

Before the Energy Facility Siting Council

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Umatilla County Exceptions to Proposed Contested Case Order (PCCO)



**KELLINGTON
LAW GROUP, PC**

Wendie L. Kellington
P.O. Box 2209
Lake Oswego, OR 97035

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Umatilla County Exception Group 1 – Exception B(iv)

- Two different ALJs – first one ruled as a part of ruling on UC’s party status that:

“Issues related to Applicant’s compliance with state and/or local land use provisions are within the Council’s jurisdiction pursuant to OAR 345-022-0000 and OAR 345-022-0030. However, an evaluation of whether the land use ordinances passed by the County are required by statewide planning goals is not within the Council’s jurisdiction.”

- That ruling is final unless appealed per OAR 345-015-0016(6), that says the ALJ’s determination:
“*** *is final unless* the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer’s determination.”
- No one appealed. That ruling “an evaluation of whether the land use ordinances passed by the County are required by the statewide planning goals *is not within the Council’s jurisdiction*” became FINAL.
- Final, means final.
- The second ALJ improperly ignored that ruling and collateral attacked the first ALJ’s final ruling.
- Proceeding to do EXACTLY what the 1st ALJ decided was beyond the scope: evaluate whether the land use ordinances passed by the County are required by the statewide planning goals.



Umatilla County Exception Group 2 – Ex. (B)(iii)

- Elected **governing body** of Umatilla County is the “special advisory group” vested with authority to identify the “applicable substantive criteria”.
- When they go to the trouble to do that, ORS 469.504(5) (second scenario) says EFSC “shall apply” their identified criteria (here 2-mile setback AKA “Criterion 3”).
- The first ALJ was right – EFSC no authority to review that SAG identification of 2-mile setback/Criterion 3 as an applicable substantive criteria.

Umatilla County Exception Group 2 – Ex. (B)(iii)

- ORS 469.504(8) says that County identification of the applicable substantive criteria “shall be subject to judicial review only as provided in ORS 469.403” –Or Sup. Ct.
- Instead, PCCO wrongly purports to “review” the governing body/special advisory group’s determination of the applicable substantive criteria.
- Accordingly, the PCCO improperly “reviews” the governing body’s applicable substantive criteria and decides they were wrong – asserting incorrectly that none of their identified local criteria are applicable substantive criteria after all.

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Umatilla County Exception Group 2 – Ex. B(ii)

- ALJ/PLCC incorrectly says 2-mile setback is not an applicable substantive criteria. Applicable substantive criteria description:

OAR 345-022-0030(3):“criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application.” ORS 469.504(1)(a)(A) is the same.

- The 2-mile setback (Criterion 3) meets this description.
- The 2-mile setback was in effect when application was filed.
- The 2-mile setback is required by at *least* Goal 2 (“To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land ***”)

Exception (b)(ii) Continued

- Goal 2 requires counties to hold public hearings, evaluate information from public in hearings and make “ultimate policy choices” based upon their citizens’ “social, economic, energy and environmental needs” **and to reflect those local determinations in plans that “shall be the basis for specific implementation measures.”**
- Criterion 3 does exactly what Goal 2 requires. Based upon written and oral testimony, the governing body established 2-mile setback from rural residences and turbines.
- There is no claim Criteria 3 does not do EXACTLY what Goal 2 requires. That means that the County’s adoption of the 2-mile setback is required by Goal 2.
- Goal 2 further requires state “actions related to land use *** shall be consistent with the” land use rules of counties and cities.
 - Thus, **even if EFSC were to apply the goals directly**, the result is the same – **EFSC must comply with Goal 2.**

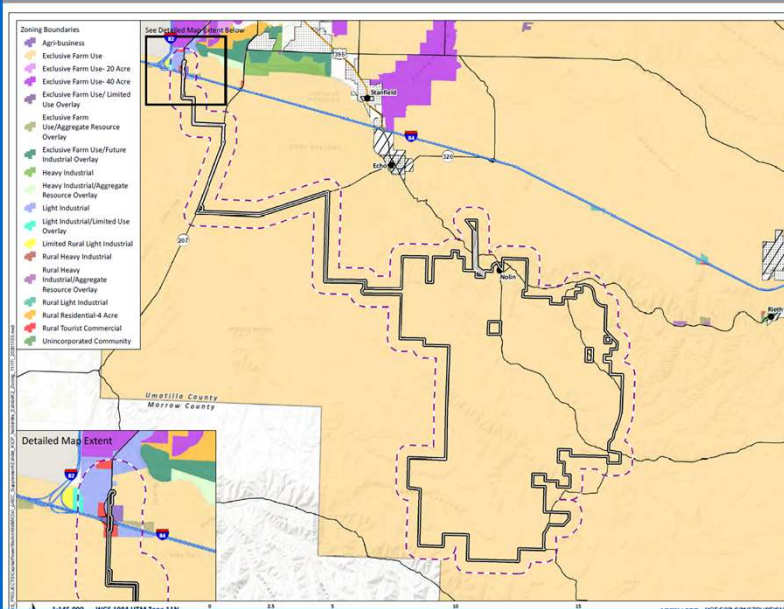
Exception A(i)-B(v)-(vi) - Generally
EFSC Must Apply APPLICABLE SUBSTANTIVE CRITERIA County Identifies
Three Scenarios of ORS 469.504(5)

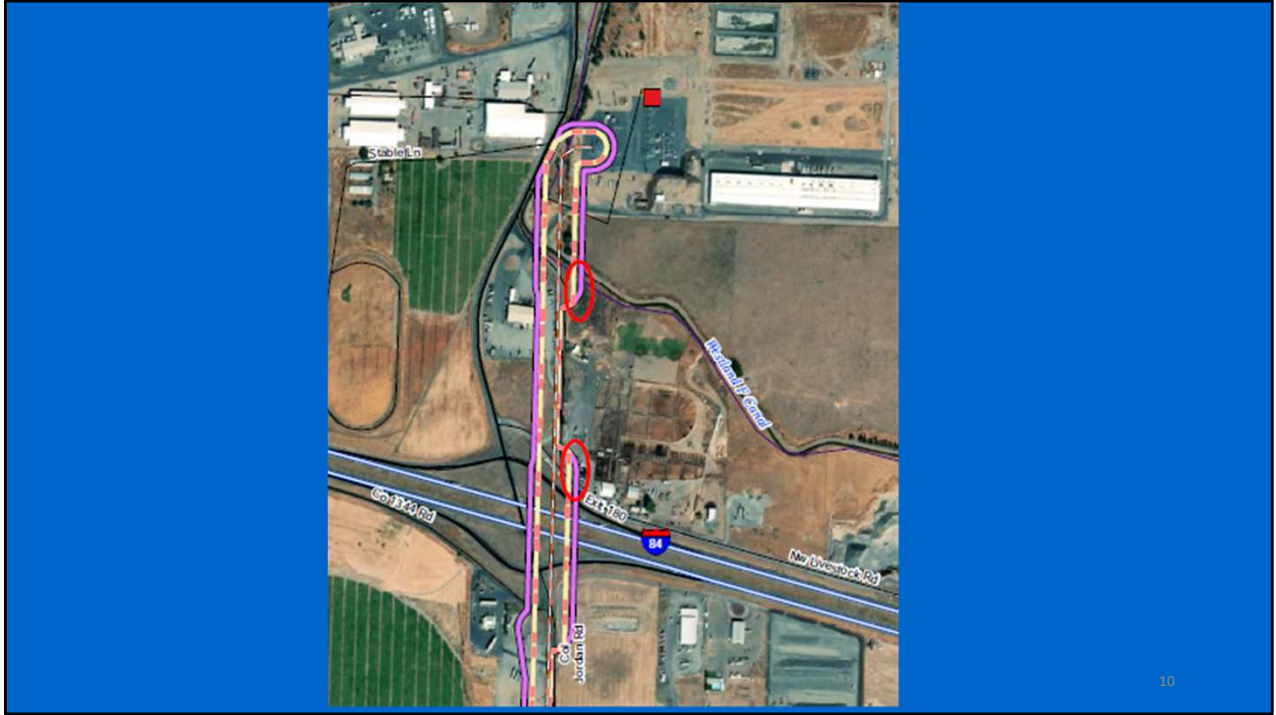
- 1st: If governing body fails to timely identify applicable substantive criteria, then EFSC can decide on its own what the applicable substantive criteria are & determine compliance with some or all of them or just apply the state planning goals. (NO DISPUTE DOES NOT APPLY.)
- 2nd If governing body timely identifies applicable substantive criteria then EFSC “shall apply” them. (**APPLIES**)
- 3rd If a ***related or supporting facility*** passes through more than three zones (passes through at least 4 zones), then EFSC can decide to apply applicable substantive criteria in whole or part or Goals based on factors. (PCCO says applies, County strongly disagrees).

Exception A(i)-(ii) & B(v)
Third Scenario does not apply

No Related or Supporting Facility will pass through more than three zones

- The PCCO incorrectly decides that EFSC can ignore the applicable substantive criteria under ORS 469.504(5)'s "third scenario" – because "related or supporting facilities" will pass through more than three zones".
- The only claimed "related or supporting facilities" asserted to trigger the third scenario is a *miniscule* part of the UEC Cottonwood line. But that line only passes through three zones (not MORE THAN THREE zones as required), and then only is a possible "alternate" line that the energy facility may or may not connect to.
- NOTE: The Notice of Intent said "The Project will connect to the proposed Bonneville Power Administration (BPA) Stanfield Substation..." which is ENTIRELY in the EFU zone.
- The idea of Cottonwood was added later to the application and it is only that POSSIBLE ALTERNATIVE LINE that the PCCO claims can trigger the third scenario.
- But only the smallest segment of the *site boundary* of the possible, alternate Cottonwood line that the proposed energy facility *might* connect to passes through four zones.





No Related or Supporting Facilities Pass Through More than Three Zones – only a Possible “Site Boundary” that the only evidence shows the Applicant won’t Construct or Modify Anyway

- ORS 469.504(5) only allows the third scenario (more than three zones) to be used if there are “related or supporting facilities” that pass through more than three zones.
- Related or supporting facilities are defined in ORS 469.300(24) to mean “any *structure* proposed to be *constructed by the applicant* or substantially modified in connection with the construction of the energy facility ***”
- A possible alternative line that may or may not connect to the facility does not meet that definition.
- There is no claim in this record that the applicant will construct or substantially modify the Cottonwood line. The undisputed evidence in the record is that UEC will do that.
- A site boundary is not a ***structure*** and the fact that a small part of the site boundary is in more than three zones, does not show that the related or supporting facility passes through more than three zones, as ORS 469.504(5) requires to trigger the third scenario.
- A site boundary is not a related or supporting facility as a matter of law. OAR 345-001-0010(31) defines the site boundary to mean: “the *perimeter* of the site of a proposed energy facility, its related or supporting facilities, all temporary laydown and staging areas and all corridors and micro-siting corridors proposed by the applicant.”

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Umatilla County Exception A(i)-(ii); B(v), (i), (vii)

- Similarly, OAR 345-001-0010(27) states that “related or supporting facilities” mean structures that “would not be built but for construction or operation of the energy facility.”
- The Applicant fails to carry its burden to demonstrate that the Cottonwood Line “would not be built but for the construction or operation of the energy facility.”
- The preponderance of the evidence is that it will be built regardless.
- PCCO claims that the County had not provided evidence that the Cottonwood Line would be built regardless, but this is an erroneous determination for two reasons.
- One it is wrong. The ASC states the Cottonwood transmission line “[f]rom the UEC Cottonwood Substation to the corner of White House Road and County Road 1348”, “will address UEC’s general utility needs by providing an upgrade to UEC’s existing utility system and may also be available to other generation facilities and for ongoing capacity needs.” NHWAPPDoc2-10 ASC Exhibit K. Land Use_2022-01-31, p. 44.
- If there are evidentiary gaps, that weighs against approval of the ASC, rather than against the County’s position that the only evidence demonstrates the UEC Cottonwood line will be built regardless of whether the wind energy facility or solar energy facility proposed here are ever built ever connected to it. Therefore, it cannot be a facility that will not be built “but for” the proposed energy facility.
- And creates a material issue of fact making SD improper.
- The other problem is that PCCO claim to this effect, impermissibly shifts the burden of proof to the County. The burden is on the applicant to prove up that the Cottonwood Line is a related or supporting facility and fails.

Exception Group 2 – Ex. (B)(vi)

- PCCO incorrectly relies on ORS 469.504(1)(b)(B) to purport to override second scenario of ORS 469.504(5), that does apply.
- But ORS 469.504(1)(b)(B) does not purport to make any part of ORS 469.504(5) useless surplusage, including the second scenario. Rather ORS 469.504(1)(b)(B) when read with ORS 469.504(5) (that it expressly cites), demonstrates the PCCO errs.
 - ORS 469.504(1)(b)(B) says that EFSC can approve a “facility”/“related or supporting facility” “pursuant to subsection (5)” even if it does not comply with some or all of the applicable substantive criteria, so long as EFSC determines the facility “otherwise complies with the applicable” state goals.
 - That “pursuant to subsection (5)” is talking about the part of ORS 469.504(5) that is the only one that references back to (1)(b)(B). (*i.e.* the inapplicable first scenario where governing body does not timely identify applicable criteria).
 - Not the situation here.

Exception B(vi) Continued

- No other of the three scenarios of ORS 469.504(5) refer to ORS 469.504(1)(b)(B) (or (C) for that matter).
- That means the PCCO errs in deciding that ORS 469.504(1)(b)(B) overrides the other scenarios posited in ORS 469.504(5). ORS 469.504(1)(b)(B) only refers to the first scenario which does not apply.
- Therefore, because there is no dispute that the governing body (SAG) timely identified applicable substantive criteria including the 2-mile setback, that means the second scenario applies, not the first.
- And the second scenario (which does not refer back to ORS 469.504(1)(b)(B) at all), expressly states that if the SAG timely identifies the applicable substantive criteria, then EFSC “shall apply” it.
- Already shown the third scenario (more than three zones) as a matter of law does not apply.

Exception (B)(vi) B(vii)

Even if Criterion 3 is ignored, it is impossible that the applicant carried the burden to demonstrate compliance with the Goals because proposal does not comply with at least Goal 2.

- Goal 2 requires state “actions related to land use *** shall be consistent with the” land use rules of counties and cities.
 - Thus, **even if EFSC were to apply the goals directly**, the result is the same – **EFSC must comply with Goal 2 which requires compliance with the County’s acknowledged land use rules**. Including the 2-mile setback.
- Contrary to ODOE claim, ORS 469.504(6) does not relieve EFSC of responsibility to comply with ALL goals including Goal 2. ORS 469.504(6) simply says that EFSC is not subject to ORS 197.180 (state agency coordination) or “rules or programs adopted under ORS 197.180”.

ORS 197.180 is not a state goal.

EFSC is only authorized to issue site certificates if facilities comply with **all state planning goals per ORS 469.503(4)**. There are no goal carve outs.

Further the statewide planning goals are adopted by LCDC under ORS 197.040(2)(a), not ORS 197.180.

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B(vi) continued

- ORS 215.190 states “no person shall locate, construct, maintain, repair, alter, or use a building or other structure or use or transfer land in violation of” County land use rules.
- Further reinforcing legislature intended EFSC comply with acknowledged local land use rules in all but the rare situations where the county fails to timely identify them or where a facility/related or supporting facility passes through more than three zones.
- The express text of the statutes and rules, plus their purpose policy, context and legislative history in the record, supports that compliance with the acknowledged land use rules of a county, in all but very narrow situations that do not apply here, is what the legislature intended.

Conclusion

- EFSC should not adopt the PCCO because it cannot find by a preponderance of the evidence as required, that it complies with law or is supported by evidence in the record.
- EFSC should decide that:
 - The SAG determination that Criterion 3 is an applicable substantive criteria is not subject to EFSC review as finally decided by the first ALJ.
 - The first scenario of ORS 469.504(5) does not apply and that means that ORS 469.504(1)(b)(B) does not apply;
 - The third scenario does not apply because:
 - There is no related or supporting facility that passes through more than three zones.
 - A site boundary for a potential transmission line that will be constructed by someone other than the applicant regardless of the energy facility is not a related or supporting facility as a matter of law.
 - The second scenario of ORS 469.504(5) applies, and it commands EFSC to apply Criterion 3.
 - Umatilla County thanks you for your consideration.