

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

OREGON DEPARTMENT OF FISH AND WILDLIFE,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

WEST PRINEVILLE SOLAR FARM LLC,
Intervenor-Respondent.

LUBA No. 2020-114

FINAL OPINION
AND ORDER

Appeal from Crook County.

Erin L. Donald filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Ellen F. Rosenblum, Attorney General.

Peter O. Watts filed a response brief and argued on behalf of respondent. Also on the brief was John R. Eisler.

Merissa Moeller filed a response brief and argued on behalf of intervenor-respondent. Also on the brief were Timothy L. McMahan, Max Yoklic and Stoel Rives LLP.

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

REMANDED

06/09/2021

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, the Oregon Department of Fish and Wildlife (ODFW), appeals a decision by the county court approving a modification of a previously issued conditional use permit for a solar facility to increase the facility size from 320 acres to 654 acres.

FACTS

In April 2019, the county approved a conditional use permit (Original CUP) to site a solar facility on approximately 320 acres of land zoned Exclusive Farm Use-3 (EFU-3). The Original CUP was not appealed and that decision is final.

In April 2020, intervenor-respondent (intervenor) applied to modify the Original CUP to expand the solar facility by an additional 334 acres, for a total facility size of 654 acres (Modified CUP). A majority of soils on the 654-acre subject property are classified by the National Resources Conservation Service as class VI or VII. Because they do not have a history of irrigation, those soils are considered nonarable. OAR 660-033-0130(38)(e). The property contains agricultural fields, sagebrush, and juniper uplands, with steep juniper forested areas in the southwest and northeast of the property. Record 202, 529. The property is located within an elk migration corridor and is adjacent to pronghorn winter range. Record 529. The entire 654-acre solar facility is proposed to be

1 fenced at a minimum height of eight feet, with gates to allow wildlife
2 inadvertently trapped in the fenced area to exit. Record 204, 541.

3 Approximately 200 acres of the 334-acre expansion area are proposed to
4 be permanently impacted by construction and development of the project. Record
5 203. The quality of habitat in the expansion area is disputed, as we explain in
6 more detail below. The project life is presumed to be 40 years. Record 207.
7 Intervenor submitted a wildlife conservation plan and then submitted a revised
8 version of the plan, which the parties refer to in their briefs and we refer to in this
9 opinion as the V2 Plan. Record 201-10. The V2 Plan includes three proposed
10 options for mitigating the impacts on deer, elk, antelope, and migratory birds that
11 the project cannot avoid. The V2 Plan explains that it is not the final mitigation
12 plan, that a final plan will be prepared that identifies the specific mitigation
13 options chosen by intervenor, that the final plan will be submitted to the county
14 planning department, and that intervenor will seek “reasonable concurrence”
15 from ODFW for any deviations from the V2 Plan. Record 208.

16 Option 1 proposes off-site removal of juniper and enhancement of shrubs
17 and herbaceous vegetation on up to 200 acres—plus a failure buffer of between
18 one and 30 percent, depending on the quality of the mitigation site—either
19 proximate to the property, elsewhere in the county, or somewhere else if
20 intervenor cannot locate a suitable site in proximity to the property or in the
21 county. Option 2 proposes a one-time payment to the Deschutes Land Trust or a
22 similar land trust to pay for mitigation at the “Aspen Valley Ranch (or some other

1 comparable project) in Crook County,” in lieu of intervenor carrying out the
2 mitigation itself. Record 209. Option 3 proposes “alternative mitigation measures
3 agreed to by ODFW.” Record 210.

4 On June 2, 2020, the planning commission approved the Modified CUP
5 and conditioned the approval on intervenor providing “evidence to the County
6 that one of the three options for implementing habitat mitigation, as detailed in
7 [the V2 Plan] and adopted as part of this Condition of Approval, has been
8 initiated.” Record 541. ODFW appealed the planning commission’s decision to
9 the county court. The county court held a public hearing on the appeal on October
10 6, 2020, and the hearing was continued to October 21, 2020. On November 10,
11 2020, the county court affirmed the planning commission’s decision but removed
12 Option 3 as an available mitigation option. This appeal followed.

13 **ASSIGNMENT OF ERROR**

14 ODFW’s single assignment of error includes an overview section
15 summarizing the applicable law and five additional sections that we treat as five
16 subassignments of error. In its third and fourth subassignments of error, ODFW
17 argues that the county improperly construed the applicable law in granting the
18 Modified CUP. In its first and second subassignments of error, ODFW argues
19 that the county’s decision is not supported by adequate findings or substantial
20 evidence in the record. In its fifth subassignment of error, ODFW argues that the
21 county improperly deferred a determination of compliance with an applicable
22 criterion to a future proceeding that does not allow for public participation. We

1 start with an overview of the applicable criteria before turning to the
2 subassignments of error.

3 **A. ORS 215.446**

4 ORS 215.446 was enacted as House Bill (HB) 2329 (2019). 2019 Or.
5 Laws, ch 650, § 4. That statute provides the standards for counties to apply in
6 determining whether to authorize solar facilities between 321 and 1,920 acres on
7 nonarable soils.¹ ORS 215.446(2) and (3) provide:

¹ Briefly, counties are authorized to permit solar facilities in EFU zones. ORS 215.283(2)(g). However, before the enactment of ORS 215.446, solar facilities on more than 320 acres of nonarable soils required a site certificate from the Energy Facility Siting Council (EFSC). ORS 496.320(1) (“[N]o facility shall be constructed or expanded unless a site certificate has been issued for the site thereof * * *.”); ORS 496.300(14) (“‘Facility’ means an energy facility together with any related or supporting facilities.”); ORS 496.300(11)(a)(D)(iii) (2017) (defining “energy facility” to include solar facilities on more than 320 acres of nonarable soils).

In enacting ORS 215.446, the legislature exempted solar facilities on between 321 and 1,920 acres of nonarable soils from the EFSC site certificate requirement. 2019 Or Laws, ch 650, § 1 (redefining “energy facility” for EFSC site certificate purposes to include solar facilities on more than 1,920 acres of nonarable soils). Simultaneously, the legislature authorized counties to permit those same facilities in EFU zones subject to the standards at ORS 215.446(3). *Id.* § 7 (authorizing counties to permit “renewable energy facilities” in EFU zones); *id.* § 4 (defining “renewable energy facilities” to exclude solar facilities on 320 acres or less of nonarable soils and setting out the standards for counties to permit renewable energy facilities). Unlike the EFSC, counties are required to make final decisions on such permits within 150 days after an application is deemed complete. ORS 215.427(1).

1 “(2) An application for a land use permit to establish a renewable
2 energy facility must be made under ORS 215.416. An
3 applicant must demonstrate to the satisfaction of the county
4 that the renewable energy facility meets the standards under
5 subsection (3) of this section.

6 “(3) In order to issue a permit, the county shall require that the
7 applicant:

8 “(a)

9 “(A) Consult with [ODFW], prior to submitting a
10 final application to the county, regarding fish
11 and wildlife habitat impacts and any mitigation
12 plan that is necessary;

13 “(B) Conduct a habitat assessment of the proposed
14 development site;

15 “(C) Develop a mitigation plan to address significant
16 fish and wildlife habitat impacts consistent with
17 the administrative rules adopted by the State
18 Fish and Wildlife Commission for the purposes
19 of implementing ORS 496.012; and

20 “(D) Follow administrative rules adopted by the State
21 Fish and Wildlife Commission and rules adopted
22 by the Land Conservation and Development
23 Commission to implement the Oregon Sage-
24 Grouse Action Plan and Executive Order 15-
25 18.”

26 Thus, ORS 215.446(2) requires that, in seeking county approval of a solar facility
27 between 321 and 1,920 acres on nonarable soils, intervenor must demonstrate “to
28 the satisfaction of the county that the * * * facility meets the standards under”
29 subsection (3). Subsection (3), in turn, requires intervenor to, among other things,
30 develop a mitigation plan to address significant impacts to fish and wildlife

1 habitat.² ORS 215.446(3)(a)(C). The parties' central dispute is over what,
2 specifically, ORS 215.446(3)(a)(C) requires intervenor to provide in order for the
3 county to find that that subparagraph is satisfied and approve the permit.

4 **B. OAR 635-415-0000 to 635-415-0025**

5 Again, ORS 215.446(3)(a)(C) requires intervenor to “[d]evelop a
6 mitigation plan to address significant fish and wildlife habitat impacts consistent
7 with the administrative rules adopted by the State Fish and Wildlife Commission
8 for the purposes of implementing ORS 496.012.”³ The “administrative rules

² The parties agree that the property does not contain sage grouse habitat, so ORS 215.446(3)(a)(D) does not apply.

³ ORS 496.012 provides:

“It is the policy of the State of Oregon that wildlife shall be managed to prevent serious depletion of any indigenous species and to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state. In furtherance of this policy, the State Fish and Wildlife Commission shall represent the public interest of the State of Oregon and implement the following coequal goals of wildlife management:

- “(1) To maintain all species of wildlife at optimum levels.
- “(2) To develop and manage the lands and waters of this state in a manner that will enhance the production and public enjoyment of wildlife.
- “(3) To permit an orderly and equitable utilization of available wildlife.
- “(4) To develop and maintain public access to the lands and waters of the state and the wildlife resources thereon.

1 adopted by the State Fish and Wildlife Commission for the purposes of
2 implementing ORS 496.012” are found in OAR chapter 635, division 415, titled
3 “Fish and Wildlife Habitat Mitigation Policy” (Mitigation Policy).

4 **1. When a Mitigation Plan is Recommended**

5 OAR 635-415-0025 provides the mitigation goals for different qualities,
6 or “categories,” of habitat. OAR 635-415-0020(5) provides:

7 “[ODFW] shall * * * recommend or require a written [mitigation] plan
8 approved by [ODFW] if the impacts of the proposed development
9 action may, in the opinion of [ODFW], be so significant in nature,
10 extent, or duration that mitigation measures to achieve the goals and
11 standards of OAR 635-415-0025 cannot be identified without the
12 evaluation that would be provided in a written mitigation plan.”

13 OAR 635-415-0005(18) defines “mitigation plan” to mean

14 “a written plan or statement that thoroughly describes the manner in
15 which the impact of a development action will be reduced or
16 eliminated over time, avoided, and/or minimized; and the affected
17 environment, including fish and wildlife habitat, monitored,
18 restored, rehabilitated, repaired and/or replaced or otherwise
19 compensated for in accordance with OAR 635-415-0010 of these

“(5) To regulate wildlife populations and the public enjoyment of
wildlife in a manner that is compatible with primary uses of
the lands and waters of the state.

“(6) To provide optimum recreational benefits.

“(7) To make decisions that affect wildlife resources of the state
for the benefit of the wildlife resources and to make decisions
that allow for the best social, economic and recreational
utilization of wildlife resources by all user groups.”

1 rules.”

2 **2. No Net Loss of Habitat Quantity and Quality/Durability**
3 **of Mitigation**

4 The quality of habitat on the subject property is disputed in the briefs.
5 ODFW maintains that the habitat is Category 3 or 4. Record 641. OAR 635-415-
6 0025(3)(a) and (4)(a) provide that the mitigation goal for Category 3 and 4 habitat
7 is “no net loss” in habitat quantity or quality. Intervenor maintains that the habitat
8 is Category 6. Record 168. OAR 635-415-0025(6)(a) provides that the mitigation
9 goal for Category 6 habitat is “to minimize impacts.” Nevertheless, intervenor
10 agreed to achieve the “no net loss” standard that applies to Category 3 and 4
11 habitat. Record 205.

12 Where the impacts of development actions on Category 3 or 4 habitat are
13 unavoidable, OAR 635-415-0025(3)(b)(B) and (4)(b)(B) direct ODFW to
14 recommend

15 “[m]itigation of impacts * * * through reliable in-kind or out-of-kind,
16 in-proximity or[, for Category 4 habitat,] off-proximity habitat
17 mitigation to achieve no net loss in either pre-development habitat
18 quantity or quality. Progress towards achieving the mitigation goals
19 and standards shall be reported on a schedule agreed to in the
20 mitigation plan performance measures. The fish and wildlife
21 mitigation measures shall be implemented and completed either
22 prior to or concurrent with the development action.”

23 **3. Required Components of a Mitigation Plan**

24 OAR 635-415-0020(8) provides:

25 “In addition to any other information that may be required by law, a
26 written mitigation plan prepared for [ODFW] shall:

- 1 “(a) Include the information required in OAR 635-415-
2 0020(4)(a)-(d); and
- 3 “(b) Describe the mitigation actions which shall be taken to
4 achieve the fish and wildlife habitat mitigation goals and
5 standards of OAR 635-415-0025; and
- 6 “(c) Describe and map the location of the development action and
7 mitigation actions including the latitude and longitude,
8 township, range, section, quartersection and county; and
- 9 “(d) Complement and not diminish mitigation provided for
10 previous development actions; and
- 11 “(e) Include protocols and methods, and a reporting schedule for
12 monitoring the effectiveness of mitigation measures.
13 Monitoring efforts shall continue for a duration and at a
14 frequency needed to ensure that the goals and standards in
15 OAR 635-415-0025 are met, unless [ODFW] determines that
16 no significant benefit would result from such monitoring; and
- 17 “(f) Provide for future modification of mitigation measures that
18 may be required to meet the goals and standards of OAR 635-
19 415-0025; and
- 20 “(g) Be effective throughout the project life or the duration of
21 project impacts whichever is greater.
- 22 “(h) Contain mitigation plan performance measures including:
- 23 “(A) Success Criteria. The mitigation plan must clearly
24 define the methods to meet mitigation goals and
25 standards and list the criteria for measuring success;
- 26 “(B) Criteria and a timeline for formal determination that the
27 mitigation goals and standards have been met;
- 28 “(C) Provisions for long-term protection and management
29 of the site if appropriate;

1 “(D) A reporting schedule for identifying progress toward
2 achieving the mitigation goals and standards and any
3 modification of mitigation measures. Mitigation goals
4 and standards must be achieved within a reasonable
5 time frame to benefit the affected fish and wildlife
6 species.”

7 **C. The County’s Decision**

8 The county court adopted “Findings of Fact and Conclusions of Law” and
9 attached and incorporated “Outside Counsel’s Proposed Findings of Fact and
10 Conclusions of Law.” Record 1-5. The county court found that “[intervenor] and
11 ODFW agree on the habitat classification and mitigation ratio” and that the no
12 net loss standard in OAR 635-415-0025 can be met by implementing either
13 Option 1 or Option 2 of the V2 Plan. Record 5.⁴ Although the findings do not

⁴ The county court found:

“8. Because of the size of this project and pursuant to the provisions found in HB 2329 (ORS 215.446) [intervenor] must consult with ODFW and the Court must make certain findings. The Court finds that there is substantial evidence in the record that [the V2 Plan] will ‘address significant fish and wildlife habitat impacts’ and is ‘consistent with the administrative rules adopted by the State Fish and Wildlife Commission for the purposes of implementing ORS 496.012.’ Those administrative rules refer to ODFW’s habitat mitigation policy at OAR Chapter 635, Division 415. ODFW’s habitat mitigation rules set forth a scheme for classifying habitat based on its relative quality and provide certain mitigation goals for each class of habitat. In this case[, intervenor] and ODFW agree on the habitat classification and mitigation ratio.

1 include an interpretation of ORS 215.446, the county court concluded that the V2
2 Plan is “consistent with” the Mitigation Policy.

3 **D. Third and Fourth Subassignments of Error**

4 Again, ORS 215.446(3)(a)(C) requires intervenor to “[d]evelop a
5 mitigation plan to address significant fish and wildlife habitat impacts consistent
6 with the [Mitigation Policy].” In its third and fourth subassignments of error,
7 ODFW argues that the county court improperly construed ORS 215.446(3)(a)(C)
8 when it determined that the V2 Plan satisfies the requirements of that statute. *See*
9 ORS 197.835(9)(a)(D) (providing that LUBA will reverse or remand a decision
10 where the local government “[i]mproperly construed the applicable law”).

“9. The Court concludes that [the V2 Plan] is within the legally acceptable range of mitigation approaches to provide ‘appropriate’ mitigation, as the County interprets that term. Specifically, the Court recognizes that the County has historically allowed a variety of mitigation approaches for solar projects in Crook County, with input from ODFW, and that ‘appropriate mitigation’ differs from project to project. The Planning Commission engaged in a robust discussion of possible mitigation options for this project, including considering approaches taken at other solar projects on nearby properties, and determined that [the V2 Plan] was consistent with the County’s previous decisions.”

“10. Further, the Court finds that of the three mitigation implementation alternatives detailed in the [V2 Plan,] Options 1 and 2 provide the most appropriate mitigation.”
Record 5.

Intervenor does not challenge those findings.

1 ODFW argues that the V2 Plan fails to qualify as a “mitigation plan,” as defined
2 in OAR 635-415-0005(18), because it fails to “thoroughly describe the manner
3 in which” implementing the plan will meet the no net loss standard. OAR 635-
4 415-0005(18); Petition for Review 25. ODFW also argues that the V2 Plan fails
5 to include information that is required by OAR 635-415-0020(8), and it is
6 therefore not “consistent with” the Mitigation Policy. In particular, ODFW
7 argues that the V2 Plan is missing the information listed in OAR 635-415-
8 0020(8)(c), (g), (h)(A), (h)(B), and (h)(D). ODFW argues that, without
9 describing and mapping any proposed mitigation site or sites, “including the
10 latitude and longitude, township, range, section, quartersection and county;”
11 without describing the durability of the mitigation measures; and without
12 identifying any performance measures, including success criteria, a project
13 timeline, and a reporting schedule, the V2 Plan is not consistent with OAR 635-
14 415-0020(8) and, more importantly, does not support a conclusion that
15 implementing it will result in no net loss of habitat quality and quantity.⁵

⁵ ODFW explains:

“While removing encroaching juniper would likely improve habitat quality, the vague requirement that juniper treatment occur where there is encroaching juniper is not sufficient evidence to conclude that the implementation of the mitigation plan will result in no net loss of habitat quality. Juniper encroachment can occur at varying levels, and just because some juniper is removed, resulting in some improvement to habitat quality, does not necessarily mean the end

1 Intervenor responds that the requirement at ORS 215.446(3)(a)(C) that it
2 “develop a mitigation plan to address significant fish and wildlife habitat impacts
3 consistent with the [Mitigation Policy]” does not mean that its plan must be
4 consistent with all of the provisions of OAR 635-415-0000 to 635-415-0025 and,
5 in particular, does not mean that its plan must include all of the information at
6 OAR 635-415-0020(8). According to intervenor, the county was not required to
7 determine consistency with OAR 635-415-0020(8) because that rule is limited to
8 situations in which ODFW is the permitting authority, which it is not in the
9 present case. Intervenor’s Response Brief 15.

10 Resolving this subassignment of error requires us to determine the
11 meaning of ORS 215.446(3)(a)(C)’s requirement that applicants “[d]evelop a
12 mitigation plan to address significant fish and wildlife habitat impacts *consistent*
13 *with the [Mitigation Policy]*.” (Emphasis added.) In determining the meaning of
14 a statute, we follow the familiar statutory construction framework established in
15 *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and *PGE v. Bureau of Labor*
16 *and Industries*, 317 Or 606, 859 P2d 1143 (1993). We begin by examining the
17 text and context of the statute, and considering any relevant legislative history.

18 ODFW argues that the plain language of the statute is unambiguous and
19 requires intervenor to develop a “mitigation plan,” as that term is defined in OAR
20 635-415-0005(18), that is “consistent with” the Mitigation Policy and, therefore,

result will be no net loss of habitat quality.” Petition for Review 27-
28 (footnote omitted).

1 includes all of the information specified in OAR 635-415-0020(8). Petition for
2 Review 10-12, 19.

3 Intervenor urges a different interpretation of ORS 215.446(3)(a)(C).
4 According to intervenor, the county is not required to determine that an
5 applicant's mitigation plan is consistent with provisions of the Mitigation Policy
6 that the county determines do not apply, such as when ODFW is not the
7 permitting authority. According to intervenor, although the text of the statute
8 broadly refers to all of the administrative rules that comprise the Mitigation
9 Policy, ORS 215.446(2) provides context for interpreting that broad requirement.
10 ORS 215.446(2) requires that an applicant demonstrate "to the satisfaction of the
11 county" that a proposed solar facility meets the standards in subsection (3).
12 Accordingly, intervenor argues, subsection (2) gives the county wide discretion
13 to determine whether a mitigation plan furnished by an applicant is consistent
14 with the Mitigation Policy, and a mitigation plan need not include ODFW's
15 recommendations or the information at OAR 635-415-0020(8) in order to be
16 "consistent with" the Mitigation Policy. Also as contextual support for its
17 interpretation, intervenor notes the different language in ORS 215.446(3)(a)(D),
18 which requires an applicant to "follow" administrative rules adopted by ODFW
19 to protect sage grouse, and subparagraph (3)(a)(C), which only requires an
20 applicant to develop a mitigation plan that is "consistent with" the Mitigation
21 Policy. Intervenor argues that the requirement to develop a consistent plan is less

1 stringent that the requirement to “follow” the administrative rules regarding sage
2 grouse.

3 We agree with ODFW that the plain language of ORS 215.446(3)(a)(C),
4 which requires intervenor to develop a mitigation plan that is “consistent with”
5 all provisions of the Mitigation Policy, requires intervenor to develop a mitigation
6 plan that includes the information set out in OAR 635-415-0020(8). All of the
7 rules at OAR 635-415-0000 to 635-415-0025 state that they implement ORS
8 496.012. Accordingly, all of the rules at OAR 635-415-0000 to 635-415-0025 are
9 “rules adopted * * * for the purposes of implementing ORS 496.012.” Thus,
10 under the plain language of the statute, intervenor must demonstrate consistency
11 with all of those rules, including OAR 635-415-0020(8). Intervenor’s
12 interpretation of ORS 215.446(3)(a)(C) essentially inserts the phrase “it deems
13 applicable” after the phrase “administrative rules adopted by the State Fish and
14 Wildlife Commission, for the purposes of implementing ORS 496.012.” The
15 legislature did not limit the universe of rules with which an applicant must
16 demonstrate consistency to only those rules that the county determines apply.
17 Rather, the legislature broadly described the consistency requirement to
18 encompass all of the rules that implement ORS 496.012.

19 We are also not persuaded that ORS 215.446(2) provides context that
20 supports intervenor’s interpretation. Subsection (2) directs that an applicant must
21 demonstrate “to the satisfaction of the county” that the standards in subsection

1 (3) are met, but nothing in subsection (2) allows the county to determine which
2 of the rules that comprise the Mitigation Policy apply.

3 We are similarly not persuaded that the difference in the language that the
4 legislature used in ORS 215.446(3)(a)(D), requiring an applicant to “follow” the
5 ODFW rules regarding sage grouse, and subparagraph (3)(a)(C), requiring an
6 applicant to develop a mitigation plan that is “consistent with” the Mitigation
7 Policy, imposes a different burden on an applicant. The word “consistent” is not
8 defined in the statute, and we therefore look to the plain meaning of the word.
9 ODFW and intervenor both cite *Websters Third New Int’l Dictionary* 484
10 (unabridged ed 2002) for the meaning: “**2 * * * b** : marked by agreement and
11 concord * * * : coexisting and showing no noteworthy opposing, conflicting,
12 inharmonious, or contradictory qualities or trends : COMPATIBLE.” Given the
13 plain meaning of the word “consistent,” we conclude that demonstrating
14 consistency with all of the rules that implement ORS 496.012 requires intervenor
15 to provide the information that is described in OAR 635-415-0020(8). Definitions
16 of “follow” include “to act in accordance with,” and we see no practical
17 difference between acting “in accordance with” and being “marked by agreement
18 and concord.” *Webster’s* at 883.

19 Although intervenor points to legislative history that it argues supports its
20 preferred interpretation, we conclude that the legislative history of ORS
21 215.446(3)(a)(C) does not support a different interpretation than the one
22 unambiguously provided in the text. The legislative history reveals that the intent

1 of HB 2329 was to streamline the permitting process and reduce permitting costs
2 for solar projects of certain sizes. Intervenor’s Response Brief 12 (citing Audio
3 Recording, Joint Committee on Ways and Means, Subcommittee on Natural
4 Resources, HB 2329, June 10, 2019, at 28:10 (comments of Rep Ken Helm)
5 (stating that, “out in Eastern Oregon, in particular, we have trouble getting
6 facilities sited and approved in a timely manner and one that’s affordable for the
7 developers” and that HB 2329 was intended to “cut[] down on processing time
8 and expense”)). Intervenor also argues that one of the purposes of HB 2329 was
9 to limit ODFW’s role in and oversight of solar projects between 321 and 1,920
10 acres by relegating it to an advisory role. *Id.* at 18. Intervenor cites the -3
11 amendments to HB 2329, which were adopted by the House Committee on
12 Energy and Environment and which intervenor argues would have given ODFW
13 more discretionary approval authority but which were later rejected through
14 further amendments in the Joint Committee on Ways and Means. *Id.* at 19 (citing
15 HB 2329, -3 amendments (Apr 8, 2019)).

16 ODFW responds that the legislative history supports its interpretation that
17 the legislature intended to broadly require consistency with all provisions of the
18 Mitigation Policy. Like intervenor, ODFW cites the -3 amendments to HB 2329,
19 which included specific references to the mitigation goals in OAR 635-415-0025
20 but which were later rejected through further amendments that instead require
21 consistency with the Mitigation Policy as a whole, without references to any
22 specific provisions.

1 Our review of the legislative history provided by intervenor reveals that
2 the primary focus of HB 2329 was to reduce the *time* and the *cost* of permitting
3 solar facilities through the EFSC process by allowing counties to permit larger
4 solar facilities at a lower cost and within the statutory 150-day time frame. *See* n
5 1. The legislative history does not demonstrate, as intervenor argues, that the
6 legislature intended to weaken habitat protection or to waive compliance with the
7 Mitigation Policy. Rather, one of the bill’s sponsors acknowledged mid-way
8 through the legislative process that more work was needed to “ensure that fish
9 and wildlife habitat is adequately protected” and stated that “we still want
10 [ODFW’s] fish and wildlife habitat protections in place.” Audio Recording,
11 House Committee on Energy and Environment, HB 2329, Apr 9, 2019, at 59:26
12 (comments of Rep Ken Helm); *LandWatch Lane County v. Lane County*, 364 Or
13 724, 746, 441 P3d 221 (2019) (considering statement of the relevant legislation’s
14 sponsor). The legislative history tends to support an interpretation that the
15 legislation was intended to maintain habitat protections adopted by ODFW.
16 Audio Recording, Joint Committee on Ways and Means, Subcommittee on
17 Natural Resources, HB 2329, June 10, 2019, at 20:40 (comments of Rep Ken
18 Helm); *id.* at 34:17 (comments of Association of Oregon Counties representative
19 Doris Penwell) or *id.* at 35:52 (comments of Renewable Northwest representative
20 Elaine Albrich).

1 **1. OAR 635-415-0020(8)(g) (Durability)**

2 OAR 635-415-0020(8)(g) requires mitigation plans to “[b]e effective
3 throughout the project life or the duration of the project impacts whichever is
4 greater.” The parties refer to that provision as the durability requirement. As
5 noted, the project life is assumed to be 40 years. ODFW argues that some of the
6 methods intervenor proposed and the county accepted in the V2 Plan to
7 demonstrate the durability of the mitigation, such as a conservation easement,
8 working lands agreement, or similar restriction, are “too vague to ensure that they
9 would run with the land, adequately prevent conflicting uses, and allow access
10 for monitoring and enforcement for decades,” and they therefore do not comply
11 with OAR 635-415-0020(8)(g). Petition for Review 29.

12 Intervenor disagrees with ODFW’s argument that the V2 Plan does not
13 include the information required by OAR 635-415-0020(8)(g). According to
14 intervenor, the V2 Plan ensures durability “by means of an outright purchase of
15 the mitigation area, a conservation easement, a working lands agreement, or other
16 materially similar restriction, reasonably expected to prevent development or
17 other substantial adverse impacts to the site habitat by the landowner.” Record
18 207. Intervenor also points to a condition of approval that the county imposed
19 requiring intervenor to provide documentation to the county that intervenor has
20 implemented one of the above-described methods before site clearing.

21 We agree with ODFW that, absent some example of the provisions that are
22 expected to be included in a conservation easement, working lands agreement, or

1 similar restriction, demonstrating that such agreements or instruments will run
2 with the land, prevent conflicting uses, and allow access for monitoring for the
3 life of the project and potentially beyond, the proposed methods for achieving
4 durability are not specific enough to satisfy OAR 635-415-0020(8)(g)'s
5 requirement that the mitigation measures "[b]e effective throughout the project
6 life or the duration of project impacts whichever is greater."

7 **2. OAR 635-415-0020(8)(h)**

8 OAR 635-415-0020(8)(h) requires mitigation plans to

9 "[c]ontain * * * performance measures including:

10 "(A) Success Criteria. The mitigation plan must clearly
11 define the methods to meet mitigation goals and
12 standards and list the criteria for measuring success;

13 "* * * * *

14 "(C) Provisions for long-term protection and management
15 of the site if appropriate;

16 "(D) A reporting schedule for identifying progress toward
17 achieving the mitigation goals and standards and any
18 modification of mitigation measures. Mitigation goals
19 and standards must be achieved within a reasonable
20 time frame to benefit the affected fish and wildlife
21 species."

22 Intervenor maintains that the V2 Plan's agreement to provide the county planning
23 department with "a final mitigation plan and related documentation," describing
24 (1) a "project timeline" including "monitoring and evaluation methods and
25 frequency," (2) the durability measures that intervenor has implemented, and (3)

1 a reporting schedule, is sufficient to satisfy the requirements in OAR 635-415-
2 0020(8)(h)(A), (C), and (D). Intervenor’s Response Brief 33-34. ODFW argues
3 that the information at OAR 635-415-0020(8) must be included in the mitigation
4 plan on which the county relies to determine whether ORS 215.446(3)(a)(C) is
5 met, and that it is not sufficient for intervenor to promise to provide that
6 information to the county after it has already approved the permit. Petition for
7 Review 31. Again, we agree with ODFW that the V2 Plan does not include the
8 information that is required to be included in a mitigation plan under OAR 635-
9 415-0020(8)(h)(A), (C), and (D).

10 The third and fourth subassignments of error are sustained.

11 **E. First Subassignment of Error**

12 Adequate findings set out the applicable approval criteria and explain the
13 facts relied upon to conclude whether the applicable criteria are satisfied. *Le Roux*
14 *v. Malheur County*, 30 Or LUBA 268, 271 (1995); *Heiller v. Josephine County*,
15 23 Or LUBA 551, 556 (1992). In addition, ORS 215.416(9) provides:

16 “Approval or denial of a permit or expedited land division shall be
17 based upon and accompanied by a brief statement that explains the
18 criteria and standards considered relevant to the decision, states the
19 facts relied upon in rendering the decision and explains the
20 justification for the decision based on the criteria, standards and
21 facts set forth.”

22 ODFW argues that the county’s findings are inadequate to explain why it
23 concluded that the V2 Plan meets the no net loss standard in OAR 635-415-0025.

24 First, ODFW argues, the county’s findings do not explain how Option 1 or Option

1 2 will result in no net loss of habitat quantity “when the anticipated impact of the
2 development is up to 654 acres.” Petition for Review 22. ODFW also argues that
3 the findings are inadequate to describe why the county concluded that the no net
4 loss standard is met without any information regarding potential mitigation sites
5 and without a description of the monitoring measures and success criteria.
6 Finally, ODFW argues that the findings are inadequate to address issues that
7 ODFW raised during the proceedings below regarding compliance with ORS
8 215.446.

9 Intervenor responds, initially, that ODFW failed to raise the issue below
10 that the county was required to consider mitigation for the habitat affected by the
11 320-acre facility that was approved in the Original CUP, and that it may not raise
12 that issue for the first time on appeal to LUBA. We agree. We have reviewed the
13 record pages that ODFW cites in support of its argument that the issue was
14 preserved, and nothing in those record pages raises an issue that the entire 654-
15 acre solar facility must result in no net loss to habitat. Consequently, intervenor
16 need only demonstrate that the additional 334 acres proposed in the Modified
17 CUP application meet the no net loss standard.

18 Intervenor also responds that the county court’s findings incorporate the
19 planning commission’s findings and that the planning commission’s decision
20 incorporates a staff report. Intervenor quotes a statement in the county court’s
21 decision that the county court “hereby modifies the Planning Commission’s

1 decision, affirming as to Options 1 and 2 of the [V2 Plan] and removing Option
2 3.” Record 3.⁶

3 As noted, the county court’s decision includes “Findings of Fact and
4 Conclusions of Law” and attaches “Outside Counsel’s Proposed Findings of Fact
5 and Conclusions of Law.” Record 1-5. The county court’s decision states, “Based
6 upon *the attached* findings of fact and conclusions of law incorporated herein,
7 the Crook County Court hereby modifies the Planning Commission’s decision,
8 affirming as to Options 1 and 2 of the mitigation plan and removing Option 3.”
9 Record 5 (emphasis added). As far as we can tell from the record, two pages of
10 “Outside Counsel’s Proposed Findings of Fact and Conclusions of Law” are
11 attached to the county court’s final decision, but no other documents are attached.
12 We do not understand the county court’s decision to incorporate the planning
13 commission’s decision or findings. In *Gonzalez v. Lane County*, we explained:

14 “[I]f a local government decision maker chooses to incorporate all
15 or portions of another document by reference into its findings, it
16 must clearly (1) indicate its intent to do so, and (2) identify the
17 document or portions of the document so incorporated. A local
18 government decision will satisfy these requirements if a reasonable
19 person reading the decision would realize that another document is
20 incorporated into the findings and, based on the decision itself,
21 would be able both to identify and to request the opportunity to
22 review the specific document thus incorporated.” 24 Or LUBA 251,
23 259 (1992) (footnote omitted).

⁶ As noted, the planning commission concluded that Options 1, 2, or 3 would constitute sufficient mitigation. Record 541.

1 We disagree with intervenor that the county court's decision clearly indicates its
2 intent to incorporate the findings and conclusions included in the planning
3 commission's decision.

4 The V2 Plan must meet the no net loss standard in OAR 635-415-0025.
5 We also agree with ODFW that the approximately three pages of findings that
6 the county did adopt and incorporate do not satisfy the requirement in ORS
7 215.416(9) that the decision be accompanied by "a brief statement that explains
8 the criteria and standards considered relevant to the decision, states the facts
9 relied upon in rendering the decision and explains the justification for the
10 decision based on the criteria, standards and facts set forth." Finally, the findings
11 are inadequate to respond to specific issues raised by ODFW concerning
12 compliance with applicable standards. *Norvell v. Portland Area LGBC*, 43 Or
13 App 849, 853, 604 P2d 896 (1979).

14 The first subassignment of error is sustained, in part.

15 **F. Second and Fifth Subassignments of Error**

16 In its second subassignment of error, ODFW argues that the county's
17 decision is not supported by substantial evidence in the whole record. In its fifth
18 subassignment of error, ODFW argues that the county improperly deferred a
19 determination of compliance with the applicable standards to a future process that
20 does not include any public participatory rights.

21 We conclude above that ORS 215.446(3)(a)(C) requires intervenor to
22 provide a mitigation plan that includes the information set out in OAR 635-415-

1 0020(8). Accordingly, the proceedings on remand will necessarily include new
2 evidence, the county will need to determine whether the no net loss standard is
3 met by that evidence and other evidence in the record, and the county will need
4 to adopt new findings addressing that evidence and arguments regarding the
5 applicable standards. For that reason, we need not and do not address ODFW's
6 substantial evidence challenge or its challenge to the county's requirement that
7 intervenor submit a final mitigation plan prior to construction.

8 The assignment of error is sustained, in part.

9 The county's decision is remanded.