

OREGON'S SITING PROCESS FOR LARGE WIND ENERGY FACILITIES

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Abstract

Under Oregon law, developers of large energy facilities must obtain a site certificate before constructing or operating a proposed facility. The authority to issue site certificates rests with the Energy Facility Siting Council. The Oregon Office of Energy staffs the siting process and makes recommendations to the Siting Council based on a set of siting standards that apply to all large energy facilities throughout the state. Under recent legislation, wind energy facilities with a nominal generating capacity of 105 megawatts or more must apply for a site certificate. Developers of smaller wind facilities can obtain separate approvals from local land use planning authorities and individual state permitting agencies. However, they may instead choose to obtain a site certificate to take advantage of the consolidated process at the state-level. More information about the state-level siting process is available from the Office of Energy's web site at www.energy.state.or.us/siting/sitehm.htm.

I. State Energy Policy

The context for siting large wind energy facilities in Oregon is the state's energy policy. Oregon's preference for renewable energy is reflected in legislative policy statements that have been a part of Oregon's energy policy for a quarter century. Oregon is a state that has a care that "future generations not be left a legacy of vanished or depleted resources" as a result of a "growth in demand for nonrenewable energy forms" (ORS¹ 469.010(1)). Oregon is a state that seeks to "promote the efficient use of energy resources and to develop permanently sustainable energy resources" (ORS 469.010(2)).

The process for siting and operating large energy facilities in the state reflects the state's policy of preserving a legacy and protecting resources. The energy facility siting policy calls for "protection of public health and safety" and "compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of this state" (ORS 469.310).

II. State-Level Siting Process

1) Site Certificate Required

Before a large energy facility can be built or operated in the state, Oregon law requires a permit, called a "site certificate" (ORS 469.320). The Oregon Energy Facility Siting Council makes decisions about siting most large energy facilities and issuing site certificates. The Siting Council is a seven-member board appointed by the Governor. Its members are citizen volunteers. None of the members is a state agency official or employee. The members serve on a volunteer basis and receive only reimbursement of their travel expenses.

The Oregon Office of Energy is a state agency. Within the agency, the Energy Resources Division serves as staff to the Siting Council. The Energy Resources staff receives site certificate applications and performs a detailed review and analysis. Sometimes the Office assigns technical review tasks to outside consultants. The Office of Energy is the public's main point of contact for information about pending applications.

Rules adopted by the Siting Council govern the review of an application. At the conclusion of its review, the Office of Energy makes a formal recommendation to the Siting Council. If the Office of Energy

¹ Oregon Revised Statutes

recommends approval of a site certificate, the Office will also recommend site certificate conditions. The Siting Council then decides whether to adopt the Office of Energy's recommendation.

The site certificate is a consolidated state permit. If the Siting Council issues a site certificate, then other state and local government permits required for siting the facility must also be issued. Other permits may include Conditional Use Permits for land use, Water Rights, Wetlands Removal or Fill Permits and environmental permits based on state regulations. The state agencies and local governments that issue such permits are bound by the site certificate. Once a site certificate has been issued, these agencies and local governments must issue their permits, subject only to conditions contained in the site certificate.

The site certificate system provides for coordination of permitting through one state agency – the Office of Energy. There is one public hearing, one contested case and one avenue for appeal of the decision. There is only one level of judicial review of a site certificate. Appeals go directly to the Oregon Supreme Court.

The site certificate process leads to a “yes or no” decision. The Siting Council *must* issue a site certificate if the proposed energy facility meets the siting standards. If the proposed facility does not meet the standards, the Siting Council *must* deny the site certificate. The Siting Council can, and does, apply conditions to its approval of a site certificate. However, the Siting Council does not select the location of a proposed energy facility and cannot require a developer to locate a facility somewhere else.

2) Notice of Intent

The standard siting process consists of two phases: a notice of intent (or pre-application) phase and the site certificate application phase. However, for all proposed wind facilities that the Siting Council is likely to see in the future, there will be no notice of intent required. That is because most large wind energy facilities are eligible for an expedited review process that eliminates the notice of intent phase. Only proposed wind facilities that would have a nominal generating capacity of 300 megawatts or more must submit a notice of intent.

Nevertheless, a notice of intent is an important part of the standard siting process and serves several very useful purposes. It gives state agencies and the public a “heads-up” about a proposed energy facility; that is, it provides early, general information about the nature and location of a proposed facility. It serves a “scoping” function of early identification of issues, problems, areas of concern and potential opposition to a project. It provides time to work with affected property owners and local city and county governments before preparation of the site certificate application. It gives notice to state agencies that allows them to give preliminary comments and raise questions that must be answered sooner or later. It allows state agencies to identify the staff contacts who will work with the applicant and the Office of Energy on the project. However, the notice of intent is just that: a notice. It does not result in approval of a project. It does not provide sufficient information for the detailed analysis that will be required before the Siting Council can approve a site certificate.

When the Office of Energy receives a notice of intent, it issues a public notice that describes the proposed energy facility and the process of review. The Office holds a public meeting in the vicinity of the proposed facility site. At the meeting, the public can comment on the proposed facility, ask questions and get information about the state-level siting process. After the public meeting, the Office of Energy sends a project order to the applicant. The project order contains specific requirements for the applicant to follow in preparing the site certificate application, including a requirement to respond to public concerns identified by the Office based on public comments.

3) Application for a Site Certificate

In a standard review, and in the expedited review that applies to most large wind facilities that will go through the state-level siting process, the site certificate application contains detailed information about the project. In the application, the applicant provides evidence to support findings by the Siting Council

on the applicable standards. The Office of Energy will ask for additional information, if necessary, to “complete” the application. These requests for additional information are based on the Office of Energy’s own review and on comments received from other state agencies, affected local governments, Native American tribes and the general public.

4) Draft Proposed Order

An application is considered “filed” when the Office of Energy finds that it is complete with the inclusion of information the applicant has submitted in response to requests for additional information. Other state agencies, local governments and tribes review the complete application and provide substantive comments to the Office of Energy. The Office analyzes the information for compliance with the siting standards. The Office then prepares a draft proposed order. Although the Office has legal authority to recommend denial of a site certificate in the draft proposed order, it is likely that the developer of any facility unable to meet the siting standards would withdraw the application. Thus, typically a draft proposed order will contain the Office of Energy’s preliminary recommendation to approve a site certificate subject to recommended conditions.

5) Public Hearing

After issuing the draft proposed order, the Office holds a public hearing. The public hearing provides the final opportunity for the public to comment on the record and to raise issues of concern. If someone opposes construction of a proposed energy facility, the person must appear at the public hearing in person or in writing and explain the basis of the opposition to the project. The person must raise the issue with sufficient specificity to allow the Siting Council (and the applicant) to respond. That is, the person must present facts that support the person’s position.

The requirement to raise issues at the public hearing is a “raise it or waive it” policy. If an issue is not raised at the public hearing, it is waived from later consideration at the contested case phase or on appeal.

After the public hearing, the Office of Energy presents the draft proposed order to the Siting Council and summarizes for the Council the comments made at the public hearing. This presentation of the draft proposed order is done at a meeting of the Council that is open to the public. Council members may raise their own questions or concerns and may direct the Office of Energy to respond to specific issues or modify language in the draft proposed order. The Council does not make a decision on the merits of the application at this meeting.

6) Proposed Order

After the Council review meeting, the Office of Energy issues a proposed order. That is, the Office of Energy revises its *draft* proposed order, taking into account comments received at the public hearing and any direction or instructions from the Council. At the time it issues the proposed order, the Office of Energy also issues a contested case notice.

7) Contested Case Proceeding

For all state-level siting of wind facilities, and for most other large energy facilities, the contested case proceeding is mandatory under Oregon law. However, although the proceeding itself is mandatory, there may not always be an actual “contest.” Any person wanting to oppose the project must petition for party status in the contested case proceeding. If no one opposes the project, then there will be no one requesting party status. In that case, the hearing officer closes the proceeding and refers the matter back to the Siting Council for final decision.

If someone opposes the project and submits a petition for party status, the hearing officer must decide whether that person is eligible to be a party. To be eligible, the person must have an interest in the outcome of the proceeding. That is, the person must demonstrate a personal or public interest that the Siting Council’s decision could affect. The hearing officer must consider whether that interest is within the scope of the Siting Council’s jurisdiction.

Once the hearing officer decides a person is eligible to be a party in the contested case, the hearing officer must decide whether issues presented by that person were sufficiently raised at the public hearing. If an issue was not raised at the public hearing, then it cannot be raised in the contested case. If the issue was raised, the hearing officer will grant party status, and what follows is a substantial contested case proceeding. It is a relatively formal legal proceeding governed by a set of procedural rules. At the conclusion of the contested case proceeding, the hearing officer issues a proposed contested case order. The matter is then referred back to the Siting Council for final decision.

8) Siting Council Decision

The Siting Council considers both the proposed order issued earlier by the Office of Energy and the hearing officer's proposed contested case order. The Council does its final deliberation in a meeting that is open to the public. The Siting Council may adopt, modify or reject the proposed orders. Typically, the Office of Energy will present a draft final order to aid the Council in its deliberation. The draft final order will include a summary of the contested case proceeding. The result of the Council's deliberation is a final order. If the Council decides that the proposed facility meets the standards, the final order will grant issuance of a site certificate. The site certificate itself is separate from the final order. It represents a binding agreement (a contract) between the State of Oregon and the applicant. The site certificate authorizes the applicant to construct and operate an energy facility on an approved site, subject to conditions specified in the certificate.

9) Appeal

There is only one opportunity for appeal of the Siting Council's site certificate decision. The Oregon Supreme Court has exclusive authority to hear appeals of a site certificate. Only parties in the contested case can appeal. An appeal must be filed within 60 days after the Siting Council's final order (ORS 469.403).

III. Contrasting State-Level and Local-Level Siting

There are significant differences between the state-level siting process through the Siting Council (described above) and local-level siting decisions. A developer proposing a wind energy facility with a nominal generating capacity of less than 105 megawatts may be faced with a local-level siting process. In a local-level process, the developer would typically apply to the land use planning authority in the local jurisdiction where the proposed facility would be located and follow the local procedures to obtain a conditional use permit. At the same time, the developer would need to contact all the appropriate state agencies to make sure that the proposed facility would qualify under all other permitting regulations affecting approval of the site.

In contrast, the state-level siting process is a consolidated process. With one exception, the developer would apply to one state agency – the Oregon Office of Energy – to obtain approval of all state permits that apply to the siting decision. There is one exception. For certain federally-delegated permits, the applicant must apply to the delegated agency. The Oregon Department of Environmental Quality administers permits required under federal air and water quality regulations. Except for the federally-delegated programs, the decision of the Siting Council is binding on all state agencies and local governments. At the local level, a conditional use permit decision is binding on local government but not on state agencies. Each state agency that issues a permit makes an independent decision.

A defined set of objective standards governs the state-level siting decision. These standards apply to all large energy facilities throughout the state. Local-level siting is subject to local procedures and ordinances that vary from county to county and city to city. Most local land use ordinances address energy facility siting in a superficial way, if they address it at all. It may not be clear what standards the local jurisdiction will apply in deciding whether to issue a conditional use permit.

Although the applicant deals directly with the Office of Energy for processing an application for a site certificate, the ultimate siting decision is in the hands of a council made up of citizen volunteers appointed by the Governor. The Oregon Energy Facility Siting Council makes the decision based on the standards. It is a “yes or no” decision. If the facility meets the standards, the Siting Council must issue a site certificate; if the facility does not meet the standards, the Council will not issue a site certificate. In contrast, local-level conditional use permit decisions are in the hands of local officials. Usually these are elected officials or local government employees, subject to local politics and local influences.

The work of the Siting Council is supported by the Energy Resources staff of the Oregon Office of Energy. The Office is a state agency with more than 20 years experience siting energy facilities. At the local level, local planning departments typically do the staff work. Most planning departments around the state have no experience siting large electric generating facilities. However, at least three Oregon counties now have some experience in siting wind energy facilities because of recent wind development in the state.

In state-level siting, the terms and conditions of the siting decision are written into the site certificate. The site certificate is a legally-binding contract between the applicant and the State of Oregon. Local-level land use decisions are implemented through conditional use permits that are usually less comprehensive.

A site certificate decision by the Council can be appealed only to Oregon Supreme Court. The right to appeal is restricted to parties in the contested case proceeding. An appeal must be filed with the Court within 60 days after the Council’s decision. At the local level, land use decisions are subject to appeal through three levels of judicial review: the Land Use Board of Appeals, the Oregon Court of Appeals and the Oregon Supreme Court. In addition, some matters of local siting could be subject to suit at the trial court level.

IV. Oregon Siting Standards

The state-level siting standards address the applicant’s qualifications and the effects of a proposed energy facility on the environment, public safety, land use and resources important to the community or locality where the facility is proposed. The Siting Council imposes conditions in the site certificate to protect public safety and to address other applicable laws, in addition to conditions based on the standards.

The basic standards that apply to all large energy facilities under the state-level review process are found in the Oregon Administrative Rules (OAR) Chapter 345, Division 22. In addition, Division 24 contains specific standards that apply to wind facilities and additional specific standards for other types of facilities. Most of these standards address public health and safety concerns. In 1997, the Oregon legislature authorized the Council to adopt standards for carbon dioxide emissions from energy facilities. The carbon dioxide emissions standards are in Division 24 as well. Division 23 contains standards requiring a demonstration of the need for the proposed facility. However, the need standard applies only to non-generating facilities.

Applicants should be mindful of the requirement to comply with other statutes, regulations and permits that are outside the site certificate process. The Siting Council has no jurisdiction over federally-delegated permits, such as National Pollutant Discharge Elimination System (NPDES) permits that address water quality or Air Contaminant Discharge Permits (ACDP) that address air quality. Also excluded from the siting process are permits related to detailed design, construction and operation specifications, such as building permits and special permits required by county road departments.

1) Organizational Expertise (OAR 345-022-0010)

This standard looks at the applicant’s ability to successfully construct and operate the proposed facility and to comply with applicable rules and site certificate conditions. The Organizational Expertise standard also assesses the applicant’s ability to restore the site. Applicants must demonstrate the ability to do an effective and conscientious job of mitigating impacts and meeting the commitments they make to the state

and to the local community. Applicants typically express commitments to mitigate and minimize the impacts of the facility, and this standard requires that they show they have the ability to keep those commitments.

2) Retirement and Financial Assurance (OAR 345-022-0050)

This standard addresses two issues regarding retirement of the facility. The first is whether the site can be restored to a useful, non-hazardous condition. The second is whether the applicant can obtain a bond or letter of credit for the estimated cost of retirement. The applicant must explain how the site could be restored when operation of the facility comes to an end or if construction is halted before the facility becomes operational. The Siting Council must decide whether the proposed restoration would leave the site in a useful, non-hazardous condition. The applicant must provide an estimate of site restoration costs. The Siting Council analyzes the basis for the applicant's estimate and, if necessary, adjusts the amount. A site certificate condition requires the certificate holder to obtain a bond or letter of credit to provide funds for restoration of the site if the certificate holder fails in its responsibility to restore the site. The Council uses the estimate to set the value of the security. The applicant must provide evidence that it can obtain the required bond or letter of credit.

3) Land Use (OAR 345-022-0030)

The Land Use standard requires the proposed facility to comply with the statewide land use planning goals. Since 1973, Oregon has maintained a statewide program for land use planning based on a set of 19 statewide planning goals. The goals express the state's policies on land use and related matters, such as citizen involvement, housing and natural resources. Local comprehensive planning implements Oregon's statewide land use goals. State law requires each city and county to adopt a comprehensive plan and the zoning and land-division ordinances needed to put the plan into effect. Local comprehensive plans must be consistent with the statewide land use goals.

Although most developers of large energy facilities have chosen to have the Siting Council decide whether the proposed facility complies with the land use goals, developers can choose instead to have the local jurisdiction make the land use decision, following local procedures. The Siting Council then adopts the local government decision.

If the applicant chooses to have the Siting Council make the decision under the Land Use standard, the Council applies local land use ordinances to determine whether the proposed energy facility is an allowed land use. In some cases, the Council must apply state statutes and regulations that are directly applicable to the siting decision, if the local jurisdiction has not updated its comprehensive plan and implementing ordinances to comply with those statutes and regulations.

If the proposed facility does not comply with one or more local ordinances, the Siting Council can make the required land use finding by directly applying the statewide land use goals. Furthermore, if the proposed facility cannot comply with a statewide land use goal, the Council has authority to take an exception to the state goal. The Land Use standard includes criteria that the Council follows to take an exception.

4) Public Services (OAR 345-022-0110)

The Public Services standard addresses the impact of construction and operation of the facility on the ability of public and private providers near the facility to deliver important public services. The applicant must provide an assessment of public services in the area, including sewers and sewage treatment, water supply, stormwater drainage, solid waste management, housing, traffic safety, police and fire protection, health care and schools. The applicant must evaluate the effect of the facility on those public services and, if necessary, propose mitigation measures.

5) Waste Minimization (OAR 345-022-0120)

This standard assures that an applicant plans for reducing solid waste and wastewater generated by construction and operation of the proposed facility. The standard requires the certificate holder to recycle wastes or otherwise dispose of wastes properly. The Siting Council has applied this standard to encourage developers to use state of the art techniques to reduce their consumptive use of water.

6) Structural Standard (OAR 345-022-0020)

The Structural standard addresses seismic hazards. It protects public health and safety, including the safety of facility workers. In many cases, compliance with the Oregon Building Code will accomplish adequate protection from such hazards. The standard generally requires a commitment from the applicant to secure all needed building permits and meet the Oregon Building Code. However, the Code does not cover some types of facilities. In addition, some sites may have specific geological features or seismic hazards that go beyond the seismic zones the Code addresses. For this reason, the structural standard is largely a site characterization standard. Before the Council can find that the site is suitable, the applicant must do enough site-specific work to identify potential faults or other hazards and to assess the extent of those hazards. This is especially important in parts of the state where detailed geological exploration and mapping have not yet been done.

7) Soil Protection (OAR 345-022-0022)

This standard requires the applicant to consider problems such as erosion and drainage that could affect land in the area surrounding the site of a proposed facility. In contrast, the Structural standard addresses seismic hazards affecting the site and the facility itself. In addition, the Soil Protection standard considers the potential impacts on soils in the surrounding area from cooling tower drift and other forms of chemical deposition. Some counties have erosion and drainage control ordinances as part of their land use ordinances. In those counties, the information required under this standard will also apply to the Land Use standard.

8) Protected Areas (OAR 345-022-0040)

This standard prohibits the construction of energy facilities in designated protected areas. The areas that are protected are listed in the standard. Generally, protected areas include national and state parks, national monuments, wilderness areas, wildlife refuges and other areas that have special scenic, natural or environmental value. The standard also ensures that the design, construction and operation of an energy facility located near a protected area will not cause a significant adverse impact to the protected area. The standard has an exception for certain related or supporting facilities (primarily transmission lines or pipelines). Such facilities may be allowed in a protected area if the applicant has studied alternative routes and can demonstrate to the Siting Council that those alternatives would have greater adverse impacts.

9) Scenic and Aesthetic Values (OAR 345-022-0080)

This standard protects scenic values that local or federal land use plans have identified as “significant or important.” In applying the Scenic standard, the Siting Council does not attempt to reconcile conflicting opinion about the general visual impact of the facility. Instead, the standard focuses narrowly on “scenic and aesthetic values identified as significant or important in applicable federal land management plans or in local land use plans in the analysis area.” In making its findings, the Siting Council must answer two questions: 1) Have the applicable land use plans identified any “significant or important” scenic values? 2) Would the visual features of the facility be likely to result in “significant adverse impact” to those values? If there is a significant impact, the applicant must mitigate the impact through design measures or relocation of parts of the facility.

10) Fish and Wildlife Habitat (OAR 345-022-0060)

The Habitat standard requires the proposed facility to comply with wildlife habitat mitigation goals and standards established by the Oregon Department of Fish and Wildlife (ODFW). The specific goals and

standards are set forth in separate ODFW administrative rules (OAR 635-415-0025). The ODFW rules define six “habitat categories.” The categories represent a ranking of habitat types based on the value to wildlife species. For example, Category 1 is habitat that is “irreplaceable, essential habitat for a fish or wildlife species, population, or a unique assemblage of species and is limited on either a physiographic province or site-specific basis, depending on the individual species, population or unique assemblage.” At the lower end of the ranking, Category 6 is habitat that has low potential to become essential or important habitat for fish and wildlife. The value and mitigation requirements for the other habitat categories range in between these extremes.

For each habitat category, the ODFW rules prescribe mitigation goals. For Category 1, the mitigation goal is no loss of quality or quantity of the habitat. This means that there can be no impact on the habitat. To meet the standard, the facility must avoid Category 1 areas. For Category 2 habitat, the mitigation goal is no *net* loss of either habitat quantity or quality *plus* provision of a *net* benefit of habitat quantity or quality. The Council interprets this to mean that both habitat quantity and quality are preserved and either habitat quantity or habitat quality is improved. The goal is achieved by avoidance of impacts or by mitigation of unavoidable impacts through reliable in-kind, in-proximity habitat mitigation to achieve no net loss of either pre-development habitat quantity or quality. In addition, mitigation must provide a net benefit of habitat quantity or quality.

The mitigation goals for lower habitat categories are progressively less restrictive. With each lower category of habitat affected by the facility, the applicant has more flexibility to propose mitigation to compensate for the loss of habitat occupied by the facility.

In applying the Habitat standard, the Siting Council must determine whether the applicant has done appropriate site-specific studies to characterize the fish and wildlife habitat at the site and in the surrounding area. If impacts cannot be avoided, the applicant must propose a habitat mitigation plan. The plan must provide for “reliable in-kind or out-of-kind, in-proximity or off-proximity habitat mitigation.” Often this entails acquiring degraded land, enhancing the land to improve its value as wildlife habitat and assuring the enhancement areas will be set aside and protected from development until the facility is retired.

11) Threatened and Endangered Species (OAR 345-022-0070)

This standard requires that the facility avoid harmful impacts to plant and animal species identified as threatened or endangered under state law. The applicant must conduct appropriate surveys of the proposed site to identify any threatened or endangered species that may be present. Threatened and endangered plant species are listed by the Oregon Department of Agriculture; ODFW lists wildlife species. If a potential risk to the survival or recovery of a threatened or endangered species exists, the applicant must redesign or relocate the facility to avoid that risk or take appropriate mitigation measures.

12) Historic, Cultural and Archaeological Resources (OAR 345-022-0090)

This standard protects the public interest in preserving places that have historic, cultural or archaeological significance. Sites of historic or religious importance to Native American tribes in Oregon are protected by this standard. The standard protects historic and cultural artifacts and prevents permanent loss of the archaeological record unique to particular sites in the state. The applicant must conduct appropriate surveys of the site to identify any historic, cultural or archaeological resources that exist. The applicant may need to redesign or relocate the facility or take other mitigation measures to avoid encroaching on such identified resources.

13) Recreation (OAR 345-022-0100)

The Recreation standard preserves important recreational opportunities on land affected by the proposed facility. The standard includes criteria to evaluate whether a recreational opportunity is “important,” including such considerations as special designation in land management plans, outstanding or unusual

qualities and availability of similar opportunities elsewhere. Where there is an impact, the applicant can propose mitigation measures.

14) Public Health and Safety Standards for Wind Energy Facilities (OAR 345-024-0010)

This standard requires the applicant for a proposed wind facility to demonstrate that the design, construction and operation of the facility will protect the public from turbine blade hazards and electrical hazards.

15) Siting Standards for Wind Energy Facilities (OAR 345-024-0015)

This standard addresses three different characteristics of wind energy facilities: visual impact, accessibility and cumulative impacts. The standard requires the applicant to use measures to reduce the visual impact of wind turbines to the extent possible. It requires measures to restrict public access to turbine towers. The last section of the standard acknowledges the potential for multiple wind energy facilities locating in proximity to one another. This section requires the applicant to minimize the need for new access roads, to combine the location of transmission lines and substations where that is possible and to avoid creating artificial habitat for raptors or raptor prey.

16) Siting Standards for Transmission Lines (OAR 345-024-0090)

This standard addresses public safety issues associated with high-voltage transmission lines. The standard requires the applicant to show that electric fields from transmission facilities do not exceed 9 kilovolts per meter at one meter above the ground surface in areas accessible to the public. Further, the standard requires the applicant to design, construct and operate transmission lines to minimize induced currents.

17) General Standard of Review (OAR 345-022-0000)

The General Standard of Review requires a finding that the proposed facility complies with the requirements of the Oregon energy facility siting statutes and the standards adopted by the Siting Council. Under this standard, the proposed facility must also comply with all other applicable Oregon statutes and administrative rules. In other words, the standard assures that the proposed facility can be built and operated lawfully.

Section (2) of the General standard contains a special provision. It is a “balancing test” that allows the Siting Council to issue a site certificate even if the facility cannot meet a particular standard. This applies to all standards except the Protected Areas standard. To meet the balancing test, the Council must find that the overall public benefits of the facility at the proposed site outweigh the damage to the resource that is protected by the standard the facility does not meet. The applicant must demonstrate that the damage to the resource is “acceptable or inconsequential in ultimate effect.” The standard includes criteria to guide the Council in making this finding. It also includes criteria for determining the “overall public benefits” of the facility.

18) Other Applicable Law

Some of the other permits and standards that the Siting Council reviews in deciding whether to issue a site certificate include:

- Noise – The Council applies noise standards established by the Oregon Department of Environmental Quality
- Wetlands – Some facilities require removal or fill permits from the Oregon Division of State Lands (DSL). Issuance of these permits is a Council determination, but the Council applies DSL criteria and consults with DSL staff.
- Water Pollution Control Facility Permit – This is a Department of Environmental Quality (DEQ) permit that is not federally delegated. The Council makes the determination using DEQ's criteria and in consultation with DEQ staff.

- Water Right – If the facility will require a new water right, water right transfer or temporary water right, the Council makes the determination, based on Water Resources Department regulations and consultation with that agency’s staff.

V. Recent Legislation and Wind Energy Facilities

1) Jurisdiction of the Siting Council

The focus of this paper is the siting process in Oregon for “large” energy facilities. A developer proposing to build a large energy facility in the state applies to the Oregon Energy Facility Siting Council for a site certificate, as described above. For a smaller facility, the developer applies to the local jurisdiction for land use approval and to other state agencies for other applicable permits.

Before 2001, a “large” electric generating facility was a facility having a “nominal electric generating capacity” of 25 megawatts or more, regardless of the energy source. That is, regardless of whether the facility generated power from wind, geothermal energy, solar energy or natural gas, the same jurisdictional threshold defined a “large” energy facility. For a wind turbine, “nominal electric generating capacity” means the maximum electric output of the turbine. A Vestas V47 turbine, for example, has a nominal electric generating capacity of 660 kilowatts.

In 2001, the Oregon Legislature changed the jurisdictional threshold in several respects. The 2001 legislation adopted the new concept of “average electric generating capacity.” The legislation defined the jurisdictional threshold for electric generation from geothermal, wind or solar energy in terms of *average electric generating capacity*. For wind facilities, the new threshold is an average electric generating capacity of 35 megawatts or more. In contrast, for thermal power and combustion turbine power plants, the legislation retained the threshold of 25 megawatts *nominal electric generating capacity*.

The legislation was a significant change for the wind energy industry. By changing the elemental definition of an energy facility, the legislation allows developers of large wind facilities to avoid the state-level siting process, if they choose. The conversion from “average” to “nominal” electric generating capacity is a factor of three for wind facilities. That is, a wind facility with an average electric generating capacity of 35 megawatts is the equivalent of a wind facility with a nominal electric generating capacity of 105 megawatts.

Depending on one’s perspective, raising the jurisdictional threshold of the Siting Council from 25 megawatts to 105 megawatts for wind facilities, in nominal terms, could be advantageous or disadvantageous for the wind industry. However, one thing is clear. As a result of this legislation, large wind energy facilities are no longer within the exclusive jurisdiction of the Siting Council. For wind energy facilities, no longer does “large” imply state-level siting and “small” imply local-level siting. It is likely that many developers of large wind energy facilities will choose to follow a local-level permitting path.

2) Some Standards Do Not Apply

The 2001 legislation curtailed the authority of the Siting Council with regard to wind energy facilities. The new jurisdictional threshold allows many wind energy facilities to avoid the state-level siting standards altogether. However, those facilities that come under the Siting Council’s review will not have to prove compliance with all siting standards that apply to other types of generating facilities. Under the new legislation, the Siting Council cannot apply the following standards to approve or deny a site certificate:

- Public Services
- Waste Minimization
- Structural
- Historic, Cultural and Archaeological Resources

Although the Council does not have to make findings on these standards to issue a site certificate, the Council may include site certificate conditions based on these standards. As a practical matter, therefore, an applicant for a site certificate must provide the same kind of information regarding these standards as if the standards were applicable to the site certificate decision.

3) Eligibility For Expedited Review

Expedited review allows a proposed facility to obtain a site certificate through a shortened process. The principal advantage of expedited review is the elimination of the notice of intent phase of review. Wind energy facilities up to 300 megawatts nominal capacity are eligible for expedited review under legislation passed in 2001. As a comparison, most natural gas-fueled combustion facilities must be less than 100 megawatts nominal capacity to be eligible for expedited review. This change means that virtually all future wind energy facilities in Oregon will be eligible for expedited review, if they need a site certificate at all.

4) Wind May Opt In

Legislation enacted in 2001 allows developers the option of choosing the state-level process. Any developer of a wind facility of less than 105 megawatts (nominal electric generating capacity) may choose to get a site certificate and avoid local-level siting. There is no lower limit on generating capacity for this option. Although many wind developers may have a perception that state-level review is a thing to be avoided, the choice to opt into the state-level process may be advantageous. Some developers may choose the state-level siting process. Some developers may see the advantages of dealing with a single agency for most permitting questions or having the greater certainty of a siting decision that can be appealed only to the Oregon Supreme Court.