural are allowed on farmland, the legal background to consider is why an LCDC rule exists that limits the amount of acreage used by power plants to 20 acres without a Goal 3 exception, and why Klamath County adopted a similar implementing ordinance.

Mr. Whitman also stated there are two justifications in the record for this exception. One has to do with resources that are necessary for this facility. The other is based on why this amount of land is necessary. He noted that Mr. Sullivan has cited other locations that have the resources, if the Council wants to rely on that. Mr. Whitman said the Council had a key policy call before it: Whether the Council wants to accept the justification in the record as adequate to take this amount of land out of agricultural production.

Chair Green mentioned that Mr. Sullivan earlier made reference to SORO’s Response to COB’s Proposed Alternative Findings, which were submitted in the last 48 hours and haven’t been addressed. Mr. Whitman said those are relevant only if the Council decides another legal question, which is slated for discussion later in the schedule. The issue is whether the power plant and all the utilities associated with it should be considered as part of a commercial utility facility for the purpose of generating power, which is allowed under 215.283 (2). If the answer is yes, the acreage for all the linear facilities gets added to the 50 acres under the Goal 3 exception request. Alternatively, the Council could decide that the linear facilities are authorized under a separate statutory provision for utility facilities necessary for public service, rather than as part of the power plant. The acreage would not then be added to the Goal 3 exception request.

Chair Green asked for procedural advice about whether the alternative findings material recently submitted can properly be considered at this point in the proceedings. Mr. Whitman said he understood that SORO has moved to strike that submission. He also recommended not getting to that issue until the legal issue arises in the proceedings.

Chair Green asked Council members for comments. Mr. Whitman suggested a summary from the Ms. Gustafson. Ms. Gustafson discussed the location’s uniqueness and the size justification, based on the evidence in the record. She further stated she did not understand SORO to be arguing the alternative sites to

debunk the location criteria so much as the requirement for an LCDC alternative sites analysis. Discussion ensued about the applicability and adequacy of SORO's alternatives analysis document that provides references to other potential sites.

Chair Green questioned Council members about their opinion. Bob Shiprack asked for clarification on the alternative site analysis and whether it is required. Mr. Whitman responded. All Council members agreed that the reasons offered by the applicant justify an exception to Goal 3. Mr. Whitman explained that Council members needed to review the evidence in the record and determine that it is more likely than not that the facts necessary for each of the justifications exist. All Council members agreed.

ESEE Analysis: OAR 345-022-0030(4)(c)(B)

Ms. Gustafson explained that the "ESEE" analysis is part of the Goal 3 exception criteria that says: "The significant environmental, economic, social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the Council applicable to the siting of the proposed facility."

She noted that the applicant submitted an ESEE analysis. In response, SORO has argued the analysis requires not only that the significant impacts be identified, but also any impacts must be mitigated. Ms. Gustafson explained that she agreed in the Recommended Order with the applicant's argument that only significant impacts must be mitigated. She noted that the applicant included a substantial mitigation plan, which SORO has challenged as cursory and vague.

Mr. Sullivan again suggested to the Council that rulemaking is required so the parties know in advance of the hearing what they must present in terms of argument and evidence on issues such as this. Mr. Sullivan and Mr. McMahan discussed ESEE evidence both had submitted into the record and the qualifications of those relied upon for the analysis.

Mr. Whitman reviewed the basis for the Council to make a decision on the issue. He noted the differences between the ESEE analysis required under the Council's Goal 3 exception rules and that required under LCDC's rules. Mr. Whitman also discussed the mitigation requirement in the ESEE analysis, referring to the Council's mitigation rules.

Chair Green reviewed the Hearing Officer's recommendations. Ms. Gustafson recommended that the Department's Proposed Order be supplemented with references to certain portions of the record, Exhibit K, and portions of the applicant's response brief. Council members expressed their positions, with Bob Shiprack asking for more time to personally look at the record on this issue. Chair Green tabled the issue to allow Council members to review the record.

Compatibility Standard. OAR 345-022-0030(4)(c)(C)

Ms. Gustafson reviewed her findings in the Recommended Order on this standard, including the finding that the proposed project would be made compatible with adjacent uses and SORO's arguments against her finding.

Mr. Sullivan argued that the term compatibility should be defined through rulemaking. He added that the Council must look at both the size as well as the nature of the use.

Martha Dibblee asked about the definition of compatibility. Mr. Whitman said that compatibility is not defined in the Council rules. He further said the question is: To what extent are the LCDC rules and statutes context for the Council and the DOJ in determining the meaning of compatible. Mr. Whitman reviewed the Council and LCDC relevant rules.

Chair Green asked for comments from Water for Life. There were none.

Mr. McMahan referred to portions of the application that address the standard under discussion.

Chair Green asked the Council for comments. Ms. Dibblee, Mr. Shiprack, and Mr. Neukomm stated they agreed with the Hearing Officer's recommendation.

Exception to Goal 5

Chair Green began discussion on the Goal 5 exception issue. Ms. Gustafson said she determined there was no requirement for a Goal 5 exception for the project, while SORO has argued that Goal 5 exceptions are required for big game winter range and for groundwater. Parties debated the issue. Ms. Dibblee, Mr. Shiprack and Mr. Neukomm agreed with the Hearing Officer's recommendation.

Exceptions to Goals 11 and 14

Ms. Gustafson said there are no exceptions in regard to Goals 11 and 14. Chair Green confirmed with Mr. Sullivan that SORO withdrew its exception on Goals 11 and 14. The Council discussed procedures with the Department of Justice.

Compliance with ORS 215.296 and LDC §54.040(C)

Ms. Gustafson said the requirement here is that the location, size, design and operating characteristics of the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forestry practices on nearby agricultural or forestry lands. Ms. Gustafson summarized and responded to SORO's exceptions to the Proposed Order and the Recommended Order's recommendation that the application complies with this requirement.

Ms. Gustafson said that there was a condition imposed in the Department's Proposed Order requiring the applicant to meet with the adjacent property owners prior to activities to make sure there weren't impacts. SORO argued that such a

condition impermissibly deferred compliance. Ms. Gustafson recommended changing the language of that condition to ensure the finding was clear that compliance had been established, and then to impose an additional burden on the applicant to ensure continued compliance by working with adjacent property owners to ensure lack of conflicts. Chair Green asked Ms. Gustafson to explain what deferred compliance means. Ms. Gustafson explained that the applicant is required to establish now that the application satisfies all the criteria. A condition cannot require compliance in the future.

Chair Green asked Ms. Gustafson to address two other sub-issues on impacts to rural life. Ms. Gustafson said part of the analysis of this issue was that a significant change in accepted farm practices would affect the livability of the area because the farmers live and work in the same place.

Parties then entered into an extensive discussion of ORS 215.283, the category of uses available within the statute for an energy facility, the relationship of ORS 215.283 to ORS 215.296, and the relevance of Klamath County Land Development Ordinance 54.040(C). SORO argued that the Council should conduct rulemaking to clarify the issues.

Parties also addressed a late submittal by COB that offers alternative findings under ORS 215.283(2)(g). Mr. Sullivan noted that he would file a motion to strike the submittal or a brief in response should the Council accept the submittal.

Chair Green summarized the issues involved. Ms. Gustafson clarified her evaluation in the Recommended Order of SORO's arguments on this issue.

Chair Green asked the Department of Justice for context for the statutes under discussion. Mr. Whitman discussed other energy facilities for comparison and noted Supreme Court case law relevant to the discussion. Parties continued their discussion about how portions of the proposed facility should be analyzed under land use law.

Bob Shiprack noted the complexity of the land use laws under discussion, especially for someone that isn't an attorney. More discussion ensued prior to adjournment for the evening.

Chair Green adjourned the meeting at 9 p.m.

Chair Green called the meeting to order. Parties continued discussing how portions of a facility should be categorized under land use law and which portions require an alternatives analysis.

Mr. Whitman said this issue came up because the applicant suggested that the Council adopt alternative findings justifying why the lateral facilities for this power plant should be on farmland. The Council's practice in dealing with lateral facilities is not to consider those laterals as part of the power plant, but to consider them as separate facilities under a separate provision of the farm-use laws. There is not any definitive case law on the subject so the applicant suggested alternative findings. DOJ is recommending the Council follow its usual practice. Mr. Whitman noted that DOJ recommends that the Council grant SORO's motion to strike COB's alternative findings and move forward with the Recommended Order. He explained that if the Council chooses to adopt the alternative findings, the Hearing Officer would need to reopen the evidentiary record, allow testimony from other parties on this issue, and develop a Supplemental Recommended Order for the Council.

Chair Green asked for comments from the parties.

Tim McMahan said the applicant was being cautious in proposing the alternative findings as an "insurance policy" and apologized again for the late submission.

Mr. Sullivan said Mr. Whitman advised him that the issue had been raised previously. Mr. Sullivan also said that if the Council decides to go with the Council's past policy, SORO would accept but disagree with the decision.

Mr. Whitman clarified that COB had raised, but not emphasized, this issue in the public hearing and in the issues list in the pre-hearing order. In the contested case, however, COB presented a different argument on the issue. Mr. Whitman explained that the differences between the current presentation and that raised earlier might mean COB is subject to some form of waiver on the issue.

Chair Green asked for comments from Council members. The Council decided to grant the motion to strike submitted by SORO, not accept the proposed alternative findings from the applicant, and follow the Hearing Officer's recommendation on the interpretation of ORS 215.283.

Compliance with ORS 215.296 and LDC § 54.040(C)

Mr. Whitman said the first issue raised by Mr. Sullivan, representing SORO and Water for Life, was the question of whether the lateral facilities should be addressed under 215.283 (1)(d) or (2)(g). He further recommended the Council follow the Recommended Order in treating the laterals under (1)(d), which means that the laterals are not subject to a test under 215.296. The power plant itself is subject to that test.

Chair Green conferred with Council members on this issue. Council members all agreed in favor of the Hearings Officer's Recommended Order. After further discussion, Council members also agreed that no rulemaking should occur on the issue and that they were in support of the Hearing Officer's Recommended Order on other arguments SORO raised on this issue.

Mr. Whitman reviewed a sub-issue raised by SORO: That the nature, extent and location of the proposed use are not sufficiently specified in the application or the Recommended Order. He described relevant exhibits that provided the information SORO claimed had not been sufficiently specified.

Mr. Sullivan asked if the easements for the wells are included in the facility area. Mr. Whitman said they are not included in the 50.6 acres designated for the energy facility itself and under consideration for a Goal 3 exception. Mr. Sullivan asked whether the infiltration basin and energy facility irrigation areas were included. Mr. Whitman said they are included in the 50.6 acres. He also pointed out that the total acreage under consideration for a Goal 3 exception would include the acreage for back-up wastewater evaporation ponds only if the reclaimed land application area fails to function as designed. That acreage is not currently included in the 50.6 acres.

Mr. Sullivan asked if there is a proposal to give a permit for that backup area in these proceedings. Dr. Van Horn said the evaporation pond system is considered under the Water Pollution Control Facilities (WPCF) permit within the site certificate. Mr. Whitman said the evaporation pond system is considered under 215.283 (2)(g) as a part of the facility. The system has been analyzed, and is in the Recommended Order.

Chair Green asked about the amount of acreage the evaporation pond system adds to the facility. Mr. McMahan said 40.2 acres, as has been identified in the record a number of times. Chair Green raised the issue about whether the evaporation pond system acreage should be counted for the purpose of the Goal 3 exception. Parties discussed the issue. Ms. Gustafson noted that the Recommended Order did not analyze the issue because it wasn't an issue in the contested case.

Mr. Sullivan asked who would decide whether the backup system is needed. Dr. Van Horn said DEQ would decide using a set of triggering criteria. She noted that the majority of the discussion in the Proposed Order on the issue is within the discussion of the WPCF permit.

Chair Green discussed with Council members the 215.283 (2)(g) issue and all were in agreement to include the site boundaries in the Final Order. Chair Green also asked Council members about the issue of shifting of the burden of proof. Ms. Gustafson said the Proposed Order had the finding that no evidence was presented that would indicate there would be any impact; the issue was raised that

it impermissibly shifted the burden. The Recommended Order addressed the issue and concluded it is the applicant's burden, and the applicant has sustained its burden, to establish that there will not be significant impacts, based on evidence in the record. Council members were in agreement on the issue.

Compliance with 44.030(C)

Ms. Gustafson reviewed the relevant discussion in the Recommended Order. She noted that SORO had raised the issue of whether the applicant could rely on the surrounding property it would own to comply with this standard. The applicant has agreed to keep this acreage in farmland. In addition, SORO raised the general issue of the project having a significant adverse impact on the livability of the community. Ms. Gustafson noted there is conflicting evidence in the record. Ms. Gustafson said considering all of the facts, she has concluded in the Recommended Order that the applicant has met the standard.

Mr. Sullivan said the applicant had the burden of proof and failed to supply sufficient evidence. He pointed out that the applicant would not have optioned an extra 2,500 acres around the facility if there weren't concerns about impacts. He said that the applicant's optioned acreage should not be counted as part of the surrounding land affected. The parties discussed the issue.

Martha Dibblee asked for Mr. McMahan to point out the boundaries. He reviewed the map. Bob Shiprack asked Mr. McMahan about the analysis of the abutting properties. Mr. McMahan referred to Figure K-5, which has an analysis of the agricultural activities in these areas. Mr. Shiprack asked about the additional acreage purchased that will be used for farmland, and who will be farming the land. Discussion ensued about the farm use of the optioned land, boundaries, surrounding properties and appropriate review criteria.

Chair Green reviewed each issue and Council members expressed agreement with the Recommended Order.

Because of time constraints, Mr. Sullivan asked for clarification about further agenda items.

Compliance with Klamath County Comprehensive Plan Policies

Ms. Gustafson said the Council recommended on the previous day that consideration of compliance on this issue be handled with an omnibus motion.

LDC 57.060(A) Electric Transmission Line

Ms. Gustafson reviewed her recommendation in the Recommended Order and SORO's challenge to her recommendation. At issue are the size of the transmission line swath, its partial location in a deer winter range area, and its appropriate legal analysis under the Council's rules. The parties discussed the issue.

Hans Neukomm asked if the local codes are more stringent than the Council standards on this issue. Mr. McMahan replied that the Council's are more stringent.

Mr. Sullivan asked if the swath would be fenced, which would have a different impact. Dr. Van Horn said it would not.

Chair Green asked Council members for comments. All were in agreement with the Recommended Order.

Goal 4 Exception

Ms. Gustafson reviewed her recommendation in the Recommended Order on the need for a Goal 4 exception for the right-of-way corridor for the proposed transmission line. She noted that the local code allows for a right of way corridor of 100 feet or less and the applicant is proposing a 154-foot wide corridor. SORO has challenged whether the Goal 4 exception needs to be more expansive. The parties discussed the issue.

Mr. Sullivan said the issue is whether the transmission line is locationally dependent. SORO's view is that alternatives exist to the transmission line site.

Mr. McMahan noted that the local code allows 100 feet for the placement of structures, but it also permits an additional right of way for vegetative management. Chair Green asked if the transmission lines themselves are constrained to the 100-foot area. Mr. McMahan agreed.

Chair Green asked Council members for comment. Council members agreed with the Recommended Order on the Goal 4 exception.

Other Land Use Standard-Related Issues.

SORO raised the issue of the applicant's failure to request a Goal 3 exception for the proposed water supply system pursuant to ORS 469.504(2). Ms. Gustafson noted that part of the issue had been covered earlier in the Council's meeting. SORO claimed a Goal 3 exception is required because the water system would permanently affect 20.7 acres of EFU land. The Recommended Order found that the water system is correctly analyzed as a permitted use under 283(1)(d) and therefore no Goal exception is required.

Chair Green asked Council members for comments. Council members agreed with the Recommended Order. Chair Green also asked Council members for comments on the ESEE analysis issue tabled yesterday. Council members agreed with the Recommended Order.

PERMIT TO APPROPRIATE THE PUBLIC WATERS

Chair Green said Mr. Sullivan, representing SORO, had to leave prior to the current discussion. Members of SORO are representing SORO. Chair Green clarified the limitations on what is being considered.

Statutory Authority

Ms. Gustafson said the first contested issue is whether the Oregon Water Resources Department (OWRD), rather than the Energy Facility Siting Council (EFSC), has the authority and obligation to decide COB's water permit application. She noted another issue: Does the EFSC process violate the rights of others who have previous permit applications pending with the Water Resources Department?

Courtney Duke, representing Water for Life, said she agreed with the Hearing Officer that previous water permit applications pending do have higher priority than COB's proposed permit. She said that Water for Life acknowledges that the Council has the statutory authority to review and evaluate COB's water permit application, but she said the fact that the Council does so violates the water rights of the people who already have permits or applications in the same area. She further stated the concern that certain water permit applicants or water permit holders in the project area are subject to conditions on their permits to which COB would not be subject. She explained that Water for Life is asking that the Council defer granting COB's water permit until existing permits in the same area are certified.

Glenn Barrett, a board member for Water for Life, reviewed the process of issuing the permits, and made the point that Water for Life believes the water permitting process needs to be made equal so that everyone has the same impacts.

Chair Green asked for other comments.

Margaret Tenold discussed the current water situation in the town of Bonanza and water issues in the area.

Lynn Brock, an officer of SORO, discussed current Department of Water Resources work on water issues in the area and appropriation limits that will be placed on certain area wells. She said that COB should also be subject to the same withdrawal limits.

Peter Mostow reviewed COB's evaluation of its water needs and the water situation in the area, including the project's change from water cooling technology to air cooling technology. He noted that the amount of water that COB would need would be equivalent to the amount needed to farm about 50-100 acres. He later corrected that number to about 33 acres. He reviewed COB's agreement to accept mitigation conditions on its proposed permit to ensure that COB's water use would not affect other water users or water bodies. Mr. Mostow also explained why the Council's approval of COB's water permit would not have

negative impacts on other water permit applications before the Department of Water Resources.

Chair Green asked for more elaboration on the sequence of water permit certification and permit timing. Mr. Mostow said the conditions in COB's permit would be different from conditions on other permits in the area. He noted that the COB permit would contain conditions designed to ensure that the COB water right complies with all the applicable legal standards for issuance of a water right. In regards to the timing, he said no legal principle exists that says the Council must evaluate COB's water right in sequence with some other unspecified group of water rights. He reiterated that the water source for the COB permit would come from a different aquifer than where the community's water is coming from.

Dr. Van Horn explained that the issues presented by the community, SORO, and Water for Life are based on the fact that they don't agree the source of water for most permits in the area and the source of water for the proposed COB permit are separate sources. COB does believe they are separate.

Hans Neukomm asked about a diagram Mr. Mostow presented and what it is based on. Mr. Mostow explained the history of the "Babson well" under discussion for the proposed water right. He said that the well was drilled decades ago, initially as an oil-exploration well, and that its depth is unknown but it is at least more than 2,000 feet deep. Mr. Neukomm asked if the deep aquifer that COB is intending to tap into had been accessed through physical drillings at a previous time. Mr. Mostow said as far as they know, the deep aquifer had been accessed only at this well.

Mr. Barrett discussed the issue of whether the two aquifers were separate and the impact of any mingling of water between the two. He offered background on other permit applications in the area and current water issues in the area. He also discussed the possibility that owners of area wells might have to drill deeper at their own expense should COB's well have an impact on their own. Mr. Barrett also responded to Mr. Mostow's earlier comparison between COB's water use and irrigation water use.

Margaret Tenold discussed the issue of separate aquifers, noting that the Department of Water Resources is fully aware of the possible connection between the two water bearing zones. She discussed issues with the pump test COB conducted on the Babson well.

Lynn Brock said any water impact COB would have would affect existing rights, life, health and livability.

Shannon O'Fallon, Department of Justice and lawyer for the Water Resources Department, said that the Department does not decide on water permit applications in any particular order. When an application is originally filed, the

date the application comes through the door is stamped on the application. The date the application is filed becomes the priority date.

Ms. O'Fallon said pending water permit applications can have different conditions, and legally there are different conditions for different water situations. Under the Department's rules, an application gets put in a different category if there is the potential for substantial interference between a ground water use and surface water. The Department's recommendation to the Council to approve the COB water permit was based in part on the Department's determination that there was no potential for interference for the COB permit. As a legal matter, she said the fact that COB would receive a water right would not affect the processing of the pending applications.

Chair Green and Ms. O'Fallon discussed individual water right applications and conditions, which may be different on each individual application.

Mr. Mostow said COB's water right would be a junior water right, and there are conditions placed on COB's water right that require COB to stop or reduce its water use, or mitigate for its impact, if there is any effect on anybody else in the area.

Mr. Neukomm asked about senior and junior rights and whether conditions that may apply can override the seniority rights. Ms. O'Fallon said generally the senior and junior rights are the determining factor.

Chair Green asked the Council if members feel the Council has the authority to issue the permit and whether the permit should be issued.

Hans Neukomm asked about Water Resources Department well drilling policy. David Stewart-Smith described the proposed action for the Babson well.

Chair Green asked Council members for comments. All Council members agreed with the Recommended Order.

Hydraulic Connection

Ms. Gustafson said Water for Life's fundamental argument was that, if any connection existed between the two water-bearing zones, the Council should deny COB's water permit. She noted a second question for the Council: If the permit is not denied, and there is a connection, will the connection cause significant injury to the surrounding users? The Recommended Order recommends that the Council approve a water permit for COB and find that, as conditioned, the COB water permit would not cause significant injury.

Ms. Gustafson said the Water Resources Department came to a different conclusion than the applicant about a potential connection between the two zones. While the Department believes a connection could exist, Jerry Grondin, a

department groundwater specialist, was very clear in his testimony that any impact from the connection would be minuscule, if even measurable, on the surrounding property owner's water rights.

Chair Green confirmed that, based on the testimony, the Hearings Officer did find a connection between the water zones. Chair Green asked Mr. Mostow about COB's position.

Mr. Mostow said that COB's position is that there is no connection, but that COB cannot definitively prove no connection. In consultation with the Water Resources Department, COB agreed to accept permit conditions to account for any potential connection. He said COB is not challenging the Department of Water Resource's finding of a potential connection.

Mr. Barrett said the applicant has tried to work with WRD, but he feels the work has not gone far enough. He again asked the question about other permit holders potentially having to drill a well to the same depth as COB's. Ms. O'Fallon said that she understands the conditions put on COB's permit would kick in to protect other water users before they had to drill deeper. COB would have to reduce or cease their water use before a senior water user would have to drill down deeper. Mr. Barrett asked about the circumstances surrounding any decision to enforce mitigation on COB's permit. Chair Green asked what the conditions require.

Mr. Mostow said COB permit conditions would require a monitoring network around the proposed wells and continuous monitoring of water levels in both the deep and the shallow water zones. He said COB is required to provide the Water Resource Department the data in almost real time about what is happening in the monitoring wells, as well as in COB's production wells.

Mr. Whitman talked about key water permit and mitigation points in the Proposed and Recommended Orders. The permit would require the monitoring system, which is one of the key ways to see any effect.

Mr. Whitman explained the general Department of Water Resources process for reviewing a groundwater permit application, including criteria for determining substantial interference. He noted that, in this case, the Department of Water Resources has asserted that, although there is a likely connection, it doesn't rise to the level of potential for substantial interference. The consequence of that evaluation is that water is presumed to be available for the COB permit. Ms. O'Fallon explained more details about the Department's permit evaluation.

Mr. Barrett asked if the Council could condition approval of the COB permit with the requirement that the Department of Water Resources review other pending area permits before issuing one for COB.

Mr. Mostow said the concern he would have is that converting a permit to a certificate is a statutory process, and that may be outside the scope of EFSC authority. Chair Green asked legal counsel for input. Mr. Whitman responded by saying that EFSC is implementing Department of Water Resources statutes. He also said he would be hesitant to say the Council does not have authority to go outside those statutes and pose a condition. He also said if a condition is imposed it has to be tied into to a statutory standard.

Gail Whitsett, Water for Life, said she was requested by the Department of Water Resources to be a reviewer on the department's area groundwater report. She offered details about her understanding of the area's water situation and COB's pump test.

Ms. Whitsett also asked if the mitigation proposed for COB's permit would set precedent, and, if so, is the Council willing to do that. Mr. Whitman said mitigation examples for permits exist throughout the state, although particular conditions are tailored to specific circumstances. Mr. Whitman read the conditions to be imposed for COB water permit mitigation.

Chair Green asked Ms. Gustafson about evidence for injury other than Jerry Grondin's groundwater report or COB's pump test. Ms. Gustafson said there was no other evidence.

Mr. Mostow offered background on the COB pump test. Lyn Brock countered with further information. The parties continued to discuss the water permitting process, including the definition of substantial interference.

Ms. Brock asked that the Council require COB to perform additional testing prior to issuing the permit to prove one way or the other the connectivity issue. She also asked if COB would have to pay any expenses tied to enforcing water permit conditions.

Mr. Whitman said any enforcement would be performed by the agency issuing the permit.

Chair Green addressed a member of the audience who objected to a conversation he just overheard between Council member Bob Shiprack and COB consultant Mark Bricker. Chair Green asked Mr. Shiprack about the conversation and he explained. Mr. Shiprack said he had wanted to know about the reference to the Uniform Building Code in COB's application because of potential code changes. Chair Green said such conversations need to be on the record if they relate to the application under consideration. She stated that Council members, applicant representatives and parties should not be having conversations about the application outside of the record.

Mr. Whitman said the Council now was required to ask if any party wants to rebut anything said during the Shiprack-Bricker conversation. Mr. Bricker was asked to give his side of the conversation. Mr. Bricker confirmed what Mr. Shiprack said and that he had replied to Mr. Shiprack that he would look into the code issue.

Chair Green reviewed water permit issues. She asked if Council members were satisfied that the applicant has met its burden to obtain the water permit, and that there will not be injury to water rights based upon proposed permit conditions and the evidence in the record. She also noted an earlier discussion about whether another system should be set up to provide additional protection to prevent injury to other permit holders. Mr. Tegart said he agreed with the Hearing Officer's Recommended Order and doesn't see the need to add any additional conditions. Mr. Neukomm, Mr. Shiprack, Ms. Dibblee and Chair Green agreed. Chair Green explained her concern about imposing additional conditions.

Conditions Imposed and Deferral

Ms. Gustafson explained the contested issue at hand, which is whether imposing mitigation conditions improperly defers compliance with EFSC standards. She noted that the Recommended Order determines there is no deferral of compliance. She said that the Department of Water Resources' recommendation states that COB met the requirements to satisfy standards, and the conditions imposed will ensure continued compliance.

Courtney Duke noted that Water for Life does not agree with the finding and discussed her concerns.

Ms. Tenold asserted that injury is already occurring to the Bonanza Big Springs, and that any COB water use will further the injury.

Mr. Barrett asked about the applicable statute that covers mitigation for injury between two water-bearing zones. Ms. O'Fallon said any mitigation plan would have to comply with the statutes and rules regarding contamination. Mr. Whitman said there are two sets of controls, one is contamination and one is co-mingling. There was further discussion of the permit conditions.

Mr. Whitman said the Council could ask staff to look at clarifying the conditions in terms of construction standards, co-mingling, and artificial recharge. The conditions can be made more specific.

Mr. Mostow said the applicant would be fine with more specific conditions, but does believe the law already encompasses them.

Chair Green asked Council members if they are in agreement with adding the more specific conditions. All members agreed.

Ms. Gustafson also referred to another Water for Life issue. She said she had denied Water for Life's Motion to Admit Selected Documents and Offer of Proof. A Water for Life spokesperson said the organization was withdrawing the motion. Chair Green re-affirmed that Ms. Gustafson did not include the motion in the record. Ms. Gustafson also said there was no exception file on her denial.

OTHER EFSC STANDARDS IN OAR CHAPTER 345, DIVISION 22

Jan Prewitt said that the only EFSC standard subject to a filed exception during the contested case process was the structural standard.

OAR 345-022-0020, Structural Standard

Ms. Gustafson explained the exception filed by Gail Whitsett and her findings in the Recommended Order. She noted that the basis of the exception is the assertion that the Department has not done enough to satisfy the structural standard. She said that significant testimony exists in the record on this issue.

Ms. Gustafson said that, based on input during the draft order stage, the department had performed additional work on structural issues. She said the way she read the exception, it seemed to question whether other issues might have been missed given that the Department had to make changes to its structural requirements in the order based on public input. Ms. Gustafson said the Recommended Order recommends that the Council find the applicant has sustained its burden to satisfy the structural standard.

Chair Green asked about internal Department of Energy e-mails in the record that address earlier public comments and additional work on the structural section of the Department's proposed order.

Ms. Whitsett explained her issues with the finding that the applicant met the structural standard and offered information about local earthquake issues. She noted her concern that OAR 345-022-0020 (b)&(c) appear to require certain studies before a site permit is issued, and that those studies have not occurred.

Chair Green reviewed Ms. Whitsett's arguments. David Stewart-Smith offered insight into the Council's usual general approach on structural standard tests. He explained that studies such as paleoseismic trenching, along with other testing, usually are done after the site certificate is issued but before construction begins. The reason is because trenching, for example, can involve a significant on-site impact, and it is a large undertaking. Such trenching is an inappropriate land-use impact until after a site certificate approval.

Jan Prewitt read the introductory paragraph from Chapter 21, OAR 345.021.0010(1)(h) (on Page 9 of the Council's rulebook, Division 21): "Exhibit H contains information from reasonably available sources regarding the geological and soil stability of the site and vicinity, providing evidence to support

findings by the Council as required by 345-022-0020.” Ms. Prewitt offered the context to help the Council understand what an applicant is required to submit in order to have a complete application on the structural standard.

Mr. Mostow explained some of the first level of seismic tests that have been done already and the determination that there is not a fatal flaw associated with this site, which was confirmed by DOGAMI. He also referred to the internal emails, and the fact they were from DOE staff in the development stages, which are early findings prior to conclusions.

Lynn Brock asked Mr. Whitman again about the language in the statute, referring to the fact the seismic testing has to be done before the certificate is issued. Adam Bless, Department of Energy, replied by referring to Division 27, which is in all site certificates.

Ms. Gustafson said the Council needs to find that the applicant has complied with the standard or established the feasibility of compliance prior to imposing conditions.

Mr. Whitman said the Council’s structural standard should be read in context not only with the mandatory condition referred to but also with the application requirements in Division 21. (**More talk by Mr. Whitman and Chair Green occurred but was missed during a changing of tapes.**)

Ms. Brock stated that the applicant should adequately characterize the site, and that the applicant had stated the fault was a mile away when in fact it is directly beneath the proposed site.

Mr. Mostow agreed that the fault does angle under the site, that it was analyzed, and the conclusion was that it is safe.

Chair Green asked for comments from Council members. Martha Dibblee suggested adding a clarifying sentence relative to the application standards as discussed earlier. All Council members agreed to accept the Recommended Order.

Requirements Under OAR 345.027.0027(1)

Jan Prewitt explained that the rule at issue is a mandatory condition that directs that the Council will include in the site certificate as conditions any representations deemed by the Council to be binding commitments made by the applicant. In the Recommended Order, the Hearing Officer brought to the Council’s attention that there were some commitments that had been made. To the extent that these commitments are not already contained within the order, the Council needs to direct the staff to find those commitments and put them into the site certificate as additional conditions to the site certificate. Ms. Gustafson said they are already listed as conditions of approval.

Jan Prewitt said the Council would need to vote on the mandatory conditions that were included in the Supplemental Proposed Order because they need to be made a part of the Recommended Order.

OTHER APPLICABLE REGULATORY REQUIREMENTS

There were no exceptions to these issues.

MISCELLANEOUS MATTERS

There were no exceptions to these issues.

IV. RECOMMENDATION CONCLUSION, ORDER AND CONDITIONS

Jan Prewitt offered additional clarification about the Council's procedure for adopting the Order. She said a Final Order will be drafted and a Council meeting scheduled to decide whether the Final Order as drafted conforms to the decision that the Council has made. The Final Order will be made available to parties, but the only issue is whether the Final Order reflects the Council's decision. Chair Green confirmed that parties to the contested case would be able to comment only on whether the Order agrees with what the Council directed staff to do.

Action Item II. C. 1 Vote: Martha Dibblee moved to direct staff to draft the Final Order and bring it back to the Council for its approval, approving the site certificate for the COB facility. Bob Shiprack seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

Action Item II. C. 2 Vote: Martha Dibblee moved that the Final Order as prepared by staff should include the tentative determinations made by the Council at this meeting, incorporated into the Hearings Officer's Recommended Order as modified by the Supplemental Recommended Order. Bob Shiprack seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

Action Item II. C. 3 Vote: Martha Dibblee moved that Staff be instructed to also incorporate into the Recommended Order the Proposed Order and the Supplemental Proposed Order, except as specifically modified by the Recommended Order, as modified by the Supplemental Recommended Order. (Clarification was given that this is to

integrate all the orders so they are consistent and not redundant.) Bob Shiprack seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

Action Item II. C. 4 Vote: Martha Dibblee moved that staff is also instructed and authorized to include in the Final Order supplemental reasoning or findings necessary to respond to the exceptions as deliberated during this meeting. (Clarification was made to authorize staff to specifically incorporate the additional reasoning and also as general authority to make as a legal matter that the Final Order is legally sufficient.) Bob Shiprack seconded the motion and Council was polled.

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

Action Item II. C. 5 Vote: Bob Shiprack moved that the Final Order determines that any motions that haven't been specifically granted during the proceeding are deemed denied. Martha Dibblee seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

Chair Green and legal counsel discussed letters submitted by people who could not attend the meeting and whether they should be admitted to the record. Mr. Whitman recommended looking at the two letters to decide whether they should be admitted for the record. Mr. McMahan said COB had no objection to the letters entering the record.

Action Item II. C. 6 Vote: Karen Green moved to include two letters received in the record but that the letters will not change the decision on the Order. Bob Shiprack seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

Action Item II. D. Vote: Martha Dibblee moved to deny the rulemaking request on the issues presented by SORO concerning the COB Facility and to draft an order pursuant to that for Chair's signature. David Tegart seconded the motion and Council was polled:

Martha Dibblee	Yes	Bob Shiprack	Yes
Karen Green	Yes	David Tegart	Yes
Hans Neukomm	Yes		

Chair Green also said copies of the tapes are available at \$5.00 per tape. Contact Sisily Fleming, Administrative Assistant.

Chair Green adjourned the meeting at 3:12 p.m.