

1                   BEFORE THE LAND USE BOARD OF APPEALS  
2                   OF THE STATE OF OREGON

3  
4                   SOUTH SUBURBAN SANITARY DISTRICT,  
5                                 *Petitioner,*

6  
7   vs.

8  
9                   KLAMATH COUNTY,  
10                                 *Respondent,*

11   and

12  
13  
14                   SUSAN F. HOUSE and WILLIAM D. KENNEDY,  
15                                 *Intervenors-Respondents.*

16  
17   LUBA No. 2020-090

18  
19   FINAL OPINION  
20   AND ORDER

21  
22                   Appeal from Klamath County.

23  
24                   Gregory S. Hathaway, Portland, filed the petition for review and reply brief  
25 and argued on behalf of petitioner. With him on the briefs was Hathaway Larson  
26 LLP.

27  
28                   No appearance by Klamath County.

29  
30                   Dominic M. Carollo, Roseburg, filed the response brief and argued on  
31 behalf of intervenors-respondents. With him on the brief were Matthew D. Query  
32 and Yockim Carollo LLP.

33  
34                   RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board  
35 Member, participated in the decision.

36  
37                   REVERSED

12/10/2020

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

**NATURE OF THE DECISION**

Petitioner challenges a county board of commissioners decision denying petitioner's request for approval to apply reclaimed water to land zoned Exclusive Farm Use-Cropland (EFU-C).

**MOTION TO INTERVENE**

Susan F. House and William D. Kennedy (intervenors) move to intervene on the side of respondent. The motion is unopposed and is granted.

**FACTS**

Petitioner is a municipal corporation providing sanitary service to residents of the area south of the City of Klamath Falls. Since 1959, petitioner has discharged its reclaimed water into the Klamath River. The State of Oregon has, however, adopted new Total Maximum Daily Load requirements for nutrients in the Klamath River, prompting petitioner to look for a new location for the discharge of its reclaimed water. Rather than continuing to discharge into the Klamath River, petitioner seeks to treat and reclaim sanitary wastewater at its facility located on Maywood Drive and then transport the reclaimed water via an 11-mile, 18-inch-diameter pipeline to an 88-acre reservoir located one quarter mile east of the intersection of North Poe Valley Road and Highway 140 (the Poe

1 site), where the water will be used to irrigate approximately 750 acres of crops.  
2 Record 616.<sup>1</sup>

3 On March 13, 2020, petitioner applied for county approval of the project.

4 *Id.* As explained in the county’s staff report,

5 “[i]n 2001, Senate Bill 212 was passed by the Oregon Legislative  
6 Assembly to allow the land application of reclaimed water,  
7 agricultural process water and biosolids for agricultural,  
8 horticultural or silvicultural productions. Upon passage of Senate  
9 Bill 212 [the Department of Land Conservation and Development  
10 (DLCD)] revised [Statewide Planning Goal 3 (Agricultural Lands)]  
11 Oregon Administrative Rule (OAR) 660-033 to incorporate these  
12 amendments into the state wide program for land use planning.

13 “There are several steps the applicants go through prior to receiving  
14 approval for land application:

15 “1) Obtain the required [Oregon Department of Environmental  
16 Quality (DEQ)] application and Land Use Compatibility  
17 Statement (LUCS) Form[;]

18 “2) Submit the completed LUCS to the County planning office  
19 for review and approval[;]

20 “3) *County conducts it[s] land use review process in accordance*  
21 *with requirements of law and returns the LUCS to the*  
22 *Applicant with any findings[;]*

23 “4) The applicant submits the DEQ application and the approved  
24 LUCS to DEQ for processing[;]

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<sup>1</sup> The project’s pipeline will travel from the treatment facility to Olene, then follow Highway 140 to North Poe Valley Road and the reservoir.

1 “5) DEQ processes the application and conducts a technical  
2 review in accordance with its rules and requirement of the  
3 law[; and]

4 “6) The applicant receives final approval from DEQ to conduct  
5 land application operation.” Record 329 (emphasis in  
6 original).

7 On June 17, 2020, the planning commission and board of commissioners  
8 conducted joint public hearings on the application. Record 540. Intervenors own  
9 ranches in the vicinity of the Poe site and opposed the application. The planning  
10 commission recommended denial of the application. The board of commissioners  
11 adopted the planning commission’s findings and denied the application.

12 This appeal followed.

### 13 **FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR**

#### 14 **A. Standard of Review**

15 We first set out and explain the starting and ending points for our standard  
16 of review in this appeal. ORS 215.283(1)(v) identifies as an allowed use on EFU  
17 zoned land,

18 “[s]ubject to the issuance of a license, permit or other approval by  
19 the [DEQ] under ORS 454.695, 459.205, 468B.050, 468B.053 or  
20 468B.055, or in compliance with rules adopted under ORS  
21 468B.095, and as provided in ORS 215.246 to 215.251, *the land*  
22 *application of reclaimed water*, agricultural or industrial process  
23 water or biosolids, or the onsite treatment of septage prior to the land  
24 application of biosolids, for agricultural, horticultural or  
25 silvicultural production, or *for irrigation in connection with a use*  
26 *allowed in an exclusive farm use zone under this chapter.”*

1 (Emphases added).<sup>2</sup>

2 ORS 215.246(3) establishes the standards that apply to an application for an ORS  
3 215.283(1)(v) use, and limits the county’s and LUBA’s scope of review:

4 *“[T]he applicant shall explain in writing how alternatives identified*  
5 *in public comments on the land use decision were considered and,*  
6 *if the alternatives are not used, explain in writing the reasons for*  
7 *not using the alternatives. The applicant must consider only those*  
8 *alternatives that are identified with sufficient specificity to afford*  
9 *the applicant an adequate opportunity to consider the alternatives. A*  
10 *land use decision relating to the land application of reclaimed*  
11 *water, agricultural or industrial process water or biosolids may not*  
12 *be reversed or remanded under this subsection unless the applicant*  
13 *failed to consider identified alternatives or to explain in writing the*  
14 *reasons for not using the alternatives.”* (Emphases added.)

15 The county’s decision denied petitioner’s application for failure to comply with  
16 ORS 215.426(3). Petitioner argues in its first, second, and third assignments of  
17 error that the board of commissioners misconstrued ORS 215.246(3). Petitioner  
18 also argues that the board of commissioners’ conclusion that petitioner did not  
19 perform the required alternative sites analysis is not supported by substantial  
20 evidence.

21 To overturn a local government’s denial on evidentiary grounds, the  
22 petitioner must demonstrate that the evidence supporting the application is such  
23 that a reasonable person could only conclude that the applicable criteria are  
24 satisfied. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124,

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<sup>2</sup> ORS 215.283(1)(v) is implemented by Klamath County Land Development Code (KCLDC) 54.030(L) and 54.010(V).

1 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adh'd to on recons*, 151 Or App 16,  
2 949 P2d 1225 (1997) (citing *Jurgenson v. Union County Court*, 42 Or App 505,  
3 600 P2d 1241 (1979)).

4 **B. First Assignment of Error**

5 ORS 215.246(3) provides that, if an alternative to a reclaimed water project  
6 is identified in public comments, the applicant must explain in writing how the  
7 alternative was considered and, if the alternative was not selected, the reason for  
8 not pursuing the alternative. As we explained in *Oregon Coast Alliance v Curry*  
9 *County*,

10 “the burden of consideration and explanation under ORS 215.246(3)  
11 is not particularly onerous. The applicant’s choice to use reclaimed  
12 wastewater for irrigation is not subject to any substantive standard  
13 before the county, and the county is not required to adopt any  
14 findings approving that choice. The last sentence of ORS 215.246(3)  
15 makes clear that the county’s role, indeed LUBA’s review itself, is  
16 confined to ensuring that the applicant (1) considered in writing any  
17 sufficiently-identified alternatives, and (2) explained in writing the  
18 reasons for not using them.

19 “\* \* \* \* \*

20 “\* \* \* Given that virtually any written explanation would suffice  
21 under the very limited obligation imposed by ORS 215.246(3) in [an  
22 application to irrigate a golf course on EFU land using reclaimed  
23 water], and our very limited scope of review over the performance  
24 of that obligation, petitioner has not demonstrated that the county  
25 erred in concluding that ORS 215.246(3) was satisfied.” 78 Or  
26 LUBA 81, 87-88 (2018).

27 One of the alternatives petitioner considered was the application of the reclaimed  
28 water to a site described as Swan Lake. The board of commissioners found that

1 the Swan Lake alternative was not pursued based on cost considerations. The  
2 board of commissioners also found that the petitioner’s assertions regarding the  
3 availability of the land did not appear accurate and that petitioner did not provide  
4 a rough cost analysis or use any type of matrix rating environmental factors,  
5 costs, expansion potential, etc., to determine whether the Swan Lake alternative  
6 might be more appropriate for the long-term benefit of the community and  
7 citizens, independent of its cost. The board concluded that “[t]he lack of thorough  
8 analysis and dismissing out of hand an alternative site location was found to not  
9 meet [the] requirements of ORS 215.246(3).” Record 5.

10 We agree with petitioner that the board of commissioners misconstrued  
11 ORS 215.246(3) because the board denied petitioner’s application despite the fact  
12 that petitioner considered the Swan Lake alternative and explained why it was  
13 not selected. We also agree with petitioner that the board of commissioners’  
14 finding that petitioner dismissed the Swan Lake alternative “out of hand” is not  
15 supported by substantial evidence, that is, evidence a reasonable person would  
16 rely upon to make a decision. *Younger v. City of Portland*, 305 Or 346, 360, 752  
17 P2d 262 (1988). As explained in petitioner’s written submittal, the Swan Lake  
18 alternative was rejected because it was approximately 20 percent more costly  
19 than the alternatives. Record 320. Petitioner explained:

20 “The capital cost for a Swan Lake alternative is greater than the  
21 other recycled water alternative sites that have been identified  
22 because of the longer pipeline that is required. In addition, the  
23 annual pumping power costs will be double the other alternatives



1 because the length of the pipeline and higher elevation of the Swan  
2 Lake Valley.

3 “Given the higher cost for the Swan Lake Alternative, this  
4 alternative has not been pursued.” Record 97.<sup>3</sup>

5 There is not substantial evidence to support the board of commissioners’  
6 conclusion that petitioner dismissed the Swan Lake alternative “out of hand” or  
7 otherwise erred in its consideration of the alternative. Rather, the evidence is such  
8 that a reasonable person could only conclude that ORS 215.426(3) was met.

9 The first assignment of error is sustained.

10 **C. Second Assignment of Error**

11 Petitioner argues that the board of commissioners misconstrued the law  
12 and made a decision not supported by substantial evidence when it concluded  
13 that petitioner did not adequately consider the Klamath Drainage District (KDD)  
14 alternative. For the reasons discussed below, we sustain this assignment of error.

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<sup>3</sup> Petitioner and the county referred to the water as “recycled” and we understand “recycled water” to be the same as “reclaimed water” in the context of this appeal. The water will be treated to Class C/B level.

“Class B recycled water must not exceed a median of 2.2 total coliform organisms per 100 milliliters, based on results of the last seven days that analyses have been completed, and 23 total coliform organisms per 100 milliliters in any single sample.” OAR 340-055-0012(6)(c).

“Class C recycled water must not exceed a median of 23 total coliform organisms per 100 milliliters, based on results of the last seven days that analyses have been completed, and 240 total coliform organisms per 100 milliliters in any two consecutive samples.” OAR 340-055-0012(5)(c).

1 The board of commissioners found:

2 “KDD will be changing its operating practices and will in the future  
3 (less than 5 years) no longer discharge to the Klamath River and  
4 Exhibit O indicates the City of Klamath Falls Design Team is  
5 working on a scope and the cost to complete an analysis to land  
6 apply their recycled water onto lands within [the] KDD District.  
7 Because of the change in operation by KDD and the fact [that] the  
8 City is completing the analysis to Land Apply its recycled water, it  
9 is too early to conclude this alternative is not the best for the  
10 citizen[s] of Klamath County. The lack of thorough analysis and  
11 dismissing out of hand an alternative site location was found to not  
12 meet [the] requirements of ORS 215.246(3).” Record 5.

13 Petitioner’s written analysis of the KDD alternative explained:

14 “The City of Klamath Falls is exploring the option to discharge  
15 recycled water to the Klamath Drainage District canal for both  
16 irrigation and conveyance of recycled water to the Lower Klamath  
17 Falls Wildlife Refuge. There are numerous regulatory constraints  
18 that will need to be addressed and this approach could not be  
19 permitted under the current regulatory framework. Issues that will  
20 need to be assessed include DEQ requirements for a recycled water  
21 use plan for each property that receives recycled water, nutrient  
22 limits on the Klamath Strait and recycled water storage during the  
23 non-irrigation season. This is a reuse program like the District  
24 program except the details need to be defined. Implementation of  
25 this program is not feasible under existing regulatory requirements  
26 and therefore, is not available option for the District.” Record 321.

27 We agree with petitioner that the board of commissioners misconstrued ORS  
28 215.246(3) by concluding that the statute allows it to deny an application because  
29 an alternative may be feasible in the future. ORS 215.246(3) requires that the  
30 applicant explain why it decided not to pursue an alternative and petitioner did  
31 so. Further, we agree with petitioner that there is not substantial evidence that

1 petitioner rejected the KDD site “out of hand” or provided an inadequate analysis.  
2 As explained above, petitioner’s burden is not onerous and petitioner explained  
3 in writing why, given the current regulatory environment, the KDD option would  
4 not be available in a timely manner. The evidence is such that a reasonable person  
5 could only conclude that ORS 215.426(3) was met.

6 The second assignment of error is sustained.

7 **D. Third Assignment of Error**

8 Similar to the first and second assignments of error, petitioner argues that  
9 the board of commissioners misconstrued ORS 215.246(3) and made a decision  
10 not supported by substantial evidence concerning petitioner’s analysis of the City  
11 of Klamath Falls (CKF) alternative. Under the CKF alternative, petitioner and  
12 CKF would partner to finance a future treatment plant. The board of  
13 commissioners found:

14 “[CKF] states they are in the process of evaluating area to land apply  
15 their recycled water. If an area can be found that is large enough to  
16 irrigate with the recycled water from both [CKF] and [petitioner], it  
17 could be more efficient for the two entities to work together to  
18 construct one transmission pipeline, reservoir system for storage if  
19 needed, and irrigation system. The idea of combining recycled water  
20 from both sewer provider[s] to irrigate one area has not been  
21 explored. The lack of through analysis and dismissing out of hand  
22 an alternative site location did not meet [the] requirements of ORS  
23 215.246(3).” Record 6.

24 The board of commissioners’ findings deny the application based on the  
25 conclusion that a more efficient alternative may exist. The problem with this  
26 conclusion is that whether a more efficient alternative may exist is not an allowed

1 consideration under ORS 215.246(3). Petitioner stated initially that “[a]t this time  
2 there is no defined [CKF project] that will meet all the regulatory requirements  
3 and the costs for such a project have not been defined.” Record 318. Petitioner  
4 later expanded its analysis:

5 “The key criterion that cannot be satisfied for this alternative to be  
6 viable is that recycled water cannot be discharged to any waters of  
7 the State. As the KDD system is currently operated, a mixture of  
8 recycled water and irrigation water would be discharged to the  
9 Klamath River in the spring when farmers are required to drain the  
10 fields.

11 “[CKF] has not defined its plan to meet the new water quality  
12 standards and cannot provide cost information to [petitioner] at this  
13 time. Based on the initial joint study between [petitioner] and  
14 [CKF], the cost to [petitioner] is higher than the selected recycled  
15 water use alternatives. The KDD option as currently envisioned for  
16 either [CKF] and [petitioner] or for [petitioner] on its own is not  
17 allowed under existing Oregon statu[t]es.” Record 60.

18 The county misconstrued ORS 215.246(3) by interpreting it to allow the board of  
19 commissioners to deny an application where petitioner has analyzed the  
20 alternative and explained the reason for rejecting it. There is not substantial  
21 evidence that petitioner did not analyze this alternative as required by ORS  
22 215.246(3). The evidence is such that a reasonable person could only conclude  
23 that ORS 215.426(3) was met.

24 The third assignment of error is sustained.

25 The first, second, and third assignments of error are sustained.

1 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

2 Petitioner argues in the fourth assignment of error that the board of  
3 commissioners improperly denied petitioner’s application because the board of  
4 commissioners found that the project is located next to a river with endangered  
5 species. Petitioner argues in the fifth assignment of error that the board of  
6 commissioners improperly denied petitioner’s application because the board of  
7 commissioners found that the project is not a long-term solution. In the  
8 alternative, petitioner argues that we should disregard both of these findings  
9 because they are not a basis for the board of commissioners’ ultimate conclusion  
10 that the application should be denied.

11 The board of commissioners found:

12 “[Petitioner] proposes to irrigate lands with recycled water next to  
13 the Lost River. Lost River provides habitat for several endangered  
14 species including the Short Nose Sucker (*Chasmistes brevirostris*)  
15 and Lost River Sucker (*Deltistes luxatus*) as well as many other  
16 terrestrial and aquatic wildlife species. As stated in numerous  
17 exhibits, there is significant community concern about irrigating  
18 with recycled water next to a river with endangered species and  
19 other sensitive wildlife.” Record 6 (italics in original).

20 The board of commissioners also found:

21 “In numerous exhibits, opponents of the recycled water proposal  
22 have stated that this project has a maximum lifespan of 20 years.  
23 [Petitioner] has not refuted this claim. It will be more difficult to  
24 expand the project at the subject site than other alternative sites such  
25 as Swan Lake Valley, in combination with the [CKF] or with KDD.  
26 Both Swan Lake Valley and KDD are large open valleys with large  
27 commercial farms, and very low density of dwelling.” *Id.*

1 The board of commissioners ultimately concluded:

2 “Based on the review of the record, the Planning Commission  
3 concluded [petitioner] has not met the criteria of ORS 215.246(3),  
4 nor did [petitioner] submit the correct application for the  
5 construction of a Utilities Facilit[y]. The Board of County  
6 Commissioners reviewed both the record in its entirety and  
7 deliberation of the Planning Commission, and concluded the  
8 proposal has not met the criteria of ORS 215.246(3) nor did  
9 [petitioner] submit the correct application for the construction of a  
10 Utilities Facilit[y]. On July 21, 2020, the Board of County  
11 Commissioners with a[] unanimous vote, adopted these findings.”  
12 Record 7.

13 We agree with petitioner that the board of commissioners’ decision makes clear  
14 that the above quoted language regarding proximity to the Lost River and project  
15 life span are surplusage and were not a basis for the board of county  
16 commissioners’ decision to deny petitioner’s application. Accordingly,  
17 petitioner’s argument provides no basis for reversal or remand of the decision.

18 The fourth and fifth assignments of error are denied.

19 **SIXTH ASSIGNMENT OF ERROR**

20 The specific uses allowed on EFU land under ORS 215.283(1)(v) include:

21 “(a) The treatment of reclaimed water, agricultural or industrial  
22 process water or biosolids that occurs as a result of the land  
23 application;

24 “(b) The establishment and use of facilities, including buildings,  
25 equipment, aerated and nonaerated water impoundments,  
26 pumps and other irrigation equipment, *that are accessory to*  
27 *and reasonably necessary for the land application to occur*  
28 *on the subject tract;*

1           “(c) The establishment and use of facilities, including buildings  
2           and equipment, that are not on the tract on which the land  
3           application occurs for the transport of reclaimed water,  
4           agricultural or industrial process water or biosolids to the tract  
5           on which the land application occurs if the facilities are  
6           located within:

7           “(A) A public right of way; or

8           “(B) Other land if the landowner provides written consent  
9           and the owner of the facility complies with ORS  
10           215.275(4); and

11           “(d) The transport by vehicle of reclaimed water or agricultural or  
12           industrial process water to a tract on which the water will be  
13           applied to land.” ORS 215.246(4) (emphasis added).

14           In addition, ORS 215.283(1)(c) provides, in part, that “[u]tility facilities  
15           necessary for public service, including wetland waste treatment systems,” may  
16           be established on EFU land. KCLDC 54.010(X) implements ORS 215.283(1)(c)  
17           and lists, as a permitted use on EFU land, “[u]tility facilities necessary for public  
18           service, including associated transmission lines as defined in Article 11 and  
19           wetland waste treatment systems.” Such uses are subject to the standards at  
20           KCLDC 54.030(N).

21           The board of commissioners found that petitioner’s proposal is a utility  
22           facility that must satisfy the standards at KCLDC 54.030(N):

23           “The recycled water will be chlorinated shortly before it leaves the  
24           treatment facility. While in the pipeline the chlorine will continue to  
25           react with the various organisms in the water, killing the pathogens.  
26           Because the water will still be in continued treatment within the  
27           pipeline, the pipeline is a Utility Facility.

28           “If the water treatment fails and water reaches the reservoir without

1 being disinfected, the disinfection would need to occur within the  
2 reservoirs, or treatment continues while in the reservoirs, turning the  
3 reservoirs into Utilities Facilities. [Petitioner] has not submitted the  
4 correct permits pertaining to approval of Utility Facilities for the  
5 pipeline or reservoirs.” Record 6-7.

6 Petitioner argues that the board of commissioners misconstrued  
7 215.246(4) because the board concluded that the project is a utility facility subject  
8 to the standards at KCLDC 54.030(N), rather than a use allowed outright under  
9 ORS 215.246(4). Petitioner also argues that, because the undisputed evidence is  
10 that no treatment of the water will occur at the Poe site, the board of  
11 commissioners’ decision that the use is a utility facility is not supported by  
12 substantial evidence.

13 The board of commissioners concluded that the pipeline is a utility facility  
14 because chlorine in the pipeline would continue to treat the water as it travels to  
15 the Poe site and because, if the water treatment failed, additional disinfection  
16 might need to be added after the water reached the Poe site. *Id.* Intervenors argue  
17 that petitioner’s planned weekly water testing and monthly reporting of the test  
18 results to DEQ is evidence supporting the conclusion that recycled water may  
19 require on-site treatment at the reservoir on EFU land.<sup>4</sup> In *Cox v. Polk County*,  
20 the Court of Appeals concluded:

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<sup>4</sup> Petitioner explained in its application that

“[t]he recycled water quality shall be tested weekly and reported on a monthly basis and shall meet all Class C/B requirements per [DEQ]. Class C and B Recycled water is biologically oxidized and



1 “Based on [the] plain meanings and statutory usages, we understand  
2 the phrase ‘utility facility,’ as used in ORS 215.283(1)(d) (1997), to  
3 mean equipment or apparatus, whether standing alone or as part of  
4 a structure, that functions to perform or provide, in whole or in part,  
5 a service such as the production, transmission, delivery or furnishing  
6 of electricity or natural gas, the purification of drinking water, or the  
7 treatment of solid or liquid waste. The equipment comprising the  
8 facility need not be extensive or complex; in addition, the facility  
9 may include ancillary or off-site equipment such as transmission  
10 lines. *See, e.g.*, ORS 215.283(1)(L) (referring to the ‘placement of  
11 utility facilities overhead and in the subsurface of public roads and  
12 highways’). *However, at a minimum, the facility must include some  
13 equipment or apparatus that itself performs the relevant production,  
14 transmission or similar function or service. Cf.* ORS 456.559(2)  
15 (Housing and Community Services Department shall not ‘own,  
16 acquire, construct, purchase, lease, operate or maintain utility  
17 facilities, including facilities for the generation of electricity, for the  
18 distribution of gas [or] electricity, [or] for the conveyance of  
19 telephone or telegraph messages’); ORS 757.273 (the Public Utility  
20 Commission is authorized to regulate the rates, terms, and  
21 conditions for ‘attachments \* \* \* to poles or other facilities of public  
22 utilities and telecommunications utilities’); ORS 757.516 (referring  
23 to the ‘point of [physical] interconnection between the facility of the  
24 natural gas utility and the facility of an interstate pipeline’).

25 “Based on the above understanding of the legislature’s intended  
26 meaning of the phrase ‘utility facility,’ we conclude that the project  
27 at issue in this case is not a utility facility. In particular, to the extent  
28 that the project includes ‘equipment’—including the irrigation  
29 equipment that will be used to apply the effluent to the trees and,  
30 perhaps, the manmade holding pond—that equipment does not itself  
31 perform the function at issue, namely, treatment of the effluent.  
32 Rather, ‘treatment’ of the effluent on the project site, if any, occurs  
33 as a result of uptake of components of the effluent by the poplar trees

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disinfected to meet total coliform destruction requirements and can  
be utilized for animal feed, or crops for human consumption.”  
Record 618.

1 and/or binding of other components with the soil. Thus, even  
2 assuming that LUBA was correct that those processes constitute  
3 ‘treatment’ of the effluent, the treatment is not accomplished by the  
4 installed equipment or apparatus. Stated another way, a project or  
5 site in which the equipment or apparatus that is present does not  
6 itself perform the critical function or functions that constitute the  
7 ‘service’ at issue, and in which, conversely, the significant processes  
8 are naturally occurring ones, is not a utility facility within the  
9 meaning of ORS 215.283(1)(d) (1997). Accordingly, LUBA erred  
10 in determining that, because nitrogen in the effluent is taken up by  
11 the trees and because other elements in the effluent bind with the  
12 soil, the project in this case constitutes a utility facility—  
13 specifically, a wastewater treatment facility. “In summary, we  
14 conclude that the project is not a utility facility within the meaning  
15 of the provisions of ORS 215.283(1)(d) (1997) at the time of the  
16 application for this project and that LUBA erred in holding  
17 otherwise. Because we so conclude, we need not consider whether  
18 LUBA erred in determining that a project can constitute two uses  
19 and in determining that such a project must meet the requirements  
20 for each.”<sup>174</sup> Or App 332, 343-45, 25 P3d 970 (2001) (footnotes  
21 omitted).

22 Similarly, we conclude that the introduction of chlorine into the water prior to its  
23 transmittal through the pipeline does not make the pipeline itself equipment or an  
24 apparatus that performs the function of disinfecting irrigation water, and the  
25 presence of disinfectant in the water does not convert the reservoir into a utility  
26 facility.

27 In addition, we agree with petitioner that there is no evidence in the record  
28 to support the board of commissioners’ conclusion that additional treatment may

1 be required at the site.<sup>5</sup> The purpose of the chlorine is to destroy pathogenic  
2 organisms and prevent the spread of waterborne disease. Record 444. According  
3 to DEQ’s internal management directive for “Implementing Oregon’s Recycled  
4 Water Use Rules,”

5 “[t]he key features of a chlorine disinfection system are:

- 6 “• Adequate initial mixing;
  - 7 “• Adequate initial dosage;
  - 8 “• Adequate contact time; and
  - 9 “• Optimizing plug flow conditions in the contact chamber.”
- 10 Record 444.

11 Expert testimony from petitioner’s project engineer explains that all treatment of  
12 the waste water is accomplished at the treatment plant, with no treatment at the  
13 Poe site. Record 100. This testimony is consistent with ORS 215.246(4), which  
14 provides that onsite treatment is limited to that which occurs as a result of the  
15 land application, as well as DEQ’s internal management directive, which states  
16 that treatment from a process other than land application or incidental changes  
17 during transportation is not allowed under the statute. Record 34, 100, 434.

18 Intervenors argue that the board of commissioners correctly determined  
19 that the project is a utility facility because

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<sup>5</sup> Petitioner also points out that the point of compliance for meeting National Pollutant Discharge Elimination System (NPDES) permit requirements is before storage. Record 37.

1 “the pressurized transmission of reclaimed wastewater to its  
2 terminus at a large water body that will undergo perpetual  
3 ‘engineering controls’ via solar-powered hypolimnetic circulation  
4 so as to allow long-term and high-volume storage. This process  
5 alone has absolutely nothing to do with permissible, existing, and  
6 accepted farm practices on EFU lands and it is logical to interpret  
7 this as merely an extension of the treatment facility itself, as well as  
8 its primary utility function.” Intervenors’ Response Brief 7 (citing  
9 Record 633-34, 637).

10 The record pages cited by intervenors in support of this statement contain  
11 reservoir site plans and an elevation view of the “Engineering Control to Prevent  
12 Reservoir Stratification.” We concluded in *Farrell v. Jackson County* that the use  
13 of circulation to prevent stratification did not create a utility facility:

14 “In summary, while potential for odors is a concern, and the aerators  
15 are one of the means used to address that concern, the treatment of  
16 the rinse water that is provided by Sabroso’s facility is essentially  
17 identical to the treatment that the Court of Appeals found to be  
18 insufficient to make the facility in *Cox* a utility facility. In both cases  
19 the noxious qualities of the wastewater were reduced by the soil the  
20 wastewater was applied to and the plants growing in that soil. While  
21 the aerators do reduce rinse water BOD, they are not employed for  
22 the purpose of ‘treating’ the rinse water. Rather, they are employed  
23 to control odors, which is a collateral concern. We do not believe  
24 the Court of Appeals would view the aerators as treatment  
25 facilities.” 41 Or LUBA 1, 11 (2001).

26 We reach the same conclusion in this case. Circulation equipment does not make  
27 the project a utility facility.

28 Finally, intervenors argue that there is “overwhelming additional evidence  
29 in the record that provides alternative support for [LUBA] to find, independently  
30 from the factual findings rendered by the County, that the project is properly

1 classified as a utility facility.” Intervenors’ Response Brief 5;<sup>6</sup> *see* ORS  
2 197.835(11)(b).<sup>7</sup>

3 We reject intervenors’ argument that LUBA should affirm the county’s  
4 decision to deny the application on the basis of ORS 197.935(11)(b). ORS

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<sup>6</sup> Intervenors contend:

“ORS 215.246 helps define the scope of this permitted use, stating the allowed uses included with the land application of reclaimed water are: ‘the establishment and use of facilities, including buildings, equipment, aerated and nonaerated water impoundments, pumps and other irrigation equipment, that are *accessory to and reasonably necessary for the land application to occur* on the subject tract.’ ORS 215.246 (emphasis added) The Legislature has explained that the equipment is to be considered ‘reasonably necessary’ for land application if it is a normal component of the land application system. Implementation of Senate Bill 212, Report to the Legislature (January 2003). This necessarily presents a discretionary issue for the local decision maker to decide.” Intervenors’ Response Brief 6 (footnote omitted).

Intervenors do not provide us with a copy of the referenced report, but rather provide a web address. Citation of a web address does not place a document before us.

<sup>7</sup> ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”

1 197.835(11)(b) only permits LUBA to affirm a decision that is supported by  
2 inadequate findings where the issue of whether the proposal complies or does not  
3 comply with the applicable criteria is obvious. *Terra v. City of Newport*, 36 Or  
4 LUBA 582, 589-90 (1999); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or  
5 LUBA 101, 122 (1995). We decline to affirm the board of county commissioners'  
6 decision on a factual and legal basis neither articulated nor relied upon in the  
7 challenged decision.

8 In addition, we agree with petitioner that the project is not a utility facility.  
9 ORS 215.246(4) provides that the reservoir must be accessory to the land  
10 application of reclaimed water. Petitioner's proposed reservoir is just that.  
11 Further, the statute does not prohibit excess water from being stored on-site until  
12 it is needed for irrigation.

13 The sixth assignment of error is sustained.

14 **DISPOSITION**

15 Petitioner requests that we reverse or remand the decision. We will reverse  
16 a decision when the decision violates a provision of applicable law and is  
17 prohibited as a matter of law. ORS 197.835(1); OAR 661-010-0073(1)(c). As  
18 explained above, the decision violates ORS 215.246.

19 The county's decision is reversed.