BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PENNY COX,
Petitioner,

vs.

POLK COUNTY,
Respondent,

and

CITY OF DALLAS,
Intervenor-Respondent.

LUBA No. 2000-030

FINAL OPINION
AND ORDER

Appeal from Polk County.

Penny Cox, Rickreall, filed the petition for review and argued on her own behalf.

David Doyle, Polk County Legal Counsel, Dallas, filed a response brief and argued on behalf of respondent.

Mark Irick, Dallas, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Shetterly, Irick, Shetterly and Ozias.

Mark D. Shipman, Salem, filed an amicus brief on behalf of the Oregon Farm Bureau Federation. With him on the brief was Saalfeld, Griggs, Gorsuch, Alexander & Emerick, P.C.

William K. Kabeiseman and Marnie Allen, Portland, filed an amicus brief on behalf of the League of Oregon Cities. With them on the brief was Preston Gates & Ellis LLP.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 11/02/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a decision by the Polk County Board of Commissioners, which concludes that a five-acre test plot where poplar trees will be irrigated with pre-treated industrial effluent is an outright permitted "farm use" in the county's exclusive farm use (EFU) zone.

MOTION TO INTERVENE

The City of Dallas (hereafter city), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The city owns and operates a wastewater treatment facility that collects and treats sewage and discharges the treated effluent into Rickreall Creek. Since 1981, Tyco Printed Circuit Group (Tyco), formerly known as Praegitzer Industries, has discharged pretreated industrial effluent from its manufacturing operation into the city's sewerage system where it has been treated along with the sewage that is collected from other sources in the city.

The city decided to separate Tyco's industrial effluent from its sewerage system and transport the effluent by truck directly from its source at Tyco to a holding pond on a 260-acre EFU-zoned site owned by the city. The EFU-zoned site is located outside the city in Polk County.[1] The city plans to spray irrigate the Tyco effluent onto poplar trees that will be planted on the 260-acre site.[2] The spray irrigation proposal requires a National Pollutant

[1]We are not sure we understand all of the reasons why the city decided upon this course of action. One reason appears to be the combined copper content of the Tyco pre-treated effluent and the sewage collected from other sources in the city. The copper remaining in the city's sewerage effluent, after current levels of treatment, exceeds the receiving capacity of Rickreall Creek during low flow periods in the summer. Apparently, having Tyco attempt to remove all of the copper in its pre-treated effluent before discharging that effluent into the city sewerage system "would be technically difficult and very expensive." Record 672.

[2]As explained later in this opinion, the city does not plan to "treat" the effluent on the 260-acre site, beyond the natural processes that will occur after the poplar trees are spray irrigated with the Tyco effluent. The

Discharge Elimination System (NPDES) permit from DEQ pursuant to ORS 468B.050 and the federal Clean Water Act.[3] On November 19, 1998, DEQ issued an NPDES permit for an "Industrial Wastewater Reuse System Pilot Project." Record 680. This permit authorizes a three-year pilot project on five acres of the city's 260-acre site. Assuming that pilot project is successful, the city plans to seek another NPDES permit in the future to expand the operation onto the remaining part of the 260-acre property. DEQ's notice of public hearing includes the following description of the proposal:

> "The City of Dallas is proposing a pilot project to test the feasibility of using industrial wastewater beneficially on poplar trees. The city proposes to use effluent from [Tyco] on a three-acre pilot site. This action is to cover the pilot project only.
>
> "Persons who live downstream on Rickreall Creek, or who otherwise may use Rickreall Creek may be affected by the discharge. Although measurable changes in groundwater are unlikely in this pilot project, nearby well owners may be affected.

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effluent will be required to meet Oregon Department of Environmental Quality (DEQ) and United States Environmental Protection Agency (EPA) standards for application of effluent to farmland.

[3]ORS 468B.050(1) provides:

> "Except as provided in ORS 468B.053 or 468B.215, without first obtaining a permit from the Director of [DEQ], which permit shall specify applicable effluent limitations, no person shall:
>
> "(a) Discharge any wastes into the waters of the state from any industrial or commercial establishment or activity or any disposal system.
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> "(b) Construct, install, modify or operate any disposal system or part thereof or any extension or addition thereto.
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> "(c) Increase in volume or strength any wastes in excess of the permissive discharges specified under an existing permit.
>
> "(d) Construct, install, operate or conduct any industrial, commercial, confined animal feeding operation or other establishment or activity or any extension or modification thereof or addition thereto, the operation or conduct of which would cause an increase in the discharge of wastes into the waters of the state or which would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized.
>
> "(e) Construct or use any new outlet for the discharge of any wastes into the waters of the state."

"* * * * *

> "Effluent will be spray irrigated during the plant growing season. The effluent from [Tyco] contains three major classes of significant pollutants - nitrogen compounds; several metals; and total dissolved solids (salts). Nitrogen compounds will be taken up by the poplar trees and used as plant nutrients. The metals are expected to be bound to [soil] particles. The total dissolved solids are not expected to be taken up by the poplar trees, and will be discharged either to Rickreall Creek in the late fall through spring (when heavy rains and rising groundwater start flushing the soils, via drain tiles under the irrigation site), or to groundwater. The discharge to Rickreall Creek will be at approximately river mile 9.5, close to the existing City WWTP outfall." Record 804-05.

In the course of issuing the NPDES permit, DEQ required that Polk County issue a land use compatibility statement (LUCS) to verify that the proposal is permitted under the county's comprehensive plan and land use regulations. Polk County's first LUCS was issued in 1998. In that LUCS, the county concluded the proposal is a "farm use," as that term is defined by ORS 215.203(2), and therefore permitted outright in the county's EFU zone. That LUCS was appealed to LUBA, and we remanded the decision because the county failed to provide notice and an opportunity for a local appeal before adopting the first LUCS. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999). On remand, the planning director issued another LUCS in which he again concluded the proposal qualifies as a "farm use." Record 602-06. The planning director's decision was appealed to the board of county commissioners, which affirmed that decision. Record 22-27. This appeal followed.

MOTIONS TO DISMISS AND TO STRIKE

Our administrative rules require that the petition for review include "[a] summary of material facts * * * with citations to the pages of the record where the facts alleged can be found." OAR 661-010-0030(4)(b)(C). The petition for review in this case does not include a summary of material facts. The three-page "History of the Project" that is include in the petition for review does not include any citations to the record. Although some of the allegations of fact that are included in the argument supporting petitioner's assignments of

error include citations to the record, many do not. Based on these failures, the city moves to dismiss the appeal.

The city is correct that petitioner's failure to include citations to the pages in the record supporting her factual allegations has hampered our review of this case. That failure also no doubt made the city's and county's responses to the petition for review more difficult. We have not combed the record to locate factual support for all of petitioner's factual allegations. However, the record citations that are provided in the petition for review and the record citations provided by the city, county and amici permit an adequate understanding of the material facts in this case. We therefore deny the motion to dismiss.

In appeals of land use decisions, LUBA's review is generally limited to the record that is filed by the local government. ORS 197.835(2). The city moves to strike a 12-page "Notice of Stipulation and Final Order" that is attached to the petition for review. That document is not included in the record, and the motion to strike is granted.

INTRODUCTION

The county's first LUCS decision concerning the disputed facility was adopted on June 12, 1997. The county adopted subsequent LUCS decisions concerning the disputed facility in 1998. We concluded in our prior decision remanding the county's October 9, 1998 LUCS that the LUCS was a "permit," as that term is defined by ORS 215.402(4). *Friends of Clean Living*, 36 Or LUBA at 558. As far as we can tell, the LUCS that is before us in the present appeal is a continuation of the proceedings that led to the October 9, 1998 LUCS decision. As a "permit," the LUCS is subject to the "standards and criteria that were applicable at the time the application was first submitted." ORS 215.427(3). It is not clear when the application that led to the October 9, 1998 LUCS decision was first submitted, however we assume that it was submitted either in 1997 or 1998. Depending on when the application was submitted either the 1995 or 1997 version of the Oregon Revised Statutes, rather than the current version of the statutes, applies. However, with one exception noted

later in this opinion, the relevant statutory language did not change between 1995 and 1999. We therefore cite to the current version of the statutes in this opinion.

Although the petition for review includes eight assignments of error, essentially three questions are presented in this appeal. The first question is whether the challenged poplar tree farm is properly viewed as a "farm use," within the meaning of ORS 215.203(2). For the reasons explained below, we conclude that it is. The second question is whether the challenged poplar tree farm is *also* properly viewed as a "utility facility," within the meaning of ORS 215.283(1)(d).[4] For the reasons explained below, we conclude that it is. The third question is whether a proposed use of land that is properly viewed as both a "farm use" and a "utility facility" must demonstrate that it qualifies as a "utility facilit[y] necessary for public service," within the meaning of ORS 215.283(1)(d), before it may be sited on land that is zoned for exclusive farm use. For the reasons explained below, we conclude that it must.[5]

Before turning to petitioner's assignments of error, we also note that we have not attempted to address every argument that is presented in the petition for review. Many of those arguments that we do not address dispute findings that were adopted by the county concerning the nature of the effluent. Most of those findings were adopted to respond to arguments presented below about the environmental consequences that might result from applying that effluent to farmland. We generally agree with the city and amicus League of Oregon Cities that those issues are within the purview of DEQ and are not relevant in this land use proceeding.

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[4]ORS 215.283(1)(d) authorizes the following facilities in exclusive farm use zones:

> "Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. * * *"

[5]As explained later in this opinion, the significance of our answer to the third question is that while "farm uses" are allowed outright on lands zoned for exclusive farm use, approval of "utility facilities" on EFU-zoned lands requires a showing that it is necessary to site the facility on EFU-zoned land.

FIRST ASSIGNMENT OF ERROR

In her first assignment of error, petitioner argues the county erred by concluding that the proposed facility is properly viewed as a "farm use," as that term is defined by ORS 215.203(2).[6] Specifically, petitioner argues that under ORS 215.203(2) the subject property must be "[currently employed] for the primary purpose of obtaining a profit in money," by engaging in one or more of the purposes or activities that are specified in ORS 215.203(2), to qualify as a farm use. Petitioner argues the "primary purpose" of the disputed proposal is to treat and dispose of industrial effluent at a lower cost than would be possible through conventional sewerage treatment methods. According to petitioner, because the city's "primary purpose" is not to "obtain a profit in money" by engaging in one of the purposes or activities specified in ORS 215.203(2), the proposal is not properly viewed as a farm use.[7]

The ORS 215.203(2) definition of "farm use" is lengthy, and awkwardly constructed. The statute has been amended a number of times over the years, and making sense out of the definition of "farm use" in ORS 215.203(2), viewed as a whole, is not easy. ORS 215.203(2)(a) is composed of six sentences. The first five sentences set out what "farm use" "means" or "includes," and the last sentence identifies certain forest lands that "farm use" "does not include."[8] Two of the first five sentences in ORS 215.203(2)(a) specifically

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[6]We set out the relevant statutory language later in this opinion.

[7]According to petitioner, "the cost of irrigating 'the crop' ($471,800) is many [times more] expensive than the estimated value of the 'the crop' ($0)." Petition for Review 10. We are not certain where these figures come from, because petitioner includes no citation to the record. Petitioner's point appears to be that the city will incur significant expenses to construct the holding pond, plant the trees and irrigate the trees and will earn no income during the three-year pilot project because no trees will be harvested during that time. There is one document in the record that indicates a poplar tree farm could generate a gross profit equal to approximately $165 per acre per year with annual per acre costs of $60 to $70, once the trees have matured sufficiently to allow harvesting to begin. Record 480-81.

[8]ORS 215.203(2)(a) is quoted below with numbers added to identify the six sentences:

> "[1] As used in this section, 'farm use' means the *current employment of land for the primary purpose of obtaining a profit in money* by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or

require "current employment of land for the primary purpose of obtaining a profit in money by" one or more of the activities listed in the statute. ORS 215.203(2)(b) then provides an 11-part description of what "'[c]urrent employment' of land for farm use includes."[9] No part

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horticultural use or animal husbandry or any combination thereof. [2] 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. [3] 'Farm use' also includes the *current employment of land for the primary purpose of obtaining a profit in money* by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. [4] 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. [5] 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. [6] 'Farm use' does not include the use of land subject to the provisions of ORS chapter 321, except * * * land described in ORS 321.267(1)(e) or 321.415(5)." (Emphases added.)

[9]ORS 215.203(2)(b) provides:

"'Current employment' of land for farm use includes:

"(A) Farmland, the operation or use of which is subject to any farm-related government program;

"(B) Land lying fallow for one year as a normal and regular requirement of good agricultural husbandry;

"(C) Land planted in orchards or other perennials, other than land specified in subparagraph (D) of this paragraph, prior to maturity;

"(D) Land not in an exclusive farm use zone which has not been eligible for assessment at special farm use value in the year prior to planting the current crop and has been planted in orchards, cultured Christmas trees or vineyards for at least three years;

"(E) Wasteland, in an exclusive farm use zone, dry or covered with water, neither economically tillable nor grazeable, lying in or adjacent to and in common ownership with a farm use land and which is not currently being used for any economic farm use;

"(F) Except for land under a single family dwelling, land under buildings supporting accepted farm practices, including the processing facilities allowed by ORS 215.213 (1)(y) and 215.283 (1)(v);

"(G) Water impoundments lying in or adjacent to and in common ownership with farm use land;

"(H) Any land constituting a woodlot, not to exceed 20 acres, contiguous to and owned by the owner of land specially valued for farm use even if the land constituting the woodlot is not utilized in conjunction with farm use;

of that 11-part description restates the "current employment of land for the primary purpose of obtaining a profit in money" language.

The county relied on the exception to the exclusion stated in the sixth sentence of ORS 215.203(2)(a) and ORS 215.203(2)(b)(J) to conclude that the disputed poplar tree farm qualifies as a farm use.[10] The county concluded that under these statutory provisions it need not determine whether the proposed poplar tree farm will be employed "for the primary purpose of obtaining a profit in money" by growing, harvesting and selling poplar trees. The county apparently concluded that such a determination is unnecessary because neither of these statutory provisions include the "current employment of land for the primary purpose of obtaining a profit in money" terminology. Petitioner assigns error to the county's interpretation and application of ORS 215.203(2)(a) and (b).

"(I) Land lying idle for no more than one year where the absence of farming activity is due to the illness of the farmer or member of the farmer's immediate family. For purposes of this paragraph, illness includes injury or infirmity whether or not such illness results in death;

"(J) Any land described under ORS 321.267 (1)(e) or 321.415 (5); and

"(K) Land used for the primary purpose of obtaining a profit in money by breeding, raising, kenneling or training of greyhounds for racing."

[10]Both those subsections refer to "land described under ORS 321.267 (1)(e)." The land described by ORS 321.267(1)(e) is as follows:

"[L]and and hardwood timber, including but not limited to hybrid cottonwood, which are:

"(A) Grown or growing on land which has been prepared by intensive cultivation methods and which is cleared of competing vegetation for at least three years after tree planting;

"(B) Of a species marketable as fiber for inclusion in the "furnish" for manufacturing paper products;

"(C) Harvested on a rotation cycle within 10 years after planting; and

"(D) Subject to intensive agricultural practices such as fertilization, insect and disease control, cultivation and irrigation."

For purposes of this opinion, we assume without deciding that, as petitioner argues, the "current employment of land for the primary purpose of obtaining a profit in money" requirement applies to the disputed poplar tree farm. Specifically, we assume that the proposal can only qualify as a farm use if it is used "for the primary purpose of obtaining a profit in money" by growing, harvesting and selling poplar trees.[11] However, we do not share petitioner's understanding of what those words mean or require. As we explained in *Friends of the Creek v. Jackson County*, 36 Or LUBA 562, 576 (1999):

> "[W]e do not believe the legislature intended, by requiring that the land be currently employed 'for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops' to require an inquiry into the primary actual motivation of particular land owners. Such an inquiry could easily have the anomalous result of having a farm that is indistinguishable from its neighbor fall outside the ORS 215.203(2)(a) definition of farm use, simply because its owner happened to be primarily motivated by something other than the monetary return that is realized from selling the crops that are raised on the property." (Footnote omitted.)

The "primary purpose" requirement is directed at the activities that are occurring on the land, not the actual motivations of the owner or operator that conducts those activities. For example, a proposed poplar tree farm could be owned and operated by (1) a bona fide farmer who earned most of his or her income from the farm, (2) a doctor living in an EFU zone who earns a small part of his or her income from the farm, or (3) a real estate investment trust that holds the property for long term speculative purposes and earns a tiny fraction of its income from the annual farm profits. So long as poplar trees are raised, harvested and sold for a gross profit, in our view, it does not matter that the particular owner of the poplar tree farm may primarily be motivated to operate the poplar tree farm by factors other than the profit that is actually realized by raising and selling the poplar trees.[12]

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[11]Amicus Oregon Farm Bureau Federation also takes this view.

[12]The term "profit in money" as used in ORS 215.203(2)(a) means "gross income" rather than "profit" in its ordinary sense of net profit. *Brown v. Jefferson County*, 33 Or LUBA 418, 433 (1997), *quoting 1000 Friends v. Benton County*, 32 Or App 413, 429, 575 P2d 651 (1978).

Finally, we note petitioner argues under this assignment of error and under other assignments of error that applying the Tyco effluent will have serious environmental consequences and quickly render the land unsuitable for continued farm use. We are uncertain whether, even if that were the case, that would render the proposed poplar tree farm something other than a farm use. However, there is substantial evidence in the record that this three-year pilot project will not render the land unsuitable for farming.[13] To the extent we have been able to locate the evidence cited by petitioner to the contrary, it is not sufficient to establish that this evidence is unreliable.[14]

The first assignment of error is denied.

SECOND THROUGH EIGHTH ASSIGNMENTS OF ERROR

A. The Proposal is a Utility Facility

Under these assignments of error, petitioner argues the county erred by failing to consider whether the proposal constitutes a "utility facilit[y] necessary for public service" within the meaning of ORS 215.283(1)(d). *See* n 4. If the proposal is such a utility facility, the county is required to demonstrate that it is not feasible to locate the facility within the

[13]The record includes a letter from Tyco discussing the efforts it makes to remove pollutants from the effluent and stating that state and federal standards for land application of its pre-treated effluent are met. Record 471-71A. The record also includes a DEQ memorandum that addresses this issue as follows:

> "* * * Based on risk assessments done by EPA relating to the impact of heavy metals applied to agricultural lands, this site could be used for many decades before it would approach the point that it could not be used for some agricultural purposes. At the federal effluent limits included in the proposed permit, the City could safely apply the effluent at the pilot site for 48 years before [it] would have to stop. At the average effluent values tested, which were far below the permit limits, the City could safely apply the effluent at the pilot site for 165 years. At the end of these time periods, the land would still be fully usable for all agricultural purposes. It should be noted that this proposed permit is for a pilot project only, to last three years. Soils testing for metals will be required to track the accumulation of metals." Record 674-75.

[14]Two documents cited by petitioner appear at Record 117-19. The city points out that, although petitioner attributes those document to EPA, neither the author nor the original source of those documents is identified.

city's UGB or on non-EFU-zoned rural lands.[15] *Dayton Prairie Water Assoc. v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 99-123, May 11, 2000), slip op 6, *aff'd* ___ Or App ___, ___ P2d ___ (2000); *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374, 386 (1998). The county rejected petitioner's argument, concluding that the proposed use is a "farm use" rather than a "utility facility."

ORS 215.283(1)(d) does not include a definition of "utility facility," and the lengthy definition of "public utility" at ORS 757.005(1)(a) is of little assistance. Polk County Zoning Ordinance 110.587 provides the following definition:

> "UTILITY FACILITY NECESSARY FOR PUBLIC SERVICE. A major physical component of an enterprise that performs an essential public service, such as a natural gas plant, water supply facility, sewage treatment facility, telephone switching station, electrical substation, or radio, microwave, fiber optic, or television transmission tower. * * *"

ORS 468B.005 includes the following definitions:

> "(1) 'Disposal system' means a system for disposing of wastes, either by surface or underground methods and includes municipal sewerage systems, domestic sewerage systems, treatment works, disposal wells and other systems.
>
> "* * * * *
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> "(5) 'Sewerage system' means pipelines or conduits, pumping stations, and force mains, and all other structures, devices, appurtenances and facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal.

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[15]Under *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 555-56, 773 P2d 779 (1989), applicants for "utility facilities necessary for public service" in EFU zones, under ORS 215.283(1)(d):

> "must establish and the county must find that it is necessary to situate the facility in the agricultural zone in order for the service to be provided."

Prior to revisions that were adopted to respond to statutory changes that were adopted in 1999, OAR 660-033-0130(16) codified the Court of Appeals' holding in *McCaw Communications, Inc*.:

> "A [utility] facility is necessary if it must be located in an agricultural zone in order for the service to be provided."

"(6) 'Treatment works' means any plant or other works used for the purpose of treating, stabilizing or holding wastes."

"* * * * *"

These definitions are broad enough to include the city's wastewater treatment facility. There can be no doubt that the city's wastewater treatment facility is a "utility facility" as that term is used in ORS 215.283(1)(d).

The relevant question, which the above-quoted definitions do not directly answer, is whether the proposed holding pond and poplar tree farm are properly viewed as an extension of, and therefore a part of, a "utility facility," within the meaning of ORS 215.283(1)(d). We agree with the county's apparent position that it is appropriate to assume for purposes of ORS 215.283(1)(d), that the city's sewerage utility facility is coextensive with the system's collection and treatment process. However, the county's position that the disputed poplar tree farm does not involve continued treatment of Tyco's industrial effluent is at odds with the evidence in the record.

The critical facts are not really in dispute. Currently, sewerage effluent from the city's wastewater treatment facility, including effluent from Tyco, is treated and then discharged into Rickreall Creek. As presently pre-treated at Tyco, Tyco effluent cannot be deposited directly into Rickreall Creek. Record 672. Depositing Tyco's effluent on the proposed poplar tree farm results in heavy metals binding with the soil, instead of being deposited in Rickreall Creek. Nitrogen compounds will be taken up in the poplar trees, instead of being deposited into Rickreall Creek. Dissolved solids will be flushed into Rickreall Creek near the city's wastewater treatment outfall during heavy rains during the fall and summer, and the point where runoff leaves the poplar tree farm and enters Rickreall Creek is covered by the NPDES permit. The expectation is that the pollutants that remain in Tyco's pre-treated effluent and will enter Rickreall Creek after they have passed through the proposed poplar tree farm will be within applicable state and federal water pollution standards. Based on these undisputed facts, we conclude the challenged poplar tree farm is

properly viewed as a "utility facility," within the meaning of ORS 215.283(1)(d).[16]

Our conclusion is supported by amendments to ORS 215.283(1)(d) that were adopted in 1999, which expressly provide that the utility facilities encompassed by the statute include "wetland waste treatment systems." If the concept of "utility facilities" includes using wetlands to remove wastes from water, we can think of no reason why using poplar tree farms to accomplish that purpose does not constitute a "utility facility."

The parties have approached this case as though "farm uses" and "utility facilities" are mutually exclusive. However, as we noted in *Swenson v. DEQ*, 9 Or LUBA 10, 20-21 (1983), there is no reason why a use of land cannot constitute both a "farm use" and a "utility facility." Because the disputed poplar tree farm is both a "farm use" and a "utility facility" it must satisfy the approval criteria that apply to both uses.[17] Farm uses are allowed outright. As we have already noted, utility facilities, like farm uses, are permissible in EFU zones. However, utility facilities may not be located on rural EFU-zoned land unless it is not feasible to locate such facilities inside an urban growth boundary or on non-EFU-zoned rural lands. *McCaw Communications Inc*., 96 Or App at 555-56; *Dayton Prairie Water Assoc*., slip op 6; *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA at 386.[18] The

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[16]We specifically limit our decision here to determining whether the proposed holding pond and poplar tree farm are properly viewed as a "utility facility" within the meaning of ORS 215.283(1)(d). In particular, we express no view concerning how other statutes or DEQ administrative rules apply to or categorize the disputed poplar tree farm.

[17]Although this circumstance is somewhat unusual, it is not unheard of. For example, a house may be used as both a residence and a home occupation. Such residences/home occupations must comply with approval criteria that apply to residences as well as the criteria for home occupations set out at ORS 215.448.

[18]Following legislative amendments that were adopted and became effective in 1999, utility facilities in EFU zones must comply with ORS 215.275, which provides as follows:

> "(1) A utility facility established under ORS 215.213 (1)(d) or 215.283 (1)(d) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
>
> "(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(d) or 215.283 (1)(d) must show that reasonable alternatives have

county erred by not recognizing that the disputed holding pond and poplar tree farm is both a farm use and a utility facility. This error led the county to fail to consider whether it is feasible to apply the Tyco pre-treated effluent to land located inside the UGB or on non-EFU-zoned land outside the UGB. The county may not authorize locating the proposed

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been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

"(a) Technical and engineering feasibility;

"(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

"(c) Lack of available urban and nonresource lands;

"(d) Availability of existing rights of way;

"(e) Public health and safety; and

"(f) Other requirements of state or federal agencies.

"(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.

"(4) The owner of a utility facility approved under ORS 215.213 (1)(d) or 215.283 (1)(d) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

"(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(d) or 215.283 (1)(d) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.

"(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission."

facility on EFU-zoned land until it does so.

B. Failure to Consider Statewide Planning Goals

Petitioner also argues the county erred by failing to respond to her arguments below that the challenged decision violates certain statewide planning goals.

The county's comprehensive plan is acknowledged. After acknowledgment, permit decisions such as the decision at issue are governed by relevant statutes and the acknowledged comprehensive plan and land use regulations. With limited exceptions, none of which appear to apply here, questions concerning compliance with statewide planning goals may not be raised in challenges of individual land use decisions that are governed by acknowledged comprehensive plans and land use regulations. ORS 197.835(5); *Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983). The county committed no error by not addressing the statewide planning goals.

C. Failure to Approve the Proposal as a Solid Waste Disposal Site or Hazardous Waste Disposal Site

Petitioner argued below that the challenged facility constitutes a solid waste disposal site or a hazardous waste disposal site and must be approved as such.[19] As far as we can tell, petitioner's "solid waste disposal site" and "hazardous waste disposal site" theories are both based on her contention that the pilot project will fail and that wastes will accumulate in the holding pond or on the poplar tree farm that will ultimately require that the site be approved as a solid waste disposal site or a hazardous waste disposal site or both. That contention appears to be based on an August 20, 1999 letter from EPA to DEQ that indicates EPA believes the Tyco effluent can be used for the pilot project, provided it is pre-treated and has

[19]Subject to the approval standards set out at ORS 215.296, counties may approve solid waste disposal sites in the EFU zone, if they have been granted a permit by DEQ under ORS 459.245. DEQ does not view the application as being for a solid waste disposal site and had not granted a permit for the disputed facility under ORS 459.245.

the characteristics that the city and Tyco represent it has. Record 640-41 The August 20, 1999 letter also includes the following language:

> "[T]he management of wastewater in the surface impoundment will inevitably generate a sludge, normally a [Resource Conservation and Recovery Act (RCRA)] solid waste per 40 CFR §261.2. It was agreed during the meeting that the City of Dallas would have to follow all applicable state and/or federal requirements in determining whether a solid and/or hazardous waste is generated at this unit. Should this sludge exhibit a hazardous characteristic, or if a wastewater from a listed waste source is ever placed into the impoundment, the impoundment would be considered an illegal land disposal unit subject to the RCRA permitting requirements of 40 CFR §270, and the entire facility would be subject to RCRA Corrective Action requirements. Additionally, should contaminant levels in the soil reach levels which pose a threat to human health or the environment, other federal or state authorities, such as RCRA §7003, or CERCLA, may require additional monitoring and/or corrective action." Record 640-41.

The EPA letter says the proposal *may* become a solid waste or hazardous waste disposal site, if certain wastes are included in the effluent. We understand the city to take the position that such wastes will not be deposited on the subject property, based in part on representations made by Tyco. Record 471-71A. We therefore do not agree the county erred by failing to treat the proposal as though it were a solid waste disposal site or a hazardous waste disposal site.

D. Conclusion

We agree with petitioner that the county erred by failing (1) to recognize that the proposed facility is both a "farm use" and a "utility facility" and (2) to consider whether it is feasible to apply the Tyco pre-treated effluent to land located inside the UGB or on non-EFU-zoned land outside the UGB. Based on these failures, we sustain the second through eighth assignments of error, in part.

The county's decision is remanded.