# Energy Facility Siting Council Meeting

**August 29-30-31, 2022**

**Agenda Item B: Council Review of the Proposed Order, Proposed Contested Case Order/Exceptions Hearing**

Council Materials

## August 29, 2022 – Day 1

## Issue, Exception/Response

Issue SS-5: Exception: J. White; Response: Idaho Power Company

Issue RFA-1: Exception: Gilbert:; Response: Department; Idaho Power Company

Issue TE-1: Exception: Geer; Response: Department; Idaho Power Company

Issue SP-1: Exception: Fouty; Response: Idaho Power Company

Issue N-1, N-3, N-2: Exception: Stop B2H; Response: Department; Idaho Power Company

**BEFORE THE ENERGY FACILITIES SITING COUNCIL**
**for the**
**STATE OF OREGON**

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | **PETITIONER JONATHAN D WHITE'S** |
| | ) | **EXCEPTIONS TO ADMINISTRATIVE** |
| **BOARDMAN TO HEMINGWAY** | ) | **LAW JUDGE WEBSTER'S RULINGS:** |
| **TRANSMISSION LINE** | ) | |
| | ) | **PROPOSED CONTESTED CASE** |
| **OAH CASE NO. 2019-ABC-02833** | ) | **ORDER; ISSUE SS-5** |

***SS-5 "Whether Applicant has adequately evaluated construction-related blasting in Union County, City of La Grande, under the Structural Standard. Specifically, whether Applicant should be required to conduct site-specific geotechnical surveys to characterize risks from slope instability and radon emissions."***

More specifically, Issue SS-5 is about whether the Applicant has met the OAR 345-022-0020 Structural Standard. Section (c) states: "The applicant, through appropriate site-specific study, has adequately characterized the potential geological and soils hazards of the site and its vicinity that could, in the absence of a seismic event, adversely affect, or be aggravated by, the construction and operation of the proposed facility;"

The ALJ erred when stating that "Idaho Power has already performed significant work to characterize the potential geological and soils hazards within the site boundary. See, e.g., ASC Exhibit H, Attachment H-1, Engineering Geology and Seismic Hazards Supplement and ASC Exhibit I, Section 3.2.3 (Assessing Erosion Impacts)."

o Exhibit H, Attachment H-1, Engineering Geology and Seismic Hazards Supplement, contains a paragraph, 4.4, about La Grande Area Faults, a short and general description from available sources rather than the result of field reconnaissance, as recommended in the Proposed Order (see quotation at the end of this document). This does not constitute a site-specific study, as mandated by OAR 345-022-0020.

o Exhibit I, Section 3.2.3 (Assessing Erosion Impacts) is less than two pages and is entirely generic. This does not constitute a site-specific study, as mandated by OAR 345-022-0020.

The ALJ also mentioned: "Furthermore, as the Department noted in the Second Amended Project Order, a detailed site-specific geotechnical investigation for the entire site boundary is not practical in advance of completing the final facility design and obtaining full site access."

Even if it is impractical for the applicant to fully comply with the provisions of OAR 345-022-0020 Section (c), it is critical to at least perform a "detailed site-specific geotechnical investigation" of the portion of the B2H line proposed to be sited on a geologically unstable slope just above a populated area in SW La Grande.

There are several passages in the Proposed Order that indicate expert concerns about the stability of hillside on the proposed B2H route above the populated area of SW La Grande. The following passage recommends field reconnaissance at towers 108/3 through 109/2 to assess the problem, and such an effort has not yet been performed.

"SLIDO 380 and 33 appear to refer to the same landslide feature and are referenced at scales of 1:100,000 and 1:500,000, respectively (Ferns et al., 2010; Walker, 2002). The IPC Proposed Route crosses the mapped limits of the slide between towers 108/2 and 109/2, and may affect stability at towers 108/3 through 109/2, along with associated work areas. Schlicker and Deacon (1971) mapped slightly different extents of the same features at a scale of 1:24,000. In the Schlicker and Deacon (1971) map, the extents of one slide area are about 650 feet southeast of tower 107/4 and 465 feet northeast of tower 107/5. A field reconnaissance of all these areas should be performed as part of the geotechnical exploration program."
*ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02.*
*Page 8735 of 10016*

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in administrative and court proceedings and are subject to penalty for perjury.

Dated this 29th day of June, 2022.

*/s/ Jonathan D. White*
Jonathan D. White

## CERTIFICATE OF MAILING

On June 30, 2022, I certify that I filed the foregoing Exceptions to the Proposed Contested Case Order with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

*/s/ Jonathan D. White*
Jonathan D. White

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**BEFORE THE ENERGY FACILITY SITING COUNCIL**

**OF THE STATE OF OREGON**

| | |
|---|---|
| In the Matter of the Application for Site Certificate for the<br><br>BOARDMAN TO HEMINGWAY TRANSMISSION LINE | APPLICANT IDAHO POWER COMPANY'S RESPONSE TO JONATHAN WHITE'S EXCEPTIONS FOR CONTESTED CASE ISSUE SS-5<br><br>OAH Case No. 2019-ABC-02833 |

**July 14, 2022**

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## I. INTRODUCTION

Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order, Applicant Idaho Power Company ("Idaho Power" or the "Company") submits its Response to Jonathan White's Exceptions for Issue SS-5.

## II. STANDARD OF LAW

In a contested case before the Energy Facility Siting Council ("EFSC" or the "Council"), the applicant bears the burden of proof to establish by a "preponderance of the evidence"[1] that the proposed facility complies with the Council's statutes, ORS 469.300 to 469.570, and that the Application for Site Certificate ("ASC") and proposed site conditions—as modified in the Oregon Department of Energy's ("ODOE") Proposed Order—satisfy each of the Council's siting standards.[2] Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true.[3] Furthermore, the applicant must demonstrate by a preponderance of evidence that the facility complies with all other statutes, administrative rules, and local government ordinances "identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility."[4]

Parties or limited parties "with specific challenges to findings, conclusions and/or recommended site certificate conditions in [ODOE's] Proposed Order bear the burden" of producing evidence in support of the facts or positions they have asserted, and the burden of

[1] OAR 345-021-0100(2) ("The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances."); *see also* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.").
[2] OAR 345-022-0000(1)(a).
[3] *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).
[4] OAR 345-021-0100(2); OAR 345-022-0000(1)(b).



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convincing the trier of fact that their alleged facts are true or their position on the identified issue is correct.[5] In particular, the parties or limited parties must establish how the applicant failed to satisfy EFSC's siting standards and/or how ODOE "erred in its findings, conclusions and/or recommended site certificate conditions."[6] To meet this burden of proof, parties or limited parties challenging the Proposed Order must provide factual testimony or evidence to substantiate their asserted claims;[7] unsubstantiated factual arguments or legal conclusions are insufficient to demonstrate the applicant's failure to establish compliance with any applicable standard.[8]

After the hearing and briefing phases of a contested case, the Hearing Officer must issue a Proposed Contested Case Order stating the Hearing Officer's findings of fact and conclusions of law.[9] Parties and limited parties may then file any exceptions to the Proposed Contested Case Order for the Council's consideration.[10] If the parties or limited parties file exceptions, the parties or limited parties must identify for each exception the finding of fact, conclusion of law, or recommended site certificate condition to which the parties or limited parties except and must state the basis for their exception.[11]

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[5] Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, "First Order on Case Management"]; Second Order on Case Management Matters and Contested Case Schedule at 7 (Aug. 31, 2021) (emphasis in original) [hereinafter, "Second Order on Case Management"]; *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).
[6] First Order on Case Management at 11; Second Order on Case Management at 7.
[7] First Order on Case Management at 11; Second Order on Case Management at 7.
[8] First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.
[9] OAR 345-015-0085(4).
[10] OAR 345-015-0085(5).
[11] OAR 345-015-0085(5).



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## III. RESPONSE TO EXCEPTION FOR ISSUE SS-5

The Hearing Officer granted limited party status to Mr. Jonathan White for SS-5, which asks:

> *Whether Applicant has adequately evaluated construction-related blasting in Union County, City of La Grande, under the Structural Standard. Specifically, whether Applicant should be required to conduct site-specific geotechnical surveys to characterize risks from slope instability and radon emissions.*[12]

Mr. White filed exceptions for this issue on June 30, 2022. For the reasons discussed below, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SS-5.

Mr. White argues that the Proposed Contested Case Order is in error because: (1) the Hearing Officer erred in concluding that "Idaho Power has already performed significant work to characterize the potential geological and soils hazards within the site boundary;"[13] and (2) the Hearing Officer erred in noting ODOE's statement in the Second Amended Project Order that "a detailed site-specific geotechnical investigation for the entire site boundary is not practical in advance of completing the final facility design and obtaining full site access."[14] In support of these exceptions, Mr. White notes various aspects of Idaho Power's analysis contained in Exhibit H and argues that they do not constitute "site specific" studies. As an initial matter, the arguments raised in Mr. White's Exception were addressed in the contested case and were fully litigated.[15] For the

[12] Second Order on Case Management at 7.
[13] Petitioner Jonathan D. White's Exceptions to Administrative Law Judge Webster's Rulings: Proposed Contested Case Order; Issue SS-5 at 1-2 (June 30, 2022) [hereinafter, "Jonathan White Exception"]; *see also* Proposed Contested Case Order at 270.
[14] Jonathan White Exception at 1-2; *see also* Proposed Contested Case Order at 270.
[15] Idaho Power's Response Brief and Motion to Strike for Contested Case Issues SS-1, SS-2, SS-3, and SS-5 at 24-26 (Mar. 30, 2022); Idaho Power's Closing Arguments for Contested Case Issues SS-1, SS-2, SS-3, and SS-5 at 30-34 (Feb. 28, 2022).



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reasons discussed in Idaho Power's briefing as well as below, Mr. White has not provided persuasive evidence that Idaho Power failed to adequately characterize the potential geologic and soil hazards within the analysis area.

**A. Jonathan White, Issue SS-5, Exception 1**

Mr. White argues that the Hearing Officer erred in concluding that "Idaho Power has already performed significant work to characterize the potential geological and soils hazards within the site boundary[.]"[16] In particular, Mr. White points to ASC, Exhibit H, Attachment H-1 (Engineering Geology and Seismic Hazards Supplement) and ASC, Exhibit I, Section 3.2.3 (Assessing Erosion Impacts) as overly generic descriptions of landslides and erosion, not constituting site-specific studies as mandated by OAR 345-022-0020.[17] These arguments are not persuasive for several reasons.

First, Idaho Power acknowledges that OAR 345-022-0020(c) states that in the ASC an applicant must adequately characterize, through appropriate *site-specific research*, the potential non-seismic geological and soils hazards of the site. However, ODOE noted in the Second Amended Project Order that Idaho Power had not obtained full site access to the entire route of B2H (e.g., due to lack of permission or dangerous conditions)—and other challenges existed due to an incomplete final facility design.[18] For that reason, ODOE stated that "detailed site-specific

[16] Jonathan White Exception at 1-2; *see also* Proposed Contested Case Order at 270.
[17] Jonathan White Exception at 1.
[18] Second Amended Project Order at 12 (July 26, 2018) ***("[ODOE] understands that detailed site-specific geotechnical investigation for the entire site boundary is not practical in advance of completing the final facility design and obtaining full site access.*** However, OAR 345-021-0010(h) requires evidence of consultation with the Oregon Department of Geology and Mineral Industries (DOGAMI) prior to submitting the application if the applicant proposes to base Exhibit H on limited pre-application geotechnical work. Exhibit H shall include written evidence of consultation with DOGAMI regarding the level of geologic and geotechnical investigation determined to be practical for the application submittal.") (emphasis added) (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 14 of 29).



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geotechnical investigation for the entire site boundary *is not practical* in advance of completing the final facility design and obtaining full site access [to the route alignment]."[19] ODOE therefore required under OAR 345-021-0010(1)(h)(B) that Exhibit H include written evidence of consultation with the Oregon Department of Geology and Mineral Industries ("DOGAMI") regarding the level of geologic and geotechnical investigation determined to be ***practical*** for the ASC submittal.[20] In accordance with the Second Amended Project Order, Shannon & Wilson provided in Attachment H-1 of the Proposed Order a detailed description of proposed site-specific geologic and geotechnical work to be conducted prior to construction.[21] And while Idaho Power was unable to provide information regarding the entire route in a site-specific manner, Idaho Power's preliminary analysis of geologic and soil hazards was, in fact, detailed and robust. Specifically, the slope stability and landslide analysis provided by Idaho Power is based on desktop review and limited site reconnaissance where possible, and further describes where additional field review is necessary. In particular, in accordance with DOGAMI's guidance, Idaho Power's consultants—Shaw Environmental & Infrastructure, Inc. ("Shaw") and Shannon & Wilson—conducted a desktop review and field reconnaissance to characterize the site based on historic landslides, as summarized below:

- Review of geographic information system ("GIS") files compiled by DOGAMI in the SLIDO, version 3.4; the review included landslides within a one-mile-wide route corridor, with initial work by Shaw utilizing SLIDO, version 2.

[19] Second Amended Project Order at 12 (emphasis added) (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 14 of 29).
[20] *See* Second Amended Project Order at 12 (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 14 of 29); *see also* OAR 345-021-0010(1)(h)(B).
[21] *See* Proposed Order, Attachment H-1: Proposed Site Specific Geotechnical Work (July 2, 2020) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8692 of 10016).


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- Review of existing geologic maps, including Engineering Geology of the La Grande Area, Union County, Oregon, by Schlicker and Deacon (1971); the maps were compiled and geo-referenced in GIS format along the alignment to confirm the location of each SLIDO landslide along the route and to check that each mapped landslide was included in the SLIDO database.
- Site reconnaissance by Shaw along portions of the original alignment, conducted on October 26-28 and November 15-18, 2011.
- Site reconnaissance by Shannon & Wilson along portions of new alignment alternatives and select alignment changes, conducted July 30 through August 2, 2012, and October 16-18, 2013.
- Review of aerial photography where Shaw reviewed 1:24,000 scale aerial photographs provided by 3Di, LLC of Eugene, Oregon, and the Environmental Systems Research Institute Microsoft Virtual Earth layer in GIS ("ESRI").
- Review of aerial photography by Shannon & Wilson from both ESRI and Google Earth.
- Review of Digital Terrain Models along 1-mile-wide route corridors.
- DOGAMI Light Detection and Ranging ("LiDAR") Data Viewer (relevant LiDAR data was available for only portions of the Meacham Lake, Huron, Kamela SE, Hilgard, LaGrande SE, Glass Hill, Craig Mountain, North Powder, Telocaset, Baker, Virtue Flat, and Owyhee Dam quadrangles; no LiDAR data was available in Idaho).[22]

[22] Proposed Order at 76-77 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 83-84 of 10016); ASC, Exhibit H, Part II, Attachment H-1, Exhibit E at E-1 through E-2 (ODOE - B2HAPPDoc3-15 ASC 08b_Exhibit H_Geology_ASC_Part 2 2018-09-28. Page 107-108 of 158).



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Based on the above desktop review and reconnaissance, Shaw and Shannon & Wilson identified 39 suspected landslide features potentially capable of impacting the Boardman to Hemingway Transmission Line ("B2H" or the "Project") within the site boundary,[23] which intersected or were otherwise near the proposed alignments.[24] Seven additional suspected landslide features were identified in the SLIDO database within a half mile of the Project for multi-use areas located away from the proposed alignments that fall outside the boundaries of the maps presented in Idaho Power's Landslide Inventory (ASC, Exhibit H, Attachment H-1, Exhibit E).[25] Of the suspected landslide features identified within the site boundary along the proposed alignments, Shaw and Shannon & Wilson determined through aerial imagery review and site visits that 16 features were indeed landslides and posed some level of risk to the stability of the Project or surrounding work areas.[26] Shaw and Shannon & Wilson preliminarily determined that the remainder of the suspected landslide features analyzed are either not landslides or are likely stable,

[23] Note that while the analysis area is defined as the site boundary, based on the analysis presented in ASC Exhibit H, Idaho Power voluntarily extended the analysis area to a half mile from the proposed transmission line centerline (or up to 2,390 feet on either side of the proposed site boundary) for the landslide analysis. Proposed Order at 73 (July 2, 2020) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 80 of 10016).

[24] ASC, Exhibit H, Part II, Attachment H-1, Exhibit E at E-3 through E-19 (ODOE - B2HAPPDoc3-15 ASC 08b_Exhibit H_Geology_ASC_Part 2 2018-09-28. Page 109-125 of 158). The proposed alignments reviewed include Idaho Power's Proposed Route; Proposed 230 kV Rebuild; Proposed 138 kV Rebuild; West of Bombing Range Road Alternative 1; West of Bombing Range Road Alternative 2; Morgan Lake Alternative; and Double Mountain Alternative. Proposed Order, Attachment H-4: Landslide Inventory, at E-2 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8739 of 10016).

[25] ASC, Exhibit H, Part II, Attachment H-1, Exhibit E, Table E1. Landslide Data for Multi-Use Areas Located Outside Map Boundaries (ODOE - B2HAPPDoc3-15 ASC 08b_Exhibit H_Geology_ASC_Part 2 2018-09-28. Page 126 of 158). Table E1 presents landslide data for multi-use areas located away from the proposed alignment such that they fall outside the boundaries of the maps presented in the Landslide Inventory. Proposed Order, Attachment H-4: Landslide Inventory, at E-2 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8739 of 10016). Table E1 includes all multi-use areas not shown on the landslide map sheets for which a SLIDO feature or suspected landslide is identified within a half mile of the Project. *See id.* The minimum distance for one of these seven suspected landslide features to a multi-use area is 330 feet. Proposed Order, Attachment H-4: Landslide Inventory, Table E1. Landslide Data for Multi-Use Areas Located Outside Map Boundaries (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8757 of 10016).

[26] ASC, Exhibit H, Part II, Attachment H-1, Exhibit E at E-3 through E-19 (ODOE - B2HAPPDoc3-15 ASC 08b_Exhibit H_Geology_ASC_Part 2 2018-09-28. Page 109-125 of 158).



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and therefore are unlikely to impact proposed structures, work areas, or multi-use areas.[27] ***Importantly, Idaho Power will either avoid construction in areas of instability or will take robust measures to mitigate any impact that might result from the Project.***[28]

Mr. White nevertheless seems to argue that Idaho Power's analysis is incomplete or otherwise flawed because Idaho Power's consultants recommended field reconnaissance at towers 108/3 through 109/2 before construction to assess potential landslide features.[29] However, this argument misses the point; Idaho Power's consultants recommended future surveys because they were unable to access the relevant sites. Accordingly, regardless of Idaho Power's preliminary determinations, Shannon & Wilson recommended, Idaho Power agreed, and relevant site certificate conditions require[30] that the Company will perform a field review prior to construction to determine the level of risk, if any, posed by the 36 landslides[31] that have not yet been visited in the field by Shaw or Shannon & Wilson.

Moreover, in order to characterize the site and design of the Project to minimize potential environmental and public safety risks, Idaho Power will conduct site-specific geologic and geotechnical investigations as presented in Recommended Structural Standard Condition 1 ***prior***

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[27] *See* ASC, Exhibit H, Part II, Attachment H-1, Exhibit E at E-3 through E-19 (ODOE - B2HAPPDoc3-15 ASC 08b_Exhibit H_Geology_ASC_Part 2 2018-09-28. Page 109-125 of 158).

[28] Idaho Power/ Rebuttal Testimony of Kekoa Cody Sorensen (Nov. 12, 2021)/ Issues SS-3 and SS-5, pp. 24-25 of 34; *see also* ASC, Exhibit H, Part I, Attachment H-1, Section 7.1 at 43 (ODOE - B2HAPPDoc3-14 ASC 08a_Exhibit H_Geology_ASC_Part 1 2018-09-28. Page 90 of 243).

[29] Jonathan White Exception at 2.

[30] Proposed Order at 80-81 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 87-88 of 10016).

[31] Of the total 39 landslides identified within the site boundary along the proposed alignments, Shaw and Shannon & Wilson determined that three landslides did not require additional reconnaissance during Phase 2 as previous site visits performed by Shaw or Shannon & Wilson found that the features were either not landslides or inactive. Specifically, SLIDO 43 and SLIDO 1103 are alluvial fans (not landslides), and PLS-005 is a small, ancient landslide without any evidence of recent movement. ASC, Exhibit H, Part II, Attachment H-1, Exhibit E at E-3 through E-19 (ODOE - B2HAPPDoc3-15 ASC 08b_Exhibit H_Geology_ASC_Part 2 2018-09-28. Page 109-125 of 158).



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***to construction of a phase or segment.***[32] Such investigations will be prepared and performed by a professional engineer or geologist licensed in Oregon, and include a geotechnical field exploration program, boring, laboratory testing, and detailed site reconnaissance where appropriate.[33] Should Idaho Power determine that, based on such investigations, placing tower foundations in a planned location would present a risk of landslide or slope instability, the Company will microsite the facility to avoid such risks where feasible.[34] Where structures cannot be moved or realigned, Idaho Power will employ mitigation techniques described in Attachment H-1, such as modification of slope geometry (grading or removing soils), hydrogeological modification (drainage to reduce the soil's water content), and slope reinforcement methods to ensure public safety and protect the environment.[35] For all of the above reasons, Attachment H-1 is sufficiently detailed and complies with ODOE's Second Amended Project Order.

Mr. White further argues that Exhibit I, Section 3.2.3 (Assessing Erosion Impacts) is "entirely generic" and does not constitute a site-specific study.[36] While it is true that Exhibit I, Section 3.2.3 is a summary of Idaho Power's erosion analysis, Mr. White's suggestion that the Company's erosion analysis is lacking is without merit. Idaho Power performed a robust study of slope instability by using data from the United States Geological Survey ("USGS") National Elevation Dataset (30-meter resolution) to assess the potential for erosion on slopes within the site

[32] Proposed Order at 80-81 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 87-88 of 10016).
[33] Proposed Order at 81 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 88 of 10016).
[34] Proposed Order at 85 (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 92 of 10016).
[35] Proposed Order at 85 (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 92 of 10016).
[36] Jonathan White Exception at 1.



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boundary.[37] Indeed, for Union County alone, Idaho Power assessed and characterized erosion hazard levels for thirty-two Natural Resources Conservation Service map units. Idaho Power also characterized soil erosion factors for Union County as shown in ASC, Exhibit I, Attachment I-2 (Table of Soil Mapping Units).[38] While Idaho Power's preliminary erosion analyses were based on data from the USGS NED and State Soil Geographic Database ("STATSGO"), when the final route has been selected and prior to construction, Idaho Power will survey additional site-specific soil properties during the site-specific geotechnical investigation. Detailed information relating to the scope of the geotechnical investigation is presented in the main text of Exhibit H and Exhibit H, Attachment H-1. The investigation will include drilling of exploration borings and collection of soil samples for laboratory analysis of soil properties.[39] For the above reasons, Idaho Power's erosion analysis is sufficiently detailed and complies with ODOE's Second Amended Project Order.

In sum, the evidence in the record demonstrates that Idaho Power's preliminary geologic and soils hazards analysis is in compliance with the Structural Standard (OAR 345-022-0020) and ODOE's Second Amended Project Order; for these reasons the Council should adopt the Hearing Officer's findings and conclusions on these issues without modification.

**B. Jonathan White, Issue SS-5, Exception 2**

Mr. White also argues the Hearing Officer erred when finding that ODOE noted in the Second Amended Project Order that "a detailed site-specific geotechnical investigation for the

[37] ASC, Exhibit I, Section 3.2.3.3 at I-6 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 10 of 115).
[38] ASC, Exhibit I, Attachment I-2: Table of Soil Mapping Units (ODOE - B2HAPPDoc3-17 ASC 09b_Exhibit I_Soil_ASC_Part 2 2018-09-28. Page 69 of 88).
[39] ASC, Exhibit H, Part I, Attachment H-1, Section 3.0 (ODOE - B2HAPPDoc3-14 ASC 08a_Exhibit H_Geology_ASC_Part 1 2018-09-28. Page 61 of 243).



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entire site boundary is not practical in advance of completing the final facility design and obtaining full site access."[40] In particular, Mr. White argues even if it is "impractical for the applicant to fully comply with the provisions of OAR 345-022-0020 Section (c)," Idaho Power must perform site-specific geotechnical investigations in geologically unstable areas prior to site certification.[41] These arguments are unpersuasive for the following reasons.

First, to the extent that Mr. White is arguing ODOE was not allowed to clarify application of OAR 345-021-0010(1)(h)(B)—i.e., that Exhibit H need only include written evidence of consultation with the DOGAMI regarding the level of geologic and geotechnical investigation ***determined to be practical*** for the ASC submittal—that argument is incorrect. OAR 345-021-0000(4) provides that ODOE may waive or modify any of the application content requirements listed in OAR 345-021-0010 that ODOE "determines are not applicable to the proposed facility," including what level of site-specific geotechnical work must be performed prior to submission of the ASC under OAR 345-021-0010(1)(h)(B). Moreover, OAR 345-021-0010(1) itself explicitly contemplates that the Project Order may modify the informational requirements contained in the rule. Specifically, OAR 345-021-0010(1) states that the "project order . . . identifies the provisions of this rule applicable to the application for the proposed facility, including any appropriate modifications to applicable provisions of this rule." Accordingly, ODOE's decision to modify the scope of OAR 345-021-0010(1)(h)(B) due to the impracticality of requiring a detailed site-specific geotechnical investigation for the entire site boundary prior to completing the final facility design is entirely consistent with the EFSC rules.

[40] Jonathan White Exception at 1-2; *see also* Proposed Contested Case Order at 270.
[41] Jonathan White Exception at 1-2.



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Finally, with respect to Mr. White's argument that Idaho Power must perform site-specific geotechnical investigations of geologically unstable areas prior to site certification regardless of site access constraints (e.g., dangerous conditions or lack of permission to enter), that argument is completely unrealistic. As discussed above, Idaho Power will conduct additional site-specific pre-blasting surveys and geotechnical investigations for Union County and the City of La Grande in Phase 2 of its structural analysis, which will occur prior to the Project's construction.[42] Performing additional site-specific surveys *prior* to obtaining a site certificate is not practical as Idaho Power is unable to obtain right of entry for multiple sites. Additional surveys prior to site certification are also unnecessary for compliance with the Council's Structural Standard as Idaho Power has performed, to the extent practicable, a thorough analysis of landslide potential and slope stability in the Project's analysis area. For these reasons, the Council should adopt the Hearing Officer's findings and conclusions on these issues without modification.

## IV. CONCLUSION

For the reasons discussed above, Idaho Power respectfully requests that the Council reject Mr. White's exceptions to the Proposed Contested Case Order regarding SS-5.

[42] Specifically, with regards to Mr. White's concerns, should Idaho Power select the Proposed Route, and not the Morgan Lake Alternative, Idaho Power will perform field reconnaissance at towers 108/3 through 109/2 during Phase 2 of the Project, which will occur prior to construction. Idaho Power/ Rebuttal Testimony of Kekoa Cody Sorensen / Issues SS-3 and SS-5, p. 33 of 34.



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DATED: July 14, 2022

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO JONATHAN WHITE'S EXCEPTIONS FOR CONTESTED CASE ISSUE SS-5** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge
Hearings Officer
Office of Administrative Hearings
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I further certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO JONATHAN WHITE'S EXCEPTIONS FOR CONTESTED CASE ISSUE SS-5** was served by First Class Mail or electronic mail as indicated below:

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**STATE OF OREGON**
**for the**
**OREGON DEPARTMENT OF ENERGY**

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | **CONTESTED CASE EXCEPTION ISSUE** |
| | ) | **RFA-1 AND RELATED SITE CERTIFICATE** |
| **BOARDMAN TO HEMINGWAY** | ) | **CONDITIONS** |
| **TRANSMISSION LINE** | ) | |

OAH Case No. 2019-ABC-02833

TO: ENERGY FACILITY SITING COUNCIL MEMBERS

FROM; IRENE GILBERT, PRO-SE PETITONERREQUEST FOR EXCEPTION FOR ISSUE RFA-1 AND RECOMMENDED SITE CERTIFICATE CONDITIONS DUE TO THE FOLLOWING FACTS PRESENTED AT THE CONTESTED CASE HEARING THAT WERE NOT INCLUDED OR RESP0NDED TO IN THE ALJ PROPOSED CONTESTED CASE ORDER:

I am submitting this request for exception based upon my standing as a Limited Party representing myself as well as my standing as representing the public as Co-Chair of STOP B2H. I request that Council base their decision on the documents I am submitting and any verbal testimony I am allowed to present rather than relying upon statements of the issue and arguments from ODOE staff and representatives. It is not consistent with providing a fair and impartial contested case process in the event that respondents in this contested case be allowed to present the arguments and recommendations regarding these exception request.

ABRIVIATED STATEMENT OF THE CONTESTED CASE ISSUE AS PROVIDED BY THE OREGON DEPARTMENT OF ENERGY :

"RFA-1: Whether the $1 bond amount adequately protects the public from facility abandonment and provides a basis for the estimated useful life. "

ACTUAL LANGUAGE OF THE APPROVED CONTESTED CASE:

"I am requesting standing and a contested case due to the fact that The Proposed Order fails to provide a bond that is adequate to protect the public, landowners and state agencies from having to assume the costs of site restoration and fails to provide owners of farm or forest land, and any other property type with mitigation from having to bear the costs of the restoration of the site once the transmission line is no longer in use."

Page 142 of Proposed Contested Case Order found against requiring Idaho Power to provide a bond in the full amount required to restore the site for the life of the development.

The only reference I located which addressed this issue is located on Page 137 of the Proposed Contested Case Order, Item 292. The Proposed Contested Case Order failed to address the list of items as included in this request for exception which I presented in the Contested Case which preclude allowing the developer to maintain a bond in the amount of $1.00 or any amount less than that required to restore the site. There are no findings of fact regarding my arguments that would support a Council decision against my arguments and Exhibits regarding Issue RFA-1 as required by ORS 183.470.

**183.470 Orders in contested cases.** In a contested case:

(1) Every order adverse to a party to the proceeding shall be in writing or stated in the record and may be accompanied by an opinion.

(2) A final order shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the underlying facts supporting the findings as to each contested issue of fact and as to each ultimate fact required to support the agency's order.

I am relying upon my previously submitted opening and closing arguments and exhibits as they provided documentation regarding the need to require the developer to comply with the Oregon Statutes and Rules requiring the developer to provide financial assurance in order to construct a transmission line. These arguments are also provided in support of my requests for site certificate conditions necessary to comply with Oregon Statutes and Rules in the event the bond amount is reduced at any time during the operation of the development.

My arguments are as follows. Item Number One should be the only one necessary to require an exception to overrule the decision against this contested case, however, I am providing additional facts supporting this exception:

1. Allowing a $1.00 bond amount was justified through the use of a balancing determination which is prohibited by EFSC rules regarding the financial assurance bond. OAR 345-022-0000(3)(c) states that the council lacks the ability to apply the balancing determination to the retirement and financial assurance standard. The rule does not provide flexibility in establishing a bond amount. It must be determined **that it would be adequate to restore the site to a useful, non-hazardous condition**.

   Evidence Showing the use of a Balancing decision in this Proposed Order:

   a. The file documents the fact that Idaho Power is not being required to meet the same Retirement and Financial Assurance standards as all other utilities.
   b. The interpretation of the Council Rules regarding the bond amount is not consistent with past practices.
      i. Christopher Clark Staff Memo to Council dated August 13, 2021 lists bond amounts required for Shepherd Flats, Obsidian, Stateline, and multiple

other Site Certificates which was submitted as Exhibit 1 in this contested case.

c. The bond amounts are not consistent with the recommendation of Charlie Voss, Principle in Risk and Decision Analysis, Golder. This Consultant was hired by ODOE to evaluate this issue in a previous site certificates and which resulted in denying the request and similar requests from other developers. Documentation is contained in the Bakeoven Proposed Order on Application for Site Certificate showing a Proposed Facility Decommissioning Cost of $23,077,335 in Table 5: Department Adjusted Decommissioning Cost Estimates and Retirement and Financial Assurance Condition 5 requiring a bond or letter of credit amount or the facility of $23,036,000.

d. Max Woods, ODOE staff member, stated in recommending accepting the reduced bond amount to the Council described the use of "balancing" as a basis for ODOE recommendations. "fairness", and "minimizing of risk" rather than avoiding any risk are "balancing" statements by definition: "EFSC meeting transcript, January 23, 2020 Page 10, "Mr. Woods stated that ODOE and DOJ have worked on this issue since it's been one of the bigger issues of how to do this that is **fair yet minimizes risk to state**".(B2HAPPDoc9, EFSC Review of DPO-Comments-ODOE – Responses Staff Report Minutes Presentation 2020-01-23-24, Page 19)

2. Council determined that a change in the interpretation of required bond amounts should be addressed through rulemaking: " Council concluded that the variation in

proposal to meet the standard from the historically accepted full bond or letter of credit amount necessary for facility decommissioning, would be more appropriately evaluated through rulemaking, where information and expertise of subject matter experts could be considered, rather than relying solely on information provided by the applicant in favor of the proposal." (Bakeoven Solar Project final order on application for site Certificate, Apr. 24, 2020, Pages 141w-142)

3. The site certificate conditions fail to meet the council's stated purpose of the bond as noted in the proposed order: "A bond or letter of credit **provides a site restoration remedy to protect the state of Oregon and its citizens if the certificate holder fails to perform its obligation** to restore the site or abandons it. The conditions fail to provide a remedy that will protect the State of Oregon and it's citizens from having to assume costs of site restoration. (B2HAPPDOC2 Proposed Order Page 295)

    *a. Council determined that the site could be restored to a useful, non-hazardous condition and established a cost to restore the site of $140.,779,000 million dollars, per the Proposed Order, Page 300 B2HAPPDOC2PROPOSED ORDER PAGE 300)*

4. Proposed site certificate conditions are not consistent with recommendations obtained by the department from Golder & Associates regarding allowing a $1.00 bond amount on another energy facility. Golder's recommendation concluded: "The Council is advised to deny the Applicant's request to reduce the decommissioning bond to $1.00 once Bakeoven begins commercial operation." As stated in Section 2.1, while the financial return to the Applicant would be improved by reducing the bond amount required for the first 50 years to $1, it does not remove or lessen the risk that the

development will cease operation during that timeframe. **The risk would entirely be borne by the State, taxpayers and property owners with rights of way moving through their property with no clear benefit.**

a. Idaho Power has admitted in their submission to the Oregon Public Utilities commission as well as their submissions to the Securities and Exchange Commission that there are multiple potential events that could impact their solvency.

b. Idaho Power is located outside the State of Oregon, however, most of the impacts will occur in Oregon. This is likely to create barriers to obtaining funding should the company fail to restore the site.

c. `Multiple examples have been provided of companies with far greater resources and greater perceived stability which have gone bankrupt due to unusual or unpredictable events.

d. The Golder report warns that the council may be exposing the Council and state to litigation due to a failure to require compliance with council rules regarding the bond amount,

**5.** The bond amount is identified as providing mitigation for the risk of farm landowners having to assume the costs of restoration as a cost of farm practices as required by ORS 215.275(5) (Falcon Heights WSD v. Klamath County, 64 Or LUBA 290 (20ll). A failure to provide a bond adequate to restore the site to allow continuation of farming practices will require mitigation required by ORS 215.275 due to the risk of these costs being assumed by the agricultural landowner.

6. Up to 70% of Idaho Power's earnings are controlled by a third party, IdaCorp, which would make recovery more complicated and less certain than a company who had control over their income.

CONCLUSION:

The Proposed Site Certificate Conditions fail to comply with the proposed order statement of the intent of the bond, the plain language of the rules, past practices of the council, court decisions limiting the interpretations of an agency regarding the plain language of the rules or the council training presented by Sarah Esterson on August 27, 2021.

The Site Certificate makes the statement, "**The Council** includes a condition in every site certificate that **requires a bond or letter of credit**, for the amount established by the Council, to be in place before construction begins **to provide funds for site restoration**. The bond or letter of credit must be maintained for the life of the facility, and is adjusted annually to account for inflation and other factors. (Exhibit 6)

The Proposed Order and the applicant have failed to provide a preponderance of evidence showing that the public would be assuming no risk as a result of allowing Idaho Power to avoid meeting the requirements of this EFSC rule. Utilizing a review of the bond amount every 5 years fails to provide protection for risks from unplanned events such as fire, stock market collapse, terrorist actions, etc. (The only way this statement is relelvent would be if the council could apply "balancing" to their decision on the bond among) It also focuses on information

regarding this one development when a catastrophic event occurring at any location owned and operated by Idaho Power could make the company insolvent.

Retirement and Financial Assurance Condition 4 and Condition 5 (B2H POAttach/DraftSC Pages 25 to 30) fail to provide financial protection to the public or the state from future events which could result in abandonment of the project or financial collapse of Idaho Power and fail to provide documentation that the state will not be subject to legal action as a result of Council actions in the event the developer fails to restore the site.

LEGAL SUPPORT FOR REQUIRING AN EXCEPTION TO THE PROPOSED CONTESTED CASE DECISION:

Courts have limited interpretations and changed interpretations of agency rules. I am relying upon the multiple court decisions in the record for this development limiting an agency interpretation of their own rules when the plain language and past practices have established the interpretation.

THREE OF THE MULTIPLE COURT CASES PREVIOUSLY REFERENCED WHICH SUPPORT THIS EXCEPTION REQQUEST:

1. Zirkerv v City of Bend "reasonably clear standards' must be uniformly consistent with general authority for a variance under code.
2. GONZALES, ATTORNEY GENERAL, et al. v. OREGON et al.(2006)

   No. 04-623 Argued: October 5, 2005Decided: January 17, 2006

   **(a) An** administrative **rule interpreting the issuing agency's own ambiguous regulation may receive substantial deference. *Auer* v. *Robbins,* 519 U. S. 452, 461-463. So may an interpretation of an ambiguous statute, *Chevron***

***U. S. A. Inc.*** **v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842-845, but only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States* v. *Mead Corp.,* 533 U. S. 218, 226-227. Otherwise, the interpretation is "entitled to respect" only to the extent it has the "power to persuade." *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140. Pp. 8-9.**

**(b) The** Interpretive **Rule at issue is not entitled to *Auer* deference as an interpretation of 21 CFR §1306.04. Unlike the underlying regulations in *Auer,* which gave specificity to a statutory scheme the Secretary of Labor was charged with enforcing and reflected the Labor Department's considerable experience and expertise, the underlying regulation here does little more than restate the terms of the statute itself.**

3. Kisor v Wilkie 2019 WL 2605554,588 US (2019) applies to this contested case by establishing that an agencies interpretation must be:
    a. "reasonable"; more specifically, the interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools."
    b. The agency's interpretation must be the agency's "authoritative" or "official" position. Interpretation must come from actors who can make "authoritative policy in the relevant context."

c. The agency's interpretation must "reflect fair and considered judgment" and not create "unfair surprise" to the regulated parties. Justice Gorsuch's concurring judgment, which was joined by Justices Thomas, Alito and Kavanaugh argued that the Court should have done away with *Auer* completely.

RULES SUPPORTING THIS CONTESTED CASE EXCEPTION REQUEST:

**OAR 345-022-0050(l**) Requires that the council find that the site can be restored to a useful non-hazardous condition at the end of the proposed development.

**OAR 345-022-0050(2)** Requires council to find the applicant has a reasonable likelihood of obtaining a bond or letter of credit in an amount necessary **to restore the site to a useful, non-hazardous condition**.

**OAR 345-022-0000(3)(c) states that the council lacks the ability to apply the balancing determination to the retirement and financial assurance standard.**

**OAR 345-025-006(8)** Mandatory Condition

"Before beginning construction of the facility, the certificate holder shall submit to the State of Oregon, through the Council, a bond or letter of credit in a form and amount satisfactory to the Council **to restore the site to a useful, non-hazardous condition. The certificate** holder shall **maintain a bond or letter of credit in effect at all time**s until the facility has been restored. The council may specify different amounts for the bond or letter of credit"

**OAR 345-027-0110** authorizes the council to draw on the bond in the event the developer fails to restore the area to a useful, non-hazardous condition.

**SITE CERTIFICATE CONDITIONS NEEDED TO COMPLY WITH OAR 345-022-0050** and the Financial Assurance requirement if a bond in an amount less than the amount identified in the site certificate for restoration of the site is allowed:

**One: "Prior to acceptance of a bond in an amount less than the amount identified in OAR 345-026-0006(9), Idaho Power will document that they have established dedicated additional funds which combined with the bond amount will equal the amount identified as being required to restore the site to a useful, non-hazardous condition based upon the calculations in the site certificate and annual adjustments. These funds will be placed in trust and dedicated specifically for use in the restoration of the transmission line site and will not be made available for other uses including those resulting from bankruptcy or actions of Ida-Corp. "**

This site certificate condition is comparable to those used in the past in other energy developments. In the event that there is disagreement with the use of this criteria, the council must provide the necessary protection through other means.

**Two: "Idaho Power must provide documentation that they have the financial resources available to construct and run their share of the Boardman to Hemingway Transmission line without making customers vulnerable to financial collapse.".**

While this statement does not changed the fact that it represents an illegal " balancing" decision, in the event the council fails to require Idaho Power to comply with the council requirements, they must be required to document with a preponderance of evidence this statement regarding why they are not being required to follow council rules. Idaho Power

states per Page 299 of the Proposed Order that the fact that they can finance the transmission line construction indicates an ability to decommission and remove the facility.

(*B2HAPPDOC2PROPOSED ORDER PAGE 299)*

Due to the specific requirements for mitigation regarding impacts to farm land, the order must provide mitigation to replace the fact that the bond is currently listed as mitigation for the risk being assumed by farm land owners to restore the site given the reduced amount does not mitigate for the amount of risk being assumed. The following site certificate condition is necessary to comply with OAR 345-022-0030 regarding owners of farm land.

**Three: "Idaho Power will provide mitigation for the risk of farm landowners being required to assume the cost of removing the transmission line structures and wires from their property by paying the landowners the estimated cost of them purchasing insurance to protect them from this risk for the 100 years the development is planned to exist."**.

Thank you,

(s)

Irene Gilbert, Pro-Se Petitioner representing myself and the Public Interest

**CERTIFICATE OF MAILING**

On June 29, 2022, I certify that I filed the foregoing CONTESTED CASE EXCEPTION ISSUE RFA-1 AND RELATED SITE CERTIFICATE CONDITIONS with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

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**ENERGY FACILITY SITING COUNCIL**
**OF THE STATE OF OREGON**

| | |
|---|---|
| **IN THE MATTER OF THE APPLICATION FOR SITE CERTIFICATE FOR THE BOARDMAN TO HEMINGWAY TRANSMISSION LINE** | **OREGON DEPARTMENT OF ENERGY'S RESPONSE TO EXCEPTIONS – ISSUE RFA-1** (OAH Case No. 2019-ABC-02833) |

# Table of Contents

## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order ("PCCO") on May 31, 2022. On June 29, 2022 Limited Party Ms. Gilbert timely filed exceptions to the PCCO regarding Issue RFA-1, respectively.[1] Mr. Gail Carbiener of the Oregon-California Trails Association ("OCTA") was also granted standing on Issue RFA-1 but did not file an exception to the PCCO.

In the Hearing Officer's December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue RFA-1 was granted as a contested case issue.

> Issue RFA-1 is: Whether the $1 bond amount adequately protects the public from facility abandonment and provides a basis for the estimated useful life of the facility.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council ("Council") pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.[2] Exceptions are written objections to the proposed findings, conclusions of law or conditions.[3] The exceptions must be based on the existing record, and should not include new or additional evidence.

### B. Gilbert's Exceptions

In her exception, Ms. Gilbert alleges that the proposed site certificate condition[4] fails to comply with the proposed order statement of the intent of the bond, the plain language of the

[1] Exceptions to Administrative Law Judge Webster's Rulings: Proposed Contested Case Order By Limited Party Gilbert Dated June 29, 2022 (hereinafter "Gilbert Exception on Issues RFA-1").
[2] ORS 183.469; OAR 137-003-0060
[3] OAR 345-015-0085(5)
[4] This refers to recommended Retirement and Financial Assurance Condition 4, which is the subject of Issue RFA-1.

rules, past practices of the council, court decisions limiting the interpretations of the agency regarding plain language of the rules or the council training presented by Sarah Esterson on August 27, 2021.

C. Summary of Department Position

The rules governing decommissioning and site restoration give Council discretion to identify the amount and form of bond or letter of credit it finds satisfactory to restore the site to a useful, non-hazardous condition. For this Application for Site Certificate ("ASC"), the monetary amount recommended to be considered satisfactory by Council for facility decommissioning and site restoration would be set at $1, post construction, for the first 50 years of operation with phasing/gradual increase by one fiftieth of the estimated decommissioning costs each year thereafter through the 100$^{th}$ year of service. The Department believes this approach is appropriate because it sets the required amount necessary for facility decommissioning/site restoration commensurate to the low risk that the proposed facility would be retired and the low risk that the applicant would be unable to pay for the decommissioning and site restoration costs were it to be retired and because under a recommended condition Council would revisit this approach every 5 years and have the authority to change it. Based on prior Council review of this proposal during their review of the Draft Proposed Order, where Retirement and Financial Assurance Condition 4 was further modified based on Council direction to Department staff, the Department considers the proposed bond or letter of credit amount to be an amount satisfactory to Council, thus meeting the requirements of the Retirement and Financial Assurance standard.

In general, arguments that Ms. Gilbert has made in the contested case and in her exceptions fail to recognize that the rules give Council discretion to determine the amount of bond or letter of credit it deems satisfactory. Also, in comparing this proposed facility to others

the Council has reviewed, Ms. Gilbert fails to recognize that for purposes of assessing financial risk, a utility applicant with a long track record of operating energy facilities and an ability to recover costs from ratepayers that is proposing to build a transmission line with an expected operating life of 100 years is distinct from developer applicants who, although experienced in designing and operating energy facilities, do not have the same lengthy history of facility operation or ability to recover costs from ratepayers and are proposing facilities with a significantly shorter expected lifespan.

## II. ANALYSIS

In addition to the summary and analysis below, the Department refers Council to the more in-depth analyses of this issue provided in the contested case – specifically, the Department's Closing Brief (pp. 166 – 177), Idaho Power Company's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 (pp. 5-30), Ms. Gilbert's RFA-1 Closing Arguments, the Department's Response to Closing Arguments (pp. 116 – 119) and Idaho Power Company's Response Brief for Contested Case Issues RFA-1 and RFA-2.

### A. Applicable Laws and Rules

OAR 345-025-0006(8) Mandatory Conditions in Site Certificates states:

> Before beginning construction of the facility, the certificate holder must submit to the State of Oregon, through the Council, a bond or letter of credit *in a form and amount satisfactory to the Council* to restore the site to a useful, non-hazardous condition. The certificate holder must maintain a bond or letter of credit in effect at all times until the facility has been retired. The Council may specify different amounts for the bond or letter of credit during construction and during operation of the facility. (Emphasis added).

Similarly, Council's Retirement and Financial Assurance standard, OAR 345-022-0050 subsection (2) requires that, to issue a site certificate, Council must find "[t]he applicant has a

reasonable likelihood of obtaining a bond or letter of credit *in a form and amount satisfactory to the Council* to restore the site to a useful, non-hazardous condition." (Emphasis added).

B. Relevant Facts/Procedural History

*The line is designed to have a perpetual useful life and is expected to be in operation at least 100 years*

While components of the proposed transmission line may by replaced over time, Idaho Power Company ("IPC") designs, constructs and operates its transmission system with the intent that the lines and related facilities will remain in service in perpetuity.[5]

In the Application for Site Certificate, IPC explained:

> "IPC's estimate regarding the perpetually useful life of the Project is based on the company's experience as well as research regarding other utility companies' operations. IPC has never retired any transmission line. Moreover, IPC has found such retirements are extremely rare throughout the industry – occurring only when a line is rerouted. Given the high demand for transmission services, the high cost of building new transmission lines, and the intrinsic value of transmission rights-of-way, it virtually never makes sense to retire a transmission line project. Accordingly, IPC estimates that the Project will have a perpetual useful life. To the extent the Council requires IPC to identify a more definite timeframe, IPC estimates that the useful life of the Project will be in excess of 100 years."[6]

*Estimated cost to decommission the line and restore the site*

IPC estimates that it would cost nearly $141 million to decommission the entire transmission line and restore the site.[7]

*Proposed financial assurance / recommended conditions*

[5] ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 299 of 10016.
[6] ODOE – BTHAPPDoc3-40 ASC 23_Exhibit W_Retirement_ASC 2018-09-28 Page 6 of 28.
[7] The estimated total decommissioning cost for the facility is $140,779,000 (3rd Quarter 2016 dollars) ODOE-B2H APPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 302-304 of 10016.

The Proposed Order recommends the applicant maintain a bond or letter of credit during the construction phase that is increased on a quarterly basis to correspond with the progress of the construction of the facility.[8]

Once the facility is placed in service, the bond or letter of credit would be set at $1 for the first 50 years. Thereafter, each year through the 100th year of service the bond or letter of credit would increase by one-fiftieth of the estimated decommissioning costs, resulting in a bond or letter of credit in the full estimated decommissioning costs by the 100th year, which would be maintained for the life of the facility.[9]

On the fifth anniversary of the facility's in-service date and on every five years thereafter, the certificate holder would report (5-year report) to the Council on the following subjects: (i) the physical condition of the facility; (ii) any evolving transmission or electrical technologies that could impact the continued viability of the facility; (iii) the facility's performance in the context of the larger Northwest power grid; and (iv) the certificate holder's financial condition, including the certificate holder's credit rating at that time.[10]

During review of the Draft Proposed Order at the January 2020 EFSC meeting, Council directed the Department to supplement the aforementioned condition to state that the Department may engage its consultant in the review of the 5-year report, may seek expert advice from other reviewing agencies, internal Department staff, industry experts and other consulting parties and that the certificate holder would be responsible for all costs associated with review of the 5-year report, in accordance with applicable rules and statutes. In the Proposed Order, the Department

[8] Recommended Retirement and Financial Assurance Condition 4, ODOE – B2HAPP Doc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 307-308 of 10016.
[9] Recommended Retirement and Financial Assurance Condition 5 subsection b., ODOE – B2HAPP Doc2 Proposed Order on ASC and Attachments 2019-07-02, Page 310 of 10016.
[10] Recommended Retirement and Financial Assurance Condition 5 subsection c., ODOE – B2HAPP Doc2 Proposed Order on ASC and Attachments 2019-07-02, Page 310 of 10016.

supplemented recommended Retirement and Financial Assurance Condition consistent with this direction from Council.[11]

Under this condition, based on the information in the 5-year report, the Council will consider whether to require the certificate holder to post a bond or letter of credit that varies from the financial assurance requirements described above / set forth in sections (a) and (b) of the condition.[12]

*IPC ability to pay decommissioning costs*

IPC provided testimony in the contested case that:

- in the unlikely event that the B2H transmission line were decommissioned before the bond is at the full decommissioning amount, it is highly unlikely IPC would be unable to pay the full amount required for decommissioning.[13]
- Idaho Power's status as a 100-year-old utility with a high credit rating and robust financials provide assurance that it will pay the cost of decommissioning.[14]

Idaho Power also pointed out that it could recover the decommissioning costs through utility customer rates.[15]

*Cost to maintain financial assurance for full decommissioning costs over the life of the facility*

IPC estimates that the cost to maintain a bond or letter of credit sufficient to guarantee

[11] Recommended Retirement and Financial Assurance Condition 5 subsection c., ODOE – B2HAPP Doc2 Proposed Order on ASC and Attachments 2019-07-02, Page 310 of 10016.
[12] Recommended Retirement and Financial Assurance Condition 5 subsection c., ODOE – B2HAPP Doc2 Proposed Order on ASC and Attachments 2019-07-02, Page 310 of 10016.
[13] Idaho Power – Rebuttal Testimony of Jared Ellsworth - Issues RFA – 1 and RFA-2, pp. 15-16 of 40.
[14] Idaho Power – Rebuttal Testimony of Randy Mills - Issue RFA – 1, pp. 14-15 of 21.
[15] Idaho Power Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 26.

$141 million decommissioning and site restoration costs would be approximately $880,000 annually.[16]

IPC further estimates that if it were required to maintain that bond or letter of credit over the 100-year plus life of the transmission line, it would cost approximately $394 million by the year 2124 (100 years after estimated commencement of construction) and that this amount, if incurred, would be borne primarily by Idaho Power's utility customers.[17]

C. Department's Evaluation of Exceptions

1. The applicant has not requested and the Department has not recommend applying a balancing determination.

In her exceptions, Ms. Gilbert argues that "[a]llowing a $1.00 bond amount was justified through the use of a balancing determination which is prohibited by EFSC rules regarding the financial assurance bond. OAR 345-022-0000(3)(c) states that the council lacks the ability to apply the balancing determination to the retirement and financial assurance standard."[18] While it is correct that a balancing determination is not to be applied to the retirement and financial assurance standard, the Department has not "justified" or recommended Council apply a balancing determination to this standard.

A balancing determination allows Council to issue a site certificate:

> "for a facility *that does not meet one or more of the applicable standards* adopted under ORS 469.501 if the Council determines that the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet. The Council shall make this balancing determination *only when the applicant has shown that the proposed facility cannot meet applicable Council standards* or has shown, to the satisfaction of Council, that there is no reasonable way to meet the applicable Council standards through mitigation or avoidance of any adverse effects on a protected resource or interest." OAR 345-022-0000(2) (emphasis added).

[16] Idaho Power – Rebuttal Testimony of Jared Ellsworth – Issues RFA-1 and RFA-2, Page 17, citing ASC, Exhibit M and M-4 (ODOE – B2HAPPDoc3-21 ASC 13_Exhibit M_Financial Capability_ASC 2018-09-28. Page 8 of 19).
[17] Idaho Power – Rebuttal Testimony of Jared Ellsworth – Issues RFA-1 and RFA-2, Page 17.
[18] I. Gilbert RFA-1 Exception, p. 3.

Here, the applicant has not requested Council make a balancing determination and the Department has not recommended Council do so. To the contrary, IPC has provided evidence demonstrating why it meets the Retirement and Financial Assurance standard and in the Proposed Order[19] the Department has analyzed and recommended Council find the applicant has met that standard, applying certain conditions, including those discussed above. The fact that an ODOE staff member, in discussing the bond amount with the Council may have used the words "balancing" or "fairness" as Ms. Gilbert notes[20] by no means equates to the applicant requesting or the Department recommending Council apply a balancing test. Ms. Gilbert has not pointed to anything in the Proposed Order that would come anywhere close to constituting Council applying a balancing test to this standard *(e.g.*, no acknowledgement the standard cannot be met, no attempt to conduct the requisite balancing of facility benefits vs adverse effects, etc.).

2. Council's past denial of a request to reduce bond amounts is readily distinguished from this application.

In her exception, Ms. Gilbert makes a number of references to Council's past decision to deny a request by the developer of Bakeoven Solar Project to reduce a decommissioning bond once their proposed facility was in operation.[21] This argument fails to recognize that for purposes of assessing financial risk, a utility applicant with a long track record of operating energy facilities, an ability to recover costs from ratepayers and that is proposing to build a transmission line with an expected operating life of 100 years is distinct from developer applicants who, although experienced in designing and operating energy facilities, do not have the same lengthy history of facility operation or ability to recover costs from ratepayers and are proposing facilities with a significantly shorter expected lifespan than the transmission line

[19] ODOE – B2HAPP Doc2 Proposed Order on ASC and Attachments 2019-07-02, Pages 299-312 of 10016
[20] I. Gilbert RFA-1 Exception, p. 4.
[21] I. Gilbert RFA-1 Exception, p. 4 (no. 1.c. and no. 2), pp. 5-6 (no. 4).

proposed by IPC. Council noted this distinction when denying Bakeoven's request, stating: "The potential risk is elevated because the developer is an independent power producer, and not a public utility, which would have access to rate recovery authorization from a state PUC to dismantle and restore a facility site."[22]

3. Allegation re: farming practices

Ms. Gilbert alleges "[a] failure to provide a bond adequate to restore the site to allow continuation of farming practices will require mitigation required by ORS 215.275 due to the risk of these costs being assumed by the agricultural landowner."[23] ORS 215.275(4) makes the owner of a utility facility in exclusive farm use zones "responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility." Ms. Gilbert's allegation is beyond the scope of issue RFA-1 because it involves a question of compliance with a land use law, which is not considered under the Retirement and Financial Assurance standard. Further, her argument is based on an assumption that the proposed phased-in approach to financial assurance coupled with the 5-year review condition proposed by the Department would not be adequate to protect farmers. For the reasons discussed above, the Department believes the proposed approach would adequately protect the public, which includes farmers.

4. The allegation re: IdaCorp

In her exception, Ms. Gilbert alleges "[u]p to 70% of Idaho Power's earnings are controlled by a third party, IdaCorp, which would make recovery more complicated and less

[22] EFSC Final Order on Application for Site Certificate – Bakeoven Solar Project (April 24, 2020), p. 141 of 208.
[23] I. Gilbert RFA-1 Exception, p. 6.

certain than a company who had control over their income."[24] Idaho Power addressed this allegation in the contested case; the Department refers Council to that analysis.[25]

## III. CONCLUSION

For the reasons set forth above, the Department recommends that the Council reject the exceptions on Issue RFA-1 and affirm the Hearing Officer's findings of fact, conclusions of law and opinion on this Issue.

DATED this 15th day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ *Patrick Rowe*
Patrick Rowe, OSB #072122
Senior Assistant Attorney General
Counsel for the Oregon Department of Energy

[24] I. Gilbert RFA-1 Exception, p. 7 (no. 6).
[25] See Idaho Power Company's Response Brie for Contested Case Issues RFA-1 and RFA-2, pp. 20-22 and witness testimony referenced therein.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE RFA-1, was emailed to:

Todd Cornett
Secretary for EFSC
Todd.Cornett@state.or.us

I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE RFA-1, was served by First Class Mail or electronic mail as indicated below:

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DATED this 15th day of July, 2022.

*/s/ Svetlana Gulevkin*
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**BEFORE THE ENERGY FACILITY SITING COUNCIL**

**OF THE STATE OF OREGON**

| | |
|---|---|
| In the Matter of the Application for Site Certificate for the<br><br>BOARDMAN TO HEMINGWAY TRANSMISSION LINE | APPLICANT IDAHO POWER COMPANY'S RESPONSE TO EXCEPTIONS TO PROPOSED CONTESTED CASE ORDER ISSUE RFA-1<br><br>OAH Case No. 2019-ABC-02833 |

**July 15, 2022**

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## I. INTRODUCTION

Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order, Applicant Idaho Power Company ("Idaho Power" or the "Company") submits its Response to Limited Parties' Exceptions ("Response to Exceptions") for Issue RFA-1.

## II. RESPONSE TO LIMITED PARTIES' EXCEPTIONS

### A. The RFA Standard and Issue RFA-1

The Hearing Officer granted limited party status to the Oregon-California Trails Association ("OCTA"), represented by Mr. Gail Carbiener, and Ms. Irene Gilbert to raise RFA-1, which asks,

> *Whether the $1 bond amount adequately protects the public from facility abandonment and provides a basis for the estimated useful life of the facility.*[1]

In the Proposed Contested Case Order, the Hearing Officer concluded,

> A preponderance of the evidence establishes that the proposed $1 bond amount for the first 50 years of operation, with a phased-in increase over the next 50 years of operation until the bond covers the full decommissioning cost, adequately protects the public from facility abandonment and provides a basis for the estimated useful life of the facility.[2]

Furthermore, the Hearing Officer concluded that Idaho Power satisfied the RFA Standard, and that

> [the] limited parties [] stated concerns, but they provided no evidence or persuasive legal argument to contradict the findings in the Proposed Order and the testimony of Idaho Power's expert witnesses explaining why it is highly unlikely that the facility would be retired before the end of its useful life. The limited parties also provided no evidence that Idaho Power would be unable to bear the costs of decommissioning the facility and restoring the site to a useful, non-hazardous condition. Idaho Power, on the other hand, persuasively explains why it is not necessary, and in fact inappropriate, to require that it maintain a

[1] Second Order on Case Management at 6 (Aug. 31, 2021).
[2] Proposed Contested Case Order at 245 (May 31, 2022).



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bond/letter of credit at the full decommissioning cost (approximately $141 million) for the life of the project.[3]

Although multiple limited parties had standing to raise RFA-1, only Irene Gilbert filed exceptions to the Hearing Officer's Proposed Contested Case Order. Ms. Gilbert's arguments are not tied to any specific exceptions to the Proposed Contested Case Order as required by OAR 345-015-0085(5),[4] and her claims should therefore be rejected.[5] Nevertheless, should the Council wish to consider Ms. Gilbert's arguments, Idaho Power addresses each of her claims below. For that reason alone, the Council should reject her pleading. However, regardless of Ms. Gilbert's failure to comply with the Council's rules for exceptions, the substantive record fully supports the bonding approach approved in the Proposed Contested Case Order, and therefore, Idaho Power respectfully requests that the Council adopt the Hearing Officer's findings and conclusions of law relevant to RFA-1, without modification.

**1. Gilbert Exception 1, Part 1[6] – Council's Discretion to Approve a Bond in an Amount Less than the Full Cost of Site Restoration**

Ms. Gilbert argues that the Council's rules OAR 340-022-0050 (Retirement and Financial Assurance Standard) and OAR 345-025-0006(8) (Mandatory Conditions in Site Certificates) require the Council to set the amount of the bond or letter of credit at the amount required to cover

[3] Proposed Contested Case Order at 245.
[4] OAR 345-015-0085(5) ("In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.").
[5] Curiously, Ms. Gilbert seems to have been unable to locate the section of the Hearing Officer's Opinion which addressed the Retirement and Financial Assurance Standard, as evidenced by Ms. Gilbert's statement, "The only reference I located which addressed this issue is located on Page 137 of the Proposed Contested Case Order, Item 292. The Proposed Contested Case Order failed to address the list of items as included in this request for exception which I presented in the Contested Case." Irene Gilbert / Contested Case Exception Issue RFA-1 and Related Site Certificate Conditions / Issue RFA-1, p. 2 of 12 [hereinafter, Gilbert RFA-1 Exceptions].
[6] In response to Ms. Gilbert's Exceptions, Idaho Power attempted to follow Ms. Gilbert's organization in her pleading to assist the Council with its review. However, in some instances it was difficult to follow and required renumbering her bullet points.



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the entire decommissioning cost, and that the amount must be in place at all times during the operation of the project.[7] In other words, Ms. Gilbert argues that the Council lacks discretion to set the bond at any other amount. Ms. Gilbert raised this issue in the Contested Case and it was fully briefed and litigated.[8] Ultimately, the Hearing Officer concluded, that "the plain text of the rule allows the Council to exercise reasonable judgment in determining the appropriate form and amount of the bond/letter of credit."[9] The Hearing Officer was correct for the following reasons.

*a. Review of the Applicable Rules and Principles of Statutory Interpretation*

As an initial matter, the RFA Standard requires that, in order to issue a site certificate, the Council must find that the applicant "has a reasonable likelihood of obtaining a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition."[10] Mandatory Condition 8 provides:

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[7] Gilbert RFA-1 Exceptions at 3.

[8] In support of her assertion, Ms. Gilbert cites to three cases (*See* Gilbert RFA-1 Exceptions at 8-9). Idaho Power has previously briefed these cases as follows:

Idaho Power responded to Ms. Gilbert's reliance on *Zirker v. City of Bend*, 233 OR App 601 (2010), in its Response Brief for Contested Case Issues RFA-1 and RFA-2 at 14-16, explaining that *Zirker v. City of Bend* is inapplicable to this Contested Case because the court was interpreting a city development code provision and not the RFA Standard, or any EFSC rule.

Idaho Power responded to Ms. Gilbert's reliance on *Gonzales v. Oregon*, 546 U.S. 243 (1997), in its Response to Procedural Exceptions. *Gonzales* is not applicable to this contested case because *Gonzales* applies only to federal agencies—EFSC is a state agency. Oregon courts do not follow *Gonzales*, and instead will defer to an agency's interpretation of its own administrative rules if the interpretation is "plausible." *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or 366, 410 (2009); *Don't Waste Or. Comm. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994). The doctrine of "plausibility" was established in *Don't Waste Oregon Committee v. Energy Facility Siting Council,* which stated that when an *"*agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.'" *Don't Waste Or. Comm.,* 320 Or at 142.

Idaho Power addressed *Kisor v. Wilkie*, 139 S Ct 2408, in its Response Brief for Contested Case Issues RFA-1 and RFA-2 at 16-18, explaining that that case is also applicable only to federal agencies and that the Council rules at issue, RFA Standard and Mandatory Condition 8, unambiguously allow EFSC to exercise discretion, therefore, there is no need for a court to consider the doctrine of deference.

[9] Proposed Contested Case Order at 244.

[10] OAR 345-022-0050(2).



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> Before beginning construction of the facility, the certificate holder must submit to the State of Oregon, through the Council, a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition. The certificate holder must maintain a bond or letter of credit in effect at all times until the facility has been retired. The Council may specify different amounts for the bond or letter of credit during construction and during operation of the facility.[11]

A careful review of both the text and context of both the RFA Standard and Mandatory Condition 8 confirms that the Council has discretion to approve a bond in an amount less than the full cost of site restoration, as long as that amount is satisfactory to the Council.

When interpreting a regulation, the goal is to "ascertain the intent of the body that promulgated it."[12] To discern the intent behind a regulation, Oregon courts apply a three-step process.[13] The first step is an examination of both the "text and context" of the provision being interpreted as, "there is no more persuasive evidence of the intent" of the body that promulgated the regulation.[14] The context includes "other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the [regulation] was enacted."[15] When reviewing text and context, the courts will "consider[] rules of construction of the statutory text that bear directly on how to read the text,"[16] and furthermore, "the courts [will] give words of common usage their plain and ordinary meanings, and [] words that have well-defined legal meanings those meanings."[17] After examining text and context, the

[11] OAR 345-025-0006(8).
[12] *Osborn v. Psychiatric Sec. Rev. Bd.*, 325 Or 135, 146 (1997); *see also State v. Gaines*, 346 Or 160, 171-73 (2009) (outlining the three-step process for interpreting statutes, which also applies to the interpretation of regulations) (*citing Portland Gen. Elec. Co. v. Bureau of Labor & Indus.,* 317 Or 606, 610-11 (1993) [hereinafter "*PGE*"]).
[13] *Gaines*, 346 Or at 164.
[14] *Gaines*, 346 Or at 171.
[15] *Fresk v. Kraemer*, 337 Or 513, 520-21 (2004).
[16] *PGE*, 317 Or at 611.
[17] *Fresk*, 337 Or at 520.



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court may consult any legislative history that the parties have proffered.[18] Finally, "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."[19]

*b. The Text and Context of EFSC's Rules Allow the Council to Exercise Discretion to Set an Appropriate Bond Amount Based on the Individual Circumstances under Review.*

In order to issue a site certificate, the Council must find that the applicant "has a reasonable likelihood of obtaining a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition."[20] Upon review, the meaning of the standard appears straightforward. The text clearly indicates that the form and amount of the bond must be "satisfactory" to the Council. On its face, the word "satisfactory" indicates that a judgment is being made as to what is adequate in view of a specific decision maker. For instance, Merriam-Webster defines "satisfactory" to mean "sufficient to meet a condition or obligation."[21] Similarly, Merriam-Webster *New College* defines "satisfy" as "to fulfill (a need[])."[22] In order to make sense of these definitions, one must imagine a party whose needs or expectations provide the yardstick that measures whether they have been met. And given the fact that the rule states that the term and amount of the bond must be "satisfactory ***to the Council,***" the standard indicates that it is the

[18] *Gaines*, 346 Or at 172.
[19] *Gaines*, 346 Or at 172.
[20] OAR 345-022-0050(2).
[21] Idaho Power Response Brief, for Contested Case Issues RFA-1 and RFA-2, Attachment A at 3 (*Satisfactory*, Webster's Third New International Dictionary (2002)).
[22] Idaho Power Response Brief, for Contested Case Issues RFA-1 and RFA-2, Attachment A at 6 (*Satisfy*, Webster's II New College Dictionary (1999)).



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Council that is granted the flexibility to determine the form and amount of the bound, in light of the relevant circumstances (so long as the determination is reasonable).[23]

The reasonableness requirement is particularly relevant given the final phrase in the RFA Standard, which indicates that the form and amount of the bond must be "satisfactory to the Council *to restore the site to a useful, non-hazardous condition*."[24] As appended to the end of the sentence, the intent of the phrase appears somewhat vague. However, when read in conjunction with the phrase "satisfactory to the Council"—which it must be[25]—the final phrase is an indication that whatever form and amount adopted, the purpose of the bond is to ensure that under all of the circumstances, the site can indeed be fully restored.[26]

Despite the text of the rules, Ms. Gilbert insists that the RFA Standard, and Mandatory Condition 8, require the certificate holder to maintain a bond for the full amount of the site restoration estimate at all times. That position is contrary to the text and context of the RFA Standard. *First*, Ms. Gilbert's interpretation would require the Council to completely ignore the phrase "in a form and amount satisfactory to the Council." As discussed above, those words plainly allow the Council to exercise reasonable judgment as to determine the appropriate form and amount of the bond—judgment that would be eliminated if Ms. Gilbert's interpretation were

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[23] *See Kearney v. Standard Ins. Co.,* 175 F3d 1084, 1089 (9th Cir. 1999) ("The phrase [satisfactory written proof] traditionally confers discretion on the [the decision maker] to decide whether the quantum of proof is sufficient"); *id.* ("Thus 'satisfactory written proof that you have become disabled' means 'proof that would be satisfactory to a reasonable person that you have become disabled.' . . . This reading is consistent with well established common law principles for reading contracts. . . . As a matter of common law, where a contract contains a condition that the obligor be 'satisfied,' 'an interpretation is preferred under which the condition occurs if . . . a reasonable person in the position of the obligor would be satisfied.' Restatement (Second) of Contracts § 228 (1981)."). Idaho Power recognizes that the proffered case is not binding precedent, nonetheless, *Kearny* provides persuasive evidence that a reasonable interpretation of satisfactory would indicate a granting of discretion to the decision maker.

[24] OAR 345-022-0050(2) (emphasis added).

[25] *See Vsetecka v. Safeway Stores, Inc.* 337 Or 502, 508 (2004) ("Ordinarily, however, 'text should not be read in isolation but must be considered in context.' (*Stevens v. Czerniak*, 336 Or 392, 401 (2004)). Context includes other provisions of the same statute.").

[26] *Kearney,* 175 F3d at 1089 ("The word "satisfactory" is traditionally limited by an objective standard, so that [the decision maker] is not permitted to reject proof that would be satisfactory to a reasonable person.").



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adopted. Moreover, Ms. Gilbert's interpretation not only attempts to read a key phrase out of the rules but it also attempts to graft new words into the rule that were not adopted by EFSC. That is, the rules do not include any reference to the amount of the required bond—other than to say it must be satisfactory to the Council. If EFSC intended that a bond in the full decommissioning cost be in effect at all times, it surely would have given an indication of that fact. Ms. Gilbert's interpretation is therefore contrary to basic rules of statutory construction, which require that the reader "not [] insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."[27]

Second, Ms. Gilbert's interpretation of the standard is squarely in conflict with Mandatory Condition 8, which also indicates that the amount and form of the bond must be "satisfactory to the Council" and allows the Council to set different bond amounts during the operational and construction phases.[28] This language reconfirms that the Council is provided flexibility in setting the form and amount of the bond based on the relevant circumstances.

Thus, Ms. Gilbert's narrow view of the Council's authority to exercise judgment as to an appropriate amount for the bond is contrary to the regulatory framework and should be rejected. The Council should therefore adopt the Hearing Officer's conclusion without modification.

*c. The Phased-in Bonding Approach Approved in the Proposed Contested Case Order is Appropriate Given the Facts and Circumstances Specific to the Project.*

During the Contested Case, Idaho Power explained that the proposed phased-in bonding approach is reasonable, given the cost to maintain a bond for the full decommissioning amount for

[27] ORS 174.010.
[28] OAR 345-025-0006(8).



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the life of the project, as measured against the risk that the Company would ever need to retire the Boardman to Hemingway Transmission Line ("B2H" or "the Project") before 100 years of operation, or that it would be unable to pay the cost to do so, should it be required. As explained by the Company during the Contested Case, the carrying costs for a bond in the full amount for decommissioning costs would be approximately $880,000, on an annual basis.[29] Moreover, the evidence supports findings that B2H will be in operation for the next 100 years, and that it is highly unlikely the Company would default on its decommissioning obligations. For these reasons, the Hearing Officer appropriately adopted the Proposed Order's phased-in bonding approach.

*d. It is Reasonable to Conclude that B2H Will be in Service for the Next 100 Years.*

In support of its proposed phased-in bonding approach, Idaho Power offered the expert testimony of witness Jared Ellsworth, who has extensive experience in transmission system planning. Mr. Ellsworth explained that B2H is designed to remain in service for 100 or more years and there is every reason to believe it will do so. Existing 500 kV lines in the Western U.S. play an integral role in the electricity grid's backbone and "are extremely valuable to today's system; there is every indication that these lines will be in service for over 100 years."[30] To his knowledge, Mr. Ellsworth is unaware that any other transmission operator, including Idaho Power, has ever retired a major transmission line.[31] Furthermore, it would be unreasonable for a utility to permit, design, and construct a major transmission line with a life of 100 years if it did not fully intend to operate it for at least that length of time. Major transmission lines are expensive to plan and permit,

[29] ASC, Exhibit M at M-4 (Sept. 2018) ODOE - B2HAPPDoc3-21 ASC 13_Exhibit M_Financial Capability_ASC 2018-09-28. Page 8 of 19).
[30] Idaho Power / Rebuttal Testimony of Jared Ellsworth / Issues RFA-1 and RFA-2, p. 32 of 40.
[31] Idaho Power / Rebuttal Testimony of Jared Ellsworth / Issues RFA-1 and RFA-2, p. 8 of 40.



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and the process can be lengthy—Idaho Power began the B2H planning process in 2007 and the permitting process in 2008. Currently, of the estimated $1 to $1.2 billion total cost for B2H, the Project funding participants, PacifiCorp and Bonneville Power Administration ("BPA"), have spent approximately $121 million towards permitting and pre-construction costs.[32]

Furthermore, the need for transmission capacity in general, and B2H in particular, has become more urgent as the United States continues to pursue a decarbonized grid. The need to expand regional transmission resources is now a focus of concern for the Oregon legislature, with a transmission organization study underway to identify the benefits, opportunities, and challenges posed by expanding the regional transmission system.[33] There is no doubt that B2H will contribute to alleviating some of these congestion issues that will need to be addressed as the State looks to bring online more renewable resources to meet RPS goals in the near future.

In conclusion, Idaho Power has conclusively demonstrated that B2H is urgently needed, and that it will continue into the future to serve as a critical component of an expanded grid required to reach the clean energy goals of both this State, and the region. There is every reason to believe that B2H will remain in service at least until the end of its useful life—at which time a bond in the full amount of decommissioning costs will be in place.

*e. Idaho Power's Record of Strong Financials and Regulated Corporate Governance Supports a Finding that it is Highly Unlikely that the Company Would Default on its Decommissioning Obligations.*

In the Contested Case, Idaho Power provided the testimony of its Treasury Services Senior Manager, Randy Mills, who testified that, Idaho Power's proven financial strength supports a

[32] Idaho Power / Rebuttal Testimony of Jared Ellsworth / Issues RFA-1 and RFA-2, p. 6 of 40.
[33] Idaho Power / Rebuttal Testimony of Jared Ellsworth / Issues RFA-1 and RFA-2, p. 37 of 40.



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finding that the Company is able to cover any decommissioning obligations, should they arise.[34] Specifically, Mr. Mills explained that Idaho Power is a vertically integrated, regulated utility that operates a large fleet of assets, including generation, transmission, and distribution facilities and that the Company has remained in business without interruption or default for more than 100 years. Idaho Power's current net worth is approximately $2.7 billion, and it has approximately $4.8 billion in net assets. In 2020, Idaho Power's operating revenue was $1,347,340,000 with a net profit of $233,235,000.[35] For the 2020 fiscal year, Idaho Power had a credit rating of "BBB" from Standard & Poor's ("S&P") Rating Services and "A3" as a long-term issuer from Moody's Investor Service ("Moody's").[36] Idaho Power has maintained investment-grade credit ratings from Moody's and S&P for decades.[37]

Moreover, Idaho Power's financial stability is enhanced by its status as a rate-regulated utility, and as such, it is authorized to recover all prudently incurred investments and expenses in customer rates. Under the jurisdiction of the Idaho Public Utilities Commission ("IPUC") and the Public Utility Commission of Oregon ("OPUC"), both PUCs are required to set rates that include the reasonable costs of providing service to its customers, plus a return on the property used to provide service. Importantly, the rates set by both state commissions include the costs associated with retiring facilities that are taken out of service.[38] And finally, the capability of Idaho Power

[34] *See* Idaho Power / Rebuttal Testimony of Randy Mills (Nov. 11, 2021) / Issue RFA-1, p. 14-20 of 21.
[35] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1/ Exhibit H, IDACORP Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Dec. 11, 2020), p. 86 of 173 (hereinafter "SEC 10-k").
[36] SEC 10-k at 54.
[37] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 15 of 21.
[38] ASC, Exhibit M at M-3 (ODOE - B2HAPPDoc3-21 ASC 13_Exhibit M_Financial Capability_ASC 2018-09-28. Page 7 of 19).



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to successfully finance the construction of the Project is significant evidence of Idaho Power's financial strength, including its financial capability to retire and remove the Project, if necessary.

Thus, given the extremely low risk that B2H would need to be decommissioned prior to its 100-year expected life, and the extremely low risk that the Company would be unable to cover the cost of decommissioning should it become necessary, the phased-in bonding approach is reasonable. For this reason, the Council should adopt the Hearing Officer's findings and conclusions without modification.

### 2. Gilbert Exception 1, Part 2 – Claim that a Balancing Determination was Used to Determine Bond Amount

Ms. Gilbert asserts that if the Council were to approve a $1.00 bond amount, then it would have engaged in a balancing determination to make that decision.[39] The Hearing Officer found that "a balancing determination is not necessary here because, as explained in the Proposed Order, Idaho Power has met the RFA standard by demonstrating a reasonable likelihood of obtaining a bond/letter of credit in an amount sufficient to restore the site to a useful, non-hazardous condition."[40] Ms. Gilbert's argument is incorrect for the following reasons.

As Idaho Power explained in its Response Brief, the Council may make a balancing determination under OAR 345-022-0000(2) when it determines there is no reasonable way for the proposed facility to meet one or more of the Council's standards and the "overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet."[41] Ms. Gilbert's appears to rest on the presumption that B2H

[39] Gilbert RFA-1 Exceptions at 3.
[40] Proposed Contested Case Order at 244-245 (citations omitted).
[41] OAR 345-022-0000(2). The Council is prohibited from applying the balancing determination to several standards, including the RFA Standard. OAR 345-022-0000(3).



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cannot comply with the RFA Standard *without a balancing determination* and that an adoption of the phased-in bonding approach would be tantamount to allowing a balancing decision. However, as discussed above, Idaho Power's proposed phased-in bonding approach is both permissible and appropriate. Therefore, because it is within the Council's discretion to accept a bond in the form and amount proposed by Idaho Power, and because the specific circumstances of relevance to B2H support the phased-in bonding approach, there is no need for an "exception" (or application of the balancing determination) to the RFA Standard because, as previously discussed, B2H meets the RFA Standard.

Nevertheless, Ms. Gilbert makes several specific arguments in support of her view that the Hearing Officer made a balancing determination—none of which are persuasive.

*f. Past Council Precedent*

Ms. Gilbert argues that the Council must reject the Proposed Order's phased-in bonding approach because the Council has established a precedent from which it may not depart. Specifically, Ms. Gilbert points to the Council's decision in the Bakeoven Solar case and a memorandum prepared by ODOE showing security deposits provided by other EFSC projects, which she argues obligate the Council to require Idaho Power to post a bond in the full amount of decommissioning costs during B2H operations. However, as pointed out in Idaho Power's testimony and briefing, these precedents do not support Ms. Gilbert's claim.

In Bakeoven Solar, the applicant requested a bonding approach similar to that requested by Idaho Power. To assist it in evaluating that proposal, ODOE engaged Golder & Associates ("Golder"), who prepared an evaluation of potential financial risk associated with Bakeoven's



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financial assurance proposal.[42] Based on the evaluation, Golder advised the Council "to deny [Bakeoven's] request to reduce the decommissioning bond to $1.00 once Bakeoven begins commercial operation."[43] However, contrary to Ms. Gilbert's position, this decision should not be applied to B2H because the Bakeoven Solar Project is easily distinguished from B2H with respect to the relevant facts. *First*, Bakeoven Solar is a single-purpose, LLC-owned solar generation project, and the risks of insolvency identified by Golder were specific to that financial vehicle and generation resource. In recommending that the phased-in bonding approach be denied to Bakeoven Solar, Golder specifically cited the risk to the State if Bakeoven filed for bankruptcy and "if the assets in bankruptcy are not acquired by another solar operator/developer."[44] By contrast, B2H is a major transmission line that will be relied upon by numerous electric utilities in the region[45] and will be owned by a public utility with a 100-year history[46] that will recover its costs, including decommissioning costs, in rates.[47] Notably, the Hearing Officer specifically cited Mr. Mill's testimony on these facts.[48]

Importantly, in denying Bakeoven Solar's proposed financial assurance request, the Council emphasized that the potential risk associated with Bakeoven Solar is elevated because, "*the developer is an independent power producer, and not a public utility, which would have*

[42] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit E, Review of Bakeoven Solar Project, Exhibit W: Retirement and Financial Assurance, p. 1 of 12.
[43] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit E, Review of Bakeoven Solar Project, Exhibit W: Retirement and Financial Assurance, p. 11 of 12.
[44] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit E, Review of Bakeoven Solar Project, Exhibit W: Retirement and Financial Assurance, p. 6 of 12.
[45] Idaho Power's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 26-27.
[46] Idaho Power's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 22; Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 7-11 of. 21
[47] Idaho Power's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 26.
[48] "[T]o the extent the limited parties compare the financing and operation of the proposed transmission line to recent solar projects (i.e., Bakeoven Solar and Obsidian Solar Center), these comparisons are misplaced. As Idaho Power's expert Randy Mills testified, the financial and operational risks associated with these solar facilities are entirely distinct from those associated with a major transmission line proposed by a regulated utility." Proposed Contested Case Order at 244.



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*access to rate recovery authorization from a state [Public Utility Commission] to dismantle and restore a facility site*."[49] Therefore, the Council has expressly acknowledged that Bakeoven Solar is differently situated from public utilities with respect to the bonding requirement, and in fact seems to contemplate that a phased-in bonding approach might be appropriate for a project developed and operated by a regulated utility.

In support of her argument that the Council is bound by past precedent, Ms. Gilbert also points to an ODOE memorandum dated August 13, 2021 ("Department memorandum") which lists EFSC security deposits made by projects as of April 1, 2021.[50] That table is not persuasive. as explained in Idaho Power's briefing, the Department memorandum was prepared by staff to "recommend[] [that] the Council amend the Surety Bond Template . . . to ensure that a bond would perform if a Surety gives notice of its intent to cancel a bond and the certificate holder fails to provide an acceptable replacement."[51] The Department memorandum does not discuss the Council's reasoning for approving/requiring the bond amounts that are presented in the memorandum; rather the focus of the document is to discuss revision of the bond template (or contract) between EFSC and the site certificate holder.[52] Moreover, the memorandum provides no indication that the amounts listed in the table are in fact the full amount necessary to restore the site or that the Council required that these projects obtain a bond/letter of credit in the full amount. The table simply presents the dollar amounts of the currently held bonds or letters of credit for

[49] Idaho Power's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 26; Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit F, Bakeoven Solar Project - Final Order on Application for Site Certificate (Apr. 24, 2020), p. 142 of 208 (emphasis added).
[50] Gilbert RFA-1 Exceptions at 3 (referring to Irene Gilbert / Irene Gilbert's Opening Arguments Regarding Contested Case RFA-1 / Issue RFA-1 / Exhibit 1, Memo to EFSC from Christopher M. Clark, Siting Policy Analyst & Rules Coordinator, Surety Bond Template Update (Aug. 13, 2021), p. 2 of 4 [hereinafter, "Gilbert Exhibit 1"].
[51] Gilbert Exhibit 1 at 1.
[52] Gilbert Exhibit 1 at 1.



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these active projects, stating that the table shows that "the Council has financial assurance on file for approximately $168.2 million in estimated retirement costs."[53] Additionally, regardless of whether the bond amounts listed do reflect the full decommissioning estimate, that fact would not suggest that the Council believes that its rules require such a bond in all instances—particularly given the contrary text and context of Mandatory Condition 8.

Thus, neither the Bakeoven Solar decision nor the Department memorandum support the view that the Council must reject the phased-in bonding approach for B2H. The Council's rejection of a phased-in bonding approach for Bakeoven Solar does not constitute controlling precedent in this case, and the Council's decision specifically recognizes that a public utility is not similarly situated with Bakeoven on this issue.[54]

*g. Statements by Max Woods*

Ms. Gilbert also argues that statements by ODOE Staff, Max Woods, establish that adoption of the phased-in bonding approach for B2H would require a balancing determination. As context, at the January 23, 2020 Council meeting, Mr. Woods made a presentation to the Council regarding the B2H Draft Proposed Order, including a discussion of ODOE's proposed site certificate conditions to satisfy the Retirement and Financial Assurance Standard, specifically the phased-in bonding approach.[55] Ms. Gilbert argues that several phrases used by Mr. Woods indicate he believes the Council would be unable to grant Idaho Power's request for a phased-in bonding approach unless it would reach the decision by balancing determination. However, Ms. Gilbert's argument on this point is flawed. First, the phrases Ms. Gilbert references do not appear to be

[53] Gilbert Exhibit 1 at 1.
[54] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit F, Bakeoven Solar Project - Final Order on Application for Site Certificate, p. 142 of 208.
[55] Irene Gilbert / Irene Gilbert's Opening Arguments Regarding Contested Case RFA-1 (Sept. 17, 2021) / Issue RFA-1, Exhibit 4, EFSC Meeting Minutes (January 23-24, 2020), p. 1 of 32.



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contained in the minutes she has offered as evidence in this case. Second, a careful review of Mr. Woods' actual statements, as recorded in the minutes, establish that he did nothing to indicate that a phased-in bonding approach would be contrary to the RFA standard or would require a balancing determination. In fact, the meeting minutes summarize Mr. Woods as stating that ODOE has worked on this issue of "how to do this that is fair [to the Company] yet minimize risk to the State."[56] The meeting minutes continue:

> [t]here were two parts to this, one being the facility would never likely be removed according to Idaho Power and second is that Idaho Power is a regulated utility in two states that has rate recovery options. The argument is that there would be money if the facility had to be retired and removed. He felt this was a reasonable approach.[57]

Based on these minutes, it appears that Mr. Woods was presenting a case for, not against, the phased-in bonding approach. Regardless, Mr. Woods' statements provide no support for the view that a balancing determination would be required, and therefore, the Council should reject any such suggestion.

### 3. Gilbert Exception 2 – Change in the Interpretation of Required Bond Amounts Should be Addressed through Rulemaking

Ms. Gilbert asserts that the Council lacks discretion to adopt a phased-in bonding approach, absent a formal rulemaking.[58] In support of this assertion, Ms. Gilbert references a statement from the Council in the Bakeoven Solar Final Order. In that Order, the Council states that when considering a variation in accepting a full bond or letter of credit amount necessary for facility decommissioning, it would be more appropriate for the Council to engage with subject matter

[56] Irene Gilbert / Irene Gilbert's Opening Arguments Regarding Contested Case RFA-1 / Issue RFA-1, Exhibit 4, EFSC Meeting Minutes (January 23-24, 2020), p. 10 of 32.
[57] Irene Gilbert / Irene Gilbert's Opening Arguments Regarding Contested Case RFA-1 (Sept. 17, 2021) / Issue RFA-1, Exhibit 4, EFSC Meeting Minutes (January 23-24, 2020) (Sept. 17, 2021), p. 10 of 32.
[58] Gilbert RFA-1 Exceptions at 4-5.



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experts rather than solely relying on information provided by the applicant. [59] The Council suggests that this process for subject matter input could be developed through a rulemaking.[60] However, Ms. Gilbert's reliance on this comment is not persuasive.

It is important to note that the Council does not state or imply that it *must* conduct a rulemaking to consider a bond in less than the full decommissioning amount. On the contrary, the Council states that it would be best to establish in a rulemaking, a process by which the Council may seek expert consultation on these matters. In fact, this understanding of the Council's statements is confirmed by the Council's actions that followed. That is, the Council ultimately chose to evaluate both Bakeoven's and Obsidian's phased-in bonding proposals[61] in the contested cases opened to review their ASCs, rather than a formal rulemaking. In so doing, the Council chose to obtain the necessary expert advice by appointing Golder to consult on the matter, under EFSC's authority under ORS 469.470(6).[62] Thus, the Council's actions clearly indicate that it has the authority to consider alternative bonding approaches in individual contested cases. Ms. Gilbert's arguments to the contrary should be rejected.

In this Contested Case, the Council does not need to seek out additional subject matter experts as Idaho Power has already provided expert witness testimony and briefing addressing the

[59] "Council concluded that the variation in proposal to meet the standard, from the historically accepted full bond or letter of credit amount necessary for facility decommissioning, would be more appropriately evaluated through rulemaking, where information and expertise of subject matter experts could be considered, rather than relying solely on information provided by the applicant in favor of the proposal." Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit F, Bakeoven Solar Project - Final Order on Application for Site Certificate (Apr. 24, 2020), p. 140 of 208.

[60] *Id.*

[61] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit G, Obsidian Solar Center – Proposed Order on Application for Site Certificate (Oct. 9, 2020), p. 106 of 198.

[62] *Id.* ("In accordance with ORS 469.470(6), at the September 26-27, 2019 meeting, Council appointed Golder Associates, Inc. (Golder) based on their experience and qualifications related to the Council's Retirement and Financial Assurance standard, as a qualified consultant to provide technical expertise in review of the above-requested approach").



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details of the proposed phased-in bonding approach and Idaho Power's financial strength.[63] The Rebuttal Testimony of Randy Mills describes the benefits to ratepayers if the bond is eliminated for the first fifty years of operation (the decrease in carrying costs which ultimately would be paid by ratepayers); the ability of Idaho Power to cover the decommissioning costs, should they arise; and distinguishes Idaho Power from other single-purpose entities that have previously requested a phased-in bonding approach. Additionally, the Rebuttal Testimony of Jared Ellsworth provides supporting testimony on the projected length of operation for B2H and the unlikelihood of decommissioning. The Council may also wish to rely on the applicable portions of the Golder Report, which highlights some of the differences between regulated utilities and independent power producers.

For all of the above reasons, the Council should find that it retains discretion to adopt the Proposed Order's phased-in bonding approach for Idaho Power and should adopt the Hearing Officer's findings and conclusions without modification.

**4. Gilbert Exception 3 – Adequately Protect Oregonians**

Ms. Gilbert asserts that the proposed site conditions fail to meet the Council's stated purpose—to protect Oregonians from bearing the unacceptable risk of shouldering decommissioning costs for B2H.[64] However, for the reasons discussed under Idaho Power's response to Ms. Gilbert's Exception 1, and as further detailed below, this argument is unpersuasive.

As an initial matter, this issue was fully litigated and was the subject of extensive testimony and briefing by Idaho Power and Ms. Gilbert. As discussed in Idaho Power's Closing Arguments,

[63] *See* Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1.
[64] Gilbert RFA-1 Exceptions at 5.



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and the testimony of Jared Ellsworth, the risk posed by Ms. Gilbert—that B2H would be decommissioned at a time where Idaho Power had insufficient funds to restore the site in compliance with Council standards—is extremely small. In fact, in order for this risk to materialize, several highly unlikely circumstances would need to occur in combination. *First,* it is highly unlikely that B2H would be decommissioned before the end of its 100-year expected life, at which point Idaho Power will be required to carry a bond in the full decommissioning amount.[65] *Second*, it is highly unlikely that Idaho Power would be unable to pay the full amount required for decommissioning.[66] As discussed in Mr. Mill's testimony, Idaho Power's status as a 100-year old utility with a high credit rating and robust financials assure the Council that Idaho Power will pay the cost of decommissioning.[67] This is particularly true given the fact that Idaho Power recovers the cost of decommissioning in customer rates.[68]

Importantly, the phased-in bonding approach was designed to reflect the potential increase in risk to Oregonians that may evolve over time. As explained by ODOE, "[t]he proposed phasing/gradual increase in the financial assurance would require the certificate holder to maintain a bond or letter of credit commensurate with the level of risk that the facility would be abandoned or retired as that risk is currently perceived."[69]

*Finally*, the conditions to the Proposed Order provide further protections for Oregonians by allowing the Council to reconsider on a regular basis whether to require a bond in a greater amount than the current conditions require. Specifically, Recommended RFA Condition 5 requires that every five years, starting on the fifth anniversary of the in-service date, Idaho Power

[65] Idaho Power / Rebuttal Testimony of Jared Ellsworth (Nov. 11, 2021) / Issues RFA-1 and RFA-2, p. 19-20 of 40.
[66] Idaho Power / Rebuttal Testimony of Jared Ellsworth / Issues RFA-1 and RFA-2, p. 15-16 of 40.
[67] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / p. 14-15 of 21.
[68] Idaho Power Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 26.
[69] ODOE Closing Brief at 173 (Feb. 28, 2022).



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will prepare a report that summarizes any changes in the physical condition of the facility, any evolving technologies, and Idaho Power's general financial condition, in order to inform ODOE if the amount of the bond/letter of credit requirements should be adjusted.[70] This is a reasonable reporting frequency as Idaho Power's financial conditions have not significantly changed over any five-year period of its 100-year operational history.[71] To the contrary, while Idaho Power may experience short-term fluctuations, when viewed over five-year increments, the Company's financial condition has been remarkably stable.[72] Thus, in the event ODOE subsequently judges the risk that Idaho Power might default on its decommissioning obligations to be higher due to changed circumstances or additional information, the Council is free to impose further requirements as necessary to protect the citizens of the State. It is therefore reasonable for the Council to review Idaho Power's financial condition every five years.

Thus, the terms of the phased-in bonding approach, together with the site certificate conditions imposed in the Proposed Contested Case Order, provide robust protections to Oregonians, and Ms. Gilbert's assertions to the contrary should be rejected. For these reasons, the Council should adopt the Hearing Officer's findings and conclusions without modification.

**5. Gilbert Exception 4 – Financial Stability**

Ms. Gilbert questions the financial stability of the Company with the following four assertions—to which Idaho Power separately responds below.

- **"Idaho Power has admitted in their submission to the Oregon Public Utilities commission as well as their submissions to the Securities and Exchange**

[70] Proposed Order at 303 (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 310 of 10016).
[71] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / p. 20 of 21.
[72] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 20, n.56 of 21.



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**Commission ["SEC"] that there are multiple potential events that could impact their solvency."[73]**

As Idaho Power explained in its Response Brief, SEC regulations require the Company to list potential risk factors so that investors are fully informed prior to making an investment decision. However, listing a risk—such as a risk of insolvency—is no indication of the degree of risk. As the testimony of Mr. Mills establishes, Idaho Power's risk of insolvency is extremely low, a fact that is supported by the Company's ability to maintain a total committed credit facility of $300 million through agreements with some of the largest financial institutions.[74] Therefore, Ms. Gilbert's concern is unsubstantiated.

- **"Idaho Power is located outside the State of Oregon, however, most of the impacts will occur in Oregon. This is likely to create barriers to obtaining funding should the company fail to restore the site."[75]**

Regardless of where the Company is headquartered, by engaging in substantial business in Oregon and operating under an Oregon-issued permit, the Company has availed itself of Oregon law and would therefore be subject to personal jurisdiction within the State.[76] Any "barrier" that Ms. Gilbert is suggesting exists would be contrary to general principles of civil procedure.

- **"Multiple examples have been provided of companies with far greater resources and greater perceived stability which have gone bankrupt due to unusual or unpredictable events."[77]**

Although Ms. Gilbert provided no specific examples in support of this assertion in her exceptions, it is assumed that she is referring to the same entities that she has repeatedly referenced, PG&E and GreenHat Energy, LLC. Idaho Power has provided extensive testimony and closing

[73] Gilbert RFA-1 Exceptions at 6.
[74] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 6 of 21.
[75] Gilbert RFA-1 Exceptions at 6.
[76] ORCP 4 A(4).
[77] Gilbert RFA-1 Exceptions at 6.



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arguments that clearly distinguish the financial situation and conduct of PG&E and GreenHat from Idaho Power's financial position.[78]

*First*, when relying upon PG&E's financial situation to question Idaho Power's financial strength, Ms. Gilbert fails to provide the full context of the circumstances under which PG&E was forced into bankruptcy and its inability to recover costs from its customers. Ms. Gilbert was referring to PG&E's wildfire liabilities that are claims from PG&E customers that PG&E agreed to settle under its Chapter 11 bankruptcy Plan of Reorganization.[79] While highly improbable, Idaho Power acknowledges that it is possible for a utility to be forced into bankruptcy. However, as explained by Mr. Mills, if this were to occur, Idaho Power would almost certainly reorganize and emerge from bankruptcy.[80] If Idaho Power did not emerge from bankruptcy, another entity would own and operate B2H so that the highly valuable transmission line remains maintained and in service.[81]

*Second*, Ms. Gilbert's concern that Idaho Power's investment in transmission infrastructure will result in financial ruin, similar to GreenHat, is completely irrelevant. GreenHat is in no way similarly situated to Idaho Power and its bankruptcy was not the result of investment in transmission assets but rather illegal manipulation of transmission rights auction markets.[82] GreenHat did not invest in, own, or operate transmission infrastructure, but rather it made

[78] *See* Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, pp. 14-21 of 21; Idaho Power's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 19-20.
[79] *See* Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 15, n.40 of 21 ("As part of the Plan of Reorganization, and as ordered by the California Public Utility Commission, PG&E made a series of commitments following emergence from bankruptcy. One of those commitments was to not seek recovery of settlement amounts paid to wildfire victims through rate recovery mechanisms." (citing Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA -1 / Exhibit I, In re Pacific Gas and Electric Corporation and Pacific Gas and Electric Company, Case No. 19-30088 (May 28, 2020), p. 75 of 123)).
[80] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 16 of 21.
[81] *Id.*
[82] *See* Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, pp. 16-17 of 21 (discussion of how GreenHat Energy LLC is in no way similarly situated to Idaho Power).

inappropriate investments in transmission line rights in the PJM financial market.[83] GreenHat was purely a financial firm and not a regulated utility. For these reasons, the facts specific to GreenHat do not support Ms. Gilbert's argument that Idaho Power will become bankrupt because it is investing in transmission infrastructure.

- **"The Golder report warns that the council may be exposing the Council and state to litigation due to a failure to require compliance with council rules regarding the bond amount"**[84]

Ms. Gilbert makes this assertion with no further supporting statements or reference to the Golder report. A review of the Golder report indicates that no such statements are made.[85] Ms. Gilbert may be misinterpreting the following statement – "Facility retirement and site restoration bonding requirements are required to manage or mitigate the risk of exposing the State to become responsible for these costs. Eliminating or reducing the bonding requirements transfers the risk to the State."[86] As previously discussed, the financial and operational risks associated with these single-entity facilities are entirely distinct from those associated with a major transmission line proposed by a regulated utility, such as Idaho Power, and therefore, it would be inappropriate to extend the conclusions of the Golder report to this Project.[87]

[83] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, pp. 16-17 of 21.
[84] Gilbert RFA-1 Exceptions at 6.
[85] *See* Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit E, Review of Bakeoven Solar Project (Nov. 5, 2019), Exhibit W: Retirement and Financial Assurance (Nov. 5, 2019), p. 11 of 12.
[86] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit E, Review of Bakeoven Solar Project, p. 11 of 12.
[87] *See* infra Section II.A.2.



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### 6. Gilbert Exception 5 - ORS 215.275(5) Requires Costs for Restoration to Farm Landowners

In this exception, Ms. Gilbert appears to be asserting that ORS 215.275(5)[88] is somehow applicable to the Council's determination of a satisfactory bond amount and that the statute requires the bond be in an amount that can cover the costs of restoration of farmlands.[89] *First*, Ms. Gilbert's assertion is made under the erroneous assumption that Idaho Power would not have the funding available to cover the costs of decommissioning. As Idaho Power has explained, there is no material risk of the transmission line being decommissioned or Idaho Power being unable to cover the costs of decommissioning, if necessary. Idaho Power's phased-in bonding approach protects all Oregonians, including farmland owners. *Second*, to the extent Ms. Gilbert is raising specific concerns to farmland owners, her argument is predicated on the assumption that Idaho Power's proposed approach will put an extra burden on these landowners—there is simply no support for her assertions in the record. *Third*, to the extent Ms. Gilbert is raising specific concerns regarding farmland impacts and statutory requirements for mitigation of impacts to farmlands, those concerns are not properly raised under the RFA Standard. Land use laws are not evaluated under the RFA Standard; this argument is outside the scope of the issue statement. Finally, Ms. Gilbert's reference to the Land Use Board of Appeals ("LUBA") decision in *Falcon Heights Water and Sewer District v. Klamath Heights* does not provide any support for her argument.[90]

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[88] ORS 215.275 establishes criteria for siting of utilities within exclusive farm use ("EFU") zones and is addressed under the Council's Land Use Standard. The statute is a county planning land use statute, it is not concerned with the applicant's requirements for retiring its facility.

[89] Gilbert RFA-1 Exceptions at 6.

[90] *Falcon Heights WSD v. Klamath County,* LUBA No. 2011-068 at 8 (Dec. 12, 2011). The statute at issue in *Falcon* is primarily ORS 215.275. Petitioners appealed the county's decision that concluded that the petitioner had taken into account only cost when evaluating options for siting its proposed facility outside of EFU zones, contrary to the requirements of ORS 215.275(3), which requires that cost alone cannot be the only consideration in applying the factors of ORS 215.275(2). The county determined that the petitioner failed to demonstrate a reasonable alternative to site its facility on EFU zoned lands. However, LUBA agreed with petitioner that the county's findings did not



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This case is wholly inapplicable to RFA-1—it is not concerned with the RFA Standard or bonding requirements for retiring of utilities, and Idaho Power cannot discern any applicable principle or argument.

### 7. Gilbert Exception 6 - "Up to 70% of Idaho Power's earnings are controlled by a third party, IdaCorp, which would make recovery more complicated and less certain than a company who had control over their income."[91]

Ms. Gilbert argues that Idaho Power is financially risky because IDACORP maintains control over Idaho Power and that IDACORP's board could contribute up to 70 percent of Idaho Power's earnings.[92] This claim is misleading. As explained by Mr. Mills and in Closing Arguments, IDACORP is a holding company, and its principal operating subsidiary is Idaho Power.[93] Idaho Power is IDACORP's core business, accounting for 98 percent of IDACORP's revenue.[94] Therefore, while IDACORP *can legally* distribute up to 70 percent of Idaho Power's earnings, it can be safely assumed that it would do so only if such distributions would not negatively impact Idaho Power's finances.[95] Furthermore, IDACORP is a regulated utility, and therefore, it must adhere to Federal Energy Regulatory Commission laws and regulations and state public utility regulations for corporate governance and distribution of dividends.[96] Thus, Ms. Gilbert's concerns are unwarranted.

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adequately explain its conclusion and seemed "at odds with the evidence in the record" and on remand, required the County take into consideration the evidence.

[91] Gilbert RFA-1 Exceptions at 7.
[92] Gilbert RFA-1 Exceptions at 7.
[93] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 18 of 21.
[94] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 19 of 21.
[95] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 19 of 21.
[96] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1, p. 19 of 21.



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**B. Ms. Gilbert's Proposed Conditions**

In addition to her more general arguments, addressed above, Ms. Gilbert takes exception to the Hearing Officer's decision to exclude three of her proposed site conditions specific to the RFA Standard.[97] The Hearings Officer's decision on these conditions was appropriate and should be adopted without modification.

> **Gilbert Proposed Site Condition 1: "SITE CERTIFICATE CONDITION NEEDED TO COMPLY WITH OAR 345-022-0050** and the Financial Assurance requirement if a bond in an amount less than the amount identified in the site certificate for restoration of the site is allowed:
> **'Prior to acceptance of a bond in an amount less than the amount identified in OAR 345-02[5]-0006([9[98]]), Idaho Power will document that they have established dedicated additional funds which combined with the bond amount will equal the amount identified as being required to restore the site to a useful, non-hazardous condition based upon the calculations in the site certificate and annual adjustments. These funds will be placed in trust and dedicated specifically for use in the restoration of the transmission line site and will not be made available for other uses including those resulting from bankruptcy or actions of Ida-Corp."[99]**

This site condition—which would require Idaho Power to place in escrow the full decommissioning cost, currently estimated at $141 million—appears to be intended as a substitute for Ms. Gilbert's request that Idaho Power be required to maintain a bond in the full decommissioning amount during the life of the Project. For all of the reasons discussed above, this condition is unnecessary because Oregonians are fully protected by the phased-in bonding approach together with the site conditions recommended in the Proposed Contested Case Order.

Moreover, despite Ms. Gilbert's claim that "comparable" conditions have been adopted by EFSC in past energy developments, to Idaho Power's knowledge, there is no such precedent.

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[97] Gilbert RFA-1 Exceptions at 11.
[98] Because there is no subsection 9 of Division 26, Idaho Power believes that Ms. Gilbert intended to refer to Division 25, subsection 8 because of her previous reference to that regulation.
[99] Gilbert RFA-1 Exceptions at 11.



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Finally, and substantively, requiring that Idaho Power maintain $141 million for the life of the project would significantly and unreasonably limit the Company's ability to deploy capital for the benefit of its customers.

In her Exceptions, Ms. Gilbert again fails to provide evidence in support of her proposed site condition, and therefore, the Council should uphold the Hearing Officer's decision not to adopt Gilbert's Proposed Site Condition 1.

> **Gilbert Proposed Site Condition 2: "Idaho Power must provide documentation that they have the financial resources available to construct and run their share of the Boardman to Hemingway Transmission line without making customers vulnerable to financial collapse."[100]**

The Hearing Officer appropriately rejected this proposed condition.[101] *First*, Ms. Gilbert fails to identify with any specificity what information she is requesting and had she made these assertions earlier in the Contested Case, Idaho Power would have had an opportunity to supplement the record with this information, if necessary. *Second,* Idaho Power provided financial information in Exhibit M of its ASC in support of its financial capability, which the Council relies on to make a finding that Idaho Power will comply with the RFA Standard subsection (2). No party argued that the information provided is inconsistent with what other projects have provided for compliance with the RFA Standard and Ms. Gilbert has failed to provide evidence to the contrary. *Third*, there are no EFSC rules requiring that an applicant provide the type of information that Ms. Gilbert is requesting. *Last,* as a publicly traded company, IDACORP's (Idaho Power's parent corporation) financials are readily available to interested parties who can access Idaho Power's public financial information through its SEC 10-k filing.[102]

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[100] Gilbert RFA-1 Exceptions at 11.
[101] Proposed Contested Case Order at 278.
[102] *See* Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1/ Exhibit H, IDACORP, *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934* (Dec. 11, 2020).



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In the Proposed Contested Case Order, the Hearing Officer did not directly address Ms. Gilbert's proposed Site Condition 2 because it was found to be untimely, as Ms. Gilbert filed the proposed condition in her Closing Arguments and not in accordance with the schedule set in the Case Management Order.[103] However, Ms. Gilbert previously proposed a similar site certificate condition, which the Hearing Officer did address in the Proposed Contested Case Order.[104] The Hearing Officer rejected the proposed condition, concluding that Ms. Gilbert did not provide evidence in support of the proposed condition to explain why it is necessary to meet the requirements of the RFA Standard.[105]

In her Exceptions, Ms. Gilbert again fails to provide evidence in support of her proposed site condition, and therefore, the Council should uphold the Hearing Officer's findings on Gilbert's Proposed Site Condition 2.

> **Gilbert Proposed Site Condition 3: "Idaho Power will provide mitigation for the risk of farm landowners being required to assume the cost of removing the transmission line structures and wires from their property by paying the landowners the estimated cost of them purchasing insurance to protect them from this risk for the 100 years the development is planned to exist."[106]**

In the Proposed Contested Case Order, the Hearing Officer did not directly address Ms. Gilbert's proposed Site Condition 3 because it was found to be untimely, as Ms. Gilbert filed the proposed condition in her Closing Arguments and not in accordance with the schedule set in

[103] "Pursuant to OAR 345-015-0085(1), 'parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer.' In this matter, the deadline for submitting written direct testimony, evidence, and any proposed site certificate conditions was September 17, 2021. Case Management Order at 16, 18." Proposed Contested Case Order at 246, n.328.
[104] "**Gilbert Proposed Financial Assurance Condition**: Prior to the start of construction, the developer will document that they have the financial ability to pay for construction costs they will be assuming that exceed the 21% amount reflected in the application and provide documentation regarding any other party which will be assuming the costs not being covered by Idaho Power." Proposed Contested Case Order at 277-278.
[105] Proposed Contested Case Order at 278.
[106] Gilbert RFA-1 Exceptions at 11.



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the Case Management Order. Regardless, the proposed site condition is inappropriate for the following reasons. *First*, this condition is proposed to "comply with OAR 345-022-0030,"[107] the Land Use Standard. Issue RFA-1 is not concerned with Idaho Power's compliance with the Land Use Standard, and therefore, this proposed site condition is outside the scope of RFA-1. *Second,* as Idaho Power has demonstrated, the circumstances that would need to occur in combination for landowners to be left with the burden of decommissioning B2H is extremely unlikely.

In her Exceptions, Ms. Gilbert again fails to provide evidence in support of her proposed site condition, and therefore, the Council should adopt the Hearing Officer's decision not to adopt Gilbert's Proposed Site Condition 3.

## III. CONCLUSION

For the aforementioned reasons, the Council should adopt the Hearing Officer's findings and conclusions of the Proposed Contested Case Order regarding the RFA Standard without modification.

DATED: July 15, 2022

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[107] Gilbert RFA-1 Exceptions at 11.

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 15, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUE RFA-1** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge
Hearings Officer
Office of Administrative Hearings
OED_OAH_Referral@oregon.gov

I further certify that on July 15, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUE RFA-1** was served by First Class Mail or electronic mail as indicated below:

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**BEFORE THE ENERGY FACILITIES SITING COUNCIL**
**for the**
**STATE OF OREGON**

| | | |
|---|---|---|
| **IN THE MATTER OF:**<br><br>THE PROPOSED BOARDMAN TO HEMINGWAY TRANSSMISSION LINE<br><br>**OAH Case No. 2019-ABC-02833** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE WEBSTER'S RULINGS: SUMMARY DETERMINATION AND PROPOSED CONTESTED CASE ORDER**<br><br>**BY PETITIONER SUSAN GEER ISSUE TE-1**<br><br>**DATED JUNE 27, 2022** |

**INTRODUCTION**

**Issue TE-1: Whether Applicant was required to have an Oregon Department of Agriculture botanist review the ASC.**

Petitioner Susan Geer (Ms. Geer) disagrees with many of the factual and legal conclusions and the characterizations of the evidence that are contained in the Summary Determinations (SDs) granted to Idaho Power (IPC) and Oregon Department of Energy (ODOE) and in the Proposed Contested Case Order (PCCO). Ms. Geer presented evidence showing that many of the findings and conclusions stated in the SDs and PCCO are not accurate or legally appropriate.

Ms. Geer requests that the Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. In the alternative, Ms. Geer requests to remand this issue back to ODOE for updated analysis using a current Threatened and Endangered plant list; in the alternative to using the T&E list currently recommended by the NPCP, the EFSC should use the T&E list maintained by the Oregon Biological

Information Center (ORBIC); the updated analysis would include the currently proposed routes. Ms. Geer also requests remand by EFSC to the ALJ for more evidence and a new PCCO.

Ms. Geer raises two exceptions to the ALJ Proposed Contested Case Order, as it relates to Issue TE-1. The exceptions are addressed below, demonstrating that the facts, or reasoning/analysis or conclusion by the ALJ is incorrect. The errors are material to EFSC's decision.

**EXCEPTIONS**

1. **Judge Webster (ALJ) erred in the PCCO by concluding that the consultation about Oregon's rare plants does not need to involve the Oregon Department of Agriculture's Native Plant Conservation Program.[1]**

A rare plant botanist representing the State of Oregon should be called upon to review and comment on the final ASC. The proposed Routes on federal land were reviewed by USFS and BLM botanists, but the Routes on other ownerships (private, City, County) did not receive the same level of review. Please read the reasons set forth by Ms. Geer in her Responses to IPC and ODOE Motions for Summary Determination, which is hereby incorporated by reference into this filing. It is attached for EFSC's convenience (Exhibit 1).

2. **ALJ erred in the Summary Determination by finding a 2013 comment and a 2014 meeting between ODOE and ODA's Native Plant Conservation Program botanist was sufficient consultation[2].**

[1] P. 28 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order.
[2] P. 10 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Ruling and Order on Motions for Summary Determination on Contested Case Issue TE-1.

In addressing Idaho Power's Motion for Summary Determination, the ALJ says that because Oregon Department of Agriculture (ODA) was provided copies of "the preliminary ASC (Application for Site Certificate), the amended preliminary ASC, and the completed ASC"[3] and ODA botanist Rebecca Currin submitted comments in 2013, that the obligations of IPC and EFSC were met because even though no further communication occurred after 2014, ODA was "given the opportunity"[4] to comment on rare plants. The ALJ notes her SD in the PCCO.[5] However, the ALJ's statement and reasoning are incorrect for at least the following reasons.

First, the ALJ misstates a legal issue at page 10 of the PCCO. Although the ALJ points out that OAR 345-022-0070 begins with, "To issue a site certificate, *the Council, after consultation with appropriate state agencies,* must find that * * *" the ALJ then goes on to reason that ODOE was acting for the Council, and "the Council" met the consultation requirement by **mailing notifications** and receiving a comment in 2013. During the time when the ODA's NPCP program[6] was essentially non-existent because it had no designated employees due to lack of funds, ODOE simply mailed notifications to ODA. Notably, they were addressed to employees who were no longer there. ODOE and the ALJ are mistaken to consider this adequate notification. The issue is not whether ODOE acting for "the Council" met some really cursory requirements, but whether the Council is fully informed of the "effects of the facility" on threatened and endangered plant species.

Second, the fact that ODOE mailed copies of the ASC to ODA and that Currin was able to provide comments in 2013 does not inform the Council, as required by ORS 469.501, of the "Effects of the

[3] P. 11 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Ruling and Order on Motions for Summary Determination on Contested Case Issue TE-1
[4] Ibid
[5] P. 28 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order.
[6] To be clear, the NPCP only covers rare plants.

facility, taking into account mitigation, on fish and wildlife, including threatened and endangered fish, wildlife or plant species.' The information used by Currin in her preliminary comments was 5 years prior to the September 2018 filing of the final ASC **and prior to the time that the current routes were proposed**. ODOE made no effort to notify the ODA the current routes.

Third, ODOE was negligent in failing to aid ODA during their fiscal crisis, since the possible shortfall was known and discussed at the 2014 meeting and had direct impact on the ability of ODA to be an effective reviewing agency.

The April 2014 meeting between ODA/IPC/ODOE was clearly not meant to be a final consultation. The Amended pASC was still under development. The meeting notes show that the NPCP botanist expected further involvement on the pASC. Meeting notes[i7]state "ODA provides technical advice to ODOE regarding compliance with the T&E species standard. If the agency is unable to respond for the lack of resources (see slide on page 3 of the PowerPoint presentation handout), ODOE has a compensation agreement with the agency, so Rebecca's work can be reimbursed." Despite this, no further interaction took place. Ms. Geer has been unable to locate any evidence in the record that would indicate that ODOE attempted to actually provide funding to ODA for an adequate consultation.

Fourth, EFSC should use a current Threatened and Endangered plant list. NCPC's recommended T & E list was ready over 5 years ago but has stagnated from lack of funds.[8] The T&E list has not been promulgated since its original iteration was completed in 1988 even though, by law (ORS 496.176 (8)), it is to be periodically reviewed every 5 years.

[7] P.1 Boardman to Hemingway Transmission Line Project IPC/ODA/ODOE Meeting Draft Meeting Notes Date: Tuesday, April 22, 2014 Time: 9:00 am to 11:45 am (PST) Meeting

[8] Federal and neighboring state agencies update lists every 3 years.

There have been attempts to fund the promulgation of the T&E list that is currently recommended by the NCPC. Native Plant Society of Oregon (NPSO) successfully petitioned the legislature to add funding to ODA's NCPC for the purposes of updating the T&E list during the 2017 budget cycle (July 1, 2017 to June 30, 2019). ODA made recommendations for updating the state list in 2018 and received (and closed) public comments in January 2019. However, the final step of rulemaking process was not completed. Lacking additional state funding, this process was again not completed under the 2019 budget cycle (July 1, 2019 to June 30, 2021).

NPSO once again successfully petitioned the legislature to add funding to ODA's NCPC for the purposes of updating the T&E list during the 2021 budget cycle. Existing work on the list now is outdated and a status reassessment of the 2017 list presumably is ongoing since funds were allotted. NPCP expects to adopt them in 2023. Oregon's updated list should be used by the Council.

ORS 469.401(2) states: "The site certificate or amended site certificate shall require both parties to abide by local ordinances and state law and the rules of the council in effect on the date *the site certificate or amended site certificate is executed*…: (Emphasis added).

Fifth, in the alternative to using the T&E list currently recommended by the NPCP, the EFSC should use the T&E list maintained by the Oregon Biological Information Center (ORBIC). ORBIC serves as a repository of information and revises rating and listing of rare plants on a 3-year cycle.

ORBIC rates rare species as Lists 1-4 with those on List 1 being the rarest species. The State of Oregon should protect all ORBIC Heritage List 1 species, defined as "taxa that are threatened with extinction or

presumed to be extinct throughout their entire range. These are the taxa most at risk and should be the highest priority for conservation action. Includes many rare Oregon endemic species".[9]

Sixth, the NCPC recommended T&E list contains species which would be impacted by the proposed transmission line, and these species deserve protection by the State of Oregon.

Counter to the ALJ's assertion that Ms. Geer has no material evidence[10], Ms. Geer is aware of occurrences of *Trifolium douglasii* and potential occurrences of *Pyrrocoma scaberula* which would be impacted on the currently proposed B2H routes. Both species are on the recommended T&E list. A full review of the currently proposed routes, and consultation with ODA's NCPC, using the recommended list is in order.

**CONCLUSION**

Notwithstanding the ALJ's statement, Idaho Power Company is required to consult with a botanist from ODA's NPCP under OAR 345-022-0070. Moreover, adequate notification was not given to the NPCP and as a result adequate consultation did not occur. EFSC (the Council) was not fully informed of the effects of the facility as called for in ORS 4469.501. In addition, ODOE was negligent in failing to aid ODA during their fiscal crisis, since the possible shortfall was known and discussed at the 2014 meeting and had direct impact on the ability of ODA to be an effective reviewing agency. Finally, the NPCP recommended T&E list contains species which would be impacted by the proposed transmission line, and these species deserve protection by the State of Oregon.

[9] P. 133 Oregon Biodiversity Information Center. 2019. Rare, Threatened and Endangered Species of Oregon. Institute for Natural Resources, Portland State University, Portland, Oregon.
[10] P.12 *In the Matter of Boardman to Hemmingway,* OAH Case No. 2019-ABC-02833 Ruling and Order on Motions for Summary Determination on Contested Case Issue TE-1

Ms. Geer requests that the Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. In the alternative, Ms. Geer requests to remand this issue back to ODOE for updated analysis using a current Threatened and Endangered plant list; in the alternative to using the T&E list currently recommended by the NPCP, the EFSC should use the T&E list maintained by the Oregon Biological Information Center (ORBIC); the updated analysis would include the currently proposed routes. Ms. Geer also requests remand by EFSC to the ALJ for more evidence and a new PCCO.

## CERTIFICATE OF MAILING

On June 27, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/ *Susan M. Geer*
Susan M. Geer

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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**
**STATE OF OREGON**
**for the**
**OREGON DEPARTMENT OF ENERGY**

| | | |
|---|---|---|
| IN THE MATTER OF:<br><br>**THE APPLICATION FOR SITE CERTIFICATE FOR THE BOARDMAN TO HEMINGWAY TRANSSMISSION LINE** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **PRO SE PETITIONER Susan Geer's OPPOSITION TO MOTION FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUE TE-1 BY IDAHO POWER COMPANY**<br><br>OAH Case No. 2019-ABC-02833 |

## Introduction

Idaho Power Company ("IPC") filed a Motion for Summary Determination May 28, 2021 for Issue TE-1. Despite their claims to the contrary in their Motion[1] genuine issues of material fact exist with respect to Petitioner Susan Geer's ("Ms. Geer") case under the Energy Facility Siting Council ("EFSC" or "Council") Threatened and Endangered ("T&E") Standard.[2] IPC's motion for summary determination must fail because: (1) IPC provides their own interpretation of the OAR which is not convincing; and (2) IPC exaggerates participation by ODA in the review process for the ASC.

## Fact 1: Idaho Power's definition of a reviewing agency makes no sense

[1] May 28, 2021 2019-ABC-02833 - Idaho Power Company's Motion f or Summary Determination of Contested Case Issue TE-1
[2] OAR **345-022-0070**

Idaho Power argues that, "although the ODA is a reviewing agency, there is no requirement in the Council's rules that the Rare Plants Program or a Rare Plants Program biologist specifically comment on the ASC because neither the Rare Plants Program nor its biologists are a reviewing agency. " This argument makes no sense, when the OAR 345-022-0070 calls for "consultation with appropriate state agencies", refers directly to "plant species that the Oregon Department of Agriculture has listed as threatened or endangered under ORS 564.105 (Responsibility to protect and conserve native plants)", and specifies consultation must find," not likely to cause a significant reduction in the likelihood of survival or recovery of the species". Oregon Department of Agriculture ("ODA")'s Native Plants Conservation Program ("NCPC") webpage states: *The Oregon Department of Agriculture (ODA) is involved in many plant conservation projects throughout the state. ODA assists land owners managing listed plant species on their property and works to support recovery goals for Oregon's listed species*.

Clearly the NPCP botanist is the appropriate reviewer. Furthermore, it is ridiculous for IPC to argue that the biologist or the Program, "is not a reviewing agency" when they are the most appropriate part of the reviewing agency to address the T&E Standard.

**Fact 2: Idaho Power has exaggerated and mis-represented ODA's participation in the review process**

Idaho Power states in their Motion that they and ODOE, "provided copies of the ASC to the ODA at all necessary stages of the review process, ODA provided comments along the way, and Idaho Power incorporated ODA's suggested changes into the ASC". This statement drastically overexaggerates participation of ODA in the review process. In fact, the sole engagement by ODA's NCPC botanist was in 2013, as evidenced by the document "Boardman to Hemingway Transmission Line Project

IPC/ODA/ODOE Meeting Draft Meeting Notes, Date: Tuesday, April 22, 2014" obtained through Discovery.

Obviously, the Union County portions of routes now being considered by IPC were unknown at that time. ODOE states that they sent 2 memos to ODA in 2017 but got no response. However, the lack of engagement should not be regarded as a response. Rather, funding issues created a long-term vacuum at ODA with no one qualified to respond. This is unfortunate but does not mean that the Threatened and Endangered standard should be ignored.

**CONCLUSION**

**Idaho Power Company has failed to demonstrate the Threatened and Endangered standard OAR 345-022-0070 has been met and there are disputable facts about what constitutes a reviewing agency and consultation required consultation for issue TE-1. Therefore Idaho Power Company's Motion for Summary Determination for Issue TE-1 must be denied.**

Sincerely,

Susan Geer
Pro Se Petitioner
La Grande, OR

**CERTIFICATE OF MAILING**

On June 25, 2021, I mailed the foregoing **PETITIONER GEER'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUE TE-1** in OAH Case No. 2019-ABC-02833.

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*/s/ Susan Geer*
Susan Geer
Pro Se Petitioner

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**
**STATE OF OREGON**
**for the**
**ENERGY FACILITY SITING COUNCIL**

| | | |
|---|---|---|
| IN THE MATTER OF:<br><br>**THE APPLICATION FOR SITE CERTIFICATE FOR THE BOARDMAN TO HEMINGWAY TRANSSMISSION LINE** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **PRO SE PETITIONER Susan Geer's OPPOSITION TO MOTION FOR SUMMARY DETERMINATION ON ISSUE TE-1 BY OREGON DEPARTMENT OF ENERGY**<br><br>OAH Case No. 2019-ABC-02833 |

## Introduction

Oregon Department of Energy ("ODOE") filed a Motion for Summary Determination May 28, 2021 for Issue TE-1. Despite their claims to the contrary in their Motion[1] genuine issues of material fact exist with respect to Petitioner Susan Geer's ("Ms. Geer") case under the Energy Facility Siting Council ("EFSC" or "Council") Threatened and Endangered ("T&E") Standard.[2] ODOE's motion for summary determination must fail because contrary to ODOE's claims, there are disputable facts in this case, as explained below.

[1] May 28, 2021 2019-ABC-02833 – Oregon Department of Energy's Motion f or Summary Determination of Contested Case Issue TE-1
[2] OAR **345-022-0070**

**Fact 1: Wording in my contested case letter of August 2020 did not imply that the Applicant was solely responsible for ODA's participation in the review process**

My letter of August 22, 2020 (Exhibit 1) requesting a contested case stated,"A State Rare Plant program botanist should have reviewed and commented but they did not". Unfortunately this got subtly re-worded in the resulting recognized issue TE-1 as "*Whether Applicant was required to have an Oregon Department of Agriculture botanist review the ASC* ". This was not my intent. Rather, regardless of who provided the reminder or motivation for their participation, clearly the ODA's NCPC is the proper branch of the agency to consult on the ASC regarding rare plants:

Department of Agriculture, Chapter 603, Division 73

PLANTS: WILDFLOWERS AND ENDANGERED, THREATENED, AND CANDIDATE SPECIES

603-073-0001

Purpose and Scope

These rules, authorized by ORS 564.040 and 564.105(6), are intended to provide for: protection of certain plants, wildflowers, and shrubs; guidelines on the listing, reclassification, and delisting of plant species as threatened or endangered; development of conservation programs intended to assist state agencies in the protection of threatened or endangered species; development of a permit system for commercial transactions and scientific taking of threatened and endangered species; and development of transplant and reintroduction protocols for endangered and threatened species.

In any case, the T&E standard requires ODA's participation.

**Fact 2: The only consultation achieved with ODA's NPCP was in 2013 on the preliminary Application for Site Certificate ("pASC")**

While it is true that an ODA rare plant botanist, Rebecca Currin, did produce comments on the pASC in 2013 (ODOE's Motion for Summary Determination Exhibit 1) there was no further consultation in the following years. ODOE states that two requests for comments on the amended preliminary Application for Site Certificate ("ApASC") were made in 2017, and a request for comments on the complete ASC was made in 2018, all of these including requests to ODA. B2HAPPDoc6-1ApASC Reviewing Agency Memo 2017-06-28. And B2HAPPDoc6-7 ApASC Reviewing Agency Final Deadline for Comments 2017-09-07. And B2HAPPDoc7-4 ASC Request for Agency Report Reviewing Agencies 2018-10-10.

No comments were ever provided by the ODA after 2013, even though significant changes occurred to the ASC during those years.

**Fact 3: In Union County, the routes under consideration in final Application for Site Certificate ("ASC") are not covered by the pASC**

The pASC was published in 2013-14 and at that time the ODA NPCP botanist provided input. The routes in Union County at the time of the pASC[3] or of the ApASC (2017-18) [4], are not even close to new routes in Union County (30+ miles plus the alternative route) of the final ASC or Proposed Order (PO). Therefore, ODA's input on the pASC in 2013 in Union County is no longer relevant. This is a glaring omission in the analysis because the new routing in Union County did not receive any ODA review for rare or T&E plants.

[3] ODOE - B2HAPPDoc1-3.2 pASC 03a_Attachment C-2_Segment Locations Maps 1-99 - 2013-02-28. Page 4 of 107
[4] ODOE - B2HAPPDoc1-3.4 ApASC Exhibit C_Project Location_Part 2c 2017-06-28. Page 1 of 20

**Fact 4: No consultation with ODA's NPCP has occurred for the routes in the final ASC**

ODOE states"ASC Exhibit Q includes the results of ODA's 2016 Oregon Threatened, Endangered and Candidate Plant list". In fact, ODA's plant list has not been updated since its inception in 1988, despite guidelines suggesting review and update every 5 years in OAR 603-073-0060 Periodic Review of State List:

(1) The director shall review each listed species at least once every five years to determine if documented evidence exists to justify reclassification from threatened to endangered or vice versa, removal from the state list, or a recommendation to the federal government for reclassification or removal if the species is also on the federal list. Such evidence may include, but is not limited to, increase in population size or numbers, reduction or removal of threats or taxonomic re-evaluation of a listed species.

Mentioning this list is not proof of consultation. The list can be obtained on their website and apparently remains unchanged for over 30 years. This is not a demonstration of diligence on the part of ODOE or ODA, but a sign of funding shortfalls for the program.

The fact remains that, following 2013 and comments on the pASC, no comments or consultation on rare plants have occurred.

**CONCLUSION**

**ODOE has failed to demonstrate the Threatened and Endangered standard OAR 345-022-0070 has been met and there are disputable facts about what constitutes the required consultation and analysis for issue TE-1. Therefore Oregon Department of Energy's Motion for Summary Determination for Issue TE-1 must be denied.**

Sincerely,

Susan Geer

Pro Se Petitioner

La Grande, OR

**EXHIBIT 1:**

**August 22, 2020**

**Alison Greene-Webster, Senior Administrative Law Judge**

**Oregon Department of Energy**

**500 Capitol Street NE, Salem, OR 97301**

**Fax: 503-373-7806**

**Email: OED_OAH_Referral@oregon.gov**

**cc: Kellen.tardaewether@oregon.gov and info@Stopb2h.org**

**CONTESTED CASE REQUEST REGARDING THE PROPOSED SITE CERTIFICATE FOR THE BOARDMAN TO HEMINGWAY TRANSMISSION LINE**

**Dear Ms. Greene-Webster:**

**I am writing to file a contested case. I request to file as a "party". I do not believe others can represent the issues I have with B2H; I would represent them myself.**

**I am a landowner affected by proposed B2H as well as a professional Botanist/Ecologist with an interest in rare plants, native plant communities, invasion by weeds, and effects of climate change on plants. The proposed B2H would affect our property value and the experience of being at our property, and possibly our health. In addition it would spread invasives to forever alter the integrity**

**of landscape and habitat.**

**My husband and I have put thousands of hours into controlling invasive species, thinning the forest to promote healthy trees, and restoring native species through seeding and planting. We have also helped our co-owner and neighboring landowner Joel Rice with those activities. I have long recreated and botanized on the Rice property, and I have been so impressed with it that I reached out to the Oregon Natural Areas Program (established by Oregon's Natural Areas Act). Oregon Natural Areas are, "designed to serve educators, researchers, resource managers and the general public with access to Oregon's most natural places far into the future" (OSU Institute for Natural Resources website).**

**After application and review, Rice Glass Hill Natural Area became the first private Natural Area dedicated by the State Parks and Recreation Commission under OR 273.586. B2H is slated to run through Rice Glass Hill Natural Area under the Proposed Route or Morgan Lake Alternative. Natural Areas should be considered Protected Areas.**

**A year ago yesterday, August 22, 2019, I submitted 2 written comments via e-mail to ODE, on the DOP and IPC's Amended Application (ASC). They were about rare plants and plant communities and about invasive species. Following summarizes comments which I believe were not addressed or addressed inadequately by the Proposed Order:**

**State Natural Areas were not addressed in the Proposed Order. No input was sought from the**

**Natural Area program in the review process. Rice Glass Hill Natural Areas should be a Protected Area.**

**ODA administers the Rare Plant Program. It was excluded because it was unfunded during the IPC Application review. A State Rare Plant program botanist should have reviewed and commented but they did not (DPO Attachment 3, Reviewing Agency Comments). The Proposed Order provides no remedy.**

**Trifolium douglasii has recently become a USFWS Species of Concern. IPC does not address it and it is not mentioned in the Proposed Order. ODA does not mention it on their website but states that "any federally listed species…will receive protection in the state of Oregon". Species of Concern should merit consideration by ODE.**

**The State of Oregon provides a hierarchy of categories in listing rare plants. List 1 and 2 as well as Climate Vulnerable plants are not addressed by IPC's Application and the Proposed Order does not address them.**

**IPC's Noxious Weed Plan does not comply with Chapter 569 of Oregon law. IPC denies responsibility for control of most weed species (all but Class A for County list) and controls weeds only annually- this is extremely irresponsible. The Proposed Order has no remedy.**

**The Proposed Order says after 5 years and unsuccessful weed control and permanent loss of habitat,**

**IPC can mitigate their way out of weed control. This is not a solution.**

**In Union County, both the Proposed Route and Morgan Lake Alternative as documented in the ASC were not part of the DEIS. The public was never given the opportunity to comment during the NEPA process on these routes. Therefore, the State hasn't done an adequate review of those routes.**

**Thank you for your consideration.**

**Sincerely,**

**Susan Geer**

**906 Penn Ave**

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**CERTIFICATE OF MAILING**

On June 25, 2021, I mailed the foregoing **PETITIONER GEER'S OPPOSITION TO OREGON DEPARTMENT OF ENERGY'S MOTION FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUE TE-1** in OAH Case No. 2019-ABC-02833.

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*/s/ Susan Geer*
Susan Geer
Pro Se Petitioner

**BEFORE THE**
**ENERGY FACILITY SITING COUNCIL**
**OF THE STATE OF OREGON**

| | |
|---|---|
| **IN THE MATTER OF THE APPLICATION FOR SITE CERTIFICATE FOR THE BOARDMAN TO HEMINGWAY TRANSMISSION LINE** | **OREGON DEPARTMENT OF ENERGY'S RESPONSE TO EXCEPTIONS – ISSUE TE-1** (OAH Case No. 2019-ABC-02833) |

# Table of Contents

## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order ("PCCO") on May 31, 2022. On June 27, 2022, limited party Ms. Susan Geer timely filed exceptions to the PCCO regarding Issue TE-1.

In the Hearing Officer's December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue TE-1 was granted as a contested case issue, but was dismissed on July 20, 2021 on summary determination[1] by the Hearing Officer following the applicant, Idaho Power Company ("IPC") and the Oregon Department of Energy ("Department") Motions for Summary Determination.

> Issue TE-1 is: Whether the Applicant was required to have an Oregon Department of Agriculture botanist review the ASC.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council ("Council") pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.[2] Exceptions are written objections to the proposed findings, conclusions of law or conditions.[3] The exceptions must be based on the existing record, and should not include new or additional evidence.

### B. Exception

Ms. Geer filed the following two exceptions regarding the dismissal of Issue TE-1:

[1] Ruling and Order on Motions for Summary Determination of Contested Case Issue TE-1, July 20, 2021.
[2] ORS 183.469; OAR 137-003-0060
[3] OAR 345-015-0085(5)

1. Judge Webster (ALJ) erred in the PCCO by concluding that the consultation about Oregon's rare plants does not need to involve the Oregon Department of Agriculture's ("ODA") Native Plant Conservation Program.
2. ALJ erred in the Summary Determination by finding a 2013 comment and a 2014 meeting between ODOE and ODA's Native Plant Conservation Program botanist was sufficient consultation.

C. Summary of Department Position

The Hearing Officer correctly dismissed Issue TE-1 from the contested case. The issue statement specifically asks "whether the *Applicant* was required to have an ODA botanist review the ASC" [Emphasis added]. Hearing Officer found that "Idaho Power was not obligated to have an Oregon Department of Agriculture botanist review the ASC." There is no requirement in law or rule that the applicant demonstrate consultation with ODA in order to satisfy the requirements of the Threatened or Endangered Species standard. Therefore, there is no basis for the Council to reject the Hearing Officer's ruling on this issue.

The Threatened and Endangered ("T&E") Species standard includes a requirement that Council consult with ODA to evaluate state-listed threatened and endangered plant species and the significance of any potential impacts of a proposed facility. The Council, through the Department, properly notified and consulted with ODA in evaluating the proposed facility's compliance with the Council's T&E Species standard. An ODA botanist reviewed and provided comments on the preliminary ASC. While the Department notified ODA and requested its input on the amended preliminary ASC and complete ASC, ODA did not respond. However, there were no changes to the list of state T&E plant species or potential impacts to these listed species

as a result of changes in routes and proposed facility locations presented in the amended preliminary ASC and complete ASC.

## II. ANALYSIS

### A. Standard for Motions for Summary Determination

Per OAR 137-003-0580, a Motion for Summary Determination shall be granted if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact[4] that is relevant to resolution of the legal issue as to which a decision is sought; and
(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

### B. Applicable Laws and Rules

Per Council's Threatened and Endangered Species standard, OAR 345-022-0070:

"To issue a site certificate, *the Council, after consultation with appropriate state agencies, must find that*:

(1) *For plant species that the Oregon Department of Agriculture has listed as threatened or endangered* under ORS 564.105 (Responsibility to protect and conserve native plants) (2), the design, construction and operation of the proposed facility, taking into account mitigation:
  (a) Are consistent with the protection and conservation program, if any, that the Oregon Department of Agriculture has adopted under ORS 564.105 (Responsibility to protect and conserve native plants) (3); or
  (b) If the Oregon Department of Agriculture has not adopted a protection and conservation program, are not likely to cause a significant reduction in the likelihood of survival or recovery of the species; . . ." (emphasis added).

Oregon law[5] requires that copies of an ASC "be sent for comment and recommendation within specified deadlines established by the council" to certain state officers, state agencies and tribes, including the "State Department of Agriculture" (*i.e.*, ODA). Similarly, Council rules

[4] A material fact is "one that, under applicable law, might affect the outcome of the case. *Zygar v. Johnson*, 169 Or Ap 638, 646, 10 P3d 326 (2000), rev den, 331 Or 583 (2001). The standard for granting summary judgment can be thought of as proceeding in two steps: "whether a genuine issue of fact exists, and, if not, whether the moving party [is] entitled to judgment as a matter of law." *Metro. Prop. & Cas. V. Harper*, 168 Or App 358, 363, 7 P3d 541 (2000).
[5] ORS 469.350.

require an applicant for a site certificate to provide copies of a preliminary ASC to the "reviewing agencies" for the proposed facility.[6] Council rule identifies the "Oregon Department of Agriculture" as a reviewing agency.[7] After the applicant provides copies of the preliminary ASC, each reviewing agency must submit written comments or recommendations stating "whether the reviewing agency needs any additional information from the applicant to review the application under the statutes, administrative rules or ordinances administered by the reviewing agency."[8] The Department assesses the reviewing agencies' comments when determining whether an ASC is complete. After the Department determines that an ASC is complete, it sends a notice requesting that reviewing agencies provide a report on the proposed facility, including any issues significant to the agency and the agency's conclusions concerning the proposed facility's compliance with state statutes, rules or ordinances administered by the agency.[9] If an agency has any comments on a complete ASC that it did not provide on the preliminary ASC, it may provide those comments to the Department before the Department's stated deadline.

C. Relevant Facts

Consistent with the framework established in the laws and rules discussed immediately above, in its preliminary ASC, IPC included its analysis of potential impacts of the proposed facility on state-listed T&E species, and ODA was provided the required opportunities to review and comment on the preliminary ASC, amended pASC and complete ASC.[10]..In 2013-2014 an ODA botanist reviewed the preliminary ASC and commented on the proposed facility's potential

[6] OAR 345-021-0050(3) ("Unless the Department directs otherwise, the applicant must mail or email an electronic copy of the preliminary application to each person on the distribution list on or before the distribution date."). The distribution list "includes, but is not limited to, the reviewing agencies for the proposed facility." OAR 345-021-0050(1).
[7] OAR 345-001-0010(51)(g).
[8] OAR 345-021-0050(4)(a).
[9] OAR 345-015-0200(4).
[10] Hearing Officer Ruling and Order on Motions for Summary Determination on Contested Case Issue TE-1, Page 3, paragraphs 5-6.

impacts on state-listed threatened and endangered species.[11] The Department notified and requested ODA (and other reviewing agencies') comments on an amended preliminary ASC and the complete ASC, stating that if the agency did not provide comments on the complete ASC by the applicable deadline, ODOE would conclude the agency had no comments[12]; ODA did not respond or submit further comments on the ASC.[13]

D. Department's Evaluation of Exceptions

In her first exception, Ms. Geer contends the ALJ "erred in the PCCO by concluding that the consultation about Oregon's rare plants does not need to involve the Oregon Department of Agriculture's Native Plant Conservation Program." That statement does not accurately characterize the ALJ's finding. In the PCCO, the ALJ did not state that ODA's Native Conservation Program does not need to be involved in consultation about Oregon's rare plants; rather, she stated that in her ruling on the MSDs on Issue TE-1, she found "that Idaho Power was not obligated to have an Oregon Department of Agriculture botanist review the ASC, and that the Council (through the Department) properly consulted with the ODA in evaluating the proposed project's compliance with the Threatened and Endangered Species standard as required by OAR 345-022-0070." At no point in the contested case has Ms. Geer cited to any statute or rule that would require an applicant to ensure that a particular professional or program at a reviewing agency review and provide comment on an ASC. As discussed above, the governing statutes and rules reasonably place an obligation on the Department to notify ODA (and other reviewing agencies) of a preliminary and complete ASC. Ms. Geer does not dispute that this was done.

[11] *Id.*, paragraphs 7-8.
[12] ODOE – B2HAPPDoc6-1 ApASC Reviewing Agency_Memo 2017-06-28. Page 7 of 11; ODOE – B2HAPPDoc7-4 ASC Request for Agency Report_Reviewing Agencies 2018-10-10. Page 6 of 10.
[13] *Id.*, Page 4, paragraphs 10, 12, 13.

In her second exception, Ms. Geer makes the following six arguments, which the Department addresses in order.

1. "First, the ALJ misstates a legal issue at page 10 of the PCCO. . . . The issue is not whether ODOE acting for "the Council" met some really cursory requirements, but whether the Council is fully informed of the "effects of the facility" on threatened and endangered plant species."[14] Ms. Geer alleges that when ODOE provided notifications regarding the ASC to ODA, "ODA's NPCP program was essentially non-existent because it had no designated employees due to lack of funds." Although she did not provide any evidence to support this allegation, even if were accurate, it would not be relevant to the resolution of Issue TE-1 because, as discussed above, the Department is charged with providing notice to ODA, it is not responsible for, nor does it have any authority to ensure that a particular program within another state agency, such as ODA's NPCP program, is funded. Per ORS 469.350(3) if a state agency can't respond to a request for comments during the ASC review process because it lacks sufficient resources, that state agency "shall contract with another entity to assist in preparing a response" and "may request funding to pay for that contract from the council pursuant to ORS 469.360." Ms. Geer has not alleged that ODA contracted with another entity to assist in preparing a response or that ODA made such a funding request to the Council but the Council disregarded it.

Ms. Geer also argues that ODOE's notifications were addressed to employees that were no longer there, but does not identify for which employees she is referring or argue that the contacts listed for ODA in the Department's notices did not receive the notifications and requests

[14] S. Geer Exceptions on Issue TE-1, p. 3.

for comments. Mr. Robert Meinke, ODA's Program Leader for the Native Plant Conservation Program, was provided a copy and notified of the ApASC in 2018 .

2. Ms. Geer alleges that the information used by the ODA botanist in her comments on the preliminary ASC "was 5 years prior to the September 2018 filing of the final ASC and prior to the time that the current routes were proposed. ODOE made no effort to notify the ODA [of] the current routes."[15] As the Department explained in its MSD briefing on Issue TE-1,[16] there are no significant changes between the potential disturbance impacts nor any changes in the list of state-listed T&E plant species between the preliminary ASC that ODA reviewed in 2013 and the complete ASC. Ms. Geer never explained or provided sufficient reasoning as to why ODA's comments in 2013 should not be considered valid for the final ASC.

3. Ms. Geer argues "ODOE was negligent in failing to aid ODA during their fiscal crisis, since the possible shortfall was known and discussed at the 2014 meeting and had direct impact on the ability of ODA to be an effective reviewing agency." As discussed above, the Department does not have authority over the funding of ODA and its NPCP program; if ODA did not have adequate funding it could have utilized the funding mechanism described in ORS 469.350(3) and ORS 469.360.

4. Ms. Geer notes the "T & E list has not been promulgated since its original iteration was completed in 1988" but contends that EFSC should use a current Threatened and Endangered plant list recommended by the NPCP. In other words, she does not allege that IPC failed to analyze plant species that the ODA has listed as threatened or endangered, but that ODA's list itself is outdated. As noted above, under its Threatened and Endangered Species

[15] S. Geer Exceptions on Issue TE-1, pp. 3-4.
[16] Oregon Department of Energy's Reply to Limited Party Response to Motion for Summary Determination on Issue TE-1, Pages 6-7.

standard, Council evaluates a proposed facility's potential impact on plant species that the Oregon Department of Agriculture has listed as threatened or endangered under ORS 564.105; Ms. Geer does not dispute that the applicant and the Department have done this.

5. Ms. Geer next contends that "in the alternative to using the T&E list currently recommended by the NPCP, the EFSC should use the T&E list maintained by the Oregon Biological Information Center ("ORBIC"). There is no basis in law for Council to use such a list and the suggestion is inconsistent with the requirement in Council's T&E standard to use the ODA list.

6. Finally, Ms. Geer argues she "is aware of occurrences of *Trifolium douglasii* and potential occurrences of *Pyrrocoma scaberula* which would be impacted on the currently proposed B2H routes. Both species are on the recommended T&E list. A full review of the currently proposed routes, and consultation with ODA's NCPC, using the recommended list is in order." Ms. Geer does not argue that *Trifolium douglasii* and *Pyrrocoma scaberula* are state-listed T&E plant species, rather she contends they have been recommended for listing. As the Department previously explained in its MSD briefing on this issue[17] and as noted above, under the T&E Species standard, OAR 345-022-0070, Council analyzes a proposed facility's impact on plant species that the ODA has listed as endangered; it does not have authority to require an applicant to evaluate or take measures to protect species not listed by ODA, regardless of whether the species may be recommended for listing, as Ms. Geer alleges.

## III. CONCLUSION

For the reasons set forth above, the Department recommends that the Council reject the

[17] Oregon Department of Energy's Reply to Limited Party Response to Motion for Summary Determination on Issue TE-1, Pages 7-8.

exceptions on Issue TE-1 and affirm the Hearing Officer's dismissal of this issue on summary determination.

DATED this 15th day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ *Patrick Rowe*
Patrick Rowe, OSB #072122
Senior Assistant Attorney General
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE TE-1, was emailed to:

Todd Cornett
Secretary for EFSC
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I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE TE-1, was served by First Class Mail or electronic mail as indicated below:

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DATED this 15th day of July, 2022.

*/s/ Svetlana Gulevkin*
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CERTIFICATE OF SERVICE
PGR:smn/41352050

**BEFORE THE ENERGY FACILITY SITING COUNCIL**

**OF THE STATE OF OREGON**

| | |
|---|---|
| In the Matter of the Application for Site Certificate for the<br><br>BOARDMAN TO HEMINGWAY TRANSMISSION LINE | APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTY'S EXCEPTIONS FOR CONTESTED CASE ISSUE TE-1<br><br>OAH Case No. 2019-ABC-02833 |

**July 14, 2022**

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McDowell Rackner Gibson PC
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## I. INTRODUCTION

Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order, Applicant Idaho Power Company ("Idaho Power" or the "Company") submits its Response to Limited Parties' Exceptions for Issue TE-1.

## II. STANDARD OF LAW

In a contested case before the Energy Facility Siting Council ("EFSC" or the "Council"), the applicant bears the burden of proof to establish by a "preponderance of the evidence"[1] that the proposed facility complies with the Council's statutes, ORS 469.300 to 469.570, and that the Application for Site Certificate ("ASC") and proposed site conditions—as modified in ODOE's Proposed Order—satisfy each of the Council's siting standards.[2] Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true.[3] Furthermore, the applicant must demonstrate by a preponderance of evidence that the facility complies with all other statutes, administrative rules, and local government ordinances "identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility."[4]

Parties or limited parties "with specific challenges to findings, conclusions and/or recommended site certificate conditions in [ODOE's] Proposed Order bear the burden" of producing evidence in support of the facts or positions they have asserted, and the burden of convincing the trier of fact that their alleged facts are true or their position on the identified issue

[1] OAR 345-021-0100(2) ("The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances."); *see also* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.").
[2] OAR 345-022-0000(1)(a).
[3] *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).
[4] OAR 345-021-0100(2); OAR 345-022-0000(1)(b).


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is correct.[5] In particular, the parties or limited parties must establish how the applicant failed to satisfy EFSC's siting standards and/or how ODOE "erred in its findings, conclusions and/or recommended site certificate conditions."[6] To meet this burden of proof, parties or limited parties challenging the Proposed Order must provide factual testimony or evidence to substantiate their asserted claims;[7] unsubstantiated factual arguments or legal conclusions are insufficient to demonstrate the applicant's failure to establish compliance with any applicable standard.[8]

After the hearing and briefing phases of a contested case, the Hearing Officer must issue a Proposed Contested Case Order stating the Hearing Officer's findings of fact and conclusions of law.[9] Parties and limited parties may then file any exceptions to the Proposed Contested Case Order for the Council's consideration.[10] If the parties or limited parties file exceptions, the parties or limited parties must identify for each exception the finding of fact, conclusion of law, or recommended site certificate condition to which the parties or limited parties except and must state the basis for their exception.[11]

## III. RESPONSE TO EXCEPTIONS – ISSUE TE-1

The hearing officer granted limited party status to Ms. Susan Geer to raise TE-1, which asks:

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[5] Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, "First Order on Case Management"]; Second Order on Case Management Matters and Contested Case Schedule at 7 (Aug. 31, 2021) (emphasis in original) [hereinafter, "Second Order on Case Management"]; *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).
[6] First Order on Case Management at 11; Second Order on Case Management at 7.
[7] First Order on Case Management at 11; Second Order on Case Management at 7.
[8] First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.
[9] OAR 345-015-0085(4).
[10] OAR 345-015-0085(5).
[11] OAR 345-015-0085(5).


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*Whether Applicant was required to have an Oregon Department of Agriculture botanist review the ASC.*[12]

In the Ruling and Order on Motions for Summary Determination on Contested Case TE-1, the hearing officer concluded that: (a) the relevant EFSC statutes and the Threatened and Endangered Species Standard require the Council to consult with the Oregon Department of Agriculture ("ODA") generally, and not necessarily with a Native Plants Conservation Program ("NPCP")[13] botanist; (b) the term "consultation" means to solicit review and comment; and (c) Ms. Geer failed to raise any genuine issue disputing the facts in the record showing that the Council (through the Department of Energy ("ODOE")) solicited ODA's review and comment at each stage of the application review process, ODA submitted comments on the preliminary application, and an ODA botanist met with ODOE and Idaho Power to discuss the application:

> As both Idaho Power and the Department note, the Threatened and Endangered Species standard, OAR 345-022-0070, specifically requires that the Council consult with appropriate state agencies. While the Department rules do not define consultation, the term is ordinarily understood to mean "the act of asking the advice or opinion of someone." Black's Law Dictionary (11th ed. 2019). Similarly, the term "consult" means "to seek the opinion of: apply to for information or instruction[.]" Webster's Third New Int'l Dictionary 490 (unabridged ed 2002).
>
> Here, the following facts are undisputed: the ODA is a reviewing agency on Idaho Power's ASC; the ODA received notice of the preliminary ASC, the amended ASC, and the completed ASC; the Department solicited the ODA's review and comments at each stage of the ASC review process; the ODA submitted comments on the preliminary ASC; and following receipt of those comments, Idaho Power and the Department consulted with the ODA to inform Exhibit Q. When ODA botanist Rebecca Curran met with representatives from the Department and Idaho Power in April 2014, they discussed the Department's permitting process in regard to the Threatened and Endangered Species standard, potential impacts to Oregon-listed threatened and endangered species, mitigation options for compliance with the standard, and revisions to ASC Exhibit Q.

[12] Order on Case Management Matters and Contested Case Schedule at 8.

13 In her Petition and Response, Ms. Geer apparently referred to both the Rare Plants Program and the NPCP interchangeably, and to avoid confusion, Idaho Power will refer to the NPCP.



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> Simply stated, Idaho Power and the Department satisfied the Council's notice requirements for the ASC. The Council (through the Department) complied with the Threatened and Endangered Species standard's requirement for consultation with appropriate state agencies, including the ODA. There is no additional requirement under the standard for Idaho Power to have a botanist from the NPCP review the ASC, nor is there a requirement for the Department to consult with the ODA (or the NPCP within ODA) at every phase of the ASC review process. ORS 469.505(1) simply requires that consultation occur during the site certificate application process. It is undisputed that such consultation with the ODA occurred in this case.[14]

Consequently, the hearing officer granted Idaho Power and ODOE's motions for summary judgment and dismissed TE-1 from the contested case.

For the reasons discussed below, Ms. Geer's exceptions do not identify any incorrect finding of fact or conclusion of law, and for that reason Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to TE-1.

## A. Susan Geer, Issue TE-1, Exception 1

In Ms. Geer's first exception to TE-1, she challenges the hearing officer's ruling on summary determination that the Council is required to consult with a NPCP botanist and the following related finding in the Proposed Contested Case Order:[15]

> The Amended Order on Party Status granted Susan Geer limited party status on Issue TE-1. In the Ruling and Order on Motions for Summary Determination of Contested Case Issue TE-1, issued July 20, 2021 and incorporated herein by this reference, the ALJ dismissed Issue TE-1 from the contested case. The ALJ found that Idaho Power was not obligated to have an Oregon Department of Agriculture botanist review the ASC, and that the Council (through the Department) properly consulted with the ODA in evaluating the proposed project's compliance with the Threatened and Endangered Species standard as required by OAR 345-022-0070.[16]

[14] Ruling and Order on Motions for Summary Determination on Contested Case TE-1 at 10.
[15] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 2.
[16] Proposed Contested Case Order at 28.


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To support her exception, Ms. Geer incorporates by reference her response brief submitted on summary determination.

First, in her response brief, Ms. Geer argues that consultation with a biologist from ODA's NPCP was required because the Program's biologist is an "appropriate state agenc[y]" under the Threatened and Endangered Species Standard or a "reviewing agency" under EFSC's application distribution rules.[17] However, Ms. Geer's assertions are incorrect. As discussed below, under the Threatened and Endangered Species Standard, ODA is the appropriate state agency, and consistent with EFSC rules and the Project Order, ODA is the reviewing agency.

Oregon law requires that certain officers, agencies, and tribes have an opportunity to comment on ASCs.[18] The Council refers to these agencies as "reviewing agencies,"[19] and the Council's rule OAR 345-001-0010(51) identifies the reviewing agencies that must be involved as including certain state officers and agencies, any other agency identified by ODOE, any tribe identified by the Legislative Commission on Indian Services, any city or county within the study area, any special advisory group designated by the Council, and any affected federal land management agency if the project is sited on federal land.[20] The applicant must provide copies of the ASC to all reviewing agencies to allow the reviewing agencies an opportunity to comment.[21]

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[17] Susan Geer's Response to TE-1 by IPC at 1-2.

[18] ORS 469.350(2) ("Copies of the notice of intent and of the application shall be sent for comment and recommendation within specified deadlines established by the council to . . . the State Department of Agriculture . . . any other state agency that has regulatory or advisory responsibility with respect to the facility and any city or county affected by the application."); OAR 345-001-0010(51) (defining "reviewing agency").

[19] OAR 345-001-0010(51).

[20] *See, e.g.*, OAR 345-001-0010(51)(g).

[21] OAR 345-021-0050(3) ("Unless the Department directs otherwise, the applicant must mail or email an electronic copy of the preliminary application to each person on the distribution list on or before the distribution date."). The distribution list "includes, but is not limited to, the reviewing agencies for the proposed facility." OAR 345-021-0050(1).



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Reviewing agencies have an opportunity to comment on both the "preliminary" and "complete" ASC.[22] When an applicant submits a preliminary ASC to ODOE, the applicant must provide copies to all reviewing agencies.[23] After the applicant provides copies of the preliminary ASC, each reviewing agency must submit written comments or recommendations stating "whether the reviewing agency needs any additional information from the applicant to review the application under the statutes, administrative rules or ordinances administered by the reviewing agency[.]"[24]

ODOE assesses the reviewing agencies' comments when determining whether an ASC is complete.[25] After ODOE determines that an ASC is complete, ODOE sends a notice requesting that reviewing agencies report and comment on the complete ASC.[26] If a reviewing agency has any additional comments for the complete ASC, then the reviewing agency may provide those comments to ODOE and the applicant before the ODOE's stated deadline.[27]

Here, consistent with this framework, ODA was included as a reviewing agency and was provided the requisite opportunities for consultation on Idaho Power's ASC. Idaho Power provided a copy of the preliminary ASC and the complete ASC to ODA, and ODOE solicited ODA's comments on both the preliminary and complete ASC.[28] Furthermore, Idaho Power and

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[22] An ASC is considered a "preliminary" ASC until ODOE determines the ASC to be "complete." OAR 345-015-0190(1).
[23] OAR 345-021-0050(3) ("Unless the Department directs otherwise, the applicant must mail or email an electronic copy of the preliminary application to each person on the distribution list on or before the distribution date.").
[24] OAR 345-021-0050(4)(a).
[25] *See* OAR 345-015-0190 (discussing Department's process for determining completeness).
[26] OAR 345-015-0200(4).
[27] OAR 345-015-0200(3) ("In the notice [of a complete ASC], the Department must: . . . [s]tate a date by which the Department and the applicant must receive the reports described in sections (4) through (6) below[.]").
[28] Memo to Reviewing Agencies (ODOE - B2HAPPDoc99 pASC Memo to Reviewing Agencies 2013-03-13) (requesting comments on the preliminary ASC from all reviewing agencies, including ODA); ASC Request for Agency Report from Reviewing Agencies (ODOE - B2HAPPDoc7-4 ASC Request for Agency Report_Reviewing Agencies 2018-10-10) (Department notice explaining that agencies may provide reports on the completed ASC no later than November 26, 2018. A copy of this memorandum was provided to the two agency contacts for ODA: Jim Johnson and Bob Meinke.).


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ODOE consulted with ODA regarding ODA's comments on the preliminary ASC,[29] and incorporated ODA's comments into Idaho Power's complete ASC.[30] ODA was also given the opportunity to comment on the complete ASC, but did not do so.[31] These facts are all undisputed.

Despite ODA's participation in the ASC review process, Ms. Geer argues that Idaho Power was specifically required to ensure that the NPCP within ODA reviewed the ASC. However, the NPCP is not identified as a reviewing agency either in the list of specific officers and agencies provided in OAR 345-001-0010(51), or in the Project Order as an additional agency identified by ODOE.[32] Accordingly, the NPCP was not a reviewing agency in this mater, and therefore, Idaho Power was not required to provide notice to, or solicit comments from, the NPCP separate and apart from Idaho Power's obligations to consult with ODA. Furthermore, there is nothing in the Council's rules or ODA's rules dictating how ODA must staff its review of an application for site certificate, including any requirement that the NPCP or its biologists be involved in the review.

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[29] Idaho Power's Response to ODOE's Requests for Information, Exhibit Q (ODOE - B2HAPPDoc1-19.1 ApASC Exhibit Q_TES-Includes RAIs 2013-2016_2017-06-28. Page 5 of 115) (referencing a meeting with ODA on April 22, 2014).

[30] *See, e.g* Idaho Power's Response to ODOE's Requests for Information, Exhibit Q (ODOE - B2HAPPDoc1-19.1 ApASC Exhibit Q_TES-Includes RAIs 2013-2016_2017-06-28. Page 5 of 115) (referencing a meeting with ODA on April 22, 2014). ("[Idaho Power] recognizes ODA's concerns with respect to transplanting certain Threatened and Endangered plants and no longer recommends this as mitigation since the standard would be met without this mitigation measure[.]").

[31] *See* Proposed Order (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 380 of 10016) ("The Oregon Department of Agriculture is responsible for managing and conserving state-listed threatened and endangered plant species in Oregon; however, ODA did not respond to requests for review and comment on the ASC."). In the notice that ODOE provided to solicit agency reports on the complete ASC, ODOE explained that, if any reviewing agency did not provide a report by the stated deadline, then "the Department [would] conclude that [the] agency ha[d] no comments and [would] conduct the review of all regulations administered by [the] agency on [the agency's] behalf." ASC Request for Agency Report from Reviewing Agencies (ODOE - B2HAPPDoc7-4 ASC Request for Agency Report_Reviewing Agencies 2018-10-10. Page 6 of 10).

[32] *See* Second Amended Project Order (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 4-5 of 29) (listing all reviewing agencies for B2H).



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Under Oregon's principles of statutory construction, which also apply to interpret agency rules,[33] the first step of interpreting a rule is to examine the "text and context" of the rule.[34] When a rule does not define words of common usage, courts look to the "plain, natural, and ordinary meaning" of the words in question.[35]

The Threatened and Endangered Species Standard provides for consultation with "appropriate state agencies."[36] Neither the EFSC statutes nor the EFSC rules define the term "appropriate." However, the Threatened and Endangered Species Standard's multiple references to the "Oregon Department of Agriculture"—rather than the NPCP—show that ODA is the "appropriate" entity for consultation under EFSC's statutes and rules.[37] In those references, the Threatened and Endangered Species Standard describes ODA as the entity responsible for listing plant species as either threatened or endangered and adopting protection and conservation programs for the listed plants.[38] Those references strongly indicate EFSC intended ODA to be the "appropriate" entity to consult with on protected plants. On the other hand, the notable absence of any reference to the NPCP suggests EFSC did not deem the NPCP similarly "appropriate."

Second, in her response brief, Ms. Geer argues it is "ridiculous" for Idaho Power to argue that the NPCP, or its biologist, is not a reviewing agency, because "they are the most appropriate

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[33] *See, e.g.*, *Abu-Adas v. Employment Dep't*, 325 Or 480, 485 (1997) ("In determining the meaning of an administrative rule, this court's role is the same as its role in determining the meaning of a statute, *viz*., to determine the meaning of the words used, giving effect to the intent of the enacting body."

[34] *State v. Gaines*, 346 Or 160, 172 (2009).

[35] *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 317 Or 606, 611 (1993).

[36] OAR 345-022-0070(1).

[37] OAR 345-022-0070 (emphasis added): "To issue a site certificate, the Council, after consultation with appropriate state agencies, must find that: (1) For plant species that the ***Oregon Department of Agriculture*** has listed as threatened or endangered under ORS 564.105(2), the design, construction and operation of the proposed facility, taking into account mitigation: (a) Are consistent with the protection and conservation program, if any, that the ***Oregon Department of Agriculture*** has adopted under ORS 564.105(3); or (b) If the ***Oregon Department of Agriculture*** has not adopted a protection and conservation program, are not likely to cause a significant reduction in the likelihood of survival or recovery of the species; and . . . ."

[38] OAR 345-022-0070.



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part of the reviewing agency to address the T&E Standard."[39] Ms. Geer's subjective, conclusory assertions about which reviewing agencies are "appropriate" to include in an EFSC project are not determinative. Rather, the term "reviewing agency" is defined by rule at OAR 345-001-0010(51), which includes a list of specific officers, agencies, and tribes, as well as "[a]ny other agency identified by the Department."[40] The rule does not include NPCP in its list of specific officers, agencies, and tribes, and ODOE does not include NPCP as an "other agency" in its Project Order, as amended.[41] As a result, the NPCP was not an "appropriate state agenc[y]" under the Threatened and Endangered Species Standard or a "reviewing agency" under EFSC's application distribution rules, and ODOE was not required to consult with the NPCP as such or otherwise.

Ms. Geer's Exception 1 does not identify any incorrect finding of fact or conclusion of law, and for that reason Idaho Power requests that the Council adopt without modification the Hearing Officer's findings and ruling on summary determination, and findings of fact and conclusions of law in the Proposed Contested Case Order, relevant to TE-1.

**B. Susan Geer, Issue TE-1, Exception 2**

In Ms. Geer's second exception to TE-1, she challenges the hearing officer's ruling on summary determination that ODA's 2013 comments and 2014 meeting with ODOE were sufficient consultation.[42]

First, Ms. Geer argues that ODOE did not provide adequate notification when it mailed the notice of the preliminary application to ODA in 2013, because the "NPCP program was essentially

[39] Geer's Response to TE-1 by IPC at 2.
[40] OAR 345-001-0010(51)(n).
[41] Second Amended Project Order at 2 (July 26, 2018) (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 4 of 29).
[42] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 2-3.


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non-existent because it had no designated employees due to lack of funds."[43] As an initial matter, Ms. Geer did not provide any factual evidence to support her assertion in her Response to Idaho Power's MSD's for TE-1. While the claim that ODA was unfunded is unsupported, as Idaho Power argued in its Reply to Ms. Geer's Response to Idaho Power's MSD for TE-1, even if true, it is irrelevant to the broader question of whether ODA had an opportunity to review and comment on the preliminary ASC, amended ASC, and ASC. Furthermore, the evidence in the record indicates that ODOE specifically informed ODA that it could be reimbursed for its employees' work reviewing the ASC.[44] Therefore, Ms. Geer's unsupported assertions about ODA's funding capabilities do not create a genuine issue of fact related to TE-1, and the Hearing Officer did not err in granting Idaho Power's motion for summary determination.

Additionally, Ms. Geer provides no factual evidence to support the allegations in her Exception 2 that the NPCP was "essentially non-existent" or "had no designated employees" or that the NPCP had a "lack of funds." Therefore, those statements should be stricken from the record for the Council's consideration of Ms. Geer's exceptions regarding TE-1, or alternatively, given no weight.[45]

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[43] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 3.

[44] ODOE / Draft Meeting Notes from April 22, 2014 Meeting Between IPC, ODOE, and ODA / ODOE's MSD of TE-1, Exhibit 1 / B2HAPP Contested Case ODOE MSD on Issue TE-1 Exhibit 1- ODA Agriculture Response to Geer Discovery Request 2021-02-17.Page 6 of 15 ("ODA provides technical advice to ODOE regarding compliance with the T&E species standard. If the agency is unable to respond for the lack of resources . . . ODOE has a compensation agreement with the agency, so Rebecca's work can be reimbursed."); *see also* ASC Request for Agency Report from Reviewing Agencies at 6 (ODOE - B2HAPPDoc7-4 ASC Request for Agency Report_Reviewing Agencies 2018-10-10. Page 6 of 10) (explaining that agencies may be reimbursed for costs associated with reviewing the ASC and providing comments).

[45] Ms. Geer made similar allegations in her DPO comments, but she did not provide the information as sworn testimony or provide other evidence in the record related to the status or funding of the NPCP during the relevant time periods. *See* Susan Geer DPO Comments on Rare Plant and Plant Communities ("I was dismayed to learn that Oregon Department of Agriculture Rare Plant program did not provide comments . . . . Upon contacting Oregon's Rare Plant Co-coordinator, I learned that no funding was provided to him for that task!") (ODOE - B2HAPPDoc5-1 All DPO Comments Combined-Rec'd 2019-05-22 to 08-22. Page 1563 of 6396).



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Second, Ms. Geer asserts that: (a) ODOE's 2013 notification to ODA regarding the preliminary ASC, and ODA's 2013 comments back to ODOE, did not comply with ORS 469.501 because the route had changed between then and the 2018 complete ASC; and (b) ODOE made no effort to notify ODA of the final route in the 2018 Complete ASC.[46] As Idaho Power explained in its Reply to Ms. Geer's Response to Idaho Power's MSD for TE-1, Ms. Geer is wrong on both counts. ORS 469.501 does not include any notification or consultation requirements, nor does the statute itself include any substantive standards for reviewing energy facilities. Instead, ORS 469.501 directs the Council to adopt standards for the siting, construction, operation, and retirement of energy facilities.[47] Moreover, it is clear from the ODOE administrative record ODA was given the opportunity to comment on the complete ASC,[48] but did not do so.[49] Indeed, on October 10, 2018, ODOE sent an email to ODA contacts Jim Johnson and Bob Meinke advising that the deadline for agency comments on the ASC was November 26, 2018.[50] Therefore, contrary to Ms. Geer's assertion, ODOE did solicit information from ODA on the final route in the complete ASC.

[46] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 3-4.
[47] ORS 469.501(1).
[48] B2HAPPDoc7-4 ASC Request for Agency Report_Reviewing Agencies 2018-10-10; B2HAPPDoc5 ASC Reviewing Agency Contact List 2018-09-28 (identifying Jim Johnson as the ODA contact for reviewing agency purposes).
[49] *See* Proposed Order (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 380 of 10016) ("The Oregon Department of Agriculture is responsible for managing and conserving state-listed threatened and endangered plant species in Oregon; however, ODA did not respond to requests for review and comment on the ASC."). In the notice that ODOE provided to solicit agency reports on the complete ASC, ODOE explained that, if any reviewing agency did not provide a report by the stated deadline, then "the Department [would] conclude that [the] agency ha[d] no comments and [would] conduct the review of all regulations administered by [the] agency on [the agency's] behalf." ASC Request for Agency Report from Reviewing Agencies (ODOE - B2HAPPDoc7-4 ASC Request for Agency Report_Reviewing Agencies 2018-10-10. Page 6 of 10).
[50] ASC Request for Agency Report from Reviewing Agencies (ODOE - B2HAPPDoc7-4 ASC Request for Agency Report_Reviewing Agencies 2018-10-10. Page 1 of 10).


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Third, Ms. Geer argues that the Council had an obligation to provide funding to ODA to support its review of the ASC and the Council failed to provide that funding, rendering ODA's consultation insufficient.[51] However, there is nothing in the record showing ODA formally requested compensation. While Ms. Geer references notes from a meeting between ODOE and ODA, those notes indicate only that ODOE explained the existence of a compensation agreement and the possibility that one of the ODA staff could be reimbursed.[52] Nothing in those notes demonstrates that ODA actually made a request for compensation. For those reasons, the Council's consultation with ODA was not rendered insufficient by ODA's lack of resources.

Fourth, Ms. Geer asserts that the Council should use a "current" list of threatened and endangered plants to assess compliance with the Threatened and Endangered Species Standard, alleging ODA has been working to update its list for adoption sometime in 2023.[53] As an initial matter, this issue is outside the scope of TE-1, which asks "whether Applicant was required to have an Oregon Department of Agriculture botanist review the ASC," and does not address any list of threatened and endangered plant species. Second, Ms. Geer provides no factual evidence to support her allegations that ODA is updating its list or is expected to finish updating its list in 2023; Ms. Geer's unsworn statements in her exception brief are not admissible record evidence, and were not offered in connection with her response to Idaho Power's MSD on TE-1. Therefore, Ms. Geer's factual allegations regarding ODA's revisions to its official list of threatened and endangered plant species should be stricken from the record, or alternatively, given no weight. Regardless of the validity of Ms. Geer's factual allegations, the Threatened and Endangered

[51] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 4.
[52] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 4.
[53] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 4-5.


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Species Standard requires an applicant to address those plant species "that the Oregon Department of Agriculture has listed as threatened or endangered under ORS 564.105(2),"[54] which are found in OAR 603-073-0070. Ms. Geer does not appear to disagree that the list of plants addressed in Exhibit Q of the ASC is consistent with that found in OAR 603-073-0070; instead, she argues that the Council should expand the list of plants considered under the Threatened and Endangered Species Standard beyond what's included in OAR 603-073-0070. However, the Threatened and Endangered Species Standard requires the Council to apply the list of threatened and endangered plants found in OAR 603-073-0070, and therefore, the Council should reject Ms. Geer's request to apply ODA's unspecified, un-adopted list of plants.

Fifth, Ms. Geer argues that, if the Council refuses to apply ODA's un-adopted list of plants, the Council should apply the list maintained by the Oregon Biological Information Center (ORBIC).[55] As discussed above, the plain language of the Threatened and Endangered Species Standard, OAR 345-022-0010(1), makes clear that the Council is to apply the list of plants adopted by ODA in OAR 603-073-0070. Thus, the Council must apply the list as adopted in OAR 603-073-0070, and not the list maintained by ORBIC.

Sixth and finally, Ms. Geer alleges that the plants on ODA's un-adopted list "deserve protection by the State of Oregon," and "[a] full review of the currently proposed routes, and consultation with ODA's NPCP, using the recommended list is in order."[56] Ms. Geer states that she "is aware of occurrences of *Trifolium douglasii* and potential occurrences of *Pyrrocoma scaberula* which would be impacted on the currently proposed B2H routes" and which she claims

[54] 345-022-0070(1).
[55] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 5-6.
[56] Susan Geer's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue TE-1 at 6.


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are on ODA's un-adopted list.[57] For the following reasons, the Council should reject Ms. Geer's request to conduct a full review of the currently proposed routes, and consultation with ODA's NPCP, using ODA's un-adopted list, particularly in relation to *Trifolium douglasii* and *Pyrrocoma scaberula*:

- As discussed above, Ms. Geer has not submitted into the record a copy of ODA's un-adopted list or any other admissible evidence providing *Trifolium douglasii* and *Pyrrocoma scaberula* are included in that list. Therefore, Ms. Geer's statements should be stricken from the record or alternatively given no weight, and her arguments, which rely on such unsubstantiated evidence, must fail.
- Regardless, neither *Trifolium douglasii* nor *Pyrrocoma scaberula* are included on ODA's official list of threatened and endangered plants in OAR 603-073-0070, and therefore, the Council should not consider those species for purposes of demonstrating compliance with the Threatened and Endangered Species Standard.
- With respect to *Pyrrocoma scaberula*, this is the first time in this contested case that Ms. Geer, or any other party or limited party, raised an issue related to that particular species. Because Ms. Geer did not raise that issue in her Draft Proposed Order Comments or her Petition for Party Status or anywhere else in this contested case, she may not raise it now.[58]

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[57] *Id.* Ms. Geer does not reference it in her Exception, but in the contested case she proposed a condition related to Trifolium douglasii:

> Geer Proposed Trifolium Douglasii Condition: Request that Idaho Power revise its plans to completely bypass Morgan Lake Park property and to avoid Trifolium douglasii (rare plant) occurrences wherever they are found.

Susan Geer / Site Certificate Conditions of Susan Geer / Issues FW-3 and FW-6, p. 2 of 3.

[58] *See* ORS 469.370(3); OAR 345-015-0016(3).



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- Additionally, while Idaho Power identified *Trifolium douglasiias* as a special status species in Exhibit P1 of the ASC,[59] there is no requirement under the Fish and Wildlife Habitat Standard or any other EFSC standard to avoid special status species in the manner Ms. Geer proposes, and Ms. Geer has not demonstrated that *Trifolium douglasii* or *Pyrrocoma scaberula* should otherwise be considered Category 1 habitat that must be avoided.

However, with respect to *Trifolium douglasiias*, although no EFSC standard requires avoidance of that species, in response to Ms. Geer's concerns, Idaho Power is voluntarily willing to take reasonable efforts to avoid impacting those populations if an impacted landowner raises concerns regarding identified populations of *Trifolium douglasii* on their property. That is, if feasible, Idaho Power will attempt to microsite the Project within the site boundary to avoid impacts to the existing populations of *Trifolium douglasii* that a landowner identifies. However, when attempting to avoid impacts to *Trifolium douglasii*, Idaho Power will not re-route the Project outside the site boundary. Therefore, while not required to do so to comply with any EFSC standard, Idaho Power is willing to accept the addition of the following condition in the site certificate, if the Council chooses to adopt it:

> Proposed New Fish and Wildlife Condition 23:[60] If a landowner identifies discrete populations of *Trifolium douglasii*, commonly known as Douglas Clover, on their property and within the Project site boundary, the certificate holder will attempt to avoid direct impacts to the identified populations by micro-siting Project features outside the boundaries of the populations, if practicable. However, nothing herein shall require the certificate holder to site any Project features outside the site boundary to comply with this condition.

[59] ASC, Exhibit P1, Attachment P1-2, Appendix E at E-5 (Sept. 2018) ( ODOE – B2HAPPDoc3-25 ASC 16A_Exhibit P1_Wildlife_ASC_Part 1_Main thru Attach P1-6 rev 2018-09-28. Page 501 of 940).
[60] If the Council adopts Idaho Power's proposed condition related to *Trifolium douglasii*, the condition should be included in the Fish and Wildlife Habitat Standard conditions.


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## IV. CONCLUSION

For the reasons discussed above, Idaho Power respectfully requests that the Council reject the limited parties' exceptions to the Proposed Contested Case Order regarding TE-1.

DATED: July 14, 2022

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUE TE-1** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge
Hearings Officer
Office of Administrative Hearings
OED_OAH_Referral@oregon.gov

I further certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUE TE-1** was served by First Class Mail or electronic mail as indicated below:

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**BEFORE THE ENERGY FACILITIES SITING COUNCIL**
**for the**
**STATE OF OREGON**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | ) | **EXCEPTIONS TO** |
| | ) | **ADMINISTRATIVE LAW JUDGE** |
| THE PROPOSED BOARDMAN TO | ) | **WEBSTER'S PROPOSED** |
| HEMINGWAY TRANSSMISSION LINE | ) | **CONTESTED CASE ORDER** |
| | ) | |
| | ) | **BY PETITIONER SUZANNE FOUTY** |
| | ) | **ISSUE SP-1** |
| | ) | |
| **OAH Case No. 2019-ABC-02833** | ) | **DATED JUNE 30, 2022** |
| | ) | |

Issue Statement SP-1: Soil Protection

> *Whether the Soil Protection Standard and General Standard of Review require an evaluation of soil compaction, loss of soil structure and infiltration, and loss of stored carbon and loss of soil productivity that may occur as a result of the release of stored carbon in the soil.*

Soil Protection Standard (OAR 345-022-0022)

> *To issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in a significant adverse impact to soils including, but not limited to, erosion and chemical factors such as salt deposition from cooling towers, land application of liquid effluent, and chemical spills.*

## INTRODUCTION

Petitioner Suzanne Fouty (Dr. Fouty) disagrees with many of the factual and legal conclusions and the characterizations of the evidence that are contained in the Proposed Contested Case Order (PCCO). Dr. Fouty has repeatedly presented evidence showing that many of the findings and conclusions stated in the PCCO are not accurate or legally appropriate. The Council will notice in

Dr. Fouty's Exceptions some repetition in response. This is because the same incorrect statements are being repeated over and over, as they have been throughout this entire process. Dr. Fouty felt it was necessary to point them out so that incorrect information does not get treated as fact when it is not. In addition, there are two statements of particular concerns that Dr. Fouty wishes to draw particular Council attention to because of their significance to the public process and Council review.

Dr. Fouty's first concern is the statement by the ALJ:

> Neither the ASC content rule nor the Soil Protection standard require that the applicant present the highest level of detail, from the most current sources, or the best available science." (Opinion, p. 260 under *Scope of the Soil Protection Standard*)

Dr. Fouty addressed this statement under **Exception 19** and hopes that the Council will correct this mindset. The ALJ appears to be saying that when an applicant is trying to show compliance with the Soils Protection standard (or any standard), that 1) the applicant can do the analysis at whatever level of detail the applicant choose regardless of what is required to address the standard, 2) it is not necessary for the applicant to use information from current sources, and 3) that best available science does not have to be used and that the applicant can use any kind of data, any kind of science no matter how out-of-date or incorrect. Such an approach is inappropriate and if allowed puts the Council in a position of making flawed and unsupportable decisions. Consistent standards, such as use of best available science, use of the most current information sources, and use of the appropriate level of detail for the project and issues of concern, are required for strong quality analyses on the part of the applicant and on the ability of the Council to make a decision that is based on a clear presentation of information and facts that are defensible. To allow otherwise destroys the legitimacy of the process and the Council's oversight and decision making.

The second area of concern is the ALJ's decision to strike large portions of Dr. Fouty's *Closing Brief and Response Brief to IPC Closing Arguments* on the grounds that they rely on the Forest Service and BLM Resource Management Plans, NRCS soils databases, and Third Oregon Climate Assessment Report that the ALJ has determined are NOT part of the evidentiary record stating:

> A citation to, or excerpt from, a database, report, or management plan in the ASC or Proposed Order does not make the entirety of that database, report, or management plan part of the evidentiary record of the contested case." (Opinion, Exception 35).

This opinion by the ALJ is inappropriate and Dr. Fouty addresses this issue in **Exceptions 30, 34, 35, and 36**. If the ALJ's opinion is allowed to stand it permits the applicant to include statements and information without the ability of the public or Council to verify its accuracy or if other information contradicts it unless that source is specifically asked to be part of the evidentiary record. This is not standard protocol in any project Dr Fouty has done when working for the USDA Forest Service or as a researcher. Any citation to, or excerpt from, a database, report, or management plan used have always been considered part of the record and available for review and use by outside individuals and agencies. As such, the same standard should apply in this case. Any citation to, or excerpt from, a database, report, or management plan used by an applicant should automatically make the entire document or database part of the evidentiary record to ensure that information is presented is correctly stated and in context and allow for the appropriate level of Council and public review.

Given concerns about this decision by the ALJ setting precedence and preventing the presentation of information that shed lights on whether IPC has or has not complied with the Soil Protection standard, the Second Amended Project Order, and OAR 345-021-0010(1)(i), Dr. Fouty asks that

the Council to reverse the ALJ's decision. The ALJ should have taken judicial notice of these documents because 1) they are key components of IPC's documents and arguments, 2) they are government documents or databases, 3) IPC does not dispute their authenticity, and 4) they are foundational to IPC's attempt to demonstrate compliance with the Soil Protection standard (OAR 345-022-0022) and Site Certificate Application Requirements (OAR 342-201-0010-(1)(i)). IPC made frequent reference to them, retrieved new information from the NRCS database to update exhibits or add new ones during Rebuttal and Sur-sur rebuttal, and IPC's expert witness directed Dr. Fouty to the NRCS website on multiple occasions in his cross-examination testimony. As such the documents were being actively used and the public and the Council has a right to examine them in their entirety and reference them.

In conclusion, based on the concerns raised above and others presented in this response to the PCCO, Dr. Fouty requests that the Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. The IPC's soils analysis of impacts is incomplete and contains significant errors, and thus fails to provide the information needed to determine if IPC's project would be in compliance with the Soil Protection standard. In the alternative, Dr. Fouty requests that EFSC remand this issue back to ODOE and IPC and that prior to approval of the site application a project level soils analysis is done and then reevaluated for compliance with the Soil Protection standard. A new, and correct analysis would involve the following:

1. Use of the appropriate NRCS soils database (SSURGO) to analyze soil map unit properties where it exists (about 70%) in the project area and only use STATSGO when SSURGO information is absent.
2. Examination of the portion of the soil profile that is the area of soil productivity (topsoil).

3. Analysis of the appropriate dynamic soil properties in the topsoil that would show change as a result of impacts (bulk density, topsoil thickness, soil organic matter/SOC, available water capacity) as well as those static properties that IPC used to describe erosion potential and reclamation limitations (K factor, Wind Erodibility Group (WEG), T factor, Droughty, Stony/Rocky)

4. Create a map of soil types that represents combined characteristics of various topsoil properties that influence reclamation potential of vegetation and soil productivity,

5. Analyze relationships between soil types, habitat types, and climate to create mitigations that take into account differences in existing vegetation types as a function of soil type and climate and adjust the Reclamation and Revegetation Plan to create site-specific vegetation and soil reclamation plan.

6. Examine existing literature for soil mitigations that are effective at reversing soil impacts and making them site-specific to the various soil types that have been identified, taking into account expected climate changes

7. Define expected time frames of soil recovery as a function of particular impact type (i.e., erosion is irreversible, compaction may be on the order of decades)

8. reclamations must be designed that are specific to soil map unit characteristics and are directly tied to dynamic soil properties.

**BACKGROUND**

Soils are a critical resource to be managed for long-term productivity. It is a non-renewable resource and thus its loss is irretrievable.[1] They are essential for the creation of food and quality habitat and provide a wide variety of ecosystem services. As such maintaining soil productivity is vital for current and future generation. Because soils are a vital and essential resource, this proposed project has a Soil Protection standard (Standard) it must be in compliance with before receiving a certificate to proceed. The Standard is about minimizing the amount of change in the soil's existing natural productivity before and after impacts such that vegetative regrowth and habitat recovery are not impeded, triggering further soil damage. If significant adverse soil

[1]1990 Wallowa-Whitman National Forest Land and Resource Management Plan, p. 2-17; 2002 BLM Southeastern Oregon Resource Management Plan and Record of Decision, p.10

impacts occur as a result of a project's action, then mitigations are required to be put in place known to effectively repair the impacted dynamic soil properties that are impeding vegetative recovery. While vegetative recovery, once under underway, will set in motion a positive feedback loop that further improve soil productivity, vegetative recovery begins with the recovery of the dynamic soil properties' values and function which is why the Soil Protection Standard is worded as it is.

However, Idaho Power Company's (IPC) did not look at dynamic soil properties within the topsoil that change in response to impact (i.e., bulk density, topsoil thickness), but only inherent soil properties within the topsoil that stay the same (i.e., K-factor, droughty, T-factor). The issue with inherent properties is that unless the entire topsoil layer is removed and the new top layer of soil is the subsoil, their values remain the same. As such, while inherent soil properties are valuable for identifying areas of concern related to erosion and inherent limitations on vegetative recovery (i.e., droughty, stony/rocky), they provide no information on how the topsoil is being changed as a result of the project's actions and, therefore, on the new limitations being imposed on vegetative recovery potential. The issues are clear. The Standard is concerned about change and therefore, IPC needed to include an analysis of the dynamic soil properties, properties that are available in the NRCS soils database. They did not.

Second, because IPC failed to consider changes to the dynamic soil properties, it has no mitigations in places that have been demonstrated through science, not unsubstantiated statements, that they will be effective at setting the impacted dynamic soil properties on a recovery path that leads to the vegetative/habitat recovery which IPC says is the goal of its Reclamation and Revegetation

Plan. As it has no mitigations related to the dynamic impacted properties, it also has no success measures of change in their functions that can be used to determine if progress is being made (i.e., changes in infiltration rates). IPC's sole measure of continued poor soil productivity is vegetative failure to recovery and indications of continued soil erosion.[2] The delay in addressing the underlying soil issues that are impeding vegetative recovery will further soil decline, setting in motion a negative feedback loop. As a result, vegetative recovery is increasing impeded by both the soil's inherent limitations and its new dynamic limitations (i.e., soil compaction effective at limiting infiltration of water, air and nutrients into soil, topsoil layer becomes thinner). Therefore, IPC has failed on complying with the second key part of the Standard, which is to have demonstrate that it has measures that have been demonstrated to be effective at restoring the productivity of the soil such that vegetative and habitat types will recover. Recovery must happen in a reasonable amount of time, not some nebulous time in excess of 100 years which is what IPC estimate the useful life of the proposed facility.[3]

IPC's Application for Site Certificate (OAR 345-021-0010(1)(i)) does not satisfy the Council's siting standards for soils. Dr. Fouty's conclusions that IPC has failed to comply with the Standard were reached after reviewing the *Closing Arguments of Idaho Power Company,* ASC documents, and Mr. Madison's rebuttal, sur-sur-rebuttal, and cross-examination testimony and various exhibits. Dr. Fouty's evidence comes from peer-reviewed published scientific literature and

[2]ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9143-9144 of 10016: Section 6.5: Adaptive Management and Site Release.

[3] Proposed Contested Case Order, p.120/337 #236 and Footnote 89:

> Footnote 83, The risk that the proposed facility would need to be retired is extremely low. From a practical standpoint, a 500 kilovolt ("kV") transmission line is designed, constructed, and operated to be in-service in perpetuity. From an accounting perspective, the useful life of a transmission line is 100 years. (Ellsworth Rebuttal Test. at 4-6.)

agency and IPC documents, and therefore meets the preponderance of evidence burden of both SP-1 and the Soil Protection Standard (OAR 345-022-0022). Neither IPC nor its expert witness have provided any factual evidence that contradicts her conclusions of deficiencies. The challenges to Dr. Fouty's conclusions have been based on unsubstantiated statements and references back to IPC and its witness' documents that contain the deficiencies Dr. Fouty has raised. It is some of these documents and databases that IPC relied on heavily for its soils analysis and claims of compliance with the Soil Protection standard and the Site Certificate Application Requirements that the ALJ has sought to deny review and use of.

**EXCEPTIONS**

**Exception 1:** Findings of Fact (FOF) #247, p. 124

**Judge Webster (ALJ) erred in her statement that IPC identified the major soil types in the analysis area as required by OAR 345-021-0010(1)(i).**

IPC did not identify and describe major soil types. In Exhibit I, Section 3.3 Soil Identification and Description[4] IPC described Soil Orders (Mollisols, Aridisols, Entisols, Andisols) and in its various renditions of ASC Exhibit I, Attachment I, Table I-2-1 (*Madison Rebuttal Exhibit D; Madison Sur-sur rebuttal Exhibit A*) IPC listed STATSGO inherent soil properties. Soil types are combinations of soil characteristics that enhance or limit recovery of soil productivity and therefore vegetative regrowth while Soil Orders are the highest level of soil grouping and comprise multiple soil types (see *Fouty Closing Brief, p. 54-56 (text and Table 7); Fouty Response Brief to IPC's Closing, p. 24 and p. 61 (Table A-1*)). Had OAR 345-021-0010(1)(i)(A) meant "soil order"

[4] ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 13-14 of 115

it would have been specific, but it recognized that when considering impacts to soils and how those impacts would influence recovery, considering soil types was what needed to be identified and considered when planning recovery strategies.

**Exception 2:** FOF #247, p. 124

**The ALJ erred in her statement that IPC identified all current land uses that require or depend on productive soils.**

IPC neglected to include lands grazed as one of the land uses it evaluated despite saying lands grazed require productive soils.[5] This error was pointed out *Fouty Closing Brief (p. 17)* and again *in Fouty Response Brief to IPC Closing Arguments (p. 34)* and yet continues to be stated as fact when it is not.

Lands grazed make up the bulk of the area proposed for soil disturbance. When these lands are included, all but the developed lands (33 acres) require or depend on productive soils area, resulting in nearly 100% of the disturbed area soils with land uses that require or depend on productive soils (*Fouty Closing Brief, p. 17-18)*. Its analysis of current land uses that require productive soils is therefore very incomplete.

**Exception 3:** FOF #247, p. 124

**The ALJ erred in both point #247 and Footnote 89 when she listed as a finding of fact the following IPC statement:**

Idaho Power also explained that impacts to soils are limited because not all of the site boundary

[5] ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 27 of 115, Section 3.5.4 Soil Impact Summary: "Disturbed soils will include productive soils used for agriculture, timber production, and grazing"

> will be disturbed. In ASC Exhibit I states that, for the total proposed route, construction activities will disturb 21 percent (4,347.6 acres) of the site boundary, and that operation will disturb 3.6 percent (756.9 acres) of the site boundary. (*Id.* at page 17 of 115.)

This IPC statement is incorrect as is made very clear by the plain language in the Analysis Area definition (OAR 345-001-0010(2)).[6] The correct analysis area for assessing impacts to soils (or any other resources) is the area of disturbance. In this project that is 5104.5 acres, not the 20,750.5 acres that encompass the entire site boundary area. A 100% of the correct analysis area will be impacted. The ALJ also was in err in her Footnote 89 where she again stated, incorrectly, as fact that the analysis area for purposes of the Soil Protection standard is the area within the site boundary. It is not. It is the area proposed for disturbance as made clear by the plain language in the Analysis Area definition.

This misrepresentation of the analysis area is not trivial because changing the size of the analysis area changes the percent of the area considered impacted from about 100% of the correct soils analysis area (area to be disturbed) to only about 25% of the total site boundary area. This misrepresentation in identifying the correct analysis area is being used by IPC to minimize the scale of the impact and needs to be corrected (*see Fouty Closing Brief 14-18).*

**Exception 4:** FOF #251, p. 125

**The ALJ erred in her statement that IPC included <u>soil compaction</u> as one of the several**

[6] OAR 345-001-0010(2): "Analysis area" means the area or areas specifically described in the project order issued under OAR 345-015-0160 (Project Order)(1), containing resources that the proposed facility may significantly affect. The analysis area is the area for which the applicant must describe the proposed facility's impacts in the application for a site certificate. A proposed facility might have different analysis areas for different types of resources. For the purpose of submitting an application for a site certificate in an expedited review granted under 345-015-0300 (Request for Expedited Review of Small Capacity Facilities) or 345-015-0310 (Request for Expedited Review of Special Criteria Facilities), the analysis areas are the study areas defined in this rule, subject to modification in the project order.

**soil properties it evaluated related to loss of soil reclamation potential.**

There is no soil property called soil compaction. Soil compaction is an impact. The soil property that informs about whether soil compaction has occurred after an action is bulk density.[7] However, IPC ignored this property in its analyses. The property is absent from IPC's ASC Exhibit I, Table I-2-1 table[8], IPC's Rebuttal Exhibit D presented by Mr. Madison (an updated version of Table I-2-1), and IPC's Exhibit A in Mr. Madison sur-sur rebuttal (a corrected version of Exhibit D). Bulk density is one of the key dynamic soil properties that Dr. Fouty has repeatedly stated is missing from IPC's analysis of soil impacts, and IPC's expert witness Mark Madison also agrees was not included.[9]

There is no disagreement that IPC evaluated some characteristics that influence soil erosion potential and no disagreement that IPC evaluated some of the properties that will affect reclamation potential. However, as has been stated repeatedly by Dr. Fouty, the properties examined were the inherent, non-changing soil properties of a particular soil horizon, not dynamic, changeable soil properties of a particular soil horizon. IPC in repeating what it did look at makes clear that it has ignored key dynamic soil properties as discussed in *Fouty Direct Testimony, p. 8* and in *Fouty Closing Response, p. 29-38.* Therefore, IPC has no soil mitigations that address impacts to this key dynamic soil property or any of the other key dynamic soil properties that are critical for soil productivity.

**Exception 5:** FOF # 249, p. 125

[7] Madison Cross-examination, January 11, 2022, p. 183, lines 1-9, Fouty Closing Brief, p. 51-52
[8] ASC Exhibit I, Attachment I-2, Table of Soil Mapping Units, p. I-2-1 to I-2-3.
[9] Fouty Direct Testimony, p. 8; Fouty sur-rebuttal p. 3, #9, Fouty Closing Brief, p. 29-38; Fouty Response Brief to IPC, p. 1, 29-30, 31, 44, 45-46, 53, 55, 56); Madison Cross-examination, January 11, 2022, p. 64, lines 17-23, p. 68, lines 11-21, p. 184, Lines 22-24, p. 185, lines 1-13.

**The ALJ erred in stating as fact that "*Idaho Power identified current land uses in the analysis area that require or depend on productive soils through analysis of high value farmland soils data and land cover type data. Idaho Power used SSURGO soils data to identify soils within the analysis areas that have potential for agricultural use.*"**

As stated in **Exception 2** and restated here for emphasis, IPC neglected to include lands grazed as one of the land uses it evaluated despite saying lands grazed require productive soils.[10]

**Exception 6:** FOF # 251, p. 125

**The ALJ erred in her statement that *"Idaho Power assessed the potential adverse impacts to soils from the Project due to….compaction…."*.**

IPC did not assess potential adverse impacts to the dynamic soil properties due to compaction but on inherent soil properties. In FOF #251, the ALJ lists the four inherent soil properties IPC examined for soil erosion potential (K factor, wind erodibility, slope, and the T-factor) and the three inherent soil properties it examined for limits to soil reclamation potential (stony-rocky, droughty soil, depth to bedrock). It does not list bulk density as one of the soil properties it assessed and yet this is the soil property that is a measure of compaction potential and provides insight into changes to soil structure and infiltration. Instead, IPC states that it used the very coarse resolution STATSGO database, which averages the bulk densities and thus compaction potential of many SSURGO soil map units. Based on this average value, it concluded that since STATSGO showed no highly compactable soils, and so it did not quantity compaction impacts.

[10] ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 27 of 115, Section 3.5.4 Soil Impact Summary: "Disturbed soils will include productive soils used for agriculture, timber production, and grazing"

This analysis is incomplete and use of the STATSGO database when about 70% of the disturbed area has SSURGO data is inappropriate and results in minimizing potential impacts to soil productivity due to compact. Evaluation of the SSURGO database in the area of the transmission lines found highly compactable soils (*see Fouty Closing Brief, 18-29*).

**Exception 7:** FOF # 251, p. 125

**The ALJ erred in her listing the IPC statement that there are no highly compaction-prone soils within the site boundary as a "fact."**

This determination could not be made by IPC because IPC used the wrong NRCS STATSGO database to use to assess this feature. The STATSGO database is intended for regional planning, not project level analysis.[11] The minimum soil map unit size for NRCS STATSGO is 2500 acres and is an aggregation of many NRCS SSURGO soil map units (minimum soil map unit size is 1-10 acres), and soil property values are an average of many map units. As a result, the resolution is too coarse to correctly determine presence/absence of highly compactable soils. The correct NRCS database to use would have been SSURGO in all places (about 70% of the area proposed for soil disturbance[12]) where SSURGO data exist for this project area, which IPC failed to use in this case. Examination of the SSURGO database found soil map units with highly compactable soils in the area proposed for disturbance. (*See Fouty Closing Brief, p. 18-26*).

[11] Fouty Closing Brief, p. 19 *citing* Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. Web Soil Survey. Available online at https://websoilsurvey.nrcs.usda.gov/. Accessed [02/20/2022].

[12] ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 8 of 115, *Figure I-1: STATSGO and SSURGO Soil Data Coverage.*

**Exception 8:** FOF #251, p. 125

**The ALJ erred in her statement that IPC addressed mitigation of compacted soils due to construction.**

Mitigation requires demonstrating effectiveness which IPC has not done (*Fouty Closing Brief, p. 45-47*). As pointed out in *Fouty Closing Brief (p. 51-52),* published, peer-reviewed science, submitted as exhibits, shows that the proposed generic set of mitigations that IPC proposes for the bulk of the disturbed areas[13] will fail to restore soil productivity and vegetation. See also **Exception 9** below.

**Exception 9:** FOF #252, p. 126

**The ALJ erred when she stated as fact that IPC will "*minimize soil impacts by using best management practices (BMPs) and restoration efforts to restore soil surfaces and vegetation following disturbances.*"**

This statement is followed by Footnote 90 which lists the various BMP and restoration efforts and this footnote spells out BMPs and restoration efforts – specific ones tied to ODEQ permits related to water quality and *"**a generic set of construction BMPs** to be available for use on a majority of the Project where soils are not highly erosive, slopes are not steep, and construction is away from surface water.* (emphasis added) IPC does not address soil compaction and its accompanying impacts (loss of soil structure and infiltration) or loss of store soil carbon. IPC has presented no documentation that these "generic set of construction BMPs" will be effective and yet they will be

[13] Proposed Contested Case Order, p. 126, #254, Footnote 90: On this point, ASC Exhibit I states:
IPC will obtain an NPDES 1200-C Stormwater Construction Permit, and will implement an ESCP. IPC proposes a generic set of construction BMPs to be available for use on a majority of the Project where soils are not highly erosive, slopes are not steep, and construction is away from surface water. More specific BMP methods and BMP locations will be designated in areas with higher potential for soil erosion impacts.

applied to the majority of the disturbed area. As noted in **Exception 8** Dr. Fouty has provided published, peer-reviewed science that the mitigations are not sufficient to produce the results IPC states they will (*see Fouty Closing Brief, p. 45-48*).

**Exception 10:** FOF #254, p. 126

NOTE: Much of what is found in #254 is a repeat of information the ALJ listed in #252 and in her Footnote 90.

> **The ALJ erred in stating as fact that "*Idaho Power included a draft monitoring plan for soil impacts during construction and operation. (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28, pages 36-37 of 115.)"***

A review of the cited pages find the following:

> During construction, monitoring will occur in accordance with the requirements of the Reclamation and Revegetation Plan (Exhibit P1, Attachment P1-3) and the ESCP as part of the 1200-C stormwater permit.
>
> During operations, IPC will conduct regular (generally bi-annual) inspections of the Project as part of the its company-wide transmission line inspection process. If IPC identifies during a regular inspection that the Project structures are resulting in erosion, IPC will take necessary corrective actions and additional mitigation measures. To ensure soil impacts are monitored during operations, IPC proposes the following site certificate condition:

The site conditions that follow are: A Spill Prevention, Control, and Countermeasures Plan and an Erosion and Sediment Control Plan – both DEQ driven, a draft Blasting Plan, a final Reclamation and Revegetation Plan and a final Vegetation Management Plan. However, as noted in *Fouty Closing Brief, p. 53-59* none of these various Plans address the issue of soil compaction and the loss of stored carbon, both major impacts. This statement is affirmed in the ALJ's Footnote 91 which is from IPC's expert witness, Mr. Madison where he states the following:

> [91] The Reclamation and Revegetation Plan was developed primarily to address potential

> impacts to fish and wildlife habitat, as opposed to rehabilitation of disturbed soils. However, it provides the framework for reclamation of areas impacted by project construction, operation, and maintenance. It also sets out the requirements for implementing and monitoring reclamation of disturbed vegetation and meeting the reclamation success standards. (Madison Rebuttal Test. at 28-29.)

**Exception 11:** Conclusion of Law (COL), p. 142

> **The ALJ erred in her first conclusion regarding Issue SP-1 when she stated**
>
> **Neither the Soil Protection Standard nor the General Standard of Review require Idaho Power to evaluate soil compaction, loss of soil structure and infiltration, loss of stored carbon in the soil, and/or the loss of soil productivity as a result of the release of stored carbon in soils to demonstrate compliance with the Council's standards.**

IPC does have to evaluate soil compaction, loss of soil structure and infiltration, loss of stored carbon in the soil, and/or loss of soil productivity as a result of the release of stored carbon in soils to demonstrate compliance with the Council's standards. These impacts result in a decrease in soil productivity and IPC is required by the plain language in the 1) Amended Order of December 4, 2020, 2) Soil Protection standard (OAR 345-022-0022), 3) General Standard of Review (OAR 345-022-0000), and 4) Site Certificate Application Requirements (OAR 345-021-0010(1)(i) to evaluate these changes because they are known and expected significant, adverse impacts to soil. Soil compaction is referenced multiple times in IPC's ASC Exhibit I as an expected impact[14]. All three OARs use the phrase **"including, but not limited to**" indicating that the list of requirements or examples provided are not considered inclusive. *See discussion Fouty Closing Brief, p. 2-5.*

> The **Amended Order on Party Status, Authorized Representatives and Issues for Contested Case** dated December 4, 2020 on P. 41/87, under Issues Properly Raised states as follows:
>
> "Impacts to soil from the construction and operation are within Council's jurisdiction" and
>
> "In the Order on Appeals, Council clarified and modified the issue stated above, finding that soil productivity impacts from loss of stored carbon is within Council's jurisdiction under the Soil

[14]ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Pages 11, 16, 19, 21, 27, 33 of 115

Protection standard."[15]

**General Standard of Review (OAR 345-022-0000 (2)(a))**

The Council shall evaluate any adverse effects on a resource or interest by considering factors **including, but not limited to**, the following:

(A) The uniqueness and significance of the resource or interest that would be affected;
(B) The degree to which current or future development may adversely affect the resource or interest, if the proposed facility is not built;
(C) Proposed measures to reduce any adverse effects on a resource or interest by avoidance of impacts;
(D) The magnitude of any anticipated adverse effects on a resource or interest, taking into account any proposed mitigation. [emphasis added]

**Soil protection standard (OAR 345-022-0022)**

To issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in a significant adverse impact to soils **including, but not limited to**, erosion and chemical factors such as salt deposition from cooling towers, land application of liquid effluent, and chemical spills. [emphasis added]

**Site Certificate Application Requirements (OAR 345-021-0010(1)(i)(C)**

**Exhibit I.** Information from reasonably available sources regarding soil conditions and uses in the analysis area, providing evidence to support findings by the Council as required by OAR 345-022-0022 (Soil Protection), including:

(C) Identification and assessment of significant potential adverse impact to soils from construction, operation and retirement of the facility, **including, but not limited to**, erosion and chemical factors such as salt deposition from cooling towers, land application of liquid effluent, and chemical spills; [emphasis added]

## **Exception 12:** Conclusion of Law (COL), p. 142

[15]Amended Order on Party Status, Authorized Representatives and Issues for Contested Case, December 4, 2020. p. 41/87. Issues Properly Raised (13)(c): (1) *Soil Protection:*

(i) Whether the Soil Protection Standard and General Standard of Review require an evaluation of soil compaction, loss of soil structure and infiltration, and loss of stored carbon and loss of soil productivity that may occur as a result of the release of stored carbon in the soil.

Impacts to soil from the construction and operation are within Council's jurisdiction. OAR 345-022-0022. In her August 20, 2019 comments on the DPO, Dr. Fouty raised concern about soil productivity and the adequacy of mitigation for loss of soil productivity in the proposed disturbance area. She offered an evaluation of ASC Exhibit 1 (addressing erosion factors for potentially impacted soils) and described potential impacts from soil compaction and loss of soil structure. Although carbon sequestration, carbon storage, or carbon loss fall outside Council's jurisdiction, the impact to soil and the loss of soil productivity do fall under the Soil Protection Standard. In the Order on Appeals, Council clarified and modified the issue stated above, finding that soil productivity impacts from loss of stored carbon is within Council's jurisdiction under the Soil Protection standard. Dr. Fouty has raised this soil protection issue with sufficient specificity to allow for a response, and it is therefore appropriate for consideration in the contested case.

**The ALJ erred in her second conclusion regarding Issue SP-1 when she stated**

***Idaho Power presented sufficient information for the Council to find that the proposed facility, taking into account mitigation, is not likely to result in a significant adverse impact to soils.***

Idaho Power has NOT represented sufficient information for the Council to find that the proposed facility, taking into account mitigation, is not likely to result in a significant adverse impact to soils. IPC did not address the loss of stored soil carbon at all. As for soil compaction and its associated impacts on soil structure and infiltration, the "***generic set of construction BMPs*** *available for use on a majority of the Project where soils are not highly erosive, slopes are not steep, and construction is away from surface water*" mentioned in ALJ Footnote 90, and discussed in **Exceptions 8 and 9,** have been shown <u>not</u> to be effective at recovering either vegetation or soil property values (*See Fouty Closing Brief, p. 51-53).*

**Exception 13:** Opinion, p. 259

**The ALJ erred in her conclusion that "*The Council's standards do not require the impact evaluations proposed by Dr. Fouty*" in order to demonstrate compliance with the Soil Protection standard.**

This statement is a repeat of a similar statement made by the ALJ under PCCO Conclusions of Law (p.142). See **Exceptions 11 and 12** for Dr. Fouty's response.

**Exception 14:** Opinion, p. 259 under *Scope of the Soil Protection standard*

**The ALJ erred in her interpretation of Dr. Fouty's position on the Soil Protection standard when she took the text "*the intent of the Soil Protection standard is to protect***

***soil productivity*" out of context with the full sentence.**

Dr. Fouty's entire sentence makes clear that Dr. Fouty is NOT saying that there is no impact, but that the soil impacts to soil productivity cannot be adverse and significant once mitigations have occurred. This is clearly spelled out in the plain language of the Soil Protection standard. It was inappropriate for the ALJ to take selectively use information from Dr. Fouty's statement.

> "**The intent of the Soil Protection Standard is to protect soil productivity** and to that end it requires that soil impacts be evaluated for adverse and significant impacts taking into account mitigations" source (Fouty Closing Brief, p. 22, #4)

**Exception 15:** Opinion, p. 259 under *Scope of the Soil Protection standard*

**The ALJ erred when she stated that "*the purpose of the Soil Protection standard is not to protect soil productivity.*"**

The ALJ's statement is in direct contradiction to the Second Amended Project Order which states: "*Describe all measures proposed to maintain soil productivity during construction and operation.*"[16] The ALJ's statement is also in opposition to OAR 345-021-0010(1)(i)(B) which states: "*Identification and description of current land uses in the analysis area, such as growing crops, that require or depend on productive soils."*

**Exception 16:** Opinion, p. 259-260 under *Scope of the Soil Protection standard*

**The ALJ erred in her narrow interpretation of the phrase "including but not limited to..." in the Soil Protection Standard and the Site Certificate Application Requirements (OAR 345-021-0010(1)(i)(C)).**

[16] Exhibit I second amended Order

The plain language of the Soil Protection standard and OAR 345-021-0010(1)(i)(C) does not support the ALJ's interpretation. When one uses the 'test' of commonality that the ALJ presents on pages 259-260, the impacts of soil compaction, loss of soil structure, loss of infiltration and loss of stored soil carbon clearly meet the test requirements.

> Where, as here, the text of a statute or rule includes a list that begins with "including, but not limited to," a court tasked with interpreting that statute or rule should look to the listed examples that follow to find a common characteristic in defining the scope of the general term.[358] Therefore, in this context, the scope of "impact to soils" must be considered in light of basic characteristics of the specific examples that follow that term, *i.e.*, erosion and deposition or application of chemical substances.

As Dr. Fouty discussed in her *Response Brief to IPC's Closing Arguments on p. 5-6,* the common characteristics between 'erosion' and 'chemical spills' are 1) both impact soils, 2) the impacts are adverse to soil productivity, 3) the adverse impacts are potentially significant, and 4) the project is the source of the impacts. Soil compaction, loss of soil structure and infiltration and loss of stored soil carbon meet all four of these points of commonality.

Furthermore, the ALJ argument breaks down when one considers the differences between 'erosion' and 'chemical spills.'. Erosion is the removal of a solid (soil) while chemical spills are the addition of a liquid to the soils. Erosion can be minimized but not fully prevented unless vegetative cover remains intact while chemical spills can be fully prevented. Chemicals are human made while erosion is wind and water driven. In fact, soil compaction, loss of soil structure and infiltration as a result of soil compaction and loss of stored soil carbon have much more in common with 'erosion' than does 'chemical spills.' Compaction, erosion, and loss of stored soil carbon are all expected to occur at any construction site due to the use of heavy equipment and removal of vegetation. A chemical spill may not. If the ALJ's interpretation was correct, then the words

"*including, but not limited to*" would not be needed.

It is concerning at how much difficulty IPC, DOE, and the ALJ have with the very straightforward language "*including, but not limited to*,". The language could not be clearer – here are some examples, but they are not inclusive. However, Dr. Fouty understands that to acknowledge the accuracy of her statements means that DOE, IPC, and the ALJ have to accept that IPC failed to do an adequate analysis and is not in compliance with the Soil Protection standard.

**Exception 17:** Opinion, p. 259-260 under *Scope of the Soil Protection standard*

**The ALJ erred in stating that the "*OAR 345-021-0010(1)(i) simply directs the applicant to provide "information from reasonably available sources regarding soil conditions and uses in the analysis area."***

The ALJ's conclusion ignores OAR 345-021-0010(1)(i)(C) which in plain language makes clear that the applicant is to identify and assess significant potential adverse impacts to soils from the project "including, but not limited to, erosion and chemical factors…": IPC has not done so.

> *(C) Identification and assessment of significant potential adverse impact to soils from construction, operation and retirement of the facility, including, but not limited to, erosion and chemical factors such as salt deposition from cooling towers, land application of liquid effluent, and chemical spills;*

**Exception 18:** Opinion, p. 260 under *Scope of the Soil Protection standard*

**The ALJ is in err that "*the plain language of the Soil Protection standard does not require the applicant to provide such detail and analysis in every site certificate application."***

First, the plain language is very clear that the soil impacts that must be considered extend beyond the

two examples listed by use of the phrase "*including but not limited to…*" in order to allow the Soil Protection standard to cover a wide variety of proposed projects. Also, analyzing soil compaction potential and loss of stored soil carbon and identifying mitigations to these impacts are not "details" but expected impacts at every construction site. The lack of their consideration in the past is unfortunate for the resource but is not reason to continue with this error into the future. In addition, OAR 345-022-0000(2)(a) (General Standard of Review) references "*any adverse effects on a resource*…."

Second, the ALJ's conclusion about the intent of the plain language is contradicted in her Footnote 359. Footnote 359 cites the Second Amended Project Order and says:

> "Indeed, in the Second Amended Project Order, the Department directed Idaho Power to **"[d]escribe all measures** proposed to maintain soil productivity during construction and operation and to include the required evidence related to the NPDES 1200-C permit application ( ODOE - B2HAPPDoc15 ASC Second Amended Project Order 2018-07-26, page 14.)"

IPC did not "*describe all measures proposed to maintain soil productivity"* because it did not analyze changes to bulk density (soil compaction) and loss of soil carbon and soil structure and infiltration and identify effective mitigations and measures of effectiveness.

Third, the ALJ's footnote 359 left out a key word and context of the Second Amended Project Order statements. Reference to the NPDES 1200-C permit application comes in paragraph 2 of the Second Amended Order and begins "Exhibit I shall **also** include the required evidence related to the federally-delegated NPDES permit…" Key is the word "also". This permit is "in addition to" the information referenced in paragraph 1 of the Second Amended Project Order, *not* all that is required.

**Exception 19:** Opinion, p. 260 under *Scope of the Soil Protection standard*

> **The ALJ is in err that "*Neither the ASC content rule nor the Soil Protection standard require that the applicant present the highest level of detail, from the most current sources, or the best available science.*"**

First, in order to fulfill the requirements of the Soil Protection standard that the project's actions "taking into account mitigations, are not likely to result in a significant adverse impact to soils including, but not limited to, erosion and chemical factors such as…" the dynamic soil properties must be identified as they are the properties that have the potential for a significant adverse impact and must be mitigated to avoid the "significant" adverse impact post-mitigation. Therefore, the project must be analyzed at the level of detail that is sufficient to assess potential for significant adverse impacts.

Second, the data used must be current, reasonably available, and at the appropriate scales to assess impacts which is why IPC uses the NRCS databases. Mr. Madison says exactly that in his Rebuttal (p. 59/101, lines 12-14) "*It is the industry standard to use the most current NRCS soils data for a soil analysis for a linear project of this scale and at this stage of development."* Thus, this statement by the ALJ makes no sense. The ALJ is stating that IPC can use any database it wants regardless of how old or out-of-date it is. However, the ASC content rule (OAR 345-021-0010(1)(i)(B) references "identification and description of **current** land uses in the analysis area…" indicating that the most current information across the board is expected to be used. Also, as noted above, use of the most current database is an industry standard, according to Mr. Madison (Madison Rebuttal, p. 59/101, lines 12-14).

Third, while the Soil Protection standard and OAR 345-021-0010(1)(i) do not specifically say that the applicant must use best available science and that the information must be accurate, it is obviously expected. How else is the applicant to demonstrate that after doing its mitigations there is not likely to be significant adverse impacts to soils? How else does the Council avoid making arbitrary and capricious decisions that may or may not meet the OAR requirements. Again, it appears that the ALJ is stating that IPC can use whatever science it wants regardless of its accuracy or currency. This is not what is implied by the sum total of the combined OARs and the Second Amended Project Order. The goal of the Soil Protection standard is to maintain soil productivity and therefore as knowledge changes so are the methods used to analyze impacts and plan mitigations.

**Exception 20:** Opinion, p. 260 under *Scope of the Soil Protection standard*

> **The ALJ is in err that *"The Council rules also do not require the applicant provide site-specific mitigation in the ASC."***

IPC of course must provide site-specific, effective mitigations if it wants to show that it will meet the Soil Protection standard and thus can be issued a permit. How else is the Council to determine if the mitigations presented are sufficient and effective at preventing significant adverse effects? The need for site-specific, effective mitigations is made clear on pages 262-263 of the PCCO where the ALJ states that site-specific mitigations are required, in direct contradiction to the above statement.

> Moreover, the recommended site certificate conditions in the Proposed Order related to soil protection and the various mitigation plans addressed within those conditions **require that Idaho Power provide site-specific mitigation information** and that the Company **have in place various finalized plans** designed to ensure that temporary adverse impacts to soil are minimized.

IPC completely lacks site-specific mitigations of soil impacts which would vary as a function of soil types which IPC also failed to determine.

**Exception 21:** Opinion, p. 260 under *Sufficiency of ASC Exhibit I and Idaho Power's analysis of impacts to soils*

> **The ALJ erred in her conclusion that *"IPC correctly identified the soil analysis area for the purposes of ASC Exhibit 1 [I] as the area within the site boundary in accordance with the Proposed Order."***

Once again, the ALJ is in err about the analysis area for soil resources despite the very plain language in OAR 345-001-0010(2). The analysis area varies as a function of resource and the area that is affected. It is not one size fits all. The OAR is presented again below for ease of review.

> "Analysis area" means the area or areas specifically described in the project order issued under OAR 345-015-0160 (Project Order)(1), containing resources that the proposed facility may significantly affect. The analysis area is the area for which the applicant must describe the proposed facility's impacts in the application for a site certificate. A proposed facility might have different analysis areas for different types of resources. For the purpose of submitting an application for a site certificate in an expedited review granted under 345-015-0300 (Request for Expedited Review of Small Capacity Facilities) or 345-015-0310 (Request for Expedited Review of Special Criteria Facilities), the analysis areas are the study areas defined in this rule, subject to modification in the project order.

**Exception 22:** Opinion, p. 261 under *Sufficiency of ASC Exhibit I and Idaho Power's analysis of impacts to soils*

> **The ALJ erred in her conclusion that "*Dr. Fouty has not demonstrated that Idaho Power was required to use the SSURGO database to determine soil properties and/or that the Company failed to use information from reasonably available sources to identify and describe the major soil types in the analysis area."***

Dr. Fouty has clearly and repeatedly laid out the reasons why IPC use of the STATSGO database for its soils analysis and evaluation of some soil properties was inappropriate in those places where SSURGO data existed (about 70% of the project area). NRCS is clear that the SSURGO database is to be used for project level work, which is what the B2H is – a project. STATSGO soil map unit properties are averages of many SSURGO map units and therefore do not provide the kind of information needed for a project. The data is available for most of the project, is easily available and used frequently by IPC elsewhere in its documents (see *Fouty Closing Brief, p. 24, Table 3*). The use of STATSGO in a project should only have been used in the absence of SSURGO data. See *Fouty Closing Brief (p. 18-29)* for more in-depth discussion.

**Exception 23:** Opinion, p. 261 under *Sufficiency of ASC Exhibit I and Idaho Power's analysis of impacts to soils*

> **The ALJ erred in her conclusion that *"Dr. Fouty also has not shown that Idaho Power's soil data analysis was flawed because the Company did not identify and analyze the dynamic properties of the soil that would be disturbed and describe the mitigation needed to restore the soil to preconstruction condition."***

Dr. Fouty has repeatedly shown why identifying and analyzing the dynamic properties of the soils is required by the Soil Protection Standard and the Second Amended Project Provision Order (See *Fouty Direct Testimony, p. 8-9; Fouty Closing Brief, p. 29-38; Fouty Response Brief to IPC, p. 1-2, 21-23*).

Mitigations are about minimizing impacts to aspects of a resource that can be changed by an action.

Mitigations are not done on properties that don't change and IPC only looked at inherent soil properties (K-Factor, droughty, stony/rocky, T-factor, Wind erodibility), factors that don't change unless the entire topsoil is eroded. IPC ignored the dynamic soil properties (bulk density, available water capacity, stored organic matter) even though these are the ones that will be altered by the project and will need to be mitigated. This information is readily available from the NRCS soils databases as stated by Mr. Madison, IPC's expert witness, during cross-examination[17] and therefore meets the requirements of OAR 345-021-0010(1)(i). IPC failed to do an integral part of any soils impact analysis.

**Exception 24:** Opinion, p. 261 under *Sufficiency of ASC Exhibit I and Idaho Power's analysis of impacts to soils*

**The ALJ erred in her conclusion that IPC identified and described *"the major soil types per county within the analysis area."***

As stated in **Exception 1**, IPC did not identify and describe major soil types. In Exhibit I, Section 3.3 Soil Identification and Description[18] IPC described Soil Orders (Mollisols, Aridisols, Entisols, Andisols) and in its various renditions of ASC Exhibit I, Attachment I, Table I-2-1 (*Madison Rebuttal Exhibit D; Madison Sur-sur rebuttal Exhibit A*) IPC listed STATSGO inherent soil properties. Soil types are combinations of soil characteristics that enhance or limit recovery of soil productivity and therefore vegetative regrowth while Soil Orders are the highest level of soil grouping and comprise multiple soil types (see *Fouty Closing Brief, p. 54-56 (text and Table 7); Fouty Response Brief to IPC's Closing, p. 24 and p. 61 (Table A-1*)). Had OAR 345-021-

[17] Madison cross-examination, January 11, 2022, p. 71, line 25 to page 72, lines 1-20.
[18] ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 13-14 of 115

0010(1)(i)(A) meant "soil order" it would have been specific, but it recognized that when considering impacts to soils and how those impacts would influence recovery, considering soil types was what needed to be identified and considered when planning recovery strategies.

**Exception 25:** Opinion, p. 261 under *Sufficiency of ASC Exhibit I and Idaho Power's analysis of impacts to soils*

> **The ALJ misrepresents what IPC provided when she states that *"IPC provided soil mapping units along the entire transmission line corridor within the analysis area."***

The implication of the ALJ statement is that IPC provided the correct soil mapping units for a project. It did not. IPC provided the STATSGO soil map units which have a minimum aggregate size of 2500 acres. The soil properties in any given STATSGO map unit reflects the averaging of many SSURGO soil map units with its minimum size of 1-10 acres. Key information was lost in the averaging of many SSURGO map units into the large STATSGO units. The correct map units would have been SSURGO soil map units. STATSGO map units are intended for regional planning efforts, while SSURGO map units for projects.[19] The B2H transmission line is a project.

**Exception 26:** Opinion, p. 262 under *Sufficiency of proposed mitigations*

> **The ALJ is in err when she agreed with IPC that *"these mitigation concerns [that mitigations be shown to be effective, address impacts to dynamic soil properties, and be rapid] are beyond the scope of Issue SP-1."***

[19] Fouty Closing Brief, p. 19 *citing* Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. Web Soil Survey. Available online at https://websoilsurvey.nrcs.usda.gov/. Accessed [02/20/2022].

First, the ALJ appears to incorrectly reference Issue SP-1 when she means to be talking about the Soil Protection standard. The Soil Protection standard addresses mitigation requirements while Issue SP-1 is about soil properties that IPC failed to analyze. Therefore, Dr. Fouty responds to this statement as it applies to the Soil Protection standard, not Issue SP-1.

Dr. Fouty's mitigation concerns are not beyond the scope of the Soil Protection Standard as the standard explicitly states:

> "To issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in a significant adverse impact to soils…." [emphasis added]

**Exception 27:** Opinion, p. 262 under *Sufficiency of proposed mitigations*

> **The ALJ is in err when she stated that *"Nor does the standard require an applicant to establish a specific timeframe for recovery or to establish quantitative measures for soil reclamation to demonstrate compliance with the Soil Protection standard. Rather, the standard requires that an applicant demonstrate that it has evaluated the potential impacts to soils from proposed facility construction and operation and that it has methods to mitigate adverse impacts to less than significant."***

Of course, a timeframe is required. A timeframe is required to assess if recovery is on track to be successful, if adjustments in mitigations need to be made, or if the recovery timeframe is of such a length as not likely result in a significant adverse impact to soils given expected climate changes and trigger additional soil degradation.

IPC masks the longevity of its impacts to soils and the significance of them by referring to soil impacts as "temporary. However, IPC defines "temporary" as anything less than the life of the project which is assumed to be indefinite[20] in several places and "in excess of 100 years which is what IPC estimate the useful life of the proposed facility"[21] in other places. This is not the intent of the Soil Protection Standard. For more discussion see *Fouty Closing Brief: Soil Recovery Times Excessive, p. 41-45.* Recovery must happen in a reasonable amount of time and the Forest Service has identified timeframes in which a soil impact shifts from being considered 'temporary' to 'permanent'. It is 15 years (see *Fouty Closing Brief, p. 45).*

**Exception 28:** Opinion, p. 262 under *Sufficiency of proposed mitigations*

> **The ALJ is in err regarding her interpretation of the requirements of OAR 345-021-0010(1)(i)(D) and the Soil Protection Standard:**
>
> **The Soil Protection standard does not prohibit impacts to soils, whether the soil is productive or non-productive. Nor does the standard require an applicant to establish a specific timeframe for recovery or to establish quantitative measures for soil reclamation to demonstrate compliance with the Soil Protection standard. Rather, the standard requires that an applicant demonstrate that it has evaluated the potential impacts to soils from proposed facility construction and operation and that it has methods to mitigate adverse impacts to less than significant. As discussed above, the ASC content rule requires that the applicant submit information from reasonably available sources describing any measures the applicant proposes to avoid or mitigate**

[20] ODOE - B2HAPPDoc2-1 Proposed Order on ASC w Hyperlink Attachments 2019-07-02. Page 316-317 of 699, Footnote 324:

"The applicant explains that habitat cleared for construction would be restored and the duration of the impact would not exceed the life of the proposed transmission line and, therefore, clearing vegetation followed by restoration would constitute a temporary impact to habitat. While restoration of certain habitat (e.g., forestlands) can take decades and restoration could span generations of wildlife, those impacts are considered temporary because they would last less than the life of the transmission line, which is expected to be in place indefinitely."

[21] Proposed Contested Case Order, p.120/337 #236 and Footnote 89:

> Footnote 83, The risk that the proposed facility would need to be retired is extremely low. From a practical standpoint, a 500 kilovolt ("kV") transmission line is designed, constructed, and operated to be in-service in perpetuity. From an accounting perspective, the useful life of a transmission line is 100 years. (Ellsworth Rebuttal Test. at 4-6.)

**adverse impacts to soils. OAR 345-021-0010(1)(i)(D). The Soil Protection standard specifically allows consideration of an applicant's proposed mitigation to make findings of compliance, but it does not require the applicant to provide proof that the mitigation will be rapid and completely effective.**

The ALJ states that as long as IPC has *described* whatever mitigation measures it plans to use to avoid or mitigate adverse impacts to soils, it does not matter if that list is complete or not or if they work. However, section (D) of this OAR must be read in conjunction with (C) "*identification and assessment of significant potential adverse impact to soils from construction, operation and retirement of the facility, including, but not limited to, erosion and chemical factors…"*.

When read together, it is clear that the applicant must first identify what soil properties will be impacted and then describe measures to avoid or mitigate adverse impacts to soils. As previously stated, the Soil Protection standard, Second Amended Order, or the Site Certification Application Requirements (OAR 345-321-0010(1)(i) are all very clear that soil impacts are not limited to erosion and chemical factors. Therefore, there needs to be mitigations that address those soil properties that are likely to change (dynamic properties). IPC has not identified and describe any adverse impacts to dynamic soil properties and how those impacts, which will vary as a function of combinations of different soil properties (soil types), will be mitigated. Therefore, IPC has not meant the requirements of the Soil Protection standard or OAR 245-201-0010(1)(i).

**Exception 29:** Opinion, p. 262 under *Sufficiency of proposed mitigations*

**The ALJ is in err when she stated that Dr. Fouty said soil mitigations must be "*completely effective*"**

Dr. Fouty never stated that mitigations must be "completely effective." Dr. Fouty said that IPC must show that the proposed soil impact mitigations are "*effective and rapid*" (*see Fouty Closing*

*Brief, p. 46*). Dr. Fouty is aware of what the Soil Protection standard language says and that there is nothing in the standard that states soil impacts must be 100% remedied. This misrepresentation of what Dr. Fouty says was inappropriate.

**Exception 30:** Opinion, p. 262-263 under *Sufficiency of proposed mitigations*

**The ALJ erred when she states that Dr. Fouty had not established that IPC has failed to sufficiently describe mitigations that once in place will likely result in no significant adverse impact to soils:**

**"Notwithstanding Dr. Fouty's arguments, it is reasonable, and consistent with industry standards, for Idaho Power to rely on agency-issued BMPs to mitigate adverse impacts. The Department reviewed ASC Exhibit I and concluded that it sufficiently described Idaho Power's avoidance and mitigation measures and that the described measures are not likely to result in a significant adverse impact to soils.[367] Dr. Fouty has not established otherwise."**

First, Dr. Fouty has repeatedly shown that IPC's mitigations are lacking and specifically why they are lacking.[22] That IPC and ODOE are not interested in what Dr. Fouty has presented is not the same thing as failure to present clear evidence of why IPC has failed to comply with the Soil Protection standard. In addition to the citations provided in Footnote 22, some excerpts from Dr. Fouty's Direct Testimony are provided as to why IPC mitigations are insufficient.

Fouty Direct Testimony

a) …the lumping of the limited soil map unit information and simplification of the Land Cover types (or GVTs) and decoupling them from each other prevents a robust analysis of existing conditions and a determination of compliance with the SPS as a result of the proposed project and its proposed mitigations. (Fouty Direct Testimony, p. 4)

b) The "applicant asserts that the mitigation measures listed in ASC Exhibit H Section 3.9 are sufficient to address any climate-change-induced increases in soil erosion or geology hazards."[23] However, this assertion cannot be made given the uncertainty in future climate conditions, the magnitude of recent droughts and wildfires, and lack of sufficient information about existing soil and vegetation conditions in the CDA and ODA by county. (Fouty Direct Testimony, p. 8)

[22] see Fouty Direct Testimony (text provided below); Fouty Closing Brief, p. 29-38 and 45-48; Fouty Response Brief to IPC Closing, p. 2, 14-17, 21-22, 24, 26,28, 37-39.

[23] ODOE - B2HAPPDoc2-1 Proposed Order on ASC w Hyperlink Attachments 2019-07-02. Page 98 of 699

c) As discussed above, ASC Exhibit I, Attachment I-2, Table I-2-1 presents numeric values for some soil factors related to soil erosion and reclamation for soil map units for the county area within the site boundary.[24] However, these are not all the factors that must be considered when assessing potential project impacts and recovery potential. The properties below are also key and needed to 1) identify other factors likely to limit recovery soil productivity, 2) additional BMPs, and 3) expected costs and time scale for the restoration of soil productivity, and if restoration is even possible. Only when these are added, in combination with vegetation information at the appropriate level of detail can a more accurate picture of existing soil conditions and possible reclamation limitations emerges. (Fouty Direct Testimony, p. 8)

d) The project lacks any measurable, quantitative soil reclamation targets based on baseline, pre-disturbance soil properties values. Preliminary Reclamation Monitoring Success Standards are using Reclamation Zone categories listed in Table 6,[25]modified from the General Vegetation Type groups found in ASC Exhibit P1, Attachment P1-1,[26] as measures of success. The vegetative measures in Table 6 currently lack context to soil map unit, are too generalized as to vegetation present in the different reclamation zones, and are without reference to CDA and ODA by county. Because climate, land use, topography and vegetation type vary across the counties, information needs to be placed in its CDA and ODA by county context. Again, this is why the existing General Vegetation Type categories are too broad and ineffective for understanding impact and recovery potential.

   Without target soil factor values you can measure there is no way to determine compliance with SPS because you cannot determine if you have reversed known soil impacts such as compaction, loss of topsoil, and loss of soil organic carbon which are required for long-term productivity. Instead of quantitative measures related to soil, we have success measures tied to vegetation types that are too generalized and without the appropriate level of detail to capture real variations. In addition, we find reclamation statements that are conflicting, vague, inconsistent. (Fouty Direct Testimony, p. 10)

e) To meet the goal of the SPS requires quantitative target values that specifically address the soil and vegetation regrowth and resiliency under a changing climate. No such targets currently exist because key soil properties, discussed earlier, were never presented and analyzed in the IPC documents. Quantitative targets allow for a data-driven assessment of the likelihood of recovery, the costs to recover soil productivity to various levels (e.g., pre-disturbance conditions, 75% of pre-disturbance, 50% of pre-disturbance), and identification of additional measures needed to achieve goals. (Fouty Direct Testimony, p. 11)

f) **QUESTION:** You have discussed the missing soils information and relationships and why they matter, and your concerns related to the lack of quantitative soil reclamation targets. Can you now discuss how that missing information impacts the ability of the Proposed Best Management Practices (BMPs) to meet the SPS?

   **ANSWER:** The BMPs are focused on minimizing soil erosion once the soil is bare. Their goal is to minimize impacts but they cannot prevent them. This is why knowing all of the soil factors by soil map unit by appropriate General Vegetation Type category by CDA and ODA by county is so important. It helps avoid areas (key mitigation strategy) and identifies those areas that will be disturbed that requires a focused reclamation approach, or may not be recoverable. (Fouty Direct Testimony, p. 12)

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[24] ASC Exhibit I, Attachment I-2, Table I-2-1 (no date stamp)

[25] ODOE - B2HAPPDoc3-25 ASC 16A_Exhibit P1_Wildlife_ASC_Part 1_Main thru Attach P1-6 rev 2018-09-28. Page 583 of 940

[26] ODOE - B2HAPPDoc3-25 ASC 16A_Exhibit P1_Wildlife_ASC_Part 1_Main thru Attach P1-6 rev 2018-09-28. Page 111 of 940 to Page 115 of 940

g) **QUESTION:** IPC acknowledges that climate change will bring changes that will have an impact on soil and vegetation. However, they feel that their mitigation measures are sufficient to address any climate-change-induced increases in soil erosion. What is your response to those claims?

**ANSWER:** Assuming that one's mitigation measures are sufficient in the face of unknown climate events of increasing severity, frequency and unpredictability with overlapping impacts is not supportable. Multiple years of drought, a common occurrence in the project area, can easily prevent the most determined revegetation plan from being successful, leaving the soils exposed and further declining in productivity. Climate change is going to make any soil restoration effort more difficult, costly, and potentially impossible. The reclamation and revegetation plans so far do little to initiate recovery of soil productivity given the scale of the changes anticipated because they require water and lack of wildfire – neither of which can be guaranteed. (Fouty Direct Testimony, p. 13)

Second, IPC provides only one set of agency-issued of BMPs and these are from ODEQ, which is a regulatory agency. These mitigations are found in the NPDES 1200-C permit and the SPCC, designed to minimize erosion and chemical spills and prevent water quality contamination. These mitigations do NOT address compaction, loss of soil structure and infiltration, and loss of stored soil carbon. There are no agency-issued BMPs related to these soil impacts. As discussed in **Exceptions 9 and 12**, IPC is very clear that it is defaulting to *"**a generic set of construction BMPs** to be available for use on a majority of the Project where soils are not highly erosive, slopes are not steep, and construction is away from surface water.* (emphasis added) IPC has no documentation that these "generic set of construction BMPs" applied to the majority of the disturbed area will be effective. (*see Fouty Closing Brief, p. 45-48*). A review of the scientific literature provided as exhibits in this contested case, shows that these "generic" BMPs will not be effective even after fairly long times scales (*see Fouty Closing Brief, p. 48-53).*

Third, as for **industry standards**, Mr. Madison, IPC's expert witness, in his January 5, 2022 sur-sur rebuttal was very clear that there really are none when he stated that he could NOT provide "references for what constitutes industry standards."

> It would be difficult to provide references for what constitutes industry standards because this knowledge is typically gained from consulting on large linear projects that involved earthwork and

> disturbance of existing vegetation. In addition, knowledge of industry standards is also typically informed by what processes are required for permits involving construction that results in ground disturbance, as opposed to academic literature. (Madison Sur-sur rebuttal, p. 13, lines 10-14)

Therefore, there is no support for the ALJ's statement that IPC is consistent with industry standards because IPC's own expert witness could not provide references of what constitutes industry standards. The only mention of what Mr. Madison considers an actual 'industry standard' is when he stated in his Rebuttal (p. 59/101, lines 12-14) "*It is the industry standard to use the most current NRCS soils data for a soil analysis for a linear project of this scale and at this stage of development."*

Fourth, what IPC attempts to do when challenged on the lack of effective BMPs for impacts not covered by the NPDES 1200-C permit, the Erosion and Sedimentation Control Plan (ESCP), and the Spill prevention, Control and Countermeasures (SPCC) Plan is default to old Forest Service and BLM Resource Management documents even as it refers to some of the BMPs as generic. Yet these are the same documents that the ALJ has failed to take judicial notice of despite IPC's reliance on them as its evidence that it is in compliance with Soil Protection standard and has said will strike/give no weight to those portions of Dr. Fouty's testimony that rely on these frequently used documents.

Examination of these Federal Land Management documents find them referenced in ASC Exhibit I (Soils) and identified in IPC's informal discovery response letter dated February 5, 2021 to STOP as the documents IPC "relied upon for discerning the efficacy of BMPs proposed for post-construction restoration for compacted or otherwise disturbed soils." IPC underscores their use of these documents in its supplemental letter dated March 5, 2021 to STOP in response to a STOP request for more information. This exchange between IPC and STOP if found in IPC's expert witness Mr. Madison Sur-sur rebuttal Exhibit C. In it IPC states:

> In its Request for Discovery Orders [2/19/2021], Stop B2H has clarified that it is looking for documentation as to how Idaho Power determined the efficacy of the Best Management Practices. With this clarification, Idaho Power provides the following additional response [3/5/2021].
>
> Idaho Power does not possess any documents responsive to the request because Idaho Power did not undertake to independently evaluate the efficacy of the Best Management Practices. On this point, Idaho Power notes that in adopting Best Management Practices, Idaho Power has relied upon the government agencies charged with protecting environmental resources and which it considers to be knowledgeable sources.

A discussion of these Federal Resource Management documents and what they actually say is found in *Fouty Closing Brief: Mitigation effectiveness unsubstantiated (p. 45-58).* This review shows that the Federal Land management agencies rely on staying current with the science and being site-specific. IPC has provided no science that its 'generic' BMPs will be effective and the science has shown they will not be. When it comes to soil erosion, loss is permanent. It is for these reasons that IPC seeks to avoid having any timeframes established for the recovery of soil properties such as bulk density, stored soil carbon, available water capacity, infiltration and soil structure beyond "less than the life of an indefinite project." This nebulous timeframe allows IPC to say it is in compliance with the Soil Protection standard even as soil degrade further due to soil impacts from the project that prevent vegetative recovery and thus leave the soils unprotected from further erosion and loss of productivity resulting in ongoing significant adverse impacts.

Finally, on pages 262-263 of the PCCO under *Sufficiency of proposed mitigations* the ALJ states that IPC must provide site-specific mitigations which IPC has not and admits it has not provided. Note the use of the word "temporary" as in "temporary adverse impacts." Again, the word "temporary" as used by IPC is any impact less than the life of an indefinite project. This timeframe does not meet the intent of the Soil Protection standard and impacts such as soil erosion are not "temporary".

> Moreover, the recommended site certificate conditions in the Proposed Order related to soil protection and the various mitigation plans addressed within those conditions require that Idaho Power provide site-specific mitigation information and that the Company have in place various finalized plans designed to ensure that temporary adverse impacts to soil are minimized. (PCCO, p. 262-263)

**Exception 31:** Opinion, p. 263 under *Sufficiency of proposed mitigations*

**The ALJ erred in the following conclusion:**

> **The Department appropriately concluded that the mitigation plans that apply to agricultural restoration, revegetation and restoration, combined with the DEQ 1200-C permit, are more than adequate to ensure that appropriate measures are implemented pre- and post-construction to ensure soil restoration. (PCCO, p. 263)**

The ALJ has no justification for this opinion. Earlier the ALJ stated that mitigations had to be site-specific and here she is saying they don't have to be. In addition, IPC has stated that most of its mitigations are 'generic' and IPC has no understanding of what soil types it is dealing with and going to implement these generic BMPs on. Furthermore, as discussed in depth in **Exception 30** and noted in Fouty Closing Brief (p. 45-48) IPC has provided no information that its proposed mitigations will be effective in reducing impacts while Dr. Fouty has shown via published, peer reviewed literature that the proposed IPC mitigations will not be effective in restoring either vegetation or soil properties (Fouty Closing Brief, p. 51-53).

IPC repeatedly defers its responsibility to demonstrate effective mitigations to agency-issued BMPs, the same documents that the ALJ has stated are not part of the evidentiary record and therefore not available for review. However, again the only agency that has issued BMP is DEQ via the SPCC Plan and the NDPES 1200-C permit, both which address water quality related to chemical spills and erosion (Fouty Closing Brief, p. 21). These DEQ related permits/plan do not provide mitigations for soil compaction, loss of soil structure and infiltration, and loss of soil

organic carbon.

**Exception 32:** Opinion, p. 263 under *Proposed site certificate condition related to the Soil Protection Standard*

> **The ALJ erred in stating that "*Dr. Fouty did not timely submit this proposed condition with her direct testimony, in accordance with the schedule set in the Case Management Order*."**

Dr. Fouty did submit a proposed Soil Condition in a timely manner in her direct testimony which the ALJ actually acknowledges this in her footnote 369[27]. In addition, DOE also acknowledges the existence of proposed soil conditions in Dr. Fouty's direct testimony by incorporating them into DOE's recommended new soil protection condition in its Rebuttal of Direct Testimony on November 12, 2021.

> **ODOE Recommended Soil Protection Condition XX**[28]: The applicant shall: a) At least 12-months prior to construction, develop and submit a Soil Impact Mitigation Protocol specific to temporary disturbance areas, and to inform the final assessment of soil erosion and compaction impact potential, and reclamation measures, which may consider information including but not limited to: (1) key soil properties such as bulk density, the thickness of the A and B horizons, soil texture (% sand, silt, clay), ash content, porosity, permeability, amount of soil organic carbon in the A and B horizons, and water-holding capacity of the soils within disturbance areas; (2) existing vegetation cover type/invasive dominated areas based on literature review and preconstruction field surveys; (3) historic and current land use; and (4) seasonal precipitation conditions. The protocol must be submitted to the Department and Soil and Water Conservation Districts for each county (Morrow, Umatilla, Baker, Union and Malheur) for review and approval in consultation with the Oregon Department of Agriculture, Natural Resource Conservation Service or a third-party consultant with expertise in soils.

[27] PCCO Footnote 369: In its Rebuttal to Direct Testimony, the Department recommended a new soil protection condition (ODOE Proposed Soil Protection Condition XX) requiring Idaho Power to, at least 12 months prior to construction, develop and submit a Soil Impact Mitigation Protocol specific to temporary disturbance areas. ODOE Rebuttal to Direct Testimony at 116. However, in its Closing Brief, the Department withdrew this proposed condition and instead proposed that language be adopted into the draft Reclamation and Revegetation Plan designed to further support successful restoration of temporary soil impacts. See ODOE Closing Brief at 202-203. Because the Department withdrew its previous recommended condition, it is not addressed herein.

[28] ODOE Rebuttal to Direct Testimony, Evidence and Response to Proposed Site Certificate Conditions (November 12, 2021), p. 114-116

> b) Prior to construction, utilize the protocol, as approved in (a), to develop a Soil Impact Mitigation Plan, with quantitative reclamation criteria. The quantitative reclamation criteria shall be developed in consultation with the Department and the Oregon Department of Agriculture, Natural Resource Conservation Service or the Department's third-party consultant with expertise in soils. The Soil Impact Mitigation Plan shall be incorporated into the Final Reclamation and Revegetation Plan (Final Order on ASC, Attachment P1-3).

The Soil Protection condition presented in Dr. Fouty's Closing Brief on p. 61-62 was simply a restatement of the Soil Protection Conditions presented in her Direct Testimony in a more succinct format and should be included.

**Exception 33:** Opinion, p. 263 under *Proposed site certificate condition related to the Soil Protection Standard*

> **The ALJ in err in her statement that "*based on the discussion of Issue SP-1 above, it is evident that the proposed condition [The ODOE Recommended Soil Condition XX] is unnecessary for compliance with the Soil Protection standard."***

Dr. Fouty has demonstrated throughout her direct testimony, sur-rebuttal, cross-examination of Mr. Madison, *Fouty Closing Brief* and *Fouty Response Brief to IPC Closing Arguments* that the additional soil condition, implemented prior to any decision regarding certificate approval, is required to be in compliance with the Soil Protection standard. The location of this information is found throughout Dr. Fouty's Exceptions to the PCCO with citations of where more detailed discussion and evidence can be found.

**Exception 34:** Opinion, p. 262-263 under *Ruling on Idaho Power's Motion to Strike portions of Dr. Fouty's Closing Brief on Issue SP-1*

> **The ALJ erred in her agreement with IPC that**
>
> **…the challenged portions of Dr. Fouty's Closing Brief are testimonial in nature and/or**

**reference documents [Federal Resource Management Plans[29], NRCS soils databases, and Third Oregon Climate Assessment Report] not admitted into the evidentiary record…. However, considering the logistical challenges and inefficiency of carving up the brief, the ALJ declines to strike the challenged statements. Instead, because the evidentiary record does not support the challenged statements, the ALJ grants Idaho Power's alternate request and gives these statements no weight. (PCCO, p. 262-263)**

The documents mentioned above are key components of IPC's documents and arguments and the ALJ should have taken judicial notice of them. They are government documents or databases and IPC does not dispute their authenticity. They are foundational to IPC's attempt to demonstrate compliance with the Soil Protection standard (OAR 345-022-0022) and Site Certificate Application Requirements (OAR 342-201-0010-(1)(i)). IPC makes frequent reference to them, retrieved new information from the NRCS database to update exhibits or add new ones, and IPC's expert witness directed Dr. Fouty to the NRCS website on multiple occasions in his cross-examination testimony (*see below*). As such the documents were being actively used.

NRCS databases (SSURGO and STATSGO

a) IPC references these two databases extensively in its documents (see Fouty Closing Brief, Table 3, p. 24).

b) IPC accessed the NRCS databases to create Madison Rebuttal Exhibit D which was an updated Exhibit I, Attachment I, Table I-2-1. IPC accessed the NRCS database again to correct errors in Madison Rebuttal Exhibit D creating Madison Sur-sur-rebuttal Exhibit A.

Q. And if we go to what's Attachment A or Exhibit A to your sur-surrebuttal, is this an updated revision of the Exhibit D?

A. Yes, it is. And updated because the map IDs that were shown previously weren't correct. There was an area that was -- I believe there was an alternative route that was included, and there was an error in this original table, and I saw ID numbers. Everything else in the table is correct. The only error was trying to match soils, **if you're going to the NRCS database** and looking up soils by ID number rather than by soil name. Some of them were not correct, and they've been corrected in this

[29] Federal Resource Management Plans: 1990 Wallowa-Whitman National Forest Land Resource Management Plan, the 1989 BLM Baker Resource Management Plan Record of Decision, and the 2002 BLM Southeastern Oregon Resource Management Plan and Record of Decision

updated table (Madison cross-examination, January 11, 2022, p. 169, lines 17-25 and P. 170, Line 1-5)

c) IPC accessed the NRCS database to create Madison sur-sur-rebuttal Exhibit B which was a screenshot of Annual Data Refresh of Soil Survey Data – NRCS page.[30]

d) Mr. Madison made frequent mention of the NRCS databases in during in his cross-examination testimony[31]

e) Mr. Madison directed Dr. Fouty to the NRCS databases multiple times during cross-examination:

> From this table -- this table [ASC Exhibit I Table I-6. Soil Reclamation Factors in Construction Disturbance Area[32]], is a summary of data, but **you can go to the NRCS soils data and the mapping** and determine all of that data. This is not intended to present that. This is a summary. (Madison cross-examination, January 11, 2022, , p. 147, line 10-16)
>
> The table [**Exhibit I, Attachment I, Table I-2-1[33]]** we provided would allow you to do that analysis yourself. It didn't include all of this information, **but it directs you to where to look in the NRCS database** if you're inclined to do that analysis yourself. (Madison cross-examination, January 11, 2022, p. 148, line 16-20)
>
> In our opinion, it was better to summarize that data into, you know, tables that you could digest. You could see the total impact of these factors rather than going to hundreds of pages or tables to present all of the crosswalks for all of the factors. You can get to that. **It's not presented in the document, but it's available in the NRCS database**, (Madison cross-examination, January 11, 2022, p. 149, Lines 2-9).
>
> "…we could have provided many, many more tables to be able to drill down to a more granular level on soil types by location. And it was determined that, you know, if someone, Dr. Fouty, for example, wanted to find that information, they certainly can find it**. It's available. It's public on -- it's on the NRCS website.** To provide that -- you know, she's asked one specific question. Yes, we could have provided that. But there could be 20 questions just like that. You know, could you provide this data with some other data? And yes, you can. But it was determined that what would be most useful for the reviewers of the permit was to have summary tables, because the dataset is hundreds or thousands of pages. And it's not -- it's not reasonable to present all of that data, not knowing ahead of time what the questions would have been. They certainly would be provided in a crosswalk. **I think Dr. Fouty could find that information herself without us doing more work**,.." (Madison cross-examination, January 11, 2022, p. 150, lines 2-22)

[30] Madison Sur-sur rebuttal, Exhibit B which was a screenshot of Annual Data Refresh of Soil Survey Data – NRCS page

[31] Madison cross-examination, January 11, 2022, p. 54 lines 1-7, p. 58, lines 1-25, p. 61 lines 22-25 and p. 62, lines 1-5; p. 62, lines 16-20; p. 115, lines 2—6; p. 147, line 10-16; p. 148, line 16-20; p. 149, Lines 2-9; p. 150, lines 2-22; p. 153, lines 9-13

[32] ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 20 of 115

[33] Exhibit I, Table I-2-1

Mr. Madison referenced examining the NRCS data in his cross-examination relative to soil mapping and rainfall, information that was not presented to the public and exists only in his statement during cross-examination.

> "And if you look at the **NRCS soils mapping, it identifies a range of rainfall** that's typical in each of those soil types. And within that range, there will be dry years and wet years, and we will establish vegetation, whether it's a dry year or wet year. (Madison cross-examination, January 11, 2022, p. 115, lines 2—6)"

> "We're likely not going to dig a hole to see how deep bedrock is. **We're going to use the NRCS database**, if we're concerned, or we're going to look at the vegetation that's on our paired site, which is very reflective, as we've discussed." (Madison cross-examination, January 11, 2022, p. 153, lines 9-13)

1. Federal Resource Management Plans[34]

Rather than be repetitive, Dr. Fouty directs the Council to **Exception 30** when these documents are discussed and why they should be considered part of the evidentiary record.

2. Third Oregon Climate Assessment Report (2017)

This document was prepared by the Oregon Climate Change Research Institute at the direction of the Oregon State Legislature in 2007 via House Bill 3543 and the report is a result of direct legislative action. The summary of this bill is as follows:

> Establishes greenhouse gas emissions reduction goals. Creates Oregon Global Warming Commission. Establishes membership and duties. Directs commission to **recommend ways to** coordinate local and state efforts to [*halt growth of*] **reduce** greenhouse gas emissions. [*Directs Public Utility Commission to consider environmental impacts of emissions of greenhouse gases attributable to electric companies.*] Creates Oregon Climate Change Research Institute.
>
> [*Appropriates moneys from General Fund to State Department of Energy for administrative expenses of commission and to Department of Higher Education to fund Oregon Climate Change Research Institute.*]
>
> Declares emergency, effective on passage.

In conclusion, IPC's objections are related not to concerns that Dr. Fouty incorrectly stated

[34] Federal Resource Management Plans: 1990 Wallowa-Whitman National Forest Land Resource Management Plan, the 1989 BLM Baker Resource Management Plan Record of Decision, and the 2002 BLM Southeastern Oregon Resource Management Plan and Record of Decision

information, but that Dr. Fouty correctly stated information that makes clear that IPC has failed to meet the requirements of the Soil Protection standard and the Site Certificate Application Requirements. **Dr. Fouty use of them is appropriate and Council should consider her statements that reference them in their entirety**. See *Fouty Opposition to IPC's MTS Portions of Fouty Closing and Response Brief* for Soil Protection standard and Issue SP-1 (p.1-6).

**Exception 35:** Opinion, p. 265 under *Ruling on Idaho Power's Motion to Strike portions of Dr. Fouty's Response Brief on Issue SP-1*

> **The ALJ is in err that *"A citation to, or excerpt from, a database, report, or management plan in the ASC or Proposed Order does not make the entirety of that database, report, or management plan part of the evidentiary record of the contested case."***

As discussed in depth under **Exceptions 30 and 34,** the ALJ should have taken judicial notice of the referenced documents because they are government documents or databases, IPC does not dispute their authenticity, and IPC, and its expert witness, have relied on them extensively as evidence of its compliance with the Soil Protection standard and the Site Certificate Application Requirements.

The AJL's refusal to allow cited documents to be examined prevents information provided by the applicant from being verified for accuracy and context. Without the ability to verify this information and assess the information in its totality, the citation or excerpt or evidence it is said to support becomes meaningless. **The ALJ's opinion about these documents is incorrect unless all references to them found within the IPC documents, Mr. Madison's rebuttal, sur-sur**

**rebuttal, and cross-examination testimony are stricken from the record as well and given no weight**.

**Exception 36:** Opinion, p. 265 under *Ruling on Idaho Power's Motion to Strike portions of Dr. Fouty's Response Brief on Issue SP-1*

> **The ALJ is in err that *"challenged statements [by IPC] in Ms. Fouty's Response Brief are based on information that is not part of the evidentiary record. For the reasons previously explained, the ALJ gives the challenged figures and statements no weight."***

With the sole exceptions of Figure 1 in *Fouty Closing Brief* (p. 19) and Figure A-2 in *Fouty Response Brief to IPC Closing* (p. 62) (they are the same figure) all of Dr. Fouty's challenged figures and statements should be given full weight. As discussed under **Exceptions, 30, 34 and 35** the ALJ should have taken judicial notice of the referenced documents because they are government documents or databases, IPC does not dispute their authenticity, and IPC, and its expert witness, have relied on them extensively as evidence of its compliance with the Soil Protection standard. Dr. Fouty's statements are based on information from sources that IPC, and its expert witness, used in its documents, and in the case of IPC's expert witness, referenced during his cross-examination on January 11, 2022.

**CONCLUSION**

In conclusion, based on the exceptions raised in this response to the PCCO, Dr. Fouty requests that the Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. The IPC's soils analysis of impacts is incomplete and contains significant errors, and thus fails to

provide the information needed to determine if IPC's project would be in compliance with the Soil Protection standard. In the alternative, Dr. Fouty requests that EFSC remand this issue back to ODOE and IPC and that prior to approval of the site application a project level soils analysis is done and then reevaluated for compliance with the Soil Protection standard. A new, and correct analysis would involve the following:

1. Use of the appropriate NRCS soils database (SSURGO) to analyze soil map unit properties where it exists (about 70%) in the project area and only use STATSGO when SSURGO information is absent.

2. Examination of the portion of the soil profile that is the area of soil productivity (topsoil).

3. Analysis of the appropriate dynamic soil properties in the topsoil that would show change as a result of impacts (bulk density, topsoil thickness, soil organic matter/SOC, available water capacity) as well as those static properties that IPC used to describe erosion potential and reclamation limitations (K factor, Wind Erodibility Group (WEG), T factor, Droughty, Stony/Rocky)

4. Create a map of soil types that represents combined characteristics of various topsoil properties that influence reclamation potential of vegetation and soil productivity,

5. Analyze relationships between soil types, habitat types, and climate to create mitigations that take into account differences in existing vegetation types as a function of soil type and climate and adjust the Reclamation and Revegetation Plan to create site-specific vegetation and soil reclamation plan.

6. Examine existing literature for soil mitigations that are effective at reversing soil impacts and making them site-specific to the various soil types that have been identified, taking into account expected climate changes

7. Define expected time frames of soil recovery as a function of particular impact type (i.e., erosion is irreversible, compaction may be on the order of decades)

8. reclamations must be designed that are specific to soil map unit characteristics and are directly tied to dynamic soil properties.

## CERTIFICATE OF MAILING

On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/_____
Suzanne Fouty, PhD
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**BEFORE THE ENERGY FACILITY SITING COUNCIL**

**OF THE STATE OF OREGON**

| | |
|---|---|
| In the Matter of the Application for Site Certificate for the<br><br>BOARDMAN TO HEMINGWAY TRANSMISSION LINE | APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUE SP-1<br><br>OAH Case No. 2019-ABC-02833 |

**July 14, 2022**

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## I. INTRODUCTION

Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order, Applicant Idaho Power Company ("Idaho Power" or the "Company") submits its Response to Limited Parties' Exceptions for Issue SP-1.

## II. STANDARD OF LAW

In a contested case before the Energy Facility Siting Council ("EFSC" or the "Council"), the applicant bears the burden of proof to establish by a "preponderance of the evidence"[1] that the proposed facility complies with the Council's statutes, ORS 469.300 to 469.570, and that the Application for Site Certificate ("ASC") and proposed site conditions—as modified in Oregon Department of Energy's ("ODOE") Proposed Order—satisfy each of the Council's siting standards.[2] Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true.[3] Furthermore, the applicant must demonstrate by a preponderance of evidence that the facility complies with all other statutes, administrative rules, and local government ordinances "identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility."[4]

Parties or limited parties "with specific challenges to findings, conclusions and/or recommended site certificate conditions in [ODOE's] Proposed Order bear the burden" of producing evidence in support of the facts alleged or positions taken on the identified issue, and

[1] OAR 345-021-0100(2) ("The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances."); *see also* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.").
[2] OAR 345-022-0000(1)(a).
[3] *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).
[4] OAR 345-021-0100(2); OAR 345-022-0000(1)(b).



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the burden of convincing the trier of fact that the alleged facts are true or the position on the identified issue is correct.[5] In particular, the party or limited party must establish how the applicant failed to satisfy EFSC's siting standards and/or how ODOE "erred in its findings, conclusions and/or recommended site certificate conditions."[6] To meet this burden of proof, parties challenging the Proposed Order must provide factual testimony or evidence to substantiate the claim asserted;[7] unsubstantiated factual arguments or legal conclusions are insufficient to demonstrate the applicant's failure to establish compliance with any applicable standard.[8]

After the hearing and briefing phases of a contested case, the Hearing Officer must issue a Proposed Contested Case Order stating the Hearing Officer's findings of fact and conclusions of law.[9] Parties and limited parties may then file any exceptions to the Proposed Contested Case Order for the Council's consideration.[10] If a party or limited party files exceptions, the party or limited party must identify for each exception the finding of fact, conclusion of law, or recommended site certificate condition to which the party excepts and must state the basis for the exception.[11]

[5] Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, "First Order on Case Management"]; Second Order on Case Management at 7 (Aug. 31, 2021) (emphasis in original); *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).
[6] First Order on Case Management at 11; Second Order on Case Management at 7.
[7] First Order on Case Management at 11; Second Order on Case Management at 7.
[8] First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.
[9] OAR 345-015-0085(4).
[10] OAR 345-015-0085(5).
[11] OAR 345-015-0085(5).



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## III. RESPONSES TO LIMITED PARTIES' EXCEPTIONS

### A. Issue SP-1

The Hearing Officer granted limited party status to Suzanne Fouty and the STOP B2H Coalition ("STOP B2H") to raise Issue SP-1,[12] which asks:

> *Whether the Soil Protection Standard and General Standard of Review require an evaluation of soil compaction, loss of soil structure and infiltration, and loss of stored carbon in the soil and loss of soil productivity as a result of the release of stored carbon in soils.*[13]

In the Proposed Contested Case Order, the Hearing Officer concluded:

> Neither the Soil Protection Standard nor the General Standard of Review require Idaho Power to evaluate soil compaction, loss of soil structure and infiltration, loss of stored carbon in the soil, and/or the loss of soil productivity as a result of the release of stored carbon in soils to demonstrate compliance with the Council's standards. Idaho Power presented sufficient information for the Council to find that the proposed facility, taking into account mitigation, is not likely to result in a significant adverse impact to soils.[14]

Dr. Suzanne Fouty filed exceptions to the Proposed Contested Case Order and STOP B2H adopted Dr. Fouty's exceptions.[15] For the reasons discussed below, Dr. Fouty's exceptions do not identify any incorrect finding of fact or conclusion of law, and for that reason, Idaho Power requests that the Council adopt, without modification, the Hearing Officer's findings of fact and conclusions of law relevant to the Soil Protection Standard.

[12] Amended Order on Party Status, Authorized Representatives and Properly Raised Issues for Contested Case at 82 (Dec. 4, 2020).
[13] Second Order on Case Management at 6.
[14] Proposed Contested Case Order at 142.
[15] STOP B2H Coalition / Exceptions to Proposed Contested Case Order (June 30, 2022), p. 36 of 48.



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## 1. Response to Introduction and Background of Exception

Before addressing Dr. Fouty's discrete exceptions, a response to the Introduction and Background section of her exception filing is provided. Dr. Fouty raises three main points in these sections, which Idaho Power addresses as follows.

### *a. Level of Detail of Soil Data*

Dr. Fouty asserts that the Hearing Officer's statements imply that the applicant may provide "whatever level of detail the applicant choose regardless of what is required to address the standard."[16] Dr. Fouty requests that the Council "correct this mindset."[17]

Dr. Fouty's interpretation of requirements for compliance with the Soil Protection Standard do not comport with industry, county, or state standards for construction projects. Dr. Fouty fails to provide *any* reference to 1) government permitting requirements, 2) agency-issued soils management documents utilized for state, county, local construction projects that have been required by for EFSC approval, or 3) proof of industry standards (testimony by professionals in the industry, project descriptions, literature review of commonly used construction practice in rea world settings, etc.) to demonstrate that the level of soils information she is expecting an applicant to provide to demonstrate compliance with the Soils Protection Standard is consistent with soils management of any large-scale construction projects. On the other hand, Idaho Power offered rebuttal and sur-sur-rebuttal testimony from expert witness Mark Madison, a licensed Civil, Environmental, and Agricultural Engineer, with over 40 years of experience providing technical

[16] Fouty Exceptions at 2.
[17] Fouty Exceptions at 2.



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expertise on soil management during construction and operation of projects.[18] Mr. Madison addressed this topic at the cross-examination hearing and explained at length that Dr. Fouty's requests are not consistent with industry standards and that Idaho Power and others are not expected to perform the academic research project level of inquiry Dr. Fouty demands, but rather need to conform to industry standards, which rely on agency-issued proven guidance documents.[19]

Idaho Power addresses Dr. Fouty's exception in further detail under its response to Exceptions 1, 24, and 19.

*b. Evidence Provided After the Close of the Evidentiary Record*

Dr. Fouty takes exception with the Hearing Officer granting Idaho Power's motion to strike Dr. Fouty's statements that were made in reliance on references not in the evidentiary record.[20] In support of this argument, Dr. Fouty states Idaho Power is including statements and information without the ability of the public (or Council) to verify its accuracy, and therefore, her documents should be introduced into the record.[21] She further argues that "this is not standard protocol in any project Dr Fouty has done when working for the USDA Forest Service or as a researcher."[22] Dr. Fouty's claims are without merit.

[18] *See* Idaho Power/ Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit A, Curriculum Vitae of Mark Madison.
[19] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 187, line 21 – page 188, line 3.
[20] Fouty Exceptions at 3.
[21] Fouty Exceptions at 3.
[22] Fouty Exceptions at 3.



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First, as a point of clarification, the Hearing Officer did not strike Dr. Fouty's statements from the record, but rather she gave no weight to Dr. Fouty's statements made in reliance on references that were not in the evidentiary record.[23]

Second, Dr. Fouty's attempt to question the procedural legitimacy of the contested case process by making comparisons to her time working on projects with the Forest Service is irrelevant. The procedures governing the contested case process are established by Oregon law and the Council's rules. On the other hand, the procedures used by the Forest Service are wholly inapplicable to the Council's contested case process.

Finally, Dr. Fouty argues that she is referring to documents that Idaho Power relied on in preparation of its ASC and therefore the references should be considered in the record so the Council can verify its accuracy.[24] These statements are inaccurate for several reasons. First, Idaho Power performed a review of the administrative record and confirmed that no portions of the Federal Resource Management Plans that Dr. Fouty references were in the record, with the exception of several pages included in support of the analysis for Exhibit R, identifying important scenic resources, because the Scenic Resources Standard specifically requires review of federal land management plans.[25] There is no similar nexus to federal land management plans within the Soil Standard, and none of the pages from the plans referenced by Dr. Fouty are in the record.

Additionally, Idaho Power listed several of these documents as references used in preparation of ASC documents,[26] and in discovery, Idaho Power provided website links to these

[23] Proposed Contested Case Order at 264-265.
[24] Fouty Exceptions at 3.
[25] OAR 345-022-0080.
[26] ASC, Exhibit I at I-36 – I-37 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 40-41 of 115).



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documents in response to a discovery request from STOP B2H,[27] however the documents themselves are not in the record, and Dr. Fouty fails to provide a citation to the record proving otherwise.[28] The Hearing Officer issued a case management order that specifically explained that *a website link to access a document or a citation to a reference does not constitute the document as being in the record.*[29] If any party wished to question the accuracy of the documents or Idaho Power's reliance on them, the parties were allowed to request the document from Idaho Power during the discovery phase and enter it into the record as an exhibit to testimony. Alternatively, many of the documents Idaho Power relied on were publicly available, Dr. Fouty could have easily raised concerns about the accuracy or use of these documents during the testimony or cross-examination phase of the contested case, entering the referenced material into the record at that time.

Idaho Power addresses Dr. Fouty's exception in further detail under its response to Exceptions 30, 34, 35, and 36.

*c. Dr. Fouty's Request for Remand*

Dr. Fouty requests that the Council remand the Hearing Officer's Proposed Contested Case Order back to ODOE and for Idaho Power to perform a new soil analysis in accordance with her specific requests.[30] Idaho Power previously briefed and provided expert testimony from Mark

[27] *See* Suzanne Fouty / Fouty Cross-Examination Exhibit M, Idaho Power's Responses to STOP B2H's Discovery Requests (Feb. 5, 2021).
[28] Idaho Power acknowledges that several pages from the Resource Management Plans are included as excerpts supporting Exhibit R, however these excerpts do not include the pages referenced by Dr. Fouty and were provided for an entirely different purpose.
[29] Second Order on Case Management at 2 ("Links to access proffered documents and or information will not suffice. The party/limited party should attach the document (or at a minimum, the pertinent portions of a voluminous document, to the written testimony).").
[30] Fouty Exceptions at 4.



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Madison explaining why these requests are unnecessary. Regardless, Idaho Power provides a brief response to these requests and directs the Council to the exceptions where the request is discussed in further detail, if applicable. In some cases, Dr. Fouty's specific request is being raised for the first time in her exceptions. For the following reasons, the Council should deny Dr. Fouty's requests.

i. "Use of the appropriate NRCS soils database (SSURGO) to analyze soil map unit properties where it exists (about 70%) in the project area and only use STATSGO when SSURGO information is absent."[31]

Idaho Power fully briefed this issue in its Response Brief. As Idaho Power explained in its briefing, the use of State Soil Geographic Database ("STATSGO") data is consistent with other EFSC projects and meets industry standards.[32] Dr. Fouty fails to provide any reference to Council rules or agency-issued requirements that soils analysis must be completed with the Soil Survey Geographic Database ("SSURGO"), data, which as Dr. Fouty concedes, is not readily available for the entire analysis area. Idaho Power provides a detailed response to this assertion in response to Exceptions 1 and 24 (addressing major soil types) and 7, 22, and 25 (addressing soils databases).

ii. "Examination of the portion of the soil profile that is the area of soil productivity (topsoil)."[33]

This issue was raised in Dr. Fouty's Closing Arguments, and as Idaho Power explained in its Response Brief, this request should be rejected. First, the evaluation of soil properties and soil impacts has already been performed in the portion of the soil profile that Dr. Fouty is referring to. In Exhibit I of the ASC, Idaho Power identified the major soil types based on those within the

[31] Fouty Exceptions at 4.
[32] *See* Idaho Power's Response Brief and Motion to Strike for Contested Case Issue SP-1 (Mar. 30, 2022) at 29-33.
[33] Fouty Exceptions at 4.



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upper soil horizons.[34] Therefore, Idaho Power already includes information for Horizon A, which is the section of the soil profile that includes topsoil. Second, the request is incredibly vague; it is not clear what would constitute "examination" to satisfy this request, particularly because all evaluation and mitigation measures already proposed by Idaho Power fail to meet Dr. Fouty's opinion of what is acceptable to comply with the Soil Protection Standard. Finally, Idaho Power provided the soil properties available through the NRCS databases for the soil's A horizon, which is the horizon containing the topsoil.[35] As such, this request should be rejected. This issue is discussed in additional detail in response to Exception 1 and 24 (Major Soil Types) and Exceptions 7, 22, and 25 (Soils Databases).

iii. "Analysis of the appropriate dynamic soil properties in the topsoil that would show change as a result of impacts (bulk density, topsoil thickness, soil organic matter/SOC, available water capacity) as well as those static properties that [Idaho Power] used to describe erosion potential and reclamation limitations (K factor, Wind Erodibility Group (WEG), T factor, Droughty, Stony/Rocky)"[36]

This issue was fully litigated in this case, and Idaho Power provided substantial expert witness testimony from Mark Madison explaining why the soil properties that Dr. Fouty is requesting are unnecessary and will provide no meaningful insight into the Project's soil impacts or result in any additional mitigation measures not already proposed by Idaho Power.[37] This issue is discussed in additional detail in response to Exceptions 6 and 23 (Dynamic Properties).

[34] ASC, Exhibit I at I9-10 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 13-14 of 115).
[35] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 58 of 93.
[36] Fouty Exceptions at 5.
[37] *See* Idaho Power/ Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 56-61 of 93; Idaho Power's Closing Arguments for Contested Case Issue SP-1 (Feb. 28, 2022) at 31-34.



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iv. "Create a map of soil types that represents combined characteristics of various topsoil properties that influence reclamation potential of vegetation and soil productivity[.]"[38]

This is the first time Dr. Fouty is making this request, which should be rejected because Idaho Power is required by the Reclamation and Revegetation Plan ("Reclamation Plan") to achieve revegetation success. Therefore, regardless of the information presented on the map, Idaho Power must implement reclamation activities necessary to support revegetation, which thereby addresses restoring soil productivity. This issue is discussed in additional detail in response to Exception 6 (Bulk Density), 10 (Monitoring Plans Addressing Soil Compaction and Loss of Soil Carbon), and 12 (Sufficient of Evidence Provided).

v. "Analyze relationships between soil types, habitat types, and climate to create mitigations that take into account differences in existing vegetation types as a function of soil type and climate and adjust the Reclamation and Revegetation Plan to create site-specific vegetation and soil reclamation plan."[39]

Idaho Power's expert witness Mark Madison provided testimony on this request, specific to the overlap of soil types and habitat types.[40] Idaho Power's expert witness Mr. Madison provided extensive testimony addressing the overlay of habitat types and soil types. In his testimony, Mr. Madison states that an overlay of habitat (or general vegetation types) provides no additional information related to reclamation, as reclamation actions will be applied at the site-specific level where this information will be combined to apply the appropriate reclamation actions.[41]

[38] Fouty Exceptions at 5.
[39] Fouty Exceptions at 5.
[40] *See* Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 57-75 of 93.
[41] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 68 of 93.



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Mr. Madison's testimony further explains why Dr. Fouty's request is not only unnecessary but also is unworkable—"there is no software, method, process or multivariate tool that can comprehensively evaluate all the soil properties that Dr. Fouty is requesting and reliably prescribe spatially explicit soil reclamation/protection practices or measures that are different than those proposed by Idaho Power."[42]

Additionally, Idaho Power fully briefed Dr. Fouty's request to address "climate" and its impacts on the Reclamation Plan.[43] Specifically, Idaho Power is required to achieve reclamation success regardless of the climate or weather conditions that may change over time in the area of reclamation.[44] While Idaho Power understands Dr. Fouty's concerns that some areas may become more arid or some areas may receive heavier rain as a result of climate change,[45] Idaho Power does not need to consider these changes because it will be required to achieve reclamation success regardless.[46] These climatic changes may increase the time, difficulty, or cost of reclamation, but they are not mandatory considerations.[47]

*First*, the time horizon associated with climate change, as opposed to weather patterns, is on a significantly longer time scale than Project-related soil disturbances—50 years versus the one to three years of project construction.[48] Idaho Power is concerned with weather patterns over the next few years during initial establishment of vegetation under the Reclamation Plan. It would be

[42] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 10 of 38.
[43] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 35-36 and 52-54.
[44] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 52.
[45] *See* Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at pages 112-118.
[46] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 52.
[47] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 52.
[48] *See* Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 114, lines 14-23.



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difficult to prepare for weather events that are unpredictable; it is more realistic to review the past 10 to 20 years of historic weather data and identify patterns within that weather data.[49]

*Second*, regardless of climatic challenges that the Company may encounter, Idaho Power has no option for seeking a waiver or otherwise "opting out" if reclamation becomes too challenging.[50] The Reclamation Plan does not allow the Company to seek a waiver from its reclamation obligations, even when those challenges result from climate change.[51] Idaho Power will be required to achieve reclamation success as measured by the vegetative density of the control site identified during preconstruction monitoring.[52] This means that both the control site and the treatment site will experience the effects of climate change.[53] Idaho Power's expert witness, Mr. Madison, recounted what these challenges may look like from his own recent experience from reclamation of a site during a prolonged drought in California.[54] Mr. Madison acknowledged the challenges that the site faced made the reclamation process longer and more costly, but they were eventually successful and were required to achieve success, notwithstanding those weather-driven challenges:

> So our standard is success based on the condition of the adjacent site, which has also survived drought, which has also gone through very wet periods. And if we're less fortunate, we may try to do our revegetation during a future drought, and it will become more difficult. And that has happened in the past many times.

[49] *See* Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 114, line 14 – page 115, line 13.
[50] All mention of waivers/waiving reclamation obligations was removed from the draft Reclamation Plan during ODOE's review. *See* Proposed Order, Attachment P1-3: Reclamation Plan at 21 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9132 of 10016).
[51] *See* Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 172, line 24 – page 174, line 15.
[52] *See* Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 113, lines 7-14.
[53] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 113, lines 7-14.
[54] Madison testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 113, lines 15-19.



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> I'm working on a project in California that we've recently gone through some severe droughts, and we reestablished vegetation. It takes a little more effort, but it certainly can be done. These targets are reasonable.[55]

Consistent with the example provided by Mr. Madison, Idaho Power does not need to account for challenges that may arise from climate change before construction of the Project, because the Company will address these unpredictable challenges as they arise and address them in order to achieve reclamation success until a site is approved for release.

vi. "Examine existing literature for soil mitigations that are effective at reversing soil impacts and making them site-specific to the various soil types that have been identified, taking into account expected climate changes[.]"[56]

Idaho Power fully briefed Dr. Fouty's request in its Closing Arguments and presents those arguments in response to Dr. Fouty's Exceptions 6, 8, 9, 20, and 27. Dr. Fouty's request is without merit for the following reasons. First, Idaho Power is not required to rely on an independent literature review for identification of mitigation or reclamation measures, but instead must apply industry standards, such as agency-issued Best Management Practices ("BMPs"). The Council's rules require the applicant to provide "[i]nformation from reasonably available sources" in response to the Exhibit I information requirements.[57] Reasonably available sources include agency-issued BMPs and not academic journals that are often not publicly available. [58]Second, there is no support for Dr. Fouty's assertion that Idaho Power is required to "reverse soil impacts" in the Council's rules per the Council's definition of "mitigation."[59] Instead, that definition,

[55] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 113, lines 11 – 19.
[56] Fouty Exceptions at 5.
[57] OAR 345-021-000(1)(i).
[58] Closing Brief of Suzanne Fouty (Feb. 28, 2022) at 61.
[59] *See* Idaho Power's Response Brief and Motion to Strike for Contested Case Issue SP-1 at 44-45.



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includes terms such as "[p]artially or completely" and "[r]educing or eliminating" when addressing mitigation for impacts.[60] These terms cover a range from partially to completely, indicating that full reversal of an impact is not the standard. Finally, while Idaho Power may select from a set of generic BMPs, the Company will need to implement the *appropriate* BMP depending on soil type and ground conditions encountered; it would be a waste of time and resources to simply implement a BMP that would be inappropriate for the ground conditions. The range of BMPs available in agency-issued documents are numerous and are selected depending on ground conditions encountered. Furthermore, Idaho Power's proposed approach to addressing impacts to compaction has been pre-approved by the Oregon Department of Environmental Quality ("ODEQ"), as evidenced by ODEQ's permit acknowledgement.[61] Any gaps in BMPs will be identified during the final permitting process and implemented accordingly in order for Idaho Power to receive its ODEQ-issued 1200-C permit.[62] Furthermore, Idaho Power will be required to prove successful reclamation and its construction sites will be inspected by ODEQ under its 1200-C permit to ensure that appropriate mitigation measures are being utilized.[63] This issue is discussed in additional detail in response to Exception 19 (Sources of Information) and 30 (Industry Standards).

In response to Dr. Fouty's claims that Idaho Power must take into consider climate change when selecting its mitigation actions, Idaho Power fully briefed these assertions.[64] Furthermore, during cross-examination, Mr. Madison explained why climate change issues are irrelevant to

[60] OAR 345-001-0010(33) (definition of mitigation).
[61] *See* ASC, Exhibit I, Attachment I-4 (ODOE – B2HAPPDoc3-17 ASC 09b_Exhibit I_Soil_ASC_Part 2 2018-09-28. Page 87 of 88).
[62] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 19.
[63] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 32 of 38.
[64] *See* Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 52-54.



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Idaho Power's selection of mitigation measures—because the period of concern for the Project is over the next few years, not over the significantly longer time domain (e.g., 50 years) that climate change is typically modeled on:

> These climate [change] issues are typically modeled on 50-year periods. This project would occur over the next few years. It may be a one- to three-year project. It will have disturbance in specific areas, maybe as short as half of a year or a portion of a year. So the fact that we're looking at drought in 50 years, if that's determined to be fact, is not relevant to the project. The project is going to deal with the weather we get in the next few years, and we can't predict that.[65]

vii. "Define expected time frames of soil recovery as a function of particular impact type (i.e., erosion is irreversible, compaction may be on the order of decades)[.]"[66]

Idaho Power fully briefed this request in its Response Brief.[67] A review of the Council's rules, specifically the Council's definition of mitigation, demonstrates that Idaho Power is not required to meet any particular time frame of recovery. As it relates to Dr. Fouty's concern regarding erosion, Idaho Power will 1) avoid highly erodible soils in the first place, and 2) implement BMPs to protect soils from erosion during construction, in accordance with the ODEQ issued 1200-C permit.[68]

Furthermore, Dr. Fouty's assertion that compaction may be in the order of decades is misleading as it fails to take into consideration the fact that Idaho Power proposes compaction mitigation methods for the site, which includes ripping and loosening of soils that will partially rectify the impacts of compaction.[69] Regrowth of vegetation would take decades to be restored,

[65] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 114, lines 14 – 23.
[66] Fouty Exceptions at 5.
[67] Idaho Power's Response to Contested Case Issue SP-1 at 19-21.
[68] Idaho Power's Response to Contested Case Issue SP-1 at 19-21.
[69] Idaho Power's Closing Argument for Contested Case Issue SP-1 at 19.



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and because Idaho Power is required to restore vegetation in areas where it has been removed, the Company would never be released from its obligations if it failed to reverse compaction sufficiently to allow vegetation to regrow.[70]

This issue is discussed in additional detail in response to Exception 27 (Mitigation Requirements).

viii. "[R]eclamations must be designed that are specific to soil map unit characteristics and are directly tied to dynamic soil properties."[71]

As previously discussed, Idaho Power is required by the Reclamation Plan to prove revegetation success. In many instances, the existing vegetative cover is closely tied to the underlying soil map units.[72] Therefore, soil map specific reclamations are not necessary as Idaho Power must implement reclamation activities necessary to support revegetation of the previously existing land cover, which it will identify during on the ground monitoring conducted pre and post disturbance. This issue is discussed in additional detail in response to Exception 10 (Monitoring Plans Addressing Compaction and Loss of Soil Carbon) and Exception 30 (Industry Standards).

**2. Exceptions 11, 13, 16, 18 – Scope of Soil Impacts Required to Be Analyzed under the Soil Protection Standard**

Idaho Power addresses Dr. Fouty's Exceptions 11, 13, 16, and 18 together as they relate to Dr. Fouty's assertion that certain soil impacts must be evaluated to satisfy the Soil Protection Standard and the statutory interpretation of the Standard. Idaho Power's arguments presented in response to these exceptions are relevant to several other responses, specifically the application of

[70] *See* Proposed Order, Attachment P1-3 at 32 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9143 of 10016).
[71] Fouty Exceptions at 5.
[72] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, pp. 21-22, 29-30 of 38.



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statutory interpretation, and therefore, Idaho Power refers back to this section throughout the document in support of its arguments.

In Exception 11, Dr. Fouty takes exception to the Hearing Officer's conclusion of law that "[neither] the Soil Protection Standard nor the General Standard of Review require Idaho Power to evaluate soil compaction, loss of soil structure and infiltration, loss of stored carbon in the soil, and/or the loss of soil productivity as a result of the release of stored carbon in soils to demonstrate compliance with the Council's standards."[73] Dr. Fouty asserts that because the applicable Council rules use the term "including, but not limited to," these impacts should be addressed by the applicant.[74]

In Exception 13, Dr. Fouty takes exception to the Hearing Officer's finding that "[t]he Council's standards do not require the impact evaluations proposed by Dr. Fouty."[75] Dr. Fouty refers to her Exception 11 and 12 (addressed later in this document) in support of Exception 13.

In Exception 16, Dr. Fouty asserts that when applying the "test of commonality" (as she terms it) that "the impacts of soil compaction, loss of soil structure, loss of infiltration and loss of stored soil carbon clearly meet the test requirements."[76]

In Exception 18, Dr. Fouty makes four assertions, her first assertion is addressed here, and the remaining three are discussed later in the document at "Exception 18 – Additional Discussion on Scope of Standard." Dr. Fouty takes exception to the Hearing Officer's conclusion that "the plain language of the Soil Protection Standard does not require the applicant to provide such detail

[73] Proposed Contested Case Order at 142; Fouty Exceptions at 16.
[74] Fouty Exceptions at 16.
[75] Proposed Contested Case Order at 259; Fouty Exceptions at 18.
[76] Proposed Contested Case Order at 260; Fouty Exceptions at 20.



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and analysis in every site certificate application."[77] Dr. Fouty asserts that the plain language is very clear that the soil impacts that must be considered extend beyond the examples listed by use of the phrase "*including, but not limited to*,[78] an assertion which Idaho Power nor the Hearing Officer disagree with. However, Dr. Fouty goes on to imply that the phrase "including but not limited to" allows the Soil Protection Standard to cover a range of impacts, without limitation. Dr. Fouty's interpretation of the phrase is unsupported and not grounded in legal analysis. For the following reasons, her reliance on the phrase "including, but not limited to" to mean the scope of Soil Protection Standard is limitless, is incorrect.

In support of her Exceptions 11, 13, 16, and 18, Dr. Fouty offers her opinion of the proper interpretation of the Council's rules, but does not apply statutory interpretation principles relied upon by Oregon law. In short, she simply asserts that when a rule uses the phrase "including, but not limited to," it means that the list of impacts that an applicant must evaluate is without limitation and all identifiable impacts must be evaluated for compliance with the Soil Protection Standard. Dr. Fouty's interpretation of the Council's rule is not supported by Oregon case law or principles of statutory interpretation.

The arguments raised in Dr. Fouty's Exceptions 11, 13, 16, and 18 were fully addressed by Idaho Power through briefing. As explained below, Dr. Fouty's Exceptions 11, 13, 16, and 18 are unsupported for the following reasons, and the Council should reject Dr. Fouty's Exceptions and 11, 13, 16, and 18.

[77] Proposed Contested Case Order at 260; Fouty Exceptions at 21
[78] Fouty Exceptions at 21-22.



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*a. The Commonality Among the Types of Soil Impacts Set Forth in the Soil Protection Standard Indicates the Council's Intent to Limit Analysis of Impacts to Soils to Impacts That Are Typically Assessed and Addressed as Part of Construction and Operation of Energy Facilities.*

As Idaho Power has already briefed, principles of statutory construction *do not* support the conclusion that loss of soil structure, loss of infiltration and loss of stored soil carbon are required by the Soil Protection Standard, despite the Council's use of the term "including, but not limited to" in the Standard.[79]

i. Principles of Statutory Interpretation

As an initial matter, Idaho Power provides the principles of statutory interpretation and the language of the Standard at issue. The Soil Protection Standard, OAR 345-022-0022, requires that, in order for the Council to issue a site certificate, the Council must find that

> the design, construction and operation of the facility, taking into account mitigation, are not likely to result in a significant adverse impact to soils including, but not limited to, erosion and chemical factors such as salt deposition from cooling towers, land application of liquid effluent, and chemical spills.[80]

To determine if the Soil Protection Standard requires the applicant to evaluate "soil compaction, loss of soil structure and infiltration, and loss of stored carbon in the soil and loss of soil productivity as a result of the release of stored carbon in soils,"[81] it is first necessary to apply principles of statutory interpretation to discern the intent behind the regulation. Specifically, the general term—"impact to soils"—must be interpreted considering the commonality between the specific terms of the regulation—"erosion" and "chemical factors such as salt deposition from

[79] *See* Idaho Power's Closing Brief on Contested Case Issue SP-1 at 12-15.
[80] OAR 345-022-0022.
[81] Second Order on Case Management at 6.



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cooling towers, land application of liquid effluent, and chemical spills"—with that interpretation then applied to the impacts identified in the issue statement.

Although the Council's definition is an administrative rule rather than a statute, the general principles of statutory interpretation still apply.[82] When interpreting a statute, the goal is "to determine the meaning of the statute that the legislature that enacted it most likely intended."[83] To discern the intent behind a statute, Oregon courts apply a three-step process.[84] The first step is "an examination of text and context."[85] After examining text and context, the court may consult any legislative history that the parties have proffered.[86] Finally, "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."[87]

Statutory construction starts with the language of the statute itself, because the text and context provide "the best evidence of the legislature's intent."[88] When reviewing text and context, the courts will "consider[] rules of construction of the . . . text that bear directly on how to read the text."[89] When a statute includes "a general term accompanied by examples of the general term"[90] courts apply the principle of interpretation *ejusdem generis* to determine if a subject fits within examples provided in the statute. *Ejusdem generis* "serves to confine the interpretation of the

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[82] *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 612 n.4 (1993), *overturned on other grounds State v. Gaines*, 346 Or 160, 171-73 (2009) [hereinafter "*PGE*"] ("The same structure outlined above applies, not only to statutes enacted by the legislature, but also to the interpretation of laws and constitutional amendments adopted by initiative or referendum, as well as to the interpretation of regulations.").
[83] *Chase and Chase*, 354 Or 776, 780 (2014).
[84] *Gaines*, 346 Or at 171-73.
[85] *Gaines*, 346 Or at 171.
[86] *Gaines*, 346 Or at 172.
[87] *Gaines*, 346 Or at 172.
[88] *PGE,* 317 Or at 610.
[89] *PGE*, 317 Or at 611.
[90] *State v. Kurtz*, 350 Or 65, 74 (2011).



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general term according to one or more common characteristics of the listed examples."[91] In interpreting a general term, the courts "have considered the context provided by specific examples when those examples fall after the general term, *as well as* when they are placed before that term."[92] When the non-exclusive term, such as "and other", follows the specific list, "the general terms are not to be construed in their broadest sense, but are to be *limited* to . . . the same kind or class" as the specific terms.[93] However, when the text includes a list that begins with the words "includes" or the phrase "including, but not limited to," the courts interpret the list of specific examples as not representing the only examples that the general term refers to,[94] but rather that the specific examples provide "interpretive influence" of how to interpret the general term.[95] This simply means that "[the court's] interpretation of the general term includes consideration of those specific examples,"[96] but not that the specific examples are the only ones of its kind. Furthermore, when looking to the specific list for interpretative influence, the court will seek to find "a common characteristic among the listed examples."[97]

ii. Application of Principles of Statutory Interpretation to the Identify Commonality Between Expressly Identified Impacts

In the Soil Protection Standard, because the location of the non-exclusive clause—including, but not limited to—precedes the list of specific terms, the specific terms do not represent the entire possible spectrum of impacts to be addressed under the Standard. However, the general

[91] *Kurtz,* 350 Or at 74.
[92] *Schmidt v. Mt. Angel Abbey*, 347 Or 389, 403-04 (2009).
[93] *Hodges v. Real Estate Div., Dep't of Commerce,* 40 Or App 243, 247 (1979) (emphasis added).
[94] *Kurtz*, 350 Or at 75.
[95] *Kurtz,* 350 Or at 74.
[96] *Kurtz*, 350 Or at 75 (*citing Schmidt*, 347 Or 404).
[97] *Kurtz,* 350 Or at 76 (citing *Schmidt*, 347 Or 405).



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term—impacts to soils—must be interpreted with consideration of the common characteristic between the specific terms. And the common characteristic between the specific examples of soil impacts provided in the Soil Protection Standard—erosion and chemical factors such as salt deposition from cooling towers, land application of liquid effluent, and chemical spills—is that those are soil impacts that are typically associated with, evaluated, and addressed as part of the construction and operation of an energy facility, as explained below:

- Erosion: The control and mitigation of erosion, which is regulated under ODEQ's 1200-C permitting program,[98] is a common impact of concern for construction projects. Erosion impacts occur from typical construction activities such as clearing, grubbing, and excavation.[99]
- Land application of effluent: During the operation of some energy facilities, such as plants that convert biomass into fuel products or co-generation facilities, effluent may be applied on surrounding soils. Consequently, the land application of effluent is an operational impact to soils. Furthermore, ODEQ regulates the land application of effluent under its implementation of the federal National Pollutant Discharge Elimination System ("NPDES") program.[100]

[98] *See* OAR 340-045-0015 (requiring person discharging stormwater associated with construction activity to obtain a National Pollutant Discharge Elimination System permit); *see generally* OAR Ch. 340 Div. 041 (regulations that set forth Oregon's plans for management of the quality of public waters within the State of Oregon, which includes direction on preparation of erosion control plans).
[99] Idaho Power / Rebuttal Testimony of Mark Madison (Nov. 12, 2021) / Issues LU-9 and SP-1, p. 14 of 93.
[100] *See* OAR Ch. 340 Div. 045 (regulations establishing limitations on discharge of wastes (effluents) and the requirements and procedures for obtaining NPDES and Water Pollution Control Facilities ("WPCF") permits from ODEQ); OAR Ch. 340 Div. 050 (regulations addressing "the land application of treated domestic wastewater biosolids, biosolids derived products, and domestic septage").



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- Chemical factors and chemical spills: The construction and operation of energy facilities typically involves the use of chemicals or hazardous substances that, if mishandled, have the potential to impact soils. Furthermore, ODEQ regulates the management of petroleum-based products under its implementation of the federal Oil Pollution Prevention Program[101] and regulates the response to the clean-up of chemical spills.[102]
- Deposition of salt: Cooling towers are unique to energy facilities, and the Council rightly understood that the potential deposition of salt from cooling towers would equate to the generation and discharge of an industrial waste onto the surrounding soils. ODEQ regulates the discharge of industrial wastes.[103]

The commonality among erosion, salt deposition from cooling towers, land application of liquid effluent, and chemical spills is that they are all soil impacts typically associated with, evaluated, and addressed as part of the construction and operation of energy facilities. Therefore, the Soil Protection Standard should be interpreted as requiring evaluation of only those types of soil impacts that are typically assessed and addressed as part of the construction and operation of an energy facility.

[101] *See* OAR Ch. 340 Div. 141 (ODEQ's implementation of the "Federal plans required under 33 C.F.R. 154, 40 C.F.R. 109, 40 C.F.R. 110, or the Federal Oil Pollution Act"); Idaho Power / Rebuttal Testimony of Joseph Stippel (Nov. 12, 2021) / Issue M-6, pp.4-6 of 45 (extensive discussion of ODEQ's implementation of the federal program and its application to the Project).
[102] *See* OAR 340-142-0001 *et seq.* ("The purpose of these rules is to identify the emergency response actions, reporting obligations, and follow up actions required in response to a spill or release, or threatened spill or release of oil or hazardous materials.").
[103] *See* OAR 340-045-0005 *et seq.* (ODEQ's regulations that "prescribe limitations on discharge of wastes and the requirements and procedures for obtaining NPDES and WPCF permits from [ODEQ]").



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*b. Response to Exceptions 11 and 13 - Neither the Soil Protection Standard nor the Project Order Requires Evaluation of the Loss of Stored Carbon in the Soil or Loss of Soil Productivity as a Result of the Release of Stored Carbon in Soils; Regardless, Idaho Power Evaluated Those Impacts.*

In Exception 11 and 13, Dr. Fouty asserts that the Hearing Officer is incorrect when she concludes that that the Council's standards "do not require the impact evaluations proposed by Dr. Fouty."[104] Here, again the application of statutory interpretation previously presented, demonstrates otherwise.

The loss of stored carbon and its impact on soil productivity are not typically assessed and addressed as part of construction of energy facilities; and therefore, they are not among the types of soil impacts that the Council may require consideration of under the Soil Protection Standard.[105] Consistently, for this Project, those impacts were not included in the Project Order.

Idaho Power's expert witness, Mr. Mark Madison, stated that the request to evaluate this particular impact is not an industry standard.[106] He emphasized that what constitutes industry

[104] Fouty Exceptions at 18.

[105] Idaho Power continues to assert that the loss of stored carbon in the soil and loss of soil productivity as a result of the release of stored carbon in soils is beyond the scope of this contested case. The question as to whether Idaho Power should evaluate the impact of the loss of stored carbon *on soils* was raised late in the process during Dr. Fouty's appeal of the Hearing Officer's order framing the issue under the Soil Protection Standard. *See* Suzanne Fouty Appealing Denial of Full Party Status and Issue Limitation in the Matter of the B2H Transmission Line at 203 (Nov. 6, 2020) ("The removal of vegetation during construction and site maintenance . . . and/or exacerbated by the project, decreases current and future soil productivity by removing existing stored carbon . . ."); Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 22 (Oct. 29, 2020). In response to Dr. Fouty's appeal of the initial framing of SP-1, the Hearing Officer's order was subsequently reviewed by EFSC. In its order, EFSC explicitly stated that the "Council finds that . . . the release of carbon from soils, *is not within the Council's jurisdiction*" and the issue was reframed to include the language "and stored carbon in the soil and loss of soil productivity that may occur as a result of the release of stored carbon in soils." Energy Facility Siting Council Order on Appeals of Hearing Officer Order on Party Status, Authorized Representatives and Issues at 5 (emphasis added). Because Dr.. Fouty did not raise these specific issues in her DPO comments, they are not properly before this Hearing Officer. *See* Amended Order on Party Status, Authorized Representatives and Properly Raised Issues for Contested Case at 9 ("As discussed previously, pursuant to ORS 469.370(5) and OAR 345-015-0016(3), only persons who commented on the record of the DPO may request to participate as a party or limited party. Subject to the narrow exception of ORS 469.370(5)(b), issues in the contested case are limited to those raised on the record of the public hearing.").

[106] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison (Jan. 5, 2022) / Issues LU-9 and SP-1, p. 13 of 38.



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standards is "knowledge [that] is typically gained from [working] on large linear projects that involve[] earthwork and disturbance of existing vegetation. In addition, knowledge of industry standards is also typically informed by what processes are required for permits involving construction that results in ground disturbance, as opposed to academic literature."[107] Furthermore, as stated by Mr. Madison, industry standards are informed by knowledge gained through the application of regulations and projects operating within the relevant permitting and regulatory framework.[108] Therefore, it is appropriate to look towards existing regulatory schemes to determine which types of soil impacts are typically involved with the construction of energy facilities, and thus, may be required under the Soil Protection Standard. This position is further supported by the fact that all the specific impacts identified by the Council in the standard are currently regulated under Oregon law.[109] As it relates to consideration of the evaluation of loss of

[107] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 13 of 38.

[108] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 13 of 38 ("It would be difficult to provide references for what constitutes industry standards because this knowledge is typically gained from consulting on large linear projects that involved earthwork and disturbance of existing vegetation. In addition, knowledge of industry standards is also typically informed by what processes are required for permits involving construction that results in ground disturbance, as opposed to academic literature.").

[109] Erosion and compaction are regulated under ODEQ's 1200-C permitting program. *See* OAR 340-045-0015 (requiring person discharging stormwater associated with construction activity to obtain an NPDES permit); OAR 340-041-0001 *et seq.* (regulations that set forth Oregon's plans for management of the quality of public waters within the State of Oregon, which includes direction on preparation of erosion control plans); *see* ODEQ General Permit National Pollutant Discharge Elimination System Construction Stormwater Discharge Permit at 17 (December 15, 2020). Since this document was not previously submitted prior to the close of the record, Idaho Power asks that the Council take official notice of this document in accordance with OAR 345-015-0046(1)(b). A courtesy copy of this document is provided as Idaho Power / Closing Arguments for Contested Case Issue SP-1 / Attachment A, ODEQ's NPDES Permit. ODEQ regulates land application of effluent. *See* OAR 340-045-0005 *et seq.* (regulations establishing limitations on discharge of wastes (effluents) and the requirements and procedures for obtaining NPDES and WPCF permits from ODEQ); OAR 340-050-0005 *et seq.* (regulations addressing "the land application of treated domestic wastewater biosolids, biosolids derived products, and domestic septage"). ODEQ regulates the management of petroleum-based products under its implementation of the federal Oil Pollution Prevention program and regulates the response to the clean-up of chemical spills. *See* OAR 340-141-0001 *et seq*. ODEQ's (implementation of the "Federal plans required under 33 C.F.R. 154, 40 C.F.R. 109, 40 C.F.R. 110, or the Federal Oil Pollution Act"); Idaho Power / Rebuttal Testimony of Joseph Stippel / Issue M-6, pp.4-6 of 35 (extensive discussion of ODEQ's implementation of the federal program and its application to the Project); s*ee* OAR 340-142-0001 *et seq.* ("The purpose of these rules is



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stored carbon in soils, there is no relevant Oregon regulation or permitting program on this topic, and therefore, there is no established regulatory scheme establishing standards for evaluating the extent and degree of the potential impact or appropriate mitigation measures. The existing regulations that do address impacts to soil productivity are narrowly applied to wind and solar projects seeking conditional use approval on agricultural lands.[110] Moreover, those regulations are concerned only with impacts to soil productivity resulting from erosion and compaction—there is no mention of the loss of stored carbon or its impact on soil productivity, or any other impact for that matter, in the regulation.[111] Dr. Fouty has not offered any evidence explaining how the extent of the Project impacts to the loss of stored carbon would be identified; what degree of loss of stored carbon requires mitigation; and what that mitigation would look like.

The Council's prior application of the Soil Protection Standard in the Final Orders for other energy facilities supports the interpretation that the loss of soil carbon or loss of soil productivity as a result of the release of soil carbon, is not considered an impact to soils that is typically assessed

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to identify the emergency response actions, reporting obligations, and follow up actions required in response to a spill or release, or threatened spill or release of oil or hazardous materials."). ODEQ regulates the discharge of industrial wastes (i.e. salt deposition on soils). *See* OAR 340-045-0005 *et seq.* ("prescribe limitations on discharge of wastes and the requirements and procedures for obtaining NPDES and WPCF permits from the Oregon Department of Environmental Quality").

[110] The Goal 3 rules are concerned with the impact to soil productivity specifically resulting from erosion and compaction; any mention of loss of carbon or its impact on soil productivity, or other potential impacts, are absent from the regulation. No such regulation exists for the construction of transmission infrastructure, and therefore, these particular rules are wholly inapplicable to the Project. *See* OAR 660-033-0130(37) ("A proposal for a wind power generation facility shall be subject to the following provisions: . . .(b) (B) The presence of a proposed wind power facility will not result in unnecessary *soil erosion* or loss that could limit agricultural productivity on the subject property. . . . (C) Construction or maintenance activities will not result in unnecessary *soil compaction* that reduces the productivity of soil for crop production.") (emphasis added); OAR 660-003-0130(38) ("A proposal to site a photovoltaic solar power generation facility shall be subject to the following definitions and provisions: . . . (h)(B) The presence of a photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. . . . (C) Construction or maintenance activities will not result in unnecessary *soil compaction* that reduces the productivity of soil for crop production. ") (emphasis added).

[111] OAR 660-033-0130(37)-(38).



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and addressed as part of construction of energy facilities. In the Final Orders reviewed by Idaho Power, none required the applicant to evaluate loss of soil carbon to satisfy the Soil Protection Standard.

- Idaho Power reviewed the Final Order of the Northwest Natural Gas Company ("NWN") South Mist Feeder Extension ("NWN pipeline project"). The NWN pipeline project is a 62-mile natural gas pipeline that was installed through Washington, Marion, and Clackamas counties.[112] The NWN pipeline project proceeded through a contested case, which included limited parties challenging NWN's compliance of the Soil Protection Standard.[113] In the Final Order, the impacts addressed under the Soil Protection Standard focused on spills, impacts from erosion, and sediment control,[114] and the site conditions included implementation of an ESCP and an Agricultural Impacts Mitigation Plan ("AIMP") to address impacts to agricultural land.[115] Idaho Power is implementing both an Agricultural Lands Assessment (to mitigate impacts to agricultural lands similar to an AIMP) and an ESCP, in addition to the Reclamation and Revegetation Plan ("Reclamation Plan").[116] While the NWN project pipeline is approximately one-

[112] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit G, Northwest Natural South Mist Feeder Extension - Final Order on Site Certificate (Mar.13, 2003), p. 1 of 86.
[113] *See* Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit G, Northwest Natural South Mist Feeder Extension - Final Order on Site Certificate, pp. 15 -18 of 86 (limited parties' challenge to the Soil Protection Stand, NWN response, and final order decision).
[114] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit G, Northwest Natural South Mist Feeder Extension - Final Order on Site Certificate, p. 64 of 86.
[115] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit G, Northwest Natural South Mist Feeder Extension, Final Order, pp. 16, 64 of 86.
[116] Proposed Order, Attachment K-1: Agricultural Lands Assessment (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8873 of 10016); Proposed Order, Attachment I-3: 1200-C Permit



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fifth the total length of B2H, the pipeline construction certainly resulted in substantial soil disturbance based on the type of construction—undergrounding of a pipeline—as compared with aboveground transmission towers and stringing of conductor.

- Idaho Power reviewed the Final Order for Madras Solar Energy Facility, a 63 MW solar facility occupying 284 acres (277 acres of which are located on Exclusive Farm Use zoned land), in Jefferson County.[117] The impacts identified in the Final Order resulting from construction included "wind or water erosion, compaction, changes in drainage patterns, or spills or releases of chemicals or other liquid materials used during construction."[118] To satisfy the Soil Protection Standard, the Final Order references the applicant's Revegetation Plan to be used in conjunction with the ESCP to address revegetation, compaction, and erosion control.[119] Furthermore, because the project is a solar facility constructed within agricultural land, the project was subject to compliance with the Goal 3 standard, and therefore, was required to evaluate the impacts of compaction and erosion on soil productivity in areas of productive soils.[120] Again, the loss of stored carbon and its impact on soil productivity are absent from the project's Final Order.

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Application and Draft ESCP (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8784 of 10016).

[117] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit F, Madras Solar Energy Facility - Final Order on Application for Site Certificate (June 25, 2021), p. 6 of 349.

[118] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit F, Madras Solar Energy Facility - Final Order on Application for Site Certificate, p. 43 of 349.

[119] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit F, Madras Solar Energy Facility - Final Order on Application for Site Certificate, pp. 43-44 of 349.

[120] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit F, Madras Solar Energy Facility – Final Order on Application for Site Certificate, p. 44 of 349.



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- Idaho Power reviewed the Final Order for the Bakeoven Solar Facility, a solar facility that would occupy up to 2,717 acres on Exclusive Farm Use zoned land.[121] Under the analysis for the Soil Protection Standard, the Council identified the impacts of concern resulting from construction activities to include "wind or water erosion, *compaction*, changes in drainage patterns, or spills or releases of chemicals or other liquid materials used during construction."[122] Compaction (and erosion) impacts were required to be mitigated through the implementation of an ESCP as required by the ODEQ-issued 1200-C permit.[123] Furthermore, because the project is a solar facility constructed within agricultural land, the project was subject to compliance with the Goal 3 standard, and therefore, was required to evaluate the impacts of compaction and erosion on soil productivity in areas of productive soils.[124] Again, the loss of stored carbon and its impact on soil productivity are absent from the Final Order.

Idaho Power reviewed the final orders issued by the Council over the last five years,[125] as well as the most recent order addressing a linear project (summarized above). Through this review, Idaho Power confirmed that the Council has not considered the loss of stored carbon as an impact that

[121] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit F, Bakeoven Solar Project – Final Order on Application for Site Certificate (Apr. 24, 2020), p. 5.
[122] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit F, Bakeoven Solar Project – Final Order on Application for Site Certificate, p. 42.
[123] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit F, Bakeoven Solar Project – Final Order on Application for Site Certificate, p. 42.
[124] Idaho Power / Rebuttal Testimony of Randy Mills / Issue RFA-1 / Exhibit F, Bakeoven Solar Project – Final Order on Application for Site Certificate, p. 102.
[125] The final orders issued by the Council over the last five years include Madras Solar Facility (June 2021), Bakeoven Solar Facility (Apr. 2020), Amendment 4 for Summit Ridge Wind Farm (Aug. 2019), Amendment 5 for Golden Hills Wind Project (Oct. 2018), and Boardman Solar Energy Facility (Feb. 2018).



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must be evaluated to satisfy the Soil Protection Standard in any of those final orders. Accordingly, based on this review, Idaho Power is not aware of any precedent established by the Council requiring that an applicant evaluate the loss of stored soil carbon and its impacts on soil productivity under the Soil Protection Standard.

As demonstrated by Mr. Madison's testimony, the lack of relevant regulatory schemes and industry standards, and past EFSC final orders, the loss of stored carbon and its impact on soil productivity are not typically assessed and addressed as part of construction of energy facilities; and therefore, they are not among the types of soil impacts that the Council may require consideration of under the Soil Protection Standard.[126]

*c. Response to Exception 16 – Commonality of Impacts.*

In Exception 16, Dr. Fouty argues that Idaho Power's statutory interpretation "breaks down when one considers the differences between 'erosion' and 'chemical spills'."[127] Specifically, she argues chemical spills can be prevented and erosion cannot be fully prevented.[128] Dr. Fouty's argument is flawed for several reasons.

First, Idaho Power agrees with Dr. Fouty's observations that "the common characteristics between 'erosion' and 'chemical spills' are 1) both impact soils, 2) the impacts are adverse to soil productivity, 3) the adverse impacts are potentially significant, and 4) the project is the source of

[126] Even if the loss of stored carbon in the soil and loss of soil productivity as a result of the release of stored carbon in soils were subject to consideration under the Soil Protection Standard, because those impacts were not included in the Project Order as an application requirement or other necessary data or information, Idaho Power was not required to assess and address those impacts to satisfy the Soil Protection Standard. *See* OAR 345-015-0160(1)(c) and (e).
[127] Fouty Exceptions at 20.
[128] Fouty Exceptions at 20.



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the impacts."[129] However, Dr. Fouty's argument fails to take into consideration or refute Idaho Power's full argument regarding the commonality between listed soil impacts, previously outlined above—1) the evaluation of loss of soil carbon is not an industry standard; 2) there are no regulatory programs/scheme that manage these impacts; 3) and prior EFSC final orders have not requested these soil impacts to be considered. If these impacts are required to be considered, there is no evaluation or mitigation process established through industry standards or a government permitting agency for Idaho Power to follow or for the reviewing agency to determine if Idaho Power's proposals are sufficient. In response to these arguments, Dr. Fouty has failed to provide evidence to the contrary. Second, Dr. Fouty's argument that chemical spills can be prevented, and erosion cannot, is unpersuasive. Relevant regulatory programs through ODEQ require Idaho Power and other developers to prepare Spill Prevention Control and Countermeasure Plans and Erosion and Sediment Control Plan ("ESCP") to prevent and minimize both types of impacts.

*d. Response to Exceptions 16 and 18 - Text and Context Indicate EFSC's Intent That an Applicant Evaluate Impacts within the Universe of Commonality of the Expressly Listed Impacts.*

In Exceptions 16 and 18, Dr. Fouty takes exception to the Hearing Officer's rejection of Dr. Fouty's argument that the phrase "including, but not limited to" means "the Council must evaluate any and all types of impacts the proposed facility may potentially have on soils within the analysis area."[130] Dr. Fouty's assertion of what impacts must be evaluated—any and all impacts—is an improper and unsupported interpretation that fails to take into consideration the text and context of the Standard. The arguments raised around the phrase "including, but not limited to" in

[129] Fouty Exceptions at 20.
[130] Proposed Contested Case Order at 259.



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Dr. Fouty's Exceptions 16 and 18 were fully addressed by Idaho Power through briefing. As explained below, Dr. Fouty's Exceptions 16 and 18 is unsupported for the following reasons.

While Dr. Fouty's position is not clearly articulated, Idaho Power understands Dr. Fouty to be arguing that the Soil Protection Standard requires an applicant to evaluate any and all impacts, without regard to the types of impacts that are identified in the Soil Protection Standard.[131] While Idaho Power agrees that the non-exclusive clause—"including, but not limited to"—within the Soil Protection Standard and Exhibit I information requirement requires consideration of soil impacts in addition to those expressly listed by the Standard, the scope of soil impacts is not limitless.[132] By applying principles of statutory interpretation to the Soil Protection Standard, Idaho Power concludes that the phrase "including, but not limited to" must be considered in context with the impacts expressly identified in the Soil Protection Standard. Based on the application of principles of statutory interpretation to the text of the rules, specifically *ejusdem generis*,[133] Idaho Power concludes that the scope of such additional soil impacts is limited to those that are typically assessed and addressed as part of construction and/or operation of an energy facility, and they must be set forth in the project order.[134] This analysis establishes the first contextual limitation of the rules—the range of potential impacts that an applicant may be required to evaluate have to be within the commonality of the impacts expressly listed in the rules.[135]

[131] Fouty Exceptions at 22.
[132] *See* Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 12-16.
[133] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 13.
[134] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 12-16.
[135] Idaho Power's Response Brief and Motion to Strike for Contested Case Issues at 13-14.



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Next, terms within the rules cannot be viewed in isolation but rather the context of the Standard and Exhibit I information requirement language must be considered as a whole.[136] Thus, the term "impact" cannot be applied without considering the context of the rule, which would require that impacts must be further limited by consideration of the commonality of the impacts that are expressly listed.[137] This results in applying a contextual filter to consideration of an impact—the impact must be traditionally assessed as part of construction of an energy facility.[138] Without this context, the applicant could be required to evaluate an endless assortment of potential impacts to soils that are not typically triggered by or addressed during the construction and operation of an energy facility, but are simply of personal concern to interested parties.[139] Dr. Fouty's interpretation entirely ignores the list of impacts and would require the reader to consider terms in isolation as opposed to the context of the entire provision. Therefore, Dr. Fouty's conclusions are contrary to principles of statutory interpretation and lead to an improper interpretation of what impacts an applicant must evaluate for compliance with the Soil Protection Standard.

Therefore, for these reasons, Dr. Fouty's Exceptions 11, 13, 16, and 18 do not identify any incorrect conclusion of law, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

[136] *Vsetecka*, 337 Or at 508.
[137] Idaho Power's Response Brief and Motion to Strike for Contested Case Issues at 14.
[138] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 12.
[139] Idaho Power's Response Brief and Motion to Strike for Contested Case Issues at 14.



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### 3. Exception 1 and 24 – Major Soil Types

Idaho Power addresses Dr. Fouty's Exceptions 1 and 24 together as they relate to the level of detail of Idaho Power's soils data.

In Exception 1, Dr. Fouty takes exception to the Hearing Officer's finding of fact that "as required by OAR 345-021-0010(1)(i) and the Second Amended Project Order, in ASC Exhibit I, Idaho Power identified the major soil types in the analysis area."[140] In support of her exception to the Hearing Officer's finding, Dr. Fouty states that when Idaho Power identified Soil Orders within the Analysis Area, that the Company should have identified "Soil Types" and had the Council's rules "meant 'soil order', [the Council] would have been specific."[141]

In Exception 24, Dr. Fouty takes exception to the Hearing Officer's legal conclusion that "In ASC Exhibit I, Idaho Power not only identified and described the major soil types per county within the analysis area."[142] Again, as in support of Exception 1, Dr. Fouty states that "[Idaho Power] did not identify and describe major soil types. . . . Had OAR 345-021-0010(1)(i)(A) meant "soil order" it would have been specific."[143] The arguments raised in Dr. Fouty's Exceptions 1 and 24 were fully addressed by Idaho Power through briefing and through expert witness testimony of Mark Madison. As explained below, Dr. Fouty's Exceptions 1 and 24 are unsupported for the following reasons.

[140] Proposed Contested Case Order at 124. *See* Suzanne Fouty / Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order (June 30, 2022) / Issue SP-1, p. 8 of 45 [hereinafter, Fouty Exceptions].
[141] Fouty Exceptions at 8-9.
[142] Proposed Contested Case Order at 261.
[143] Fouty Exceptions at 27-28.



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*First*, Idaho Power's expert witness Mr. Madison provided substantial detail on the level of soils data the Company provided in his Rebuttal and Sur-sur-rebuttal Testimony.[144] As Mr. Madison described in testimony (and as Idaho Power subsequently explained in its briefing),[145] by providing both the soil mapping unit and soil order level data, the information provided by the Company fully complies with the application requirements of OAR 345-021-0010(1)(i)(A), which requires identification and description of the "major soil types" in the analysis area.[146] Idaho Power exceeded these requirements by providing not only the major soil types (soil orders) per county within the analysis area,[147] but also the *soil mapping units* per county within the analysis area.[148] Thus, there is no evidence in the record that supports Dr. Fouty's claim that compliance with the Soil Protection Standard requires a more granular analysis or that a more granular analysis would result in any new or different mitigation measures or BMPs that are necessary for compliance with the Standard.

*Second*, even if the Council rules required a finer level of data beyond the major soil types, Idaho Power provided sufficient additional granularity to address Dr. Fouty's concerns in the rebuttal and sur-sur-rebuttal testimony of Idaho Power's expert witness Mark Madison. In response to Dr. Fouty's assertions raised in her testimony that Exhibit I lacked the necessary level of data to make an informed decision regarding Idaho Power's soil impacts, Idaho Power provided

[144] *See* Idaho Power / Rebuttal Testimony of Mark Madison (Nov. 17, 2021) / Issues LU-9 and SP-1, p. 52-55 of 93; Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison (Jan. 5, 2022) / Issues LU-9 and SP-1, p. 17-18 of 38.
[145] *See* Idaho Power Closing Arguments for Contested Case Issue SP -1 (Feb. 28, 2022) at 31-33.
[146] OAR 345-021-0010(1)(i)(A).
[147] ASC, Exhibit I at I-10 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 14 of 115).
[148] *See* ASC, Exhibit I, Attachment I-1 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 42-68 of 115) (soil mapping units along the entire transmission line corridor within the analysis area); ASC, Exhibit I, Attachment I-2 (ODOE - B2HAPPDoc3-17 ASC 09b_Exhibit I_Soil_ASC_Part 2 2018-09-28. Page 69-72 of 88) (original Table I-2-1, showing the soil mapping units per county).



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an updated Table I-2-1 as Exhibit A of expert witness Mark Madison's Sur-sur-rebuttal Testimony, satisfying Dr. Fouty's request.[149] Exhibit A consolidated information that was provided in Exhibit I of the ASC into one table.[150] When providing Exhibit A, no revisions were made to the existing data; Idaho Power combined existing information to provide the soil mapping units per construction disturbance area ("CDA") by county, to fulfill Dr. Fouty's request.[151] Therefore, the granularity at which Idaho Power provided the soils data in Exhibit I meets both the Council's requirement—thus satisfying the Soil Protection Standard—and Dr. Fouty's request.

Dr. Fouty's Exceptions 1 and 24 do not identify any incorrect finding of fact, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**4. Exceptions 2 and 5 – Lands Grazed**

Idaho Power addresses Dr. Fouty's Exceptions 2 and 5 together as they both relate to identifying land cover types that are used for grazing lands.

In Exception 2, Dr. Fouty takes exception to the Hearing Officer's finding of fact that "as required by OAR 345-021-0010(1)(i) and the Second Amended Project Order, in ASC Exhibit I, Idaho Power identified . . . the current land uses that require or depend on productive soils."[152] Specifically, Dr. Fouty states that "[Idaho Power] neglected to include lands grazed as one of the land uses it evaluated despite saying lands grazed require productive soils."[153] In support of this

[149] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit A, Revised Exhibit D of Rebuttal Testimony of Mark Madison - Updated Table I-2-1.
[150] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit A, Revised Exhibit D of Rebuttal Testimony of Mark Madison - Updated Table I-2-1.
[151] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 17 of 38.
[152] Proposed Contested Case Order at 124; Fouty Exceptions at 9.
[153] Fouty Exceptions at 9.



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statement, Dr. Fouty cites to one statement in Exhibit I—"Disturbed soils will include productive soils used for agriculture, timber production, and grazing."[154]

In Exception 5, Dr. Fouty takes exception to the Hearing Officer's finding of fact that "Idaho Power identified current land uses in the analysis area that require or depend on productive soils through analysis of high value farmland soils data and land cover type data."[155] Specifically, Dr. Fouty states that "[Idaho Power] neglected to include lands grazed as one of the land uses it evaluated despite saying lands grazed require productive soils" adding no further support for this exception.[156] Dr. Fouty's Exceptions 2 and 5 should be rejected for the following reasons.

*First*, grazing is a land use that relies on certain land cover types, however, not all of these land cover types necessarily require or depend on productive soils. Idaho Power identified multiple land cover types over which grazing could occur, including, pasture/hay, forest, woodland, shrub/grass.[157] Therefore, by identifying land cover types that may be used for grazing, Idaho Power adequately identified current land uses for grazing.

Furthermore, the Second Amended Project Order required Idaho Power to describe proposed measures for maintaining soil productivity, with the apparent focus of soil productivity to be on *productive* soils.[158] In the Second Amended Project Order, ODOE emphasized agricultural and forest lands, and instructed Idaho Power to

[154] Fouty Exceptions at 9 (citing ASC, Exhibit I at I-23 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 27 of 115)).
[155] Proposed Contested Case Order at 125; Fouty Exceptions at 12.
[156] Fouty Exceptions at 12.
[157] ASC, Exhibit I at I-11 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 15 of 115).
[158] Second Amended Project Order at 12 (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 14 of 29); ASC, Exhibit I at I-12 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 16 of 115).



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> consult with local farmers, landowners, soil conservation districts, and federal land managers regarding mitigation of impacts to **agricultural and forest lands.** Specific discussion could include weed encroachment, interference with irrigation equipment, and the potential for restrictions to aerial applications caused by the proximity of transmission towers.[159]

The agricultural and forest land uses are supported by productive soils, which is the reason that Idaho Power focused its evaluation of impacts to soil productivity on these important and valuable productive soils.[160] Idaho Power interpreted this direction from ODOE to indicate that when evaluating impacts to soil productivity, particular focus should be on productive soils associated with agricultural/croplands and forest lands.

Nonetheless, regardless of the land use/land cover classification, Idaho Power analyzed and considered potential impacts to *all disturbed soils.* As Idaho Power explained in its Closing Brief,[161] Idaho Power evaluated impacts to soil productivity on all disturbed soils, with particular focus on productive soils because of their value to support agriculture and forest lands and because of ODOE's direction provided in the Second Amended Project Order.[162] However, despite a more focused approach to mitigating impacts to productive soils, Idaho Power did not disregard the potential impacts to soil productivity of the other 79 percent of disturbed areas. Indeed, Idaho Power is proposing to mitigate soil impacts in *all areas*, even if the soils in the area would not be classified as "productive soils."[163] Additionally, Idaho Power's Reclamation Plan addresses all

[159] Second Amended Project Order at 12 (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 14 of 29) (emphasis added.)
[160] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 21 of 38.
[161] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 36-38.
[162] ASC, Exhibit I at I-17 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 21 of 115).
[163] *See* ASC, Exhibit I at 24-31 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 28-35 of 115) (Idaho Power's mitigation of soil impacts to all soils).



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general vegetation types occurring in the Project area, not only those classified as productive (agricultural/crop land and forest lands).[164] Therefore, Idaho Power evaluated impacts to soil productivity of all soils, and in accordance with ODOE's direction in the Second Amended Project Order, proposed additional actions that could be implemented in areas containing productive soils because of their inherent value to Oregon's agricultural and forest communities.

Dr. Fouty's Exception 2 does not identify any incorrect finding of fact, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**5. Exceptions 3 and 21 – Analysis Area**

Idaho Power addresses Dr. Fouty's Exceptions 3 and 21 together as they both relate to the Hearing Officer's finding of fact and conclusion of law regarding the analysis area.

In Exception 3, Dr. Fouty takes exception to the Hearing Officer's finding "that impacts to soils are limited because not all of the site boundary will be disturbed" and "[f]or purposes of the Soil Protection standard, the analysis area means the area within the site boundary."[165] Dr. Fouty argues that based on her interpretation of the plain language of the definition of analysis area, the "correct analysis area for assessing impacts to soils (or any other resources) is the area of *disturbance*."[166]

In Exception 21, Dr. Fouty takes exception to the Hearing Officer's conclusion that "Idaho Power correctly identified the soil analysis area for purposes of ASC Exhibit I as the area within

[164] *See* Proposed Order, Attachment P1-3: Reclamation Plan at 13 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9124 of 10016) (table presenting pre and postconstruction reclamation actions for all general vegetation types).
[165] Proposed Contested Case Order at 124, 124 n.89; Fouty Exceptions at 9-10.
[166] Fouty Exceptions at 10 (emphasis added).



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the site boundary in accordance with the Project Order."[167] Dr. Fouty asserts that the Hearing Officer is "in err about the analysis area for soil resources despite the very plain language in OAR 345-001-0010(2)", stating that the analysis area is a "function of resource and the area that is affected."[168]

The arguments raised in Dr. Fouty's Exception 3 and 21 were fully addressed by Idaho Power through briefing. As explained below, Dr. Fouty's Exceptions 3 and 21 are unsupported for the following reasons.

*First*, as Idaho Power discussed in its Response Brief,[169] Dr. Fouty's arguments entirely ignore the plain language of the first sentence of the definition of analysis area—"'[a]nalysis area' means the area or areas specifically described in the project order issued under OAR 345-015-0160 (Project Order)(1)."[170] In accordance with OAR 345-015-0160, ODOE issues the project order, which establishes, among other things, "[a]ll application requirements in OAR 345-021-0010 applicable to the proposed facility"[171] including the analysis area to be evaluated for each standard. In the B2H Second Amended Project Order, ODOE defined the analysis area for the Soil Protection Standard as "[t]he area within the site boundary."[172] Thus, Idaho Power correctly described the analysis area as the site boundary for purposes of Exhibit I.

[167] Proposed Contested Case Order at 260; Fouty Exceptions at 25.
[168] Fouty Exceptions at 25.
[169] Idaho Power Response Brief at 26-28.
[170] OAR 345-001-0010(2).
[171] OAR 345-015-0160(1)(c).
[172] Second Amended Project Order at 23 (ODOE – B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 25 of 29).



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Additionally, Dr. Fouty questioned Idaho Power's expert witness Mark Madison on this issue during cross-examination.[173] Mr. Madison's testimony again shows that Idaho Power correctly selected the analysis area in accordance with EFSC regulations and the Project Order. During cross-examination, in response to Dr. Fouty's question "that the analysis area, it's a regulatory requirement that we're looking at that", Mr. Madison confirmed that "yes, it is."[174] Furthermore, while the defined analysis area is larger than the area of disturbance, the area of disturbance is contained within the analysis area.[175] Again, during cross-examination by Dr. Fouty, Mr. Madison explained that "[t]he construction area is a subset of the site boundary."[176]

Furthermore, Dr. Fouty seemingly ignores the plain language of the definition site boundary—the site boundary "means the perimeter of the site of a proposed energy facility."[177] There is no language in the definition related to the extent of impacts, disturbance, or resources. Furthermore, Idaho Power is required by the Exhibit I information requirement to evaluate the soil impacts within the analysis area, which for the Soil Protection Standard is the "area within the site boundary"—not limited to the area of disturbance.[178] Therefore, Idaho Power identified the site boundary, per the definition, and then considered the analysis area to be the site boundary, as directed to by ODOE in the Project Order. Dr. Fouty's fails to identify how Idaho Power's

[173] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 171, line 7 – page 172 line 11; *id.* at page 33, line 8 – page 34, line 22.
[174] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 171, lines 8 – 14.
[175] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 171, line 7 – page 172, line 11; *id.* at page 33, line 8 – page 34, line 22.
[176] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 31, lines 1-2.
[177] OAR 345-001-0010(54) ("'Site boundary' means 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 micrositing corridors proposed by the applicant.")
[178] Second Amended Project Order at 23 (ODOE – B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 25 of 29); OAR 345-021-0010(1)(i) ("(A) Identification and description of the major soil types in the *analysis area*")\ (emphasis added).



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approach does not meet the regulations. As such, Dr. Fouty's Exceptions 3 and 21 do not identify any incorrect finding of fact, and for that reason Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

### 6. Exception 4 – Soil Reclamation Potential

In Exception 4, Dr. Fouty takes exception to the Hearing Officer's finding of fact that "[a]s for loss of soil reclamation potential, Idaho Power considered several soil properties, including soil compaction."[179] Dr. Fouty disputes the finding that Idaho Power considered soil compaction in its evaluation of soil reclamation, stating that there is no soil property called soil compaction.[180] It appears that this may have been a scrivener's error, which should be corrected to instead reference susceptibility to compaction—which Idaho Power did evaluate[181]—rather than soil compaction, when discussing the soil properties evaluated for reclamation potential. Revising this language in Finding of Fact No. 251 does not negate the Hearing Officer's findings, and therefore, Dr. Fouty's exception should be denied.

### 7. Exceptions 6 and 23 – Dynamic Properties

Idaho Power addresses Dr. Fouty's Exceptions 6 and 23 together as they both relate to the Hearing Officer's finding of fact and conclusion of law regarding analysis of dynamic properties.

In her Exception 6, Dr. Fouty takes exception with the Hearing Officer's findings that "Idaho Power assessed the potential adverse impacts to soils from the Project due to . . .

[179] Proposed Contested Case Order at 125; Fouty Exceptions at 10-11.
[180] Proposed Contested Case Order at 125; Fouty Exceptions at 10-11.
[181] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 16-17 of 93.



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compaction."[182] Dr. Fouty asserts that "[Idaho Power] did not assess potential adverse impacts to the *dynamic* soil properties due to compaction but on *inherent* soil properties", specifically, that bulk density was not assessed.[183] Dr. Fouty provides no definition or explanation for "dynamic" versus "inherent" soil properties and fails to indicate any regulation or Council rule or precedent requiring that the applicant evaluate dynamic and inherent soil properties. The arguments raised in Dr. Fouty's Exception 6 were fully addressed by Idaho Power through briefing and through expert witness testimony of Mark Madison. As explained below, Dr. Fouty's Exception 6 is unsupported for the following reasons.

In Exception 23, Dr. Fouty takes exception to the Hearing Officer's conclusion that "Dr. Fouty has not shown that Idaho Power's soil data analysis was flawed because the Company did not identify and analyze the dynamic properties of soil that would be disturbed and describe the mitigation needed to restore the soil to the preconstruction condition."[184] Dr. Fouty asserts that "[m]itigations are not done on properties that don't change and [Idaho Power] only looked at inherent soil properties (K-Factor, droughty, stony/rocky, T-factor, Wind erodibility), factors that don't change unless the entire topsoil is eroded."[185] Dr. Fouty is asserting for the first time that Idaho Power's mitigation is inadequate because it "only looked at inherent soil properties." As explained below, Dr. Fouty's Exception 23 is unsupported for the following reasons.

[182] Proposed Contested Case Order at 125; Fouty Exceptions at 12.
[183] Fouty Exceptions at 12 (emphasis added).
[184] Proposed Contested Case Order at 261.
[185] Fouty Exceptions at 27.



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*a. Response to Exception 6 – Bulk Density*

The collection of bulk density soil property information will not provide meaningful insight into soil impacts from the Project or inform the Company on additional mitigation measures, beyond what has already been proposed. In his Rebuttal Testimony, Idaho Power's expert witness Mr. Madison stated that "[i]t is not necessary to collect these soil properties [i.e., bulk density] prior to construction to analyze whether the Project has significant adverse impacts on soils. Impacts to these soil properties will be addressed during implementation of the Reclamation Plan when revegetation of the areas will depend on restoring a supportive soil environment. Accordingly, collecting soil samples to obtain pre-construction soil properties is not necessary because the post-construction mitigation will be required to establish soil properties that best support the vegetation that will be planted in the impacted area through the Company's reclamation and revegetation efforts."[186]

This point was further discussed during Dr. Fouty's cross-examination of Mr. Madison, in which Mr. Madison discussed how the collection of certain soil properties would not provide meaningful insight into the extent of soil impacts because regardless of this pre-construction information, *reclamation activities will need to be undertaken that will support revegetation*. Specifically, Idaho Power does "not need to know to a granular degree what the preconstruction bulk density, porosity, and permeability of the soil is, even though these three soil properties will be impacted by construction activities. If Idaho Power did not provide the soil with enough aeration through sufficient mitigation of compaction impacts, the soil will tell us this through the success

[186] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 60-61 of 93.



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of the vegetation, . . . which includes hundreds of thousands of acres of successful revegetation."[187] Additionally, during cross-examination Dr. Fouty posed the question: "But [bulk density] is an important property, is it not? Because if a soil is compacted, it is difficult for plants, roots, water, air, and nutrients to pass through; is that correct?"[188] Mr. Madison responded by explaining that

> In our reclamation plan, we show that compaction is a concern, and compaction will be addressed with deep ripping of soils and scarification, tilling, disking, preparing a seed bed, much like a farmer would, to loosen bulk density, same as a farmer would, after harvest vehicles and trucks have driven over a soil and compacted it.
>
> And so depending on the level of compaction that occurs and the soil susceptibility to compaction, that will determine the level of decompaction or ripping, scarifying, and plowing that occurs to reloosen that soil to create a seed bed for the seeding that will occur.[189]

Therefore, as evidenced by Idaho Power's expert witness, regardless of the collection pre-construction bulk density information, Idaho Power will still be required to conduct decompaction efforts in order to create an environment that supports revegetation. Accordingly, Idaho Power collected the necessary and appropriate soils information to evaluate adverse impacts to soils that would provide meaningful insight into soil mitigation measures.

In response to Dr. Fouty's assertion that Idaho Power did not evaluate the "dynamic" soil property of bulk density, as discussed in its Closing Arguments, Idaho Power addressed how it would be a fruitless endeavor to implement Dr. Fouty's request to identify bulk density for soils.[190] While it may be possible to establish preconstruction values for soil properties based on a literature

[187] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 29 of 38.
[188] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 185, line 19 – page 186, line 6.
[189] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 185, line 12 - 18.
[190] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 46-48.



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review, there are two significant issues with Dr. Fouty's assumption that bulk density information must be gathered to adequately assess the degree of impact to soils, when : 1) the soil properties presented in the literature review may not be a precise representation of conditions on the ground; and 2) if the use of pre-construction bulk density information is to require Idaho Power to recreate preconstruction conditions, it would be nearly impossible (and unnecessary), and therefore the pre-construction value provides little to inform post-construction reclamation efforts.[191] It would be nearly impossible to recreate preconstruction values because, in attempting to achieve one preconstruction soil value, Idaho Power would likely impact another soil value.[192] For example, to achieve preconstruction compaction, Idaho Power would potentially create greater soil disturbance than simply trying to mitigate to a compaction value that is adequate to support successful revegetation.[193] By attempting to achieve preconstruction compaction, Idaho Power would in turn create further impacts, such as potentially increasing erosion potential by making soils less compacted and more susceptible to erosion by wind and water.[194] Idaho Power would essentially be chasing its tail to improve one soil property value only to adversely impact another one. [195]

*b. Response to Exception 23 – Use of Inherent Soil Properties*

Dr. Fouty argues that Idaho Power only looked at inherent and not dynamic soil properties and therefore its mitigation efforts are inadequate because they "are not done on properties that don't change." Dr. Fouty's arguments are unpersuasive for the following reasons.

[191] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 47.
[192] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 47.
[193] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 47.
[194] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 47.
[195] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 47.



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First, Idaho Power absolutely needed to consider the "inherent" soil properties, as only Dr. Fouty calls them, because those properties inform the appropriate mitigation measures. To evaluate erosion potential and appropriate mitigation measures, Idaho Power identified areas of high erosion prone soils based on analysis of the inherent soil properties of K-factor, T-factor, and wind erodibility.[196] These properties allow Idaho Power to identify the varying degrees of erodibility of the soils and select appropriate BMPs based on that information.[197] Curiously, Dr. Fouty makes similar observations that the use of these properties allow for an applicant to identify high-erosion prone soils—"When the three soil properties provided for Warden and Quincy SMUs ([wind erodibility group], Kfactor, and T-factor) are looked at together, we see soils which are highly wind erodible and have moderate-high to very high K factors" and "[t]wo other properties, found in ASC Exhibit I, Attachment I-2 table, are also important when assessing soil sensitivity to disturbance. They are the T factor and whether a SMU is considered Droughty."[198]

Second, in support of her assertions, Dr. Fouty fails to provide any example of a dynamic soil property that should have been evaluated and what additional or different mitigation approach would have resulted from reviewing that information. Specifically for erosion, Dr. Fouty fails to identify what specific dynamic soil property Idaho Power failed to identify that would have provided more appropriate mitigation approach, or even what other mitigation method could have been identified.

[196] *See* ASC, Exhibit I at I-5 through I-7 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 9-11 of 115). Dr. Fouty makes similar reliance on the inherent soil properties in support of identifying erosion prone areas in her Direct Testimony -

[197] *See* ASC, Exhibit I at I-27 through I-29 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 31-33 of 115).

[198] Suzanne Fouty / Direct Testimony of Suzanne Fouty (Sept. 17, 2021) / Issue SP-1, p. 6.



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Dr. Fouty's Exceptions 6 and 23 do not identify any incorrect finding of fact, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**8. Exceptions 7, 22, and 25 - Soils Databases**

Idaho Power addresses Dr. Fouty's Exceptions 7, 22, and 25 together as they relate to the Hearing Officer's findings of fact and conclusions of law regarding Idaho Power's use of the Natural Resources Conservation Service ("NRCS") STATSGO database.

In Exception 7, Dr. Fouty takes exception to the Hearing Officer's finding that "there were no highly compaction-prone soils within the site boundary."[199] Dr. Fouty asserts that because Idaho Power utilized the State Soil Geographic Database STATSGO database, as opposed to the SSURGO, the Company could not determine the extent of highly-compaction prone soils because "the resolution is too coarse to correctly determine presence/absence of highly compactable soils."[200]

In Exception 22, Dr. Fouty takes issues with the Hearing Officer's conclusion that Dr. Fouty has not demonstrated that Idaho Power was required to use SSURGO database to identify soil types.[201] Dr. Fouty asserts that the use of STATSGO database for soil analysis was inappropriate,[202] but provides no supporting reference to the Council's rules or precedent that require the use of specific NRCS databases.

[199] Proposed Contested Case Order at 125; Fouty Exceptions at 13.
[200] Fouty Exceptions at 13.
[201] Proposed Contested Case Order at 261; Fouty Exceptions at 25-26.
[202] Fouty Exceptions at 26.



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In Exception 25, Dr. Fouty takes exception to the Hearing Officer's conclusion that Idaho Power "also presented soil mapping units along the entire transmission line corridor within the analysis area."[203] Dr. Fouty argues that the soil mapping units were not correct because they were generated from STATSGO and not SSURGO mapping data.[204] The arguments raised in Dr. Fouty's Exceptions 7, 22, and 25 were fully addressed by Idaho Power through briefing. As explained below, Dr. Fouty's Exceptions 7, 22, and 25 are unsupported for the following reasons.

In Idaho Power's Response Brief, the Company addressed Dr. Fouty's assertion that Idaho Power did not use the correct database from the NRCS soil survey.[205] Strangely enough, during cross-examination, Dr. Fouty raised this issue with Idaho Power's expert witness Mr. Madison, but in *entirely* the opposite manner, stating that Idaho Power incorrectly inferred that she was suggesting that Idaho Power was not using the correct database.[206]

Dr. Fouty asserts that Idaho Power incorrectly relied on STATSGO for some areas and soil properties, when it should have utilized the SSURGO database.[207] In Exhibit I of the ASC, Idaho Power presented its methodology for the selection of soil properties, either from the SSURGO or

[203] Proposed Contested Case Order at 261; Fouty Exceptions at 28.
[204] Fouty Exceptions at 28.
[205] Dr. Fouty first raised this assertion in her Closing Arguments (Idaho Power reviewed the administrative and contested case record for any prior reference by Dr. Fouty to the incorrect use of the NRCS database and was unable to find any such reference); additionally, she relied on information outside the evidentiary record in support of her assertion. In its Response Brief, Idaho Power challenged the use of the information outside the evidentiary record, requesting that statements made in reliance on those documents be stricken. *See* Idaho Power's Response Brief and Motion to Strike for Contested Case Issue SP-1 at 2-3 (Mar. 30, 2022). In the Proposed Contested Case Order, the Hearing Officer determined that the information was not part of the record, and rather than striking the statements, the Hearing Officer granted "Idaho Power's alternate request and [gave] these statements no weight." Proposed Contested Case Order at 263-264.
[206] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 53, lines 2-8. ("You state in your [rebuttal testimony] that I implied that Idaho Power did not use the correct source of soil data and that the -- that the industry standard used is the most current NRCS soil data. So where in my testimony did I state that Idaho Power, in their use of the NRCS soil data, was not using the correct data?").
[207] Fouty Exceptions at 13, 26, and 28.



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STATSGO database.[208] Idaho Power acknowledged that SSURGO data includes more detailed soil properties information based on smaller map units than the STATSGO data; however, "SSURGO data [did] not provide complete coverage of the Site Boundary . . . and [t]he SSURGO database was used only if similar data were not available in STATSGO."[209] Idaho Power provided a figure representing the overlap and use of the two databases in the project area.[210] Idaho Power was transparent with identifying what database was the source of soils data.[211] Moreover, Idaho Power's approach is consistent with the Exhibit I rule, which requires that the applicant identify major soil types within the area.[212] The STATSGO data provides complete coverage of major soil types within the site boundary,[213] and therefore was appropriate to use for the analysis in Exhibit I.

On the other hand, Dr. Fouty has not provided any justification through reference to other EFSC-approved projects or any other earthwork construction project to show how Idaho Power failed to meet industry standards, or that EFSC rules or precedent require that energy facility projects exclusively rely on SSURGO data for the soils analysis. Additionally, she fails to explain

[208] ASC, Exhibit I at I-3 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 7 of 115).
[209] ASC, Exhibit I at I-3 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 7 of 115).
[210] ASC, Exhibit I at I-4 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 8 of 115).
[211] *See* ASC, Exhibit I at I-5 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 9 of 115) ("STATSGO data were used for the analysis of soil erosion properties, and [the USGS National Elevation Dataset (NED)] data were used to evaluate slope."); *id.* at I-6 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 10 of 115) ("The potential for soil erosion by wind was evaluated using NRCS STATSGO"); *Id.* at I-8 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 12 of 115) ("Hydric soil was analyzed using SSURGO data and hydric soil data from the Oregon Wetlands Database.").
[212] OAR 345-021-0010(1)(i) ("(A) Identification and description of the major soil types in the analysis area").
[213] ASC, Exhibit I at I-4 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 8 of 115).



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how Idaho Power failed to comply with the Exhibit I information requirement, which requires that the applicant identify major soil types within the area.[214]

Next, Dr. Fouty argues that "the resolution is too coarse to correctly determine presence/absence of highly compactable soils."[215] Dr. Fouty acknowledges that the SSURGO data is only available for approximately 70 percent of the disturbance area."[216] She goes on to state that "examination of the SSURGO database found soil map units with highly compatible soils in the area proposed for disturbance."[217] However, because she fails to provide any detail from her independent analysis—for example, indicating what percentage of the disturbed area contains highly compatible soils—it is impossible to verify her claims, and they are nothing more than speculation.[218]

Dr. Fouty's argument fails to demonstrate that the use of SSURGO data for the entire site boundary would have resulted in a different outcome of the analysis of impacts to soils from the Project. She provides no support for her implication that had Idaho Power used a higher resolution of soils data, that the evidence would support that Idaho Power cannot comply with the Soils Protection Standard. Additionally, because Dr. Fouty makes no reference to the information provided in Exhibit I and her analysis has not been conducted on the entire Project site boundary, it is not appropriate to give Dr. Fouty's assertions any weight; rather, the preponderance of the

[214] OAR 345-021-0010(1)(i)(A) (requiring that Exhibit I include "[i]dentification and description of the major soil types in the analysis area").
[215] Fouty Exceptions at 13.
[216] Fouty Exceptions at 13. Note that Dr. Fouty relied on information outside the evidentiary record in support of these statements, and as such, the Council should give no weight to these statements.
[217] Fouty Exceptions at 13. Note that Dr. Fouty relied on information outside the evidentiary record in support of these statements, and as such, the Council should give no weight to these statements.
[218] STATSGO soil data suggest that highly compactible soils are generally not present in the analysis area. ASC, Exhibit I at I-15 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 33 of 115).



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evidence demonstrates that Idaho Power's reliance on the STATSGO database was appropriate and satisfies the Company's obligations in connection with Exhibit I information requirements and the Soil Protection Standard.

Dr. Fouty's Exceptions 7, 22, and 25 do not identify any incorrect finding of fact or conclusion of law, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**9. Exceptions 8, 9, and 27 – Mitigation Requirements**

Idaho Power addresses Dr. Fouty's Exceptions 8, 9, and 27 together as they relate to the interpretation of the Council's rules as they apply to mitigation requirements.

In Exception 8, Dr. Fouty takes exception to the Hearing Officer's finding that "Idaho Power [] addressed mitigation of compacted soils due to construction activities."[219] Dr. Fouty asserts that Idaho Power could not have addressed mitigation of compacted soils due to construction because "[m]itigation requires demonstrating effectiveness which [Idaho Power] has not done."[220]

In Exception 9, Dr. Fouty takes exception to the Hearing Officer's finding that "Idaho Power [] will minimize soil impacts by using best management practices (BMPs) and restoration efforts to restore soil surfaces and vegetation following disturbances."[221] Dr. Fouty asserts that Idaho Power "presented no documentation that these 'generic set of construction BMPs' will be effective and yet they will be applied to the majority of the disturbed area."[222]

[219] Proposed Contested Case Order at 125; Fouty Exceptions at 14.
[220] Fouty Exceptions at 14.
[221] Proposed Contested Case Order at 126; Fouty Exceptions at 14-15.
[222] Fouty Exceptions at 14-15.



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In Exception 27, Dr. Fouty takes exception to the Hearing Officer's conclusion of law that the Soil Protection Standard does not require an applicant "to establish a specific timeframe for recovery or to establish quantitative measures for soil reclamation to demonstrate compliance."[223] Dr. Fouty asserts that "of course, a timeframe is required" arguing that the "Forest Service has identified timeframes in which soil impacts shift from being considered 'temporary' to 'permanent'. It is 15 years."[224]

The arguments raised in Dr. Fouty's Exceptions 8, 9, and 27 were fully addressed by Idaho Power through briefing and expert testimony. As explained below, Dr. Fouty's Exceptions 8, 9, and 27 are unsupported for the following reasons.

As an initial mater, in her Closing Arguments, Dr. Fouty relied on Forest Service Management Plans not admitted into the evidentiary record, and therefore, Idaho Power objected to statements made in reliance on these documents.[225] The Hearing Office agreed with Idaho Power that the reference documents were not admitted into the record and therefore, gave the statements made in reliance on those documents no weight.[226] Therefore, any statements made by Dr. Fouty in reliance on Forest Service Management Plans—such as, "soil impacts shift from being considered 'temporary' to 'permanent'"[227]— should be given no weight by the Council as these documents have not been entered into the evidentiary record.[228]

[223] Proposed Contested Case Order at 262; Fouty Exceptions at 29.
[224] Fouty Exceptions at 29-30.
[225] Idaho Power's Response Brief and Motion to Strike for Contested Case Issue SP-1 at 3-6.
[226] Proposed Contested Case Order at 264.
[227] Fouty Exceptions at 30.
[228] See Proposed Contested Case Contested Case, Appendix 1 (tabulation of evidentiary record by issue).



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*a. Statutory Interpretation of the Council's Definition of Mitigation Does not Support Dr. Fouty's Assertions.*

Dr. Fouty's Exceptions 8, 9, and 27 all stem from her misinterpretation of the Council's definition of "mitigation". Dr. Fouty's interpretation of the definition of "mitigation" leads her to conclude that 1) Idaho Power is required to conduct a literature review and provide evidence that its proposed BMPs will be effective (Exception 8); [229] 2) by relying on agency-issued BMPs and mitigation methods, Idaho Power is deferring its responsibility to the agencies (Exception 9);[230] and 3) that the applicant is limited to implement mitigation that effectuates recovery within a specific timeframe (Exception 27).[231] Idaho Power addressed these arguments in its Closing Arguments and Response Brief. Dr. Fouty's assertions are incorrect and unsupported, and for the following reasons, the Council should reject Dr. Fouty's Exceptions 8, 9, and 27.

As Idaho Power explained in its briefing, Dr. Fouty's interpretation of the Council's definition of "mitigation" is made without reliance on supporting documentation or legal argument. Idaho Power relies on principles of statutory interpretation, specifically, consideration of the plain language of the rule, to demonstrate that the Council's rules do not support Dr. Fouty's assertion.[232] As Idaho Power previously discussed in response to Exceptions 11, 13, 16, and 18, statutory construction starts with the language of the statute itself, because the text and context provide "the best evidence of the legislature's intent."[233]

[229] Fouty Exceptions at 14.
[230] Fouty Exceptions at 15.
[231] Fouty Exceptions at 29-30.
[232] *See* Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 12-14 ("Statutory construction starts with the language of the statute itself, because the text and context provide "the best evidence of the legislature's intent.'" *Portland Gen. Elec. Co. v. Bureau of Labor & Indus*., 317 Or 606, 610 (1993)).
[233] *PGE,* 317 Or at 610.



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For reference, the Council's definition of "mitigation" means taking one or more of the following actions listed in order of priority:

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action;
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
> (c) Partially or completely rectifying the impact by repairing, rehabilitating or restoring the affected environment;
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures;
> (e) Partially or completely compensating for the impact by replacing or providing comparable substitute resources or environments; or
> (f) Implementing other measures approved by the Council.[234]

As discussed below, based on the plain language of the definition, there is no support for Dr. Fouty's assertions.

*b. Response to Exceptions 8 and 9 - Effectiveness of Mitigation Measures.*

In Exceptions 8 and 9, Dr. Fouty appears to ask that Idaho Power must demonstrate the effectiveness of its proposed mitigation measures through a study of the effectiveness of the BMPs and mitigation measures,[235] even though no such study is contemplated in the Council's rules or the Soil Protection Standard. A plain language reading of the definition of mitigation provides no such support for Dr. Fouty's assertion and the Council should reject Dr. Fouty's assertions for the following reasons.

First, as Idaho Power's expert witness Mark Madison explained during cross-examination, the BMPs that Idaho Power is utilizing for mitigation, were developed by the agencies that "are

[234] OAR 345-021-0010(33).
[235] Fouty Exceptions at 14.



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responsible for managing many, many programs. They are reviewing available information. They're determining if their program is appropriate or not, and they're updating their references."[236] If the agency-issued BMPs were not effective for the typical construction activities that Idaho Power is carrying out, the agency would no longer rely on those BMPs. Additionally, if the science had dramatically changed, and there were better techniques to accomplish mitigation goals, then one could logically assume that the agencies charged with environmental protection, would have updated the manuals.[237] Furthermore, as, expert witness Mr. Madison testified during cross-examination by Dr. Fouty, it is not the applicant's job to "to produce research projects on the site to understand the science [of mitigation measures] in that level of detail. The science that they'll use is the science that's available in those reference documents. . . the ODOE documents that are typically used to develop revegetation plans."[238]

Second, there is no language in the definition of mitigation to support Dr. Fouty's assertion that Idaho Power must seek out mitigation measures beyond those agency-issued BMPs. Idaho Power is utilizing BMPs in its 1200-C permit and Reclamation Plan that work together to reduce impacts and restore disturbed areas.[239] These BMPs are approved or recommended by natural resources agencies and agencies that will be involved in the finalization process of the soils monitoring plans.[240] Dr. Fouty herself acknowledges that Idaho Power's "erosion and sediment

[236] *See* Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 135, line 24 – page 137, line 4 (expert witness Mark Madison discussing how regulatory agencies would update their guidance documents when new information becomes available).
[237] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 136, lines 8-17.
[238] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 187, line 21 – page 188, line 3.
[239] *See* ASC, Exhibit I at I-36 – I-37 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 40-41 of 115) (references providing BMPs relied upon by Idaho Power).
[240] *See* ASC, Exhibit I at I-36 – I-37 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 40-41 of 115) (references providing BMPs relied upon by Idaho Power).



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control measures [the 1200-C permit] may meet local, county, state, and federal guidelines," although she goes on to question their effectiveness.[241] However, hundreds of projects utilize the BMPs that Idaho Power is relying upon, and therefore, the efficacy of these BMPs has been tested through application by a multitude of projects.[242] If a government agency finds that a particular BMP is not effective or better technologies are available to replace a BMP, it is reasonable to assume that the applicable government agency would update its BMP requirements.[243]

Third, Idaho Power will be held to achieving reclamation success and meeting permit requirements, which means that if a BMP or mitigation measure is not successful, Idaho Power will have to implement a different measure until it can achieve success.[244] Under the Reclamation Plan, Idaho Power is required to continue monitoring and implementation of corrective measures until the Company receives approval from the appropriate agencies, only then may the reclamation site be released.[245] Consequently, even if Idaho Power provided a desktop study of the effectiveness of its mitigation measures, it would have little value, as the true measure of effectiveness will be determined in the field, as measured by the reclamation success standards that need to be met before Idaho Power is released from its mitigation obligations.

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[241] Dr. Fouty DPO Comments at 4 (Aug. 20, 2019) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 2145 of 10016).
[242] "You know, the DEQ document, as an example, is one that -- you know, the regulators are responsible for managing many, many programs. They are reviewing available information. They're determining if their program is appropriate or not, and they're updating their references." Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 136, lines 2 – 7.
[243] *See* Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 135, line 24 – page 137, line 4 (expert witness Mark Madison discussing how regulatory agencies would update their guidance documents when new information becomes available).
[244] Proposed Order, Attachment P1-3 at 32-34 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9143-9145 of 10016).
[245] Proposed Order, Attachment P1-3 at 32-34 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9143-9145 of 10016).



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Finally, as previously discussed, if a proposed mitigation method is so ineffective that Idaho Power cannot achieve reclamation success standards, the Company will be required to implement corrective actions before the reviewing agencies will release the Company from its obligations.[246] Idaho Power could provide all the literature and proof of mitigation effectiveness during the permitting phase, but the true test is the outcome in the field, and Idaho Power will not be released from its mitigation obligations until attaining those reclamation success standards.[247] The requirements for Idaho Power to continue to modify and adopt its mitigation action if it is not successful at first, was discussed during the cross-examination of expert witness Mark Madison. Mr. Madison explained that

> if [Idaho Power] fail[s], or even if a portion of the site fails -- a portion of it could be accepted, a portion of it could go back into the mitigation program, and it could be there for another five years and another five years and another five years. If we can't get to the targets that we've agreed upon, the agency has the right to say it's not approved yet, and we continue to own an obligation during the life of the project to restore those areas, which is, as you can imagine, very expensive to do multiple times.
>
> So, you know, there's a big focus on we want quick mitigation and rehabilitation and establishment of soil conditions that don't erode. Because if we get erosion, it's more difficult to revegetate later.[248]

For these reasons, Dr. Fouty's Exception 9 does not identify any incorrect finding of fact or conclusion of law, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

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[246] Proposed Order, Attachment P1-3 at 32 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9143 of 10016).
[247] Proposed Order, Attachment P1-3 at 30-32 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9141-9143 of 10016).
[248] Mark pg. 153, line 25 – pg.



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*c. Response to Exception 27 - Timeframe for Recovery of Impacts.*

In response to Dr. Fouty's Exception 27 assertion that a timeframe is required for mitigation, the only mention of a timeframe in the definition of mitigation is in subpart "(d) Reducing or eliminating the impact *over time* by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures."[249] First, looking to the text of the rule, the term "over time" indicates that the efforts taken to reduce or eliminate an impact may occur *over time,* as in not immediately or at any specific rate, i.e., not rapidly. Indeed, in many cases mitigation efforts cannot reasonably be expected to be rapid, e.g., regrowth of mature vegetation will not happen overnight.

Second, there are no Council rules applicable to the Soil Protection Standard that require mitigation of impacts to occur within a certain timeframe. It would be unreasonable to require that an applicant mitigate soil impacts within a specific timeframe, considering that no matter how efficient a particular method may be, time is needed to restore certain impacts,[250] i.e., while ripping of compacted soils provides immediate results to mitigate compaction, regrowth of seeding in areas of vegetation removal requires time for regrowth.

Additionally, in Exception 27, Dr. Fouty asserts that Idaho Power's use of the word "temporary" when discussing impacts and disturbance, is deceptive.[251] Dr. Fouty's argument is unfounded, and ignores the evidence that Idaho Power has put into the record that clearly and

[249] OAR 345-001-0010(33) (emphasis added).
[250] Proposed Order, Attachment P1-3 at 11 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9122 of 10016) ("For instance, a RL2 in native shrub-steppe habitat may require more time and effort to meet success criteria than a RL3 in an introduced upland vegetation habitat."); *id*. at 19 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9130 of 10016) ("The plans will include proposed seed mixes, seeding application rates, seeding methodologies, seeding timeframes,…").
[251] Fouty Exceptions at 30.



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transparently describes the timeframe for construction impacts and recovery of disturbed lands. Regardless, the Exhibit I information requirement in the Council's rules makes no reference to timeframes for disturbance or restoration, rather it requires the applicant to identify potential impacts during "construction, operation and retirement of the facility[.]"[252] Idaho Power identified temporary disturbance impacts as those occurring during construction and permanent disturbance impacts as those occurring during the operations phase, because structures would be installed in the ground thereby permanently displacing soils.[253] Additionally, the Soil Protection Standard make no reference to "temporary" and "permanent", but rather the Standard mentions the distinct points in the Project timeline—"the design, construction and operation of the facility[.]"[254]

Finally, Idaho Power agrees that temporary disturbance does not always equate to a temporary impact, i.e., erosion of soils may occur during the temporary phase of construction, but any related loss of soil may last past the construction phase if not mitigated. To prevent extensive permanent impacts from occurring, Idaho Power identified soils that are susceptible to being significantly impacted (highly erodible soils and compaction prone soils) and avoided them where possible or implemented minimization measures to reduce impacts to those soils.[255] The reason that minimization efforts are put in place, is to decrease the extent of these impacts from occurring in the first place.

[252] OAR 345-021-0010(1)(i)(C).
[253] ASC, Exhibit I at I-12 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 16 of 115) ("The analysis is organized by construction (temporary) and operational (permanent) disturbance impacts.").
[254] OAR 345-022-0022.
[255] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 24-25 of 93.



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Dr. Fouty's Exceptions 8, 9, and 27 do not identify any incorrect finding of fact or conclusion of law, and for that reason Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

### 10. Exception 10 – Monitoring Plans Addressing Compaction and Loss of Soil Carbon

In Exception 10, Dr. Fouty takes exception to the Hearing Officer's finding that "Idaho Power included a draft monitoring plan for soil impacts during construction and operation."[256] Dr. Fouty asserts that the plans that the Hearing Officer references—the Reclamation Plan and the ODEQ issued 1200-C Permit and associated ESCP—do not address major impacts such as soil compaction and loss of stored carbon.[257] Dr. Fouty's statements are without merit. The argument raised in Dr. Fouty's Exception 10 was fully addressed by Idaho Power through briefing and expert witness testimony. As explained below, Dr. Fouty's Exception 10 is unsupported for the following reasons.

#### *a. Idaho Power's Monitoring Plans Address the Impact of Soil Compaction.*

As previously addressed by Idaho Power's expert witness Mr. Madison, and presented above in response to Exceptions 6 and 23, Idaho Power addressed soil compaction in its Reclamation Plan—"we show that compaction is a concern, and compaction will be addressed with deep ripping of soils and scarification, tilling, disking, preparing a seed bed. . . to loosen bulk density."[258]

[256] Proposed Contested Case Order at 126; Fouty Exceptions at 15-16.
[257] Proposed Contested Case Order at 126; Fouty Exceptions at 15-16.
[258] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 185, line 19 – page 186, line 6.



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Additionally, Idaho Power addressed Dr. Fouty's assertion in its Closing Arguments, explaining that soil compaction is addressed through mitigation by implementation of BMPs but also during postconstruction implementation of the reclamation plan and final clean-up activities.[259] Furthermore, Idaho Power's proposed approach to addressing impacts to compaction has been pre-approved by ODEQ, as evidenced by ODEQ's permit acknowledgement.[260] Any gaps in BMPs for compaction will be identified during the final permitting process and implemented accordingly in order for Idaho Power to receive its ODEQ-issued 1200-C permit.

*b. Proposed Mitigation Measures Will Inherently Address Mitigation of Loss of Stored Carbon.*

Regarding Dr. Fouty's assertion that the proposed monitoring plans do not address loss of soil carbon, Idaho Power is not required to evaluate and propose mitigation measures for loss of soil carbon. Idaho Power provides a detailed response in the following discussion for Exceptions 11, 13, 16, and 18 explaining the legal reasoning why the Company is not required to address loss of soil carbon for compliance with the Soil Protection Standard. However, as previously addressed in the testimony from expert witness Mark Madison, Idaho Power's implementation of the Reclamation Plan will inherently address mitigation of loss of stored carbon through activities that also support soil productivity.[261]

Idaho Power takes issue with Dr. Fouty's oversimplification of Idaho Power's approach to soils reclamation, specifically the approach to restore soil productivity (and therefore by default,

[259] ASC, Exhibit I-29 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 33 of 115).
[260] *See* ASC, Exhibit I, Attachment I-4 (ODOE – B2HAPPDoc3-17 ASC 09b_Exhibit I_Soil_ASC_Part 2 2018-09-28. Page 87 of 88).
[261] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 33-34, 78-83 of 93.



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soil carbon content) proposed in the Reclamation Plan. Idaho Power identified that the potential soil impacts to productive soils (which was the main focus in addressing soil productivity) include soil erosion, mixing or loss of topsoil, and soil compaction.[262] Idaho Power addresses each of these impacts through both implementation of BMPs to mitigate impacts and the application of its soils monitoring plan, in addition to proposing further actions to enhance soil productivity. Topsoil segregation and replacement is a reclamation action proposed for all soil types, regardless of their classification as "productive soils" or "other."[263] To minimize any potential carbon loss from aboveground removal and annual loss of root deposited soil carbon, Idaho Power will pursue revegetation with species suited to soil types, among other soil protection conditions, which would offset temporary carbon losses (approximately one growing season worth).[264]

Additionally, Idaho Power will use soil amendments on a case-by-case basis to enhance the soil environment to support revegetation, which contributes to soil productivity and in turn, restoration of soil carbon content.[265] While carbon content may be lost during soil disturbance, the amount and type could be replenished through application of organic matter amendments.[266] For these reasons, it is clear that Idaho Power is proposing a more comprehensive approach than Dr. Fouty suggests.

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[262] ASC, Exhibit I at I-17 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 21 of 115).
[263] Proposed Order, Attachment P1-3: Reclamation Plan at 13, 16, 17 (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9127, 9124, 9128 of 10016).
[264] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 34 of 38.
[265] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 34 of 38; Proposed Order, Attachment P1-3: Reclamation Plan at 19 (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9130 of 10016).
[266] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 36 of 38 ("Because the loss of soil carbon content can be replenished through the application of organic matter amendments, which is a common and not an unusual farming practice, I believe the impacts will be minimal.").



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Furthermore, not all areas that are temporarily disturbed during construction will experience clearing and cutting of vegetation; many areas will have vegetation "crushed" in place, thereby limiting the extent of ground disturbance[267], and leaving the more stable carbon stocks in place. However, in areas that will undergo clearing and cutting of vegetation, Idaho Power's proposal for topsoil segregation will involve selective clearing in areas of dense vegetation, leaving root systems intact during vegetation removal to preserve organic matter, and replanting of native species will help to reduce the extent of temporary carbon losses.[268]

Finally, Dr. Fouty fails to acknowledge that the duration of construction disturbance of soils is both temporary and brief in duration—approximately three to four months per construction location. This limited duration of soil disturbance minimizes the loss of stored soil carbon both because of the limited disturbance time and because erosion stabilization measures and revegetation actions will be implemented in a timely manner. On this point, Idaho Power's expert witness, Mark Madison, provided an example of how farming practices that result in soil disturbance and exposure of bare soils for an extended period of time can ultimately improve crop yield.[269] At three to four months, the duration of temporary disturbance from the Project's construction activities will be less than the duration in the farming practices that Mr. Madison

[267] Proposed Order, Attachment P1-3: Reclamation Plan at 10 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9121 of 10016) (Reclamation Level 2 – Low level of temporary disturbance that will result in vegetation crushing and require limited reclamation actions. This level of disturbance is expected in areas of pulling and tensioning sites and the temporary areas of structural work.).

[268] *See* Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 83 of 93 (citing ASC, Exhibit I at I-30 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 34 of 115); Proposed Order, Attachment P1-3: Reclamation Plan at 13 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9124 of 10016) (Reclamation zone 3, areas that are limited to clearing and cutting of vegetation will receive reclamation activities of topsoil segregation, selective clearing and reclamation monitoring site selection).

[269] *See* Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, pp. 77-78 of 93 (discussing dry fallow farming, duration of exposed bare land (14 months), and successful high yield crops from this process of disturbing soils and allowing them to remain bare).



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discussed (14 months).[270] Moreover, Mr. Madison's discussion provided a clear example of how soil disturbance does not necessarily result in such significant impacts to soil productivity that crop growth would be inhibited on productive soils.

Thus, should the Council decide that the loss of soil carbon must be evaluated under the Soil Protection Standard, Idaho Power has already provided sufficient evidence to support a finding that there is no significant adverse impact to soils from the negligible loss of stored carbon nor is there a significant adverse impact to soil productivity resulting from the negligible loss of stored carbon.

Dr. Fouty's Exception 10 does not identify any incorrect finding of fact, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**11. Exception 12 – Sufficiency of Evidence Presented**

In Exception 12, Dr. Fouty takes exception to the Hearing Officer's conclusion that "Idaho Power presented sufficient information for the Council to find that the proposed facility, taking into account mitigation, is not likely to result in a significant adverse impact to soils."[271] Dr. Fouty makes two assertions in Exception 12—that Idaho Power has not provided sufficient evidence for the Hearing Officer to make such a conclusion and that Idaho Power "did not address the loss of stored soil carbon *at all*."[272] To the contrary, Idaho Power provided sufficient evidence in support of its ASC and its arguments in this contested case and also provided expert testimony regarding

[270] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p 77 of 93.
[271] Proposed Contested Case Order at 142; Fouty Exceptions at 17-18.
[272] Fouty Exceptions at 18 (emphasis added).



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evaluation of the loss of stored carbon. For the following reasons, the Council should reject Dr. Fouty's assertions.

In addition to the information presented in the Company's ASC, the record of the contested case is voluminous. During this process, Idaho Power responded to dozens of Discovery Requests and provided hundreds of pages of testimony and exhibits from its expert witness Mark Madison, who was also made available for cross-examination by Dr. Fouty. At the hearing, Dr. Fouty conducted over 4.5 hours of cross examination of Mr. Madison. The contested case record speaks for itself—Idaho Power provided more than sufficient information to support a finding by the Hearing Officer, and the Council, that the proposed facility, taking into account mitigation, is not likely to result in a significant adverse impact to soils.

Dr. Fouty also asserts that Idaho Power "did not address the loss of stored carbon at all."[273] This assertion is wholly false and should be rejected by the Council for the following reasons. Idaho Power presented two evaluations of soil carbon—a review of the soil carbon content of the soil orders that the Project encounters and an evaluation of the correlation between soil carbon content and soil productivity with existing vegetative cover.

Idaho Power analyzed the carbon stocks within the upper 100 centimeters at the soil order level and presented the range of soil productivity index and mean carbon context for the four main soil orders encountered across the Project.[274] Idaho Power's analysis confirms that the loss of soil carbon will not result in significant adverse impacts on soil productivity.[275] The loss of soil carbon

[273] Fouty Exceptions at 18.
[274] *See* Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, pp. 80-83 of 93 (analysis of stored carbon in soil and corresponding level of soil productivity; discussion of soil productivity with overlapping land uses and how human intervention has altered soils with low productivity to be highly productive soils).
[275] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, pp. 80-83 of 93.



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from soil disturbance will be minimal because "the greatest fraction of organic matter and carbon in the soil of the Project area is stable, meaning it is resistant to decay."[276] On the time scale of the Project construction disturbance to revegetation, the impact is insubstantial because the greatest fraction of organic matter within the soil is stable (as opposed to volatile and easily released from disturbance) and, as a result, it requires significantly longer exposure or disturbance time to decay.[277] The concern of loss of carbon from soils, and ultimately, productivity would become detectable only after intense and repetitive disturbance to the soil over cycles of years to decades.[278] Therefore, while more volatile carbon will be lost from disturbance, the greatest fraction of carbon remains in the soils and the restoration of carbon stocks will begin as revegetation of species progresses.[279]

Utilizing the aforementioned soil carbon content information, Idaho Power presented an analysis comparing the soil productivity and soil carbon content of the soil orders that the Project encounters.[280] In his Rebuttal Testimony, with support from two additional expert witnesses, Denny Mengel who specializes in soil science, and Guerry Holm whose expertise is in large scale greenhouse gas emissions quantification, Mark Madison provided several figures that present an overlap between soil productivity (which is dependent on the carbon content of the soil) and soils

[276] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 83 of 93.
[277] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 83 of 93 ("The active pool of carbon in the soil is equivalent to the most recent (i.e., seasonal) deposition by plant roots. The inactive, or stable, carbon pool is one to two orders of magnitude greater than seasonal plant contributions, making this timeframe much longer than the anticipated duration of impacts (one growing season) that Project soils will experience disruption.")
[278] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, pp. 81-82 of 93.
[279] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 25 of 38.
[280] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 80-83 of 93.



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that are supporting vegetation as evidenced by aerial photographs in Exhibit I.[281] In his testimony, Mr. Madison described how the noticeably lower soil productivity soil orders—with corresponding lower soil carbon contents—support vegetation typically present in high productivity soils because of the *significant human intervention that helps those soils to be more productive than they naturally are*.[282] Consequently, the analysis concluded that impacts to productivity soils and soil carbon content are not as significant as has been asserted by Dr. Fouty because many of these soils are only productive because of significant human intervention.[283]

Therefore, although Idaho Power was not required to do so, the preponderance of the evidence shows that the Company, through the analysis in the testimony and evidence provided in this contested case, evaluated loss of stored carbon in the soil and its impact on soil productivity as a result of the release of stored carbon in soils, and will inherently address mitigation of loss of stored carbon during mitigation of other impacts or otherwise through implementation of the Reclamation Plan, as presented in response to Exception 10.

Thus, Dr. Fouty's Exception 12 does not identify any incorrect conclusion of law, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**12. Exception 14 – Misinterpretation of Statement**

In Exception 14, Dr. Fouty takes exception to the Hearing Officer's conclusion that "Dr. Fouty argues that 'the intent of the Soil Protection standard is to protect soil productivity.'"[284]

[281] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit I, Figures for Soil Orders and Productivity.
[282] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 81 of 93.
[283] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 81 of 93.
[284] Proposed Contested Case Order at 259; Fouty Exceptions at 17-18.



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Dr. Fouty asserts that the Hearing Officer took Dr. Fouty's statements "out of context with the full sentence."[285] Idaho Power similarly interpreted Dr. Fouty's statement in its Response Brief, when in her Closing Arguments, Dr. Fouty asserted that "[t]he Soil Protection Standard is about maintaining soil productivity."[286]

It appears that the Hearing Officer's statement is a conclusion that, contrary to Dr. Fouty's assertion, the primary objective of the Soil Protection Standard is not only to maintain soil productivity but also to identify potential impacts to soils and mitigation measures as they relate to construction and operation of energy facilities, which in some instances, may require evaluating soil productivity. In support of the Hearing Officer's conclusions, Idaho Power provides its arguments as previously presented in its Response Brief.

Idaho Power acknowledges that ODOE directed the Company to analyze soil productivity in productive soils in the Project Order[287] and the information requirements for Exhibit I of the ASC also include consideration of impacts to lands uses that depend on productive soils.[288] However, Dr. Fouty's interpretation of the Soil Protection Standard as stated in her Closing Brief—"[t]he Soil Protection Standard is about maintaining soil productivity"[289]—is not based on principles of statutory interpretation or application of relevant case law, but rather is based solely on her own unsupported and conclusory statements. In its Closing Arguments, Idaho Power provided legal analysis of the Soil Protection Standard in support of its assertion that the Soil Protection Standard requires an applicant to evaluate impacts that are typically associated with,

[285] Fouty Exceptions at 18-19.
[286] Closing Brief of Suzanne Fouty at 11.
[287] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 35-37.
[288] OAR 345-021-0010(1)(i)(B).
[289] Closing Brief of Suzanne Fouty at 11.



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evaluated, and addressed as part of the construction and operation of an energy facility and impacts that are included in the project order.[290] Please refer to discussion of statutory interpretation of the Soil Protection Standard in response to Exceptions 11, 13, 16, and 18 above.

Consequently, Dr. Fouty's Exception 14 does not identify any incorrect conclusion of law, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**13. Exception 15 – Scope of Soil Protection Standard**

In Exception 15, Dr. Fouty takes exception to the Hearing Officer's conclusion that "contrary to Dr. Fouty's contention, the purpose of the Soil Protection standard is not to protect soil productivity."[291] Dr. Fouty asserts that the Hearing Officer's statement is in direct contradiction to the Second Amended Project Order and to OAR 345-021-0010(1)(i)(B).[292] Dr. Fouty's exception is misinterpreting the Hearing Officer's conclusion.

The Hearing Officer's statements are not in direct contradiction with the Second Amended Project Order because the Hearing Officer did not conclude that it would be inappropriate to address soil productivity under the Soil Protection Standard. Rather, the Hearing Officer is simply stating that the scope of the Soil Protection Standard is broader than protecting soil productivity. Therefore, the Council should reject Exception 15, as it does not identify any incorrect conclusion of law.

[290] *See* Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 11-16 (applying principles of statutory interpretation to determine what impacts the Soil Protection Standard does require an applicant to evaluate).
[291] Proposed Contested Case Order at 259; Fouty Exceptions 18-19.
[292] Fouty Exceptions 19.



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### 14. Exception 17– Request for Additional Impacts

In Exception 17, Dr. Fouty takes exception to the Hearing Officer's conclusion that "OAR 345-021-0010(1)(i) simply directs the applicant to provide 'information from reasonably available sources regarding soil conditions and uses in the analysis area.'"[293] Dr. Fouty asserts that the Hearing Officer ignores the plain language of OAR 345-021-0010(1)(i)(C), which states that the applicant is required to identify and assess significant potential adverse impacts to soils from the project "including, but not limited to, erosion and chemical factors."[294]

While it is not entirely clear what Dr. Fouty is arguing, it appears she is interpreting the Hearing Officer's conclusions as limiting the soil impacts that an applicant may be required to evaluate. The Hearing Officer's conclusion does not limit the impacts that an applicant may be required to evaluate at the request of the Council or ODOE. Rather, it appears that the Hearing Officer is simply concluding that an applicant may provide, as a baseline, an evaluation of the impacts listed in the Soil Protection Standard, and for any impacts beyond those listed in the Council's rules, "[ODOE] or the Council may request in the project order that an applicant provide information and evaluations of other impacts to soil (such as soil compaction, loss of structure and infiltration, loss of stored carbon, and/or loss of productivity)",[295] as ODOE did in this this case. ODOE and the Council have the discretion to request information on additional impacts beyond those expressly listed; however, in responding to those requests, it would be reasonable for the

[293] Proposed Contested Case Order at 260; Fouty Exceptions at 21.
[294] Fouty Exceptions at 21.
[295] Proposed Contested Case Order at 260.



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applicant to provide "information from reasonably available sources regarding soil conditions and uses in the analysis area."[296]

For these reasons, Dr. Fouty's Exception 17 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**15. Exception 18 – Additional Discussion on Scope of Standard**

In Exception 18, Dr. Fouty makes four assertions. In her first assertion, Dr. Fouty takes exception to the Hearing Officer's interpretation of the phrase "including, but not limited to."[297] Idaho Power provided a response to this exception in response to Exceptions 11, 13, 16, and 18 above.

Dr. Fouty's second assertion is that the General Standard of Review references "any adverse effects on a resource."[298] Dr. Fouty's statement has no further supporting argument or reference to the Proposed Contested Case Order. Dr. Fouty's assertion is irrelevant. The Council relies on the General Standard of Review OAR 345-022-0000(2) (referenced by Dr. Fouty) only when an applicant cannot satisfy one of the applicable standards, and must conduct a balancing analysis. However, in this case, because Idaho Power has demonstrated compliance with the Soil Protection Standard, the Council's balancing authority is not at issue. Simply put, Dr. Fouty's reference to the words "any adverse effects" is from a rule that does not apply and has no bearing on the resolution of SP-1.

[296] Proposed Contested Case Order at 260.
[297] Fouty Exceptions at 22.
[298] Fouty Exceptions at 22.



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In Dr. Fouty's third assertion, she takes exception to the Hearing Officer's statements in footnote 359, claiming that they contradict the Hearing Officer's conclusions about "intent of the plain language."[299] Specifically, Dr. Fouty argues that Idaho Power did not "describe all measures proposed to maintain soil productivity" because it did not "analyze changes to bulk density (soil compaction) and loss of soil carbon and soil structure and infiltration and identify effective mitigations and measures of effectiveness."[300] Dr. Fouty's argument fails for two reasons.

First, Dr. Fouty's appears to interpret the phrase "describe all measures proposed" as meaning "describe all measures that could possibly be used but that Idaho Power is not using." Idaho Power described all measures that it proposed to use in Exhibit I, in accordance with the Second Amended Project Order. Again, a plain language interpretation demonstrates that Idaho Power was not asked to describe all possible measures that could potentially be used; rather, that Idaho Power must present the measures that it will be using.

Second, despite Dr. Fouty's statements to the contrary and although Idaho Power was not required to do so, the preponderance of the evidence shows that the Company, through the analysis in Exhibit I and the testimony and evidence provided in this contested case, fully evaluated soil compaction, and related loss of soil structure and infiltration, and will inherently address those impacts during mitigation of other impacts or otherwise through implementation of the Reclamation Plan. Idaho Power identified compaction as a potential impact to soils because, during construction, the use of construction equipment may result in compaction of on-site soils.[301]

[299] Fouty Exceptions at 22.
[300] Fouty Exceptions at 22.
[301] ASC, Exhibit I at I-15 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 19 of 115).



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Soil structure (the arrangement of soil particles)[302] and infiltration (the ability of water to enter the soil column) are also altered through compaction of soils.[303] Compaction of soils may limit reclamation potential[304] by reducing pore space between soil particles (altering soil structure), thereby increasing run off and limiting infiltration potential for air and water.[305] Therefore, because soil structure and infiltration are soil properties that are affected when soils are compacted, those factors are necessarily also addressed when evaluating impacts from compaction. In the absence of mitigation, compaction impacts have the potential to result in adverse impacts on soils. Idaho Power will minimize these impacts by avoiding highly compactible soils, and in areas that have been impacted, the Company will implement restoration efforts in temporarily disturbed areas, which will include ripping and loosening of soils to restore the productive potential for soils.[306] The reclamation actions of ripping and loosening soils alter soil structure and increase infiltration by introducing space between soil particles. Thus, Idaho Power evaluated compaction, loss of structure, and infiltration in Exhibit I, and proposed mitigation to address compaction impacts in both Exhibit I[307] and Exhibit P1.[308]

[302] Idaho Power / Rebuttal Testimony of Mark Madison / Issues SP-1 and LU-9, p. 13 of 93.
[303] ASC, Exhibit I at I-15 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 19 of 115).
[304] ASC, Exhibit I at I-7 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 11 of 115).
[305] ASC, Exhibit I at I-15 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 19 of 115).
[306] ASC, Exhibit I at I-29 (Sept. 2018) (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 33 of 115).
[307] S*ee* ASC, Exhibit I at I-15 (ODOE - B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 19 of 115) ("Over compacted soil reduces the amount of water infiltration necessary to support plant growth. Compacted soil is also less suitable to natural plant regeneration or seeding.").
[308] Proposed Order, Attachment P1-3: Reclamation Plan at 17 (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9128 of 10016).



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Dr. Fouty's fourth comment is that the Hearing Officer omitted the word "also" from her reiteration of paragraph 2 of the Second Amended Project Order.[309] Dr. Fouty's assertion is irrelevant. A close review of the Second Amended Project Order and of footnote 359, shows 1) the Hearing Officer was not directly quoting from the document into the Proposed Contested Case Order, and therefore, she did not omit "also" but rather she was paraphrasing, and 2) the use of "also" was simply directing Idaho Power to include the additional requested information in its revised Exhibit I with the other information requested by ODOE. Idaho Power complied with the requirements from the Second Amended Project Order, which stated: "Exhibit I shall also include the required evidence related to the federally-delegated National Pollutant Discharge Elimination System (NPDES) 1200-C permit application."[310] Idaho Power submitted proof of the ODEQ reviewed 1200-C permit in Exhibit I.[311]

For these reasons, Dr. Fouty's Exception 18 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**16. Exception 19 – Sources of Information**

In Exception 19, Dr. Fouty makes three assertions in response to the Hearing Officer's conclusion that "[n]either the ASC content rule nor the Soil Protection standard require that the

[309] Fouty Exceptions at 22. See Proposed Contested Case Order at 260, n.359.
[310] Second Amended Project Order at 12 (July 26, 2018) (ODOE – B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 14 of 29).
[311] ASC, Exhibit I, Attachment I-4 (ODOE – B2HAPPDoc3-17 ASC 09b_Exhibit I_Soil_ASC_Part 2 2018-09-28. Page 87 of 88).



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applicant present the highest level of detail, from the most current sources, or the best available science.'"[312]

First, Dr. Fouty asserts that the Hearing Officer is "stating that [Idaho Power] can use whatever science it wants regardless of its accuracy or currency."[313] Dr. Fouty's interpretation of the Hearing Officer's conclusion should be rejected for the following reasons.

Idaho Power believes that Dr. Fouty is taking the Hearing Officer's statements out of context. During his cross-examination by Dr. Fouty, expert witness Mark Madison discussed how the latest science is used to inform the governmental agencies that establish BMPs. In response to a series of questions from Dr. Fouty regarding the use of 30-year-old BMP documents, Mr. Madison states that:

> New information continues to become available, but it hasn't changed the basic science. You know, the DEQ document, as an example, is one that -- you know, the regulators are responsible for managing many, many programs. They are reviewing available information. They're determining if their program is appropriate or not, and they're updating their references.
>
> So the fact that there's a 2005 soil and sediment control manual that's available, that manual -- you know, *if the science had dramatically changed and there was a new better way to do things, that's one of the manuals that would have changed and been updated, but that is still the standard of the industry*. It's still the manual that most linear projects like this refer to. And it's somewhat dated, but it's good science, and the good science that's in it has not changed.[314]

Mr. Madison's testimony makes clear that it is industry standard to rely on proven agency-issued BMPs, and even in the event that those BMPs may be decades old, they are still good science. The

[312] Proposed Contested Case Order at 260; Fouty Exceptions at 23.
[313] Fouty Exceptions at 24.
[314] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), at page 136, lines 1 -17 (emphasis added).



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Hearing Officer similarly concludes that an applicant is not required to utilize the latest science to meet compliance with the Soil Protection Standard.

Dr. Fouty's second assertion provided in Exception 19 argues that the Hearing Officer's conclusion implies that an applicant can use any database, regardless if it is out of date, contrary to the language of the rule—"identification and description of **current** land uses in the analysis area."[315] Dr. Fouty's assertion is misleading. First, Dr. Fouty seems to be taking the Hearing Officer's statement out of context, as the Hearing Officer makes no such conclusion that the applicant can use any information regardless of recency or accuracy. Second, in support of her argument that the Hearing Officer contradicts the language of the Council's rules, Dr. Fouty relies on the one instance of "current" in the Exhibit I information requirement rule, where the use of the word is specific to "land uses" *not* the applicant's requirements to provide soils information. Dr. Fouty's assertion is therefore without merit.

Dr. Fouty's third argument is that although the Soil Protection Standard does not say that the applicant must use "best available science and that the information must be accurate, it is obviously expected."[316] First, as Idaho Power previously stated in response to the first assertion in this exception, agency-issued documents are updated when deemed appropriate, even when they may be 30 years old, they may provide the best available science, as in some cases, the science simply does not change. Second, as a point of clarification, as expert witness Mark Madison stated during cross-examination by Dr. Fouty—"'[B]est available science' is a pretty broad term. . . . The science that [Idaho Power will] use is the science that's available in those reference documents

[315] Fouty Exceptions at 23 (emphasis in original).
[316] Fouty Exceptions at 24.



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that we've talked about, the Forest Service or Department of Agriculture, the ODOE documents that are typically used to develop revegetation plans."[317] Last, in response to the questions Dr. Fouty raises in this Exception,[318] Idaho Power could conduct an elaborate literature research of all the latest academic studies on soil reclamation. However, regardless of the mitigation measures it presents, Idaho Power will be required to achieve successful revegetation in accordance with its Reclamation Plan, and if revegetation cannot successfully occur, then it will be evident that mitigation was not successful. Idaho Power responded in further detail to this assertion in response to Exceptions 8, 9, and 27.

Therefore, Dr. Fouty's Exception 19 does not identify any incorrect conclusion of law, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**17. Exception 20 – Site-specific Information**

In Exception 20, Dr. Fouty takes exception to the Hearing Officer's conclusion that "[t]he Council rules [] do not require the applicant provide site-specific mitigation in the ASC."[319] Dr. Fouty asserts that the Hearing Officer is mistaken, and that site-specific level of detail is necessary.[320] Dr. Fouty believes that the Hearing Officer has contradicted herself and provides the following statement from the Proposed Contested Case Order in support of this assertion:

> Moreover, the recommended site certificate conditions in the Proposed Order related to soil protection and the various mitigation plans addressed within those

[317] Madison Testimony, Cross-Examination Hearing Day 2, January 11, 2022 (Tr. Day 2), page 187, line 21 – page 188, line.
[318] "How else is the applicant to demonstrate that after doing its mitigations there is not likely to be significant adverse impacts to soils? How else does the Council avoid making arbitrary and capricious decisions that may or may not meet the OAR requirements." Fouty Exceptions at 24.
[319] Proposed Contested Case Order at 260; Fouty Exceptions at 24.
[320] Fouty Exceptions at 24 and 37.



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> conditions *require that Idaho Power provide site-specific mitigation* information and that the Company have in place various finalized plans designed to ensure that temporary adverse impacts to soil are minimized.[321]

Dr. Fouty is conflating two separate conclusions of law that address two separate elements—the Soil Protection Standard and the Proposed Order. Despite Dr. Fouty's assertions, it is possible to harmonize the Hearing Officer's statements. Dr. Fouty's Exception 20 should be rejected for the following reasons.

In the first instance, the Hearing Officer concludes that an interpretation of the Council's rules do not indicate that site-specific mitigation is required for compliance with the Soil Protection Standard, because as stated in the rule, the applicant is expected to provide "[i]nformation from reasonably available sources regarding soil conditions and uses in the analysis area."[322] The Hearing Officer's statements are consistent with her prior statements that the applicant is expected to provide a reasonable level of information from reasonably obtainable sources.[323] A plain language interpretation of the rule clearly demonstrates that there is no requirement for site-specific, highly granular information to be provided in the ASC. To acquire site-specific information may in some instances require efforts beyond accessing "reasonably available sources," such as the collection of field data. Importantly, the Hearing Officer's statements address the required content of the ASC.

In the second instance cited by Dr. Fouty, the Hearing Officer acknowledges that the site certificate conditions require that Idaho Power provide site-specific information as part of finalizing its mitigation plans. This information will be provided after issuance of the site

[321] Proposed Contested Case Order at 262-263.
[322] OAR 345-021-0010(1)(i).
[323] Proposed Contested Case Order at 260.



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certificate, as Idaho Power is finalizing its mitigation plans. Due to the timing difference (ASC v. post-ASC work on finalizing mitigation), the Hearing Officer's statements can be read in harmony. For these reasons, Dr. Fouty's Exception 20 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**18. Exception 26 – Scope of Issue SP-1**

In Exception 26, Dr. Fouty takes exception to the Hearing Officer's conclusion that the mitigation concerns raised by Dr. Fouty are beyond the scope of Issue SP-1.[324] Dr. Fouty asserts that the Hearing Officer is mistaken when she states that evaluation of mitigation measures are beyond the scope of SP-1, and instead the Hearing Officer intended to reference the broader Soil Protection Standard and therefore, Dr. Fouty's concerns with Idaho Power's mitigation are not beyond the scope and should be addressed.[325] However, it is Dr. Fouty that is mistaken. The intent of the Proposed Contested Case Order is to address the contested case issues, not to address the full scope of the Council's standards. As the Council's rules state—"After the hearing in a contested case proceeding on an application for a site certificate . . . the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, and recommended site certificate conditions *on the issues in the contested case*."[326] Therefore, although the section of the Hearing Officer's Opinion is titled "Soil Protection Standard," the Hearing Officer is addressing the issues under the Soil Protection Standard—SP-1—not the standard as a whole. Thus, Dr. Fouty's Exception 26 does not identify any incorrect conclusion

[324] Proposed Contested Case Order at 262.
[325] Fouty Exceptions at 24.
[326] OAR 345-015-0085(3) (emphasis added).



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of law, and for that reason, Idaho Power requests that the Council adopt without modification the Hearing Officer's conclusions of law relevant to SP-1.

### 19. Exception 28 – Sufficiency of Proposed Mitigation

In Exception 28, Dr. Fouty takes exception to the Hearing Officer's conclusion of the requirements of the Soil Protection Standard.[327] It is unclear specifically what portion of the Hearing Officer's conclusion that Dr. Fouty takes issue with, but her interpretation is that the Hearing Officer is stating that "as along as [Idaho Power] has *described* whatever mitigation measures it plans to use to avoid or mitigate adverse impacts to soils, it does not matter if that list is complete or not or if they work."[328] It is clear from a close review of the Hearing Officer's statement, that she is making no such conclusions. Dr. Fouty's assertions are made without support and she does not provide any clear analysis of the Hearing Officer's conclusions; the Council should reject Dr. Fouty's Exception 28 for the following reasons. The Hearing Officer's statement and Idaho Power's response is provided as follows.

- **"Rather, the standard requires that an applicant demonstrate that it has evaluated the potential impacts to soils from proposed facility construction and operation and that it has methods to mitigate adverse impacts to less than significant."[329]**

[327] "The Soil Protection standard does not prohibit impacts to soils, whether the soil is productive or non-productive. Nor does the standard require an applicant to establish a specific timeframe for recovery or to establish quantitative measures for soil reclamation to demonstrate compliance with the Soil Protection standard. Rather, the standard requires that an applicant demonstrate that it has evaluated the potential impacts to soils from proposed facility construction and operation and that it has methods to mitigate adverse impacts to less than significant. As discussed above, the ASC content rule requires that the applicant submit information from reasonably available sources *describing* any measures the applicant proposes to avoid or mitigate adverse impacts to soils. OAR 345-021-0010(1)(i)(D). The Soil Protection standard specifically allows consideration of an applicant's proposed mitigation to make findings of compliance, but it does not require the applicant to provide proof that the mitigation will be rapid and completely effective."

Proposed Contested Case Order at 262.

[328] Fouty Exceptions at 31.

[329] Proposed Contested Case Order at 262.



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Idaho Power interprets this statement as the Hearing Officer concluding that the Soil Protection Standard in fact requires that an applicant demonstrate that it has *evaluated*—which naturally implies an effort greater than describing an impact—and identified methods that will mitigate the impacts to be less than significant. No portion of the Hearing Officer's statement implies that the compliance with the Soil Protection Standard can be achieved by "describ[ing] whatever mitigation measures… it does not matter if they work" as Dr. Fouty asserts.[330]

- **As discussed above, the ASC content rule requires that the applicant submit information from reasonably available sources describing any measures the applicant proposes to avoid or mitigate adverse impacts to soils. OAR 345-021-0010(1)(i)(D)."[331]**

The reference to reasonably available resources, such as agency-issued BMPs, indicates that the Hearing Officer does not believe the Standard to mean any method regardless if they work, and there is no such support for Dr. Fouty's conclusions.

- **The Soil Protection standard specifically allows consideration of an applicant's proposed mitigation to make findings of compliance, but it does not require the applicant to provide proof that the mitigation will be rapid and completely effective.[332]**

Idaho Power interprets the Hearing Officer's statements as implying that Idaho Power must provide its proposed BMPs, it must follow those BMPs, but it need not perform an independent assessment of their efficacy. The fact that the BMPs proposed by Idaho Power are still being used by the agencies with the expertise in these areas, is indicative of their efficacy. Idaho Power provides further discussion of agency-issued BMPs in response to Exceptions 8, 9, and 19.

[330] Fouty Exceptions at 31.
[331] Proposed Contested Case Order at 262.
[332] Proposed Contested Case Order at 262.



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### 20. Exception 29 – Reversal of Impacts

In Exception 29, Dr. Fouty takes exception to the Hearing Officer's conclusion that the Soil Protection Standard does not require that mitigation will be "completely effective."[333] Dr. Fouty claims that she never insisted that "soil impacts must be 100% remedied."[334] However, in Dr. Fouty's Closing Arguments, she made statements such as, "mitigations must be shown to effectively reverse the impacts they are intended to address,"[335] which could reasonably be interpreted as Dr. Fouty arguing that impacts must be completely effective. Regardless, because Dr. Fouty and the Hearing Officer appear to be in agreement that the Soil Protection Standard does not require that mitigation must be completely effective, there appears to be no issue with the Hearing Officer's conclusion, and therefore, the Council should reject Exception 29.

### 21. Exception 30 – Industry Standards

In Exception 30, Dr. Fouty takes exception to the Hearing Officer's conclusion that it was reasonable and consistent with industry standards "for Idaho Power to rely on agency-issued BMPs to mitigate adverse impacts" and "Dr. Fouty has not established otherwise."[336] Dr. Fouty makes six arguments against the Hearing Officer's conclusions.

**1) Dr. Fouty asserts that she has repeatedly shown that "[Idaho Power's] mitigations are lacking."**[337]

The Hearing Officer is correct in concluding that Dr. Fouty has not established that Idaho Power's reliance on agency-issued documents is inconsistent with industry standards. Despite

[333] Proposed Contested Case Order at 262.
[334] Fouty Exceptions at 32.
[335] Closing Brief of Suzanne Fouty at 3.
[336] Proposed Contested Case Order at 262.
[337] Fouty Exceptions at 32.



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Dr. Fouty's assertions and her submittal of direct and sur-rebuttal testimony with accompanying exhibits, not once has she shown that 1) Idaho Power's proposed mitigation measures are inconsistent with industry standards; 2) that the Council has required more than agency-issued BMPs for approval of a site certificate; 3) that any Council rules require more than agency-issued BMPs to address mitigation; 4) that agency-issued BMPs have been deemed inadequate by any agency, including EFSC; and 5) that any agency, including EFSC, has required an applicant to propose mitigation measures that were solely based on literature review and not practical implementation and approval by an experienced agency. Idaho Power addressed a similar assertion in response to Exceptions 8 and 9 above.

**2) Dr. Fouty argues that Idaho Power provided only one set of agency-issued BMPs and that they do not address compaction, loss of soil structure and infiltration, and loss of stored carbon.[338]**

*First*, as previously discussed in response to Exceptions 11, 13, 16, and 18, loss of soil carbon is not required to be evaluated under the Soil Protection Standard. Regardless, as it relates to consideration of the evaluation of loss of stored carbon in soils, there is no relevant Oregon regulation or permitting program on this topic, and therefore, there is no established regulatory scheme establishing standards for evaluating the extent and degree of the potential impact or appropriate mitigation measures. The fact that no agency-issued BMPs were available for evaluation of this soil property further supports that it is not industry standard to evaluate this property impact.

[338] Fouty Exceptions at 34.



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*Second*, in addition to the ODEQ 1200-C general permit, which addresses compaction (and therefore loss of soil structure and infiltration, as both may be altered during compaction of soils),[339] Idaho Power is mitigating soil compaction prevention and mitigation methods beyond the requirements of the 1200-C general permit through the use of typical industry preventative measures and implementation of Reclamation Plan. For example, as expert witness Mark Madison testified, to minimize compaction impacts, contractors will avoid working in soils that are prone to compaction during wet weather, and to the extent possible, only conduct mechanized clearing and maintenance in the late summer/early fall months.[91] Compaction impacts can be reduced by constraining traffic, heavy equipment, and construction to existing roads where possible.[340] Idaho Power addressed a similar assertion in response to Exceptions 10 and 13 above.

**3) Dr. Fouty asserts that Mr. Madison could not provide "references for what constitutes industry standards."**[341]

Idaho Power's expert witness, Mark Madison, during cross-examination emphasized that what constitutes industry standards is "knowledge [that] is typically gained from [working] on large linear projects that involve[] earthwork and disturbance of existing vegetation. In addition,

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[339] Erosion and compaction are regulated under ODEQ's 1200-C permitting program. *See* OAR 340-045-0015 (requiring person discharging stormwater associated with construction activity to obtain an NPDES permit); OAR 340-041-0001 *et seq.* (regulations that set forth Oregon's plans for management of the quality of public waters within the State of Oregon, which includes direction on preparation of erosion control plans); *see* ODEQ General Permit National Pollutant Discharge Elimination System Construction Stormwater Discharge Permit at 17 (December 15, 2020). Since this document was not previously submitted prior to the close of the record, Idaho Power asks that the Council take official notice of this document in accordance with OAR 345-015-0046(1)(b). A courtesy copy of this document was provided as Idaho Power / Closing Arguments for Contested Case Issue SP-1 / Attachment A, ODEQ's NPDES Permit. ODEQ regulates land application of effluent. *See* OAR 340-045-0005 *et seq.* (regulations establishing limitations on discharge of wastes (effluents) and the requirements and procedures for obtaining NPDES and WPCF permits from ODEQ); OAR 340-050-0005 *et seq.* (regulations addressing "the land application of treated domestic wastewater biosolids, biosolids derived products, and domestic septage").

[340] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 17, 25, and 34 of 92.

[341] Fouty Exceptions at 34.



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knowledge of industry standards is also typically informed by what processes are required for permits involving construction that results in ground disturbance, as opposed to academic literature."[342] Furthermore, as stated by Mr. Madison, industry standards are informed by knowledge gained through the application of regulations and projects operating within the relevant permitting and regulatory framework.[343] Therefore, it is appropriate to look towards existing regulatory schemes to determine which types of soil impacts are typically involved with the construction of energy facilities, and thus, may be required under the Soil Protection Standard.

When addressing the question of whether loss of soil carbon was a soil impact that was evaluated according to industry standards, expert witness Mr. Madison gave an example of when the request to evaluate an impact would be inconsistent with industry standards—when there is currently "no software, method, process or multivariate tool that can comprehensively evaluate [] the soil properties [being requested] and reliably prescribe spatially explicit soil reclamation/protection practices or measures that are different than those proposed by Idaho Power."[344]

4) **Dr. Fouty asserts that in the absence of mitigation measures under the referenced agency-issued BMPs, that Idaho Power "defaults to old Forest Service and [Bureau of Land Management ("BLM")] Resource Management documents."**[345]

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[342] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 13 of 38.
[343] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 13 of 38 ("It would be difficult to provide references for what constitutes industry standards because this knowledge is typically gained from consulting on large linear projects that involved earthwork and disturbance of existing vegetation. In addition, knowledge of industry standards is also typically informed by what processes are required for permits involving construction that results in ground disturbance, as opposed to academic literature.").
[344] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 10 of 38.
[345] Fouty Exceptions at 35.



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While it is true that Idaho Power includes reference to Forest Service and BLM Management documents in Exhibit I of the ASC, because Dr. Fouty fails to provide any specific example where in the ASC Idaho Power declined to rely on the referenced agency-issued BMPs and instead cites to "old Forest Service" documents, Idaho Power cannot directly respond to this assertion.

**5) Dr. Fouty argues that the Hearing Officer should have taken judicial notice of the Forest Service and BLM Management documents that Dr. Fouty relied on for her Closing and Response Briefs.[346]**

Dr. Fouty's argues that it was improper for the Hearing Officer to grant Idaho Power's motion to strike Dr. Fouty's arguments that relied on Forest Service and BLM resource management plans, which were not in the record, and that the Hearing Officer should have taken official notice of those documents. Dr. Fouty's argument is without merit. Idaho Power addressed this assertion in response to Dr. Fouty's introductory statements, presented in Bullet No. 1 above. In brief, Idaho Power performed a review of the administrative record and confirmed that no portions of the Federal Resource Management Plans that Dr. Fouty references were in the record; several pages were included in support of the analysis for Exhibit R[347] There is no similar nexus to federal land management plans within the Soil Standard, and none of the pages from the plans referenced by Dr. Fouty are in the record. Additionally, Idaho Power listed several of these documents as references used in preparation of ASC documents,[348] and in discovery, Idaho Power

[346] Fouty Exceptions at 35.
[347] OAR 345-022-0080.
[348] ASC, Exhibit I at I-36 – I-37 (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 40-41 of 115).



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provided website links to these documents in response to a discovery request from STOP B2H,[349] however the documents themselves are not in the record, and Dr. Fouty fails to provide a citation to the record proving otherwise.[350] The Hearing Officer issued a case management order that specifically explained that *a website link to access a document or a citation to a reference does not constitute the document as being in the record.*[351] If any party wished to question the accuracy of the documents or Idaho Power's reliance on them, the parties were allowed to request the document from Idaho Power and enter it into the record. Alternatively, many of the documents Idaho Power relied on were publicly available, Dr. Fouty could have easily raised concerns about the accuracy or use of these documents during the testimony phase of the case, entering the reference into the record at that time.

**6) Dr. Fouty asserts that Idaho Power has not provided any science to support its BMPs will be effective and it "avoid[s] having any timeframes established for recovery of soil properties."**[352]

Idaho Power previously addressed Dr. Fouty's assertions that supporting science must be provided to ensure effective BMPs, in response to Exception 8, 9, and 28. In sum, Dr. Fouty provides no reference to the Council's rules in support of her assertion, and a plain language reading of the definition of mitigation provides no such support for Dr. Fouty's assertion.

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[349] *See* Suzanne Fouty / Fouty Cross-Examination Exhibit M, Idaho Power's Responses to STOP B2H's Discovery Requests (Feb. 5, 2021).
[350] Idaho Power acknowledges that several pages from the Resource Management Plans are included as excerpts supporting Exhibit R, however these excerpts do not include the pages referenced by Dr. Fouty and were provided for an entirely different purpose.
[351] Second Order on Case Management at 2 ("Links to access proffered documents and or information will not suffice. The party/limited party should attach the document (or at a minimum, the pertinent portions of a voluminous document, to the written testimony).").
[352] Fouty Exceptions at 36.



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Idaho Power previously addressed Dr. Fouty's assertions regarding "timeframes" in response to Exception 27. In short, Dr. Fouty provides no support for her assertions that the Council's rules require timeframes to be established and a review of the Council's rules do not indicate such.

**7) Dr. Fouty asserts that Idaho Power has not provided site-specific mitigations.**[353]

Dr. Fouty's assertion completely dismisses the final review process that both the ODEQ issued 1200-C permit and the Reclamation Plan will proceed through. As discussed in response to Exception 9 above, and in Idaho Power's Closing Arguments, Idaho Power's mitigation approach will be 1) finalized with site-specific details once the exact location of the transmission line is determined, and 2) relies on agency-issued and agency-reviewed plans.[354] The two plans that comprise Idaho Power's soil monitoring plan[355]—the Reclamation Plan and ODEQ issued 1200-C permit[356]—are put through an agency review process. The final Reclamation Plan requires approval by ODOE, working in coordination with the "appropriate state agencies," including but not limited to the Oregon Department of Fish and Wildlife, to review and provide feedback on necessary mitigation measures to ensure successful reclamation under the Reclamation Plan.[357] Idaho Power is required to submit its 1200-C permit application and receive approval from ODEQ

[353] Fouty Exceptions at 36.
[354] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 42-44.
[355] ASC, Exhibit I at I-32-33 (Sept. 2018) (ODOE – B2HAPPDoc3-16 ASC 09a_Exhibit I_Soil_ASC_Part 1 2018-09-28. Page 36-37 of 115). *See also* Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 42-50.
[356] Idaho Power's Closing Arguments for Contested Case Issue SP-1 at 43-44.
[357] Proposed Order, Attachment P1-3 at iv (September 2018; July 2020 Modified by Oregon Department of Energy during ASC – PO Phase) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9110 of 10016) (""Appropriate" state agencies would include Oregon Department of Agriculture and Oregon Department of Fish and Wildlife; "appropriate" local agencies refer to the County Planning Department, Public Works Department and Weed Department, or other county departments with expertise in revegetation.").



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that the proposed BMPs are appropriate for the site and construction activities that Idaho Power will engage in.[358] Furthermore, Idaho Power is required to submit documentation that the site has been closed-up to receive approval for termination of the 1200-C permit at the conclusion of disturbance in a construction area.[359] Therefore, Dr. Fouty's assertion that Idaho Power is not providing site-specific mitigation is clearly unsupported.

For these reasons, Dr. Fouty's Exception 30 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**22. Exception 31 – Site-specific Information**

In Exception 31, Dr. Fouty takes exception to the Hearing Officer's conclusion that "[ODOE] appropriately concluded that the mitigation plans . . . are more than adequate to ensure that appropriate measures are implemented pre- and post construction to ensure soil restoration."[360] Dr. Fouty asserts that "[e]arlier the [Hearing Officer] stated that mitigations had to be site-specific and here she is saying they don't have to be."[361] Dr. Fouty believes that the Hearing Officer has contradicted herself, and she provides the following statement from the Proposed Contested Case Order in support of this assertion:

> Moreover, the recommended site certificate conditions in the Proposed Order related to soil protection and the various mitigation plans addressed within those conditions *require that Idaho Power provide site-specific mitigation* information and that the Company have in place various finalized plans designed to ensure that temporary adverse impacts to soil are minimized.[362]

[358] Idaho Power / Sur-sur-rebuttal Testimony of Mark Madison (Jan. 5, 2022) / Issues LU-9 and SP-1, p. 31 of 38.
[359] Idaho Power / Sur-sur-rebuttal testimony of Mark Madison / Issues LU-9 and SP-1, p. 32 of 38.
[360] Proposed Contested Case Order at 263.
[361] Fouty Exceptions at 37.
[362] Proposed Contested Case Order at 262-263 (emphasis added).



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Again, as in Exception 20, Dr. Fouty is conflating two separate conclusions of law that address two separate elements—the requirements of the ASC as reviewed by ODOE and the Proposed Order. Despite Dr. Fouty's assertions, it is possible to harmonize the Hearing Officer's statements. Dr. Fouty's Exception 20 should be rejected for the following reasons.

In the first instance, the Hearing Officer concludes ODOE reasonably concluded that the level of information in Idaho Power's ASC was sufficient, which is based on her earlier interpretation of the Council's rules, which do not indicate that site-specific mitigation is required for compliance with the Soil Protection Standard.

In the second instance cited by Dr. Fouty, the Hearing Officer acknowledges that the site certificate condition will require Idaho Power to provide site-specific information as part of the process of finalizing its mitigation plans. This interpretation is consistent with the Hearing Officer's early statements that ODOE and the Council may request that an applicant provide additional information beyond what the rules explicitly request.[363]

For these reasons, Dr. Fouty's Exception 31 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**23. Exception 32 – Untimely Submittal of Proposed Site Conditions**

In Exception 32, Dr. Fouty takes exception to the Hearing Officer's denial of Dr. Fouty's proposed site condition that was filed in her Closing Brief.[364] Dr. Fouty asserts that the Hearing

[363] Proposed Contested Case Order at 260 ("While [ODOE] or the Council may request in the project order that an applicant provide information and evaluations of other impacts to soil (such as soil compaction, loss of structure and infiltration, loss of stored carbon, and/or loss of productivity), the plain language of the Soil Protection standard does not require the applicant to provide such detail and analysis in every site certificate application.").
[364] Proposed Contested Case Order at 263; Fouty Exceptions at 38.



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Officer is mistaken because Dr. Fouty "did submit a proposed soil condition in a timely manner in her direct testimony."[365] Dr. Fouty is incorrect and the Hearing Officer's decision to reject Dr. Fouty's proposed site condition as untimely should be adopted by the Council for the following reasons.

*First*, Dr. Fouty's proposed site condition is untimely as it was filed after the deadline prescribed in the Hearing Officer's schedule. The Council's rules specifically state that parties must submit proposed site certificate conditions to the hearing officer in writing "according to a schedule set by the hearing officer."[366] Consistent with that requirement, the Hearing Officer adopted an updated schedule for submittal of Proposed Site Conditions in the Second Order on Case Management,[367] which required that they be filed by September 17, 2021. Thus, any proposed site certificate conditions submitted after September 17, 2021, are appropriately considered untimely, and should be denied by the Hearing Officer for consideration.

*Second*, Dr. Fouty is mistaken when she states that she submitted a proposed Soil Condition in her Direct Testimony, and that "the [Hearing Officer] actually acknowledges this in her footnote 369."[368] In footnote 369 of the Proposed Contested Case Order, the Hearing Officer is acknowledging *ODOE's proposed site condition*; the Hearing Officer makes no mention of site conditions proposed by Dr. Fouty in the footnote.[369]

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[365] Fouty Exceptions at 38.
[366] OAR 345-015-0085(1) (Hearing Officer's Proposed Contested Case Order).
[367] Second Order on Case Management at 10 ("Submit direct testimony and evidence OAR 345-015-0043 and proposed site certificate conditions pursuant to OAR 345-015-0085(1)" set for September 17, 2021).
[368] Fouty Exceptions at 38.
[369] Proposed Contested Case Order at 263, n.369 ("In its Rebuttal to Direct Testimony, the Department").



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Furthermore, in a review of Dr. Fouty's filings in the contested case record (direct testimony, sur-rebuttal testimony, closing and response briefs), the only mention of a proposed site condition is presented in her Closing Brief, which was filed after the deadline for submitting proposed site conditions in the contested case.[370] Curiously, Dr. Fouty does not provide the citation for where the Council can locate said proposed site condition in her Direct Testimony, should it exist. Additionally, a review of Idaho Power's Response to Limited Parties Proposed Site Certificate Conditions also shows that Dr. Fouty did not provide a site condition in accordance with the schedule set in the Second Order on Case Management.[371]

For these reasons, Dr. Fouty's Exception 32 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**24. Exception 33 – Withdraw of Proposed Site Condition**

In Exception 33, Dr. Fouty takes exception to the Hearing Officer's conclusion that ODOE's proposed site condition "is unnecessary for compliance with the Soil Protection standard."[372] Dr. Fouty asserts that the Hearing Officer is mistaken and the information requested in the proposed condition is "required to be in compliance with the Soil Protection standard."[373] Dr. Fouty's exception should be rejected for the following reasons.

*First*, ODOE withdrew the proposed condition,[374] and therefore, discussion of its merit is moot.

[370] Closing Brief of Suzanne Fouty at 61-62.
[371] Idaho Power's Response to Limited Parties Proposed Site Certificate Conditions (Nov. 12, 2021).
[372] Proposed Contested Case Order at 263; Fouty Exceptions at 39.
[373] Fouty Exceptions at 39.
[374] ODOE Closing Brief at 202-203 (Feb. 28, 2022).



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*Second,* Dr. Fouty fails to acknowledge that while ODOE did withdraw the proposed condition, it proposed that during finalization of the Reclamation Plan, the following additional language be incorporated:

> On page 14 of Attachment P1-3 as attached to the Proposed Order, underneath the heading "Pre-Construction Agency Consultation"
>
> - Identification of proposed BMPs and construction methods that would occur in temporary disturbance areas where soils have either been mapped or identified during preconstruction site reconnaissance as highly wind erodible, high K factor or slopes greater than 25% and that are not covered by the 1200-C NPDES permit. Consultation with the Department and other state and local agencies, as applicable, shall seek input on adequacy of BMPs and construction methods for minimizing temporary soil impacts and supporting restoration and revegetation goals under the plan.[375]

*Finally*, despite multiple assertions in her testimony that the additional suite of soil properties that are mentioned in ODOE's withdrawn proposed site condition must be identified and evaluated by Idaho Power,[376] Dr. Fouty fails to identify how a specific soil property or combination of soil properties is required to demonstrate compliance with the Soil Protection Standard. Dr. Fouty further fails to explain how compliance with the Soil Protection Standard requires that additional soils data be evaluated and how that data will result in identifying new or different mitigation obligations for Idaho Power. Idaho Power agrees that some of the soil properties that Dr. Fouty identified will be impacted, but the evaluation of those impacts will not lead to new or different mitigation measures.[377]

[375] ODOE Closing Brief at 205.
[376] Suzanne Fouty / Direct Testimony of Suzanne Fouty / Issue SP-1, p. 8 of 20.
[377] Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, p. 57 of 93.



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For these reasons, Dr. Fouty's Exception 33 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**25. Exceptions 34 and 35 – Motion to Strike Statements in Closing Brief**

Idaho Power addresses Dr. Fouty's Exceptions 34 and 35 together as they relate to Idaho Power's motion to strike Dr. Fouty's statements of a testimonial nature and references to documents or databases that were not submitted as evidence in the contested case proceeding.[378]

In Exception 34, Dr. Fouty takes exception to the Hearing Officer's conclusion that the portions of Dr. Fouty's Closing Brief challenged by Idaho Power, are "testimonial in nature and/or reference documents not admitted into the evidentiary record."[379] Specifically, the Hearing Officer granted Idaho Power's motion to strike Dr. Fouty's testimonial statements, those statements identified by Idaho Power in her Closing Arguments that were "unsupported statements that offer her opinion or analysis in what amounts to improper testimony offered after the close of the record."[380] Dr. Fouty asserts that the documents are referenced by Idaho Power in its ASC documents and therefore, the Hearing Officer should have taken judicial notice of them.[381]

In Exception 35, Dr. Fouty takes exception to the Hearing Officer's conclusion that "[a] citation to, or excerpt from, a database, report, or management plan in the ASC or Proposed Order does not make the entirety of that database, report, or management plan part of the evidentiary

[378] The evidentiary record in this case closed on January 31, 2022. *See* Contested Case Status Updated to Council Pursuant to OAR 345-015-0023(4) as of February 15, 2022 (Feb. 14, 2022).
[379] Proposed Contested Case Order at 265; Fouty Exceptions at 39-43.
[380] Idaho Power's Response Brief and Motion to Strike for Contested Case Issue SP-1 at 6.
[381] Fouty Exceptions at 40.



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record of the contested case."[382] Dr. Fouty makes two assertions in response to the Hearing Officer's conclusion —1) the Hearing Officer should have taken judicial notice of the referenced documents and 2) "[the Hearing Officer's] opinion about these documents is incorrect unless all references to them found within the [Idaho Power] documents, Mr. Madison's rebuttal, sur-sur-rebuttal, and cross-examination testimony are stricken from the record as well and given no weight."[383] As Idaho Power argued in its Closing Brief, in accordance with the Hearing Officer's conclusions, the Council should reject Dr. Fouty's Exceptions 34 and 35 and give no weight to the statements identified as testimonial in nature or referencing documents not admitted into evidentiary record, for the following reasons.

*First*, while the Hearing Officer may take official (judicial) notice of certain documents, it appears that she did not do so in the contested case for any of the parties, as evidenced by the fact that she did not notify parties "of facts officially noticed" which would require her to then "allow parties an opportunity to contest the facts so noticed."[384]

Dr. Fouty's arguments fail to acknowledge the evidentiary process in the contested case. First, the NRCS database documents are not in the record in their entirety (or in some cases at all).[385] This argument was previously addressed in response to Exception 30 above.

Second, while Idaho Power acknowledges that portions of the NRCS database were relied upon by Idaho Power to develop its soil analysis, in her Closing Brief, Dr. Fouty is not utilizing

[382] Proposed Contested Case Order at 265; Fouty Exceptions at 43-44.
[383] Fouty Exceptions at 43.
[384] OAR 345-015-0046(2) ("(2) The hearing officer shall notify parties of facts officially noticed and shall allow parties an opportunity to contest the facts so noticed.").
[385] A website link to access a document or a citation to a reference does not constitute the document as being in the record. Second Order on Case Management at 2 ("Links to access proffered documents and or information will not suffice. The party/limited party should attach the document (or at a minimum, the pertinent portions of a voluminous document, to the written testimony).").



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existing data in the record as evidenced by the fact that she cites to the NRCS database and it appears she was assisted by an NRCS geographic information system ("GIS") coordinator to retrieve and analyze the data.[386] Indeed, Dr. Fouty cites the source of Figure 1 of her Closing Brief as "Whityn Owen, NRCS GIS coordinator, Oregon," which appears to be a reference to an individual at NRCS who assisted her in producing the figures and sourcing the information that she relies upon for her statements.[387] These references plainly demonstrate that Dr. Fouty did not utilize information existing in the record, and instead sought to introduce brand new evidence in her Closing Arguments, well after the close of the record.[388] Dr. Fouty's attempt to present new evidence in closing arguments was procedurally improper and highly prejudicial to Idaho Power, as the Company could not verify the source of data used, review the data for accuracy, or present additional analysis or evidence in response.

*Finally*, to the extent that Dr. Fouty is now arguing that the references cited by Idaho Power in its ASC could not be examined prevents information provided by Idaho Power from being verified for accuracy and context, this argument is without merit. First, if Dr. Fouty was concerned with the accuracy of documents cited by Idaho Power, she had the opportunity to request such information through an informal Discovery Request. In the alternative, all of Idaho Power's references listed in the Exhibit I document are publicly available and could be located on the internet. If Dr. Fouty had wanted to introduce them into the evidentiary record in this case, she

[386] Closing Brief of Suzanne Fouty at 19.
[387] Closing Brief of Suzanne Fouty at 19.
[388] *See* Second Amended List of Testimony and Exhibits Admitted into the Contested Case Hearing Record at 4 (Feb. 14, 2022) ("Together, the B2H Project Record and documents listed below in the Table of Additional Admitted Evidence constitute the evidentiary record for the above-captioned contested case proceeding and, accordingly, are the only documents that the parties/limited parties may reference and/or rely upon in their closing briefs.").



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had ample opportunity to do so. Second, the information that Dr. Fouty is utilizing is not the same information that Idaho Power relied upon, as evidenced by the fact that Dr. Fouty went to collect additional data from the NRCS database, rather than request that information that Idaho Power relied upon.

For these reasons, Dr. Fouty's Exceptions 34 and 35 do not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's findings of fact and conclusions of law relevant to SP-1.

**26. Exception 36 – Motion to Strike Statements in Response Brief**

In Exception 36, Dr. Fouty takes exception to the Hearing Officer's conclusion that Dr. Fouty's statements made in reliance on documents not in the evidentiary record should be given no weight.[389] Specifically, Dr. Fouty takes issue with the Hearing Officer's reasoning in support of her conclusion, that "if the referenced information from the database, report, or management plan is not included in the B2H Project Record or not listed as an exhibit in the Table of Additional Admitted Evidence, then that information is not part of the evidentiary record." [390]

Dr. Fouty raises the same arguments that she provided in support of Exceptions 34 and 35—the Hearing Officer should have taken judicial notice of these documents because they are government documents or databases or are sources that Idaho Power used in preparation of the ASC, testimony, and cross-examination, specifically the NRCS database, and therefore, she argues she was referring to information in the evidentiary record.[391] Dr. Fouty's arguments are without merit.

[389] Proposed Contested Case Order at 265; Fouty Exceptions at 44.
[390] Proposed Contested Case Order at 265.
[391] Fouty Exceptions at 44.



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Dr. Fouty fails to recognize that 1) the NRCS database information was not provided in its entirety, and therefore, the information that she was relying upon was not in the record, 2) the evidentiary record was closed on January 31, 2022, and 3) it appears that the Hearing Officer did not take official notice of any references submitted after the close of the record, for Idaho Power or others.

Therefore, based on these reasons and the reasons provided in response to Exceptions 34 and 35, Dr. Fouty's Exception 36 does not identify any incorrect conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer's conclusions of law relevant to SP-1.

## IV. CONCLUSION

For the reasons discussed above, Idaho Power respectfully requests that the Council reject the limited parties' exceptions to the Proposed Contested Case Order regarding SP-1 and adopt the Proposed Contested Case Order with no modifications.

DATED: July 14, 2022

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUE SP-1** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge
Hearings Officer
Office of Administrative Hearings
OED_OAH_Referral@oregon.gov

I further certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUE SP-1** was served by First Class Mail or electronic mail as indicated below:

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*/s/ Suzanne Prinsen*
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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**
**STATE OF OREGON**
**for the**
**OREGON DEPARTMENT OF ENERGY**

| | |
|---|---|
| IN THE MATTER OF: | **STOP B2H COALITION** |
| **BOARDMAN TO HEMINGWAY TRANSMISSION LINE** | **EXCEPTIONS TO PROPOSED CONTESTED CASE ORDER** |
| | OAH Case No. 2019-ABC-02833 |

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## I. INTRODUCTION

STOP B2H Coalition (hereafter "STOP") disagrees with many of the factual and legal conclusions, and characterizations of the evidence, that are contained in the Proposed Contested Case Order (hereafter "PCCO"). STOP presented briefing upon, and/or presented or adduced evidence showing, that many of the findings and conclusions in this PCCO are not accurate or legally appropriate.

STOP has outlined the Exceptions it takes, on the issues upon which it has standing. In the interest of administrative economy, rather than repeating the same points, STOP incorporates by reference and relies on the exceptions outlined by Dr. Suzanne Fouty, with regard to determinations on Issue SP-1, and several exceptions outlined by Lois Barry which relate to scenic resource impacts (Ms. Barry's issues R-2, R-3, R-4; and, STOP's issue SR-7).

## II. SPECIFIC EXCEPTIONS

### A. Procedural Issues

#### *i. Party Status*

STOP B2H Coalition requested "full" party status in this contested case hearing. On September 29, 2020, STOP filed briefing on the matter, pointing out that it had a broad demonstrated interests across many intertwined issues, including generally a public interest, and that as a result it was entitled to full party status, rather than just "limited party" status in this matter. STOP outlined how it had participated throughout the application process on a wide range of issues. STOP also noted that nothing in OAR 137-003-0005(3)(c) provides for the input of another party on a petition for party status, and that Idaho Power Company's (IPC's) comments on STOP's petition were therefore inappropriate.

On October 29, 2020, the Administrative Law Judge (ALJ) issued an *Order on Petitions*

*for Party Status, Authorized Representatives, and Issues for Contested Case (Order on Party Status)*. For the reasons set forth in STOP's September 24, 2020 briefing, STOP takes exception to this portion of the Proposed Contested Case Order ("PCCO") at p.2.

The PCCO fails to incorporate and address any valid reasoning or legal basis for restricting STOP's participation to that of merely "limited" party in this matter. [1] As STOP noted, its interests in the B2H matter are broad and inextricably intertwined. STOP Party Status Brief p.2. STOP has participated as a public interest organization throughout the application and pre-contested case process, and as a result, it has a broad public interest in the outcome of the proceeding. *Id*. Additionally, STOP made note that nothing in OAR 137-003-0005(8) provides for *other parties' input* on this matter, and despite that, the ALJ took briefing and arguments from IPC on other parties' status. *Id* at p.3.

Finally, the PCCO does not appear to incorporate the Order limiting STOP's party status. STOP takes exception to the failure of the PCCO to fully address and explain why, as a matter of fact and law, STOP should be limited in its participation in this contested case proceeding.

*ii. Site Conditions and Responses*

The ALJ wrongly interpreted OAR 345-015-0085(1)-(2) when holding in the PCCO that "allowing a limited party to propose *any* site certificate conditions that the limited party believes are necessary or appropriate notwithstanding the limitations on that limited party's standing and participation in the contested case tends to frustrate the intent of ORS 469.370 and OAR 345-015-0016." PCCO p.277. To the contrary, this illuminates the due process issues raised by artificially limiting STOP (and others) party status. These issues are inextricably intertwined, and

[1] STOP, as a grass-roots, 501(c)(3) non-profit with over 900 members, was injured by the ALJ's ruling, limiting its public interest participation.

site conditions touch many of the artificially narrow issue statements.

The ALJ posits in the PCCO that it was not necessary to address some of STOP's Site Condition proposals because they were allegedly "untimely." The ALJ's theory on this was that because some of the STOP Condition proposals were included in STOP's Response Argument (submitted after seeing the Condition language proposals made by ODOE & IPC in their Closing Arguments) the STOP Condition proposals were supposedly improper/untimely. PCCO pp.204-205 (claiming this was improper because "the Department and Idaho Power did not have any opportunity to respond.")

This approach is unfair, and unlawful, as the ALJ was holding STOP to a different standard than other parties – specifically ODOE and IPC. The PCCO acknowledges that both ODOE & IPC **also** submitted proposed Condition **language in their Response briefs**. *See,* PCCO p.204 ("In their respective Closing and Response briefs, both the Department and Idaho Power proposed revisions to the Recommended Noise Control Conditions…"). The ODOE & IPC Response Condition proposals were accepted as timely, and considered by the ALJ – **even though** STOP (and other parties) did not have "an opportunity to respond" to those proposals, as required by OAR 345-015-0085(2). This inconsistent application of the law is not acceptable.

The ALJ's refusal to consider each of STOP's Response brief Site Condition proposals was error. The Council should remand this matter to the ALJ for proper consideration of the STOP proposed Condition language, or the Council should adopt STOP's proposed Site Condition language.

*iii. Format Of PCCO Conclusions*

STOP takes exception to the form of the Conclusions of Law in the PCCO. In the section marked as Conclusions of Law, the PCCO merely restates each issue statement in the

affirmative. PCCO pp.138-143. The Conclusions of Law must apply the facts to the law, and tie the facts to the conclusions, otherwise a reviewing Council (or Court) will not be able to discern *how* the conclusion was reached. While the "Opinion" section of the PCCO does attempt to address some of the reasoning behind some of the Conclusions, not every Conclusion of law is clearly tied to specific facts and reasoning. That will make review much more difficult, and STOP takes exception to the format used for Conclusions of Law. Each Conclusion should have the supporting facts identified and the reasoning behind the conclusion clearly articulated.

B. Issues Disposed of on Summary Determination

*i. Standard of Review*

In order to prevail on a Motion for Summary Determination (MSD), the moving party must demonstrate that "[t]he pleadings, affidavits, supporting documents… and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to the resolution of the legal issue as to which a decision is sought; **and** . . . [t]he agency or party filing the motion is entitled to a favorable ruling as a matter of law." OAR 137-003-0580(6)(a)-(b) (emphasis added). When reviewing the facts, the ALJ "shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency." OAR 137-003-0580(7).

This means, according to the Courts, that: "If there is evidence creating a relevant fact issue, then no matter how "overwhelming" the moving party's evidence may be, or how implausible the nonmoving party's version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing." *Watts v. Board of Nursing*, 282 Or App 705, 714 (2016). *See also*, *King v. Department of Public Safety Standards and Training*, 289 Or App 314, 321 (2017) ("Issues may be resolved on a motion for summary determination **only** where the application of law to the facts requires a single, particular result.") (emphasis added).

*ii. NEED (Issues N-1, N-2, AND N-3)*

As noted in the PCCO, the ALJ dismissed Issues N-1, N-2, and N-3 on July 29, 2021 on IPC/Oregon Department of Energy (ODOE) MSD's. PCCO p.25. In its June 25, 2021, Memorandum in Opposition to the MSD's on issues N-1, N-2, and N-3, STOP pointed out that factual disputes existed as to each of those issues. STOP noted that even though the Record incorporated into the Contested Case contained a great number of facts which shouldn't (in theory) be in dispute, when viewed in the light required on MSD (i.e. in the light most favorable to STOP) those facts indicated that ODOE/IPC were also not entitled to a ruling as a matter of law. Further, STOP noted that the framing of facts on the part of IPC and ODOE were self-serving and incomplete, further reinforcing the existence of a dispute of material facts, making a ruling granting the MSD's improper.

In particular, the ALJ erred in making factual determinations in a manner contrary to the light most favorable to STOP in several instances. First, she acknowledged that no one definition of "capacity" was codified, but then did not acknowledge the tension between the use of kV or MW for determining system capacity. The context of the definition was misinterpreted as kV-only for describing a transmission line.

As STOP has noted, both kV and MW describe the capacity of a transmission line. In ORS 469.300(11) there are over 10 definitions (A-J) for types of "energy facilities". ORS 469.300(11)(a)(C) specifically describes a transmission line in kV. But there are also 9 other definitions that involve other terminology such as wind farms (MW), pipelines (inches), and solar farms (acres). Because of these 10 definitions of energy facilities the statute left room for interpretation by saying "unless the context requires otherwise..."

This is legislative recognition that situations may arise where the definitions are not

perfect fits and discretion must be used. In short, discretion was written into the statute. Here, there was a dispute of fact about what definition should be applied in this instance. In her ruling the ALJ did not properly apply this discretion in favor of STOP, as required in the context of ruling on MSD.[2]

In "Undisputable Fact #15" (MSD Ruling p.9)[3] the ALJ states that "High voltage transmission lines are generally sized at 230 kV, 345 kV or 500 kV." The OPUC approved line is a 500 **kV** line. However, Idaho Power and partners were, and still are discussing, whether the line will be a 350, 400, 450, 500, or 550 **MW capacity line**.[4] Given the evidence in the Record on N-3 (IPC has only demonstrated a need for 21% of the facility) and on NC-2 (regarding IPC's admission of rarely using maximum voltage), the ALJ erred in ruling against STOP, and not allowing this issue to go forward to Hearing.

Second, in the IPC Reply on MSD, IPC introduced new evidence by Jared Ellsworth. However, Mr. Ellsworth's assertations are both incorrect, and factually inconsistent with the facts pointed out by STOP. Yet the ALJ relied on those facts to rule in favor of IPC/ODOE. By construing the facts in a manner favorable to IPC/ODOE, rather than in a manner most favorable to STOP, the ALJ erred in her ruling on N-1.

Regarding issue N-3, STOP pointed out that IPC did not comply with the Least-Cost Plan Rule or System Reliability Rule, because the entire B2H Facility had not been acknowledged by OPUC. Instead, IPC's 21% of project, was not enough to comply with OAR 345-023-0020(1).

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[2] *See,* Ruling and Order on MSD on Contested Case Issues N-1, N-2, and N-3 dated July 29, 2021 p.15 (Need MSD Ruling).

[3] *In the Matter of Boardman to Hemmingway,* OAH Case No. 2019-ABC-02833 Ruling and Order on Motions for Summary Determination on Contested Case Issues N-1, N-2, and N-3 p.9.

[4] This discussion is continuing in the 2021 Integrated Resource Plan (IRP).

## III. CONCLUSION

For each of the foregoing reasons, STOP asks that EFSC send this matter back to the ALJ for revised rulings on Issues, MSD, Hearing, and revised Findings, Legal Conclusions, and Opinions as outlined in these Exceptions.

Respectfully Submitted,

/s/ *Karl G. Anuta*

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## CERTIFICATE OF MAILING

On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/ *Mike J. Sargetakis*
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**BEFORE THE**
**ENERGY FACILITY SITING COUNCIL**
**OF THE STATE OF OREGON**

| | |
|---|---|
| **IN THE MATTER OF THE APPLICATION FOR SITE CERTIFICATE FOR THE BOARDMAN TO HEMINGWAY TRANSMISSION LINE** | **OREGON DEPARTMENT OF ENERGY'S RESPONSE TO EXCEPTIONS – ISSUES N-1, N-2 AND N-3** (OAH Case No. 2019-ABC-02833) |

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## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order ("PCCO") on May 31, 2022. On June 30, 2022, STOP B2H timely filed exceptions to the PCCO regarding Issues N-1, N-2 and N-3.[1]

In the Hearing Officer's December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issues N-1, N-2 and N- 3 were granted as contested case issues. Issues N-1 and N-3 were dismissed on July 29, 2021 on summary determination[2] by the Hearing Officer following the Motions for Summary Determination ("MSD") filed by the applicant, Idaho Power Company ("IPC"), supported in response by the Oregon Department of Energy ("Department"). Issue N-2 was dismissed in the same summary determination by the Hearing Officer following MSDs filed by IPC and the Department.

> Issue N-1 is: Whether the Department erred in defining capacity in terms of kilovolts instead of megawatts.
>
> Issue N-2: Whether in evaluating capacity, the Department applied balancing considerations in contravention of OAR 345-022-0000(3)(d).
> Issue N-3: Whether Applicant demonstrated need for the proposed facility when Applicant has only shown that its needs represent 21 percent of the total capacity.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council ("Council") pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.[3] Exceptions are written objections to

[1] STOP B2H Coalition Exceptions to Proposed Contested Case Order (hereinafter "STOP Exceptions").
[2] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2 and N-3 July 29, 2021.
[3] ORS 183.469; OAR 137-003-0060

the proposed findings, conclusions of law or conditions.[4] The exceptions must be based on the existing record, and should not include new or additional evidence.

B. Exceptions

In the exception, STOP makes the following arguments:

1. Hearing Officer failed to make factual determinations related to defining capacity in kilovolts ("kV") versus megawatt ("MW"), in the light most favorable to STOP, as required by OAR 137-003-0580(7);

2. STOP takes exception to the Hearing Officer's finding that the Applicant demonstrated the need for the proposed facility under the Least-Cost Plan Rule in accordance with OAR 345-023-0005(1) and OAR 345-023-0020(2). STOP argues that the entire facility was not acknowledged by the Oregon Public Utility Commission ("PUC") because the PUC had only demonstrated a need for 21 percent of the transmission capacity of the proposed facility;

3. STOP takes exception to the Hearing Officer's finding that the Proposed Order properly considered the Applicant's 2019 Integrated Resource Plan ("IRP") when making findings of compliance with the Need Standard, when STOP believed that the 2017 IRP should have been considered. STOP claims that in this dispute, the Hearing Officer should have considered the evidence in the light most favorable to STOP.

C. Summary of Department Position

The Department believes the Hearing Officer appropriately considered all evidence in the record as required by OAR 137-003-0580(7), and was correct in concluding that (1) the Department did not err in defining capacity in terms of kV for purposes of evaluating the need for the proposed facility under the Least-Cost Plan Rule; (2) the Department concluded that IPC demonstrated the need for the proposed facility under the Least-Cost Plan Rule, OAR 345-023-0020(2), and did not apply balancing considerations to the Need Standard in contravention of OAR 345-022-0000(3)(d); and (3) that IPC demonstrated the need for the

[4] OAR 345-015-0085(5)

proposed facility under the Least-Cost Plan Rule in accordance with OAR 345-023-0005(1) and OAR 345-023-0020(2).

## II. ANALYSIS

### A. Exception 1

STOP contends that, in finding that transmission lines under development are rated by kV, the Hearing Officer failed to make factual determinations in the light most favorable to STOP, as required by OAR 137-003-0580(7). STOP contends that the capacity of a transmission line can be described either in terms of kV or MW. STOP further contends that the use of kV to describe the capacity of a transmission line under ORS 469.300(11)(a)(C) is not dispositive because the statute allows for discretion if "context requires otherwise..."[5] STOP argues that the Hearing Officer was required to apply this discretion in favor of STOP.[6] STOP further cites discussion in the Applicant's 2021 Integrated Resource Plan, which discusses the capacity of the proposed facility both in terms of kV and MW.[7]

In her Ruling, the Hearing Officer adopted the following as an Undisputed Fact 15: "Transmission lines under development are rated by kilovolts (kV). A transmission line's megawatt (MW) rating is determined in later-stage development of the project. When a transmission line provider seeks to construct a transmission line, the provider determines the size of the line by virtue of the kV rating. High voltage transmission lines are generally sized at 230 kV, 345 kV or 500 kV. The higher the kV rating, the more capacity the transmission line is capable of providing.[8]

[5] STOP B2H Coalition's Exceptions to Proposed Contested Case Order. June 30, 2022. Pg. 7.
[6] STOP B2H Coalition's Exceptions to Proposed Contested Case Order. June 30, 2022. Pg. 8.
[7] STOP B2H Coalition's Exceptions to Proposed Contested Case Order. June 30, 2022. Pg. 8.
[8] Hearing Officer's Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3. July 29, 2021. Page 9, citing Idaho Power Reply; Exhibit B.

STOP incorrectly argues that the Hearing Officer was required to choose between two different measures that are applicable to transmission lines in a manner that was favorable to STOP under OAR 137-003-0580(7). That rule requires the Hearing Officer to consider *all evidence* in a manner most favorable to the non-moving party but does not require the Hearing Officer to disregard or omit factual statements if those statements do not support the nonmoving party's position. Here, Undisputed Fact 15 accurately describes the positive correlation between the size of a line (described in terms of voltage rating) and the amount of electrical power it can deliver (described in terms of wattage.) Both measures are used to describe different functions of the capacity of the line, and as described in the Ruling and Order, there is no genuine factual dispute in this regard.[9] As a result, the Hearing Officer was correct in describing issue N-1 as a purely legal question.

The Hearing Officer was also correct in finding that while the term "capacity" is not defined in ORS chapter 469 or OAR chapter 345, in the context of evaluating compliance with the Need Standard and reviewing the Applicant's Integrated Resource Plans ("IRP"), the Department appropriately considered the operating voltage of the proposed facility in concluding that IPC demonstrated need under the Least-Cost Plan Rule. For these reasons, this exception should be rejected.

B. Exception 2

STOP takes exception to the Hearing Officer's finding that IPC demonstrated the need for the proposed facility under the Least-Cost Plan Rule in accordance with

[9] Ruling and Order on Motions for Summary Determination on Contested Case Issues N-1, N-2, and N-3. June 30, 2022. Pages 15-16.

OAR 345-023-0005(1) and OAR 345-023-0020(2). STOP argues that the entire facility was not acknowledged by the PUC Commission because the PUC had only demonstrated a need for 21 percent of the transmission capacity of the proposed facility.

As explained in Undisputed Fact 10 in the Ruling, PUC Order No. 18-176, which acknowledged the PUC's 2017 IRP, specifically found that it was satisfied that the permitting and construction of the proposed facility, described as a 500-kv single circuit transmission line, represented the least cost, list risk resource for meeting the demonstrated resource needs of IPC's customers. This finding was not dependent on IPC demonstrating that there was demand for 100 percent of the electric power that could potentially be delivered by a line of that size. For these reasons, this exception should be rejected.

C. Exception 3

STOP takes exception to the Hearing Officer's finding that the Proposed Order properly considered the Applicant's 2019 IRP when making findings of compliance with the Need Standard, when STOP believes that the 2017 IRP should have been considered. STOP claims that in this dispute, the Hearing Officer should have considered the evidence in the light most favorable to STOP.

OAR 137-003-0580(7) requires the Hearing Officer to consider *all evidence* in a manner most favorable to the non-moving party but does not require the Hearing Officer to disregard or omit factual statements if those statements do not support the nonmoving party's position. Here, the Hearing Officer's Ruling and Order explains that "there is no dispute that the OPUC acknowledged the B2H Project action items in Idaho Power's 2017 IRP and affirmed its acknowledgment of the B2H Project action items in Idaho Power's 2019 IRP."[10] The Hearing

[10] Ruling and Order on Motions for Summary Determination on Contested Case Issues N-1, N-2, and N-3. June 30, 2022. Page 19.

Officer was correct in determining that there was no genuine factual dispute, but even if there were, the evidence in the record demonstrates that the proposed facility was acknowledged in both the 2017 and 2019 IRPs. For these reasons, this exception should be rejected.

## III. CONCLUSION

For the reasons set forth above, the Department recommends that the Council reject the exceptions on Issues N-1, N-2 and N-3 and affirm the Hearing Officer's findings of fact, conclusions of law and opinion on these issues.

DATED this 15th day of July, 2022.

Respectfully submitted,

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Attorney General

/s/ *Patrick Rowe*
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## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE N-1, N-2 AND N-3, was emailed to:

Todd Cornett
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I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE N-1, N-2 AND N-3, was served by First Class Mail or electronic mail as indicated below:

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DATED this 15th day of July, 2022.

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**BEFORE THE ENERGY FACILITY SITING COUNCIL**

**OF THE STATE OF OREGON**

| | |
|---|---|
| In the Matter of the Application for Site Certificate for the<br><br>BOARDMAN TO HEMINGWAY TRANSMISSION LINE | APPLICANT IDAHO POWER COMPANY'S RESPONSE TO STOP B2H'S EXCEPTIONS FOR CONTESTED CASE ISSUES N-1 AND N-3<br><br>OAH Case No. 2019-ABC-02833 |

**July 15, 2022**

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## I. INTRODUCTION

During the contested case, the Hearing Officer granted Idaho Power's Motion for Summary Determination ("MSD") on Issues N-1, N-2, and N-3, and therefore concluded that Idaho Power had satisfied the Energy Facility Siting Council's ("EFSC" or the "Council") Need Standard under the Least Cost Plan Rule.[1] STOP B2H Coalition ("STOP B2H") takes exception to the Hearings Officer's rulings on Issues N-1 and N-3, arguing that issues of fact exist rendering summary determination improper.[2] Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order, Applicant Idaho Power Company ("Idaho Power" or the "Company") submits its Response to STOP B2H's Exceptions for Issues N-1 and N-3.

## II. STANDARD OF LAW

In a contested case before the Council, the applicant bears the burden of proof to establish by a "preponderance of the evidence"[3] that the proposed facility complies with the Council's statutes, ORS 469.300 to 469.570, and that the Application for Site Certificate ("ASC") and proposed site conditions—as modified in the Oregon Department of Energy's ("ODOE" or the "Department") Proposed Order—satisfy each of the Council's siting standards.[4] Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true.[5] Furthermore, the applicant must demonstrate by a preponderance of

[1] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (July 29, 2021).
[2] STOP B2H did not take exception to the Hearing Officer's ruling on Idaho Power's MSD for N-2, and therefore, N-2 is not addressed in this response.
[3] OAR 345-021-0100(2) ("The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances."); *see also* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.").
[4] OAR 345-022-0000(1)(a).
[5] *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).



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evidence that the facility complies with all other statutes, administrative rules, and local government ordinances "identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility."[6]

Parties or limited parties "with specific challenges to findings, conclusions and/or recommended site certificate conditions in [ODOE's] Proposed Order bear the burden" of producing evidence in support of the facts or positions they have asserted, and the burden of convincing the trier of fact that their alleged facts are true or their position on the identified issue is correct.[7] In particular, the parties or limited parties must establish how the applicant failed to satisfy EFSC's siting standards and/or how ODOE "erred in its findings, conclusions and/or recommended site certificate conditions."[8] To meet this burden of proof, parties or limited parties challenging the Proposed Order must provide factual testimony or evidence to substantiate their asserted claims;[9] unsubstantiated factual arguments or legal conclusions are insufficient to demonstrate the applicant's failure to establish compliance with any applicable standard.[10]

After the hearing and briefing phases of a contested case, the Hearing Officer must issue a Proposed Contested Case Order stating the Hearing Officer's findings of fact and conclusions of law.[11] Parties and limited parties may then file any exceptions to the Proposed Contested Case

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[6] OAR 345-021-0100(2); OAR 345-022-0000(1)(b).
[7] Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, "First Order on Case Management"]; Second Order on Case Management Matters and Contested Case Schedule at 7 (Aug. 31, 2021) (emphasis in original) [hereinafter, "Second Order on Case Management"]; *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).
[8] First Order on Case Management at 11; Second Order on Case Management at 7.
[9] First Order on Case Management at 11; Second Order on Case Management at 7.
[10] First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company's Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.
[11] OAR 345-015-0085(4).



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Order for the Council's consideration.[12] If the parties or limited parties file exceptions, the parties or limited parties must identify for each exception the finding of fact, conclusion of law, or recommended site certificate condition to which the parties or limited parties except and must state the basis for their exception.[13]

In the summary determination phase of this contested case, as noted in the Order on Case Management, the Hearing Officer relied on OAR 137-003-0580 for guidance when assessing MSDs.[14] Consistent with that rule, summary determination is appropriate where (a) the pleadings, affidavits, supporting documents (including any responses to interrogatories and requests for admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and (b) the moving party is entitled to prevail as a matter of law.[15] The Hearing Officer considers all evidence in a manner most favorable to the non-moving party and each party is responsible for producing evidence on any issue relevant to the motion as to which that party would have the burden of persuasion at the contested case hearing.[16] While a party may satisfy the burden of producing evidence through affidavits based on personal knowledge,[17] a non-moving party may not rest upon mere allegations or conclusory restatements of ultimate facts to survive a motion for summary determination.[18]

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[12] OAR 345-015-0085(5).
[13] OAR 345-015-0085(5).
[14] First Order on Case Management at 14.
[15] OAR 137-003-0580(6).
[16] OAR 137-003-0580(7)-(8).
[17] OAR 137-003-0580(9).
[18] OAR 137-003-0580(10); *see also, e.g.*, *Greer v. Ace Hardware Corp.*, 256 Or. App. 132, 141 (2013) (finding that plaintiff's initial declarations did not create a genuine issue of fact because they did not identify any specific asbestos-containing products that plaintiff alleged were obtained from the defendants; thus, plaintiff's declarations "amount to little more than paraphrasing of the ultimate facts that decedent had alleged in his first amended complaint. Such conclusory restatements of ultimate facts are not 'specific facts showing that there is a genuine issue for trial'").



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## III. RESPONSE TO EXCEPTIONS

### A. Background on the Least-Cost Plan Rule and the Public Utility Commission of Oregon's ("OPUC") Acknowledgment of the Boardman to Hemingway Transmission Line ("B2H") in Idaho Power's Integrated Resource Plan ("IRP")

Under the Council's rules, the need for a transmission line can be demonstrated in any of three ways:

(1) by complying with the Least-Cost Plan Rule (OAR 345-023-0020(1));

(2) by complying with the system reliability rule for transmission lines (OAR 345-023-0030) (hereinafter, "System Reliability Rule"); or

(3) by demonstrating that the line is proposed to be located within a "National Interest Electric Transmission Corridor."[19]

Crucially, an applicant must demonstrate compliance with ***only one*** of the above approaches to establish need for a transmission line. In this case, Idaho Power has chosen to provide the Council with as clear and robust a record as possible by fulfilling two different paths of compliance with the Need Standard: (1) the Least-Cost Plan Rule and (2) the System Reliability Rule.[20] The Least-Cost Plan Rule requires the Council to find that an applicant has demonstrated need for a facility if "the capacity of the proposed facility or a facility substantially similar to the proposed facility . . . is identified for acquisition in the short-term plan of action of an energy resource plan or combination of plans."[21] Moreover, the Council must "find that a least-cost plan

[19] OAR 345-023-0005(1).
[20] ASC, Exhibit N at N-5 (Sept. 2018) (ODOE – B2HAPPDoc3-22 ASC 14a_Exhibit N_Need_ASC_Part 1 2018-09-28. Page 9 of 1076).
[21] OAR 345-023-0020(1).



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meets the criteria of an energy resource plan" described above, "if the [OPUC] has acknowledged the least cost plan."[22]

By way of background, least-cost plans in the OPUC context are referred to as "integrated resource plans" ("IRP"). An IRP is a planning document filed by investor-owned energy utilities (such as Idaho Power) on a biannual basis.[23] An IRP is "the energy utility's written plan . . . detailing its determination of future long-term resource needs, its analysis of the expected costs and associated risks of the alternatives to meet those needs, and its Action Plan to select the best portfolio of resources to meet those needs."[24] While IRPs are filed by utilities, the public review process involves extensive discovery, and opportunities for oral and written comments and recommendations from OPUC Staff and interested parties:

> The IRP provides extensive opportunity for the provision of broad input from a range of stakeholders, and public participation and input is a central goal of the IRP. This input, along with IRP guideline requirements that ensure a detailed and wide-ranging review of resource options, technology advancements, pricing scenarios and risk profiles are intended to test the conclusions of the utility.[25]

The OPUC will acknowledge an IRP Action Plan if the utility has demonstrated that it has: (1) evaluated resources on a consistent and comparable basis; (2) considered risk and uncertainty; (3) selected a resource portfolio with the best combination of expected costs and associated risks and uncertainties for the utility and its customers; and (4) created a plan that is consistent with the long-run public interest as expressed in Oregon and federal energy policies.[26] The primary

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[22] OAR 345-023-0020(2).
[23] OAR 860-027-0400(3).
[24] OAR 860-027-0400(2).
[25] ASC Exhibit N, Attachment N-10, *In re Idaho Power Company, 2017 Integrated Resource Plan*, Docket LC 69, Order No. 18-176 at 2 (May 23, 2018) (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2018 of 2046).
[26] ASC Exhibit N, Attachment N-8, *In re Idaho Power Company, 2013 Integrated Resource Plan*, Docket LC 58, Order No. 14-253 at 1 (July 8, 2014) (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 1979 of 2046).



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outcome of the IRP process is the selection of a portfolio of resources, along with the specific acknowledgment of near-term actions required to implement this portfolio.[27] OPUC acknowledgment confirms that the Action Plan satisfies the procedural and substantive requirements of the Commission's IRP guidelines and is "reasonable based on the information available at that time."[28] Action Plan items typically involve steps to acquire new resources, but may also involve steps necessary to upgrade or exit existing resources.[29] The OPUC may choose to acknowledge some items in an Action Plan but not others.[30]

Here, B2H has been included in the preferred portfolios for each of Idaho Power's IRPs since 2009, with action items associated with the Project also contained in those IRPs' near-term Action Plans.[31] To be clear, B2H consistently has been included in Idaho Power's IRPs, and considered by the OPUC, as a 500 kilovolt ("kV") line to be constructed by Idaho Power ***with co-participants***.[32] Idaho Power's relative share, as evaluated in these IRP proceedings, assumes

[27] Order No. 18-176 at 3 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2019 of 2046).
[28] Order No. 14-253 at 1 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 1979 of 2046).
[29] Order No. 14-253 at 1 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 1979 of 2046).
[30] Order No. 18-176 at 3 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2019 of 2046).
[31] ASC Exhibit N, Attachment N-1, Idaho Power Company's 2009 Integrated Resource Plan at 6-7 (Dec. 30, 2009) ("2009 IRP") (ODOE - B2HAPPDoc3-22 ASC 14a_Exhibit N_Need_ASC_Part 1 2018-09-28. Page 54 of 1076); ASC Exhibit N, Attachment N-2, Idaho Power Company's 2011 Integrated Resource Plan at 6-8 (June 30, 2011) ("2011 IRP") (ODOE - B2HAPPDoc3-22 ASC 14a_Exhibit N_Need_ASC_Part 1 2018-09-28. Page 536 of 1076); ASC Exhibit N, Attachment N-3, Idaho Power Company's 2013 Integrated Resource Plan at 8-9 (June 28, 2013) ("2013 IRP") (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 22 of 2046); ASC Exhibit N, Attachment N-4, Idaho Power Company's 2015 Integrated Resource Plan at 141-42 (June 30, 2015) ("2015 IRP") (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 695-96 of 2046).
[32] *See e.g.*, ASC Exhibit N, Attachment N-4, Idaho Power Company's 2015 Integrated Resource Plan at 141-42 (June 30, 2015) ("2015 IRP") (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 695-96 of 2046).


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21 percent ownership—with PacifiCorp and Bonneville Power Authority ("BPA") sharing responsibility for the remaining 79 percent of project costs.[33]

In the 2013 IRP (Docket LC 58) and the 2015 IRP (Docket LC 63), the OPUC specifically acknowledged the Company's action items describing ongoing permitting, planning studies, and regulatory filings associated with B2H.[34] Subsequently in Idaho Power's 2017 IRP (Docket LC 68), the OPUC acknowledged Idaho Power's action items, which included construction of B2H.[35] Most recently, in the 2019 IRP, Idaho Power again identified B2H as part of the Company's least-cost, least-risk portfolio of resources to serve customers' long-term needs.[36] Specifically, Idaho Power continued to include the construction of B2H by 2026 as part of the Company's Action Plan.[37] At a Public Meeting on April 15, 2021, the OPUC once again acknowledged the need for B2H as part of Idaho Power's preferred portfolio, and the Company's action items, which included construction of B2H.[38]

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[33] *See* Idaho Power's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 21, n.88 ("*In re Idaho Power Company, 2021 Integrated Resource Plan*, OPUC Docket LC 78, Idaho Power Company's Letter to OPUC re Boardman to Hemingway Transmission Line Project, Attachment A at 22 (Jan. 19, 2022). A courtesy copy of this document was provided as Idaho Power / Closing Arguments for Contested Case Issues RFA-1 and RFA-2 / Attachment A, *In re Idaho Power Company, 2021 Integrated Resource Plan*, OPUC Docket LC 78, Idaho Power Company's Letter to OPUC re Boardman to Hemingway Transmission Line Project (Jan. 19, 2022), p. 26 of 36).

[34] Order No. 14-253 at 5; ASC Exhibit N, Attachment N-9, *In re Idaho Power Company, 2015 Integrated Resource Plan*, Docket LC 63, Order No. 16-160, Appendix A at 7 (Apr. 28, 2016) (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2008 of 2046).

[35] Order No. 18-176 at 9-10 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2025-26 of 2046).

[36] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, LC 74, Idaho Power Company's Second Amended IRP at 15-16 (available at https://edocs.puc.state.or.us/efdocs/HAS/lc74has162123.pdf) (last accessed July 15, 2022). Because the IRP is so voluminous, Idaho Power provided a hyperlink to access the IRP instead of submitting it as an exhibit to its motion.

[37] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Affidavit of Lisa Rackner, Exhibit B, Attachment 1, Idaho Power Company Final Comments in LC 74 p. 6 of 86 (Feb. 5, 2021).

[38] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 / Issues N-1, N-2, N-3, OPUC Special Public Meeting, Docket LC 74 Idaho Power IRP Deliberation and Discussion, Recording at 2:28:00 (Apr. 15, 2021) (available at



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## B. Issue N-1

### 1. Issue N-1 - Whether the Department Erred in Defining Capacity in Terms of Kilovolts instead of Megawatts.

In the *Amended Order on Party Status, Authorized Representatives and Properly Raised Issues for Contested Case*,[39] the Hearing Officer granted STOP B2H limited party status on Issue N-1, which asks:

> *Whether the Department erred in defining capacity in terms of kilovolts instead of megawatts.*[40]

In its comments on the Draft Proposed Order ("DPO Comments") and Petition for Party Status, STOP B2H had argued that the OPUC's acknowledgment of B2H was insufficient to satisfy the Least-Cost Plan Rule because that acknowledgment approved B2H as a 500 kV line, as opposed to referencing the "capacity" of the line, which STOP B2H argued was required to be expressed in megawatts ("MW") and not kV.[41] STOP B2H interpreted ODOE's acceptance of the OPUC's acknowledgment as a determination that capacity is defined in kV instead of in MW, and argued that this was an error.[42]

### 2. Briefing on Motion for Summary Determination for N-1

In its MSD, Idaho Power acknowledged that the capacity of a transmission line can be defined in reference to either MW or kV—but argued that as a pure matter of law, the OPUC's acknowledgement of B2H as a 500 kV line should be accepted in satisfaction of the Least Cost

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https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=733) (last accessed July 15, 2022). At the time of the MSD filing, OPUC had not yet issued the written order acknowledging Idaho Power's 2019 IRP.

[39] Amended Order on Party Status, Authorized Representatives and Properly Raised Issues for Contested Case at 79-80 (Dec. 4, 2020).

[40] First Order on Case Management at 5.

[41] STOP B2H DPO Comments at 5 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 6326 of 10016).

[42] STOP B2H's Petition for Party Status at 4 (Aug. 27, 2020).



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Plan Rule because: (a) the statutory definition of high-voltage transmission facilities refers to voltage and not wattage; (b) there is nothing in the Council's rules that would require capacity of a transmission line to be evaluated in terms of MW instead of kV for the purpose of the Least Cost Plan Rule; and (c) transmission line size is consistently defined in terms of kV—consistent with the OPUC's acknowledgment of B2H.[43]

*First*, ORS 469.300(11)(a)(C) specifically defines high-voltage transmission facilities, for purposes of the Council's review and assessment, as having a "capacity" measured in "volts" (or kilovolts)—not watts (or megawatts). Indeed, the very term "high-voltage transmission facilities" includes "volt" to reference a transmission line's size. By way of context, different energy facilities are subject to different types of measurements. For instance, the statute defines a generating plant by its capacity in MW;[44] wind energy generating facilities by an average electric generating capacity in MW;[45] and solar photovoltaic power generation facilities by the impacted acreage, soil types, and whether it is proposed on high-value farmland.[46] As relevant here, high-voltage transmission lines are defined by length, jurisdictions crossed, and ***voltage*** capacity.[47] Thus, the statute clearly anticipates that the Council will evaluate the size of a project in terms of voltage, not wattage.

*Second*, the Need Standard does *not* require the Council to evaluate high-voltage transmission facilities using MW because it does not define "capacity" using either volts or watts. The System Reliability Rule states that the Council must find that "[t]he facility is needed to enable

[43] Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 12-13.
[44] ORS 469.300(11)(a)(A)
[45] ORS 469.300(11)(a)(J)
[46] ORS 469.300(11)(a)(D).
[47] ORS 469.300(11)(a)(C).



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the transmission system of which it is to be a part to meet firm capacity demands for electricity or firm annual electricity sales[.]"[48] Similarly, the Least-Cost Plan Rule requires the Council to evaluate whether "the applicant has demonstrated need for the facility" based on "the capacity of the proposed facility[.]"[49] As STOP B2H itself recognizes, the term "capacity" is not defined in these rules.[50] The Council can thus appropriately rely on the statutory definitions, which evaluate the capacity of high-voltage transmission facilities using kV (not MW).[51]

*Third*, evaluating a project using kV rather than MW allows the Council to evaluate whether the transmission line is needed at its proposed size. Kilovolts are a consistent unit of measurement that indicate the size of a transmission facility—hence their use to determine the size of project requiring Council review under ORS 469.300.[52] As discussed in more detail below in response to Issue N-3, B2H was evaluated and acknowledged by the OPUC ***as a 500 kV project***.[53] As a result, any determination that a 500 kV line was needed, necessarily evaluated the Project's proposed size.

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[48] OAR 345-023-0030(1).
[49] OAR 345-023-0020(1).
[50] Stop B2H Petition for Party Status at 4 ("The term 'capacity' as used in the Need Standard is not a defined term[.]").
[51] When the relevant statute does not define a term, the court will consider definitions of the same term in another statute. *See generally, State v. Holloway,* 138 Or App 260, 267 (1995). ("We turn, therefore, to relevant maxims of statutory construction. Particularly relevant to this case is the maxim that in the absence of evidence to the contrary, we may assume that the legislature intends words to be used consistently. . . . In this case, there is no evidence that the legislature intended the term [] to mean something different from what it has defined the term to mean in other statutes.").
[52] "A high voltage transmission line of more than 10 miles in length with a capacity of 230,000 *volts* or more to be constructed in more than one city or county in this state" ORS 469.300(11) (emphasis added).
[53] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, OPUC Special Public Meeting, Docket LC 74 Idaho Power IRP Deliberation and Discussion, Recording at 2:27:59 (Apr. 15, 2021) (available at https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=733) (last accessed July 15, 2022) (emphasis added).


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In its Response to Idaho Power's MSD on this issue, STOP B2H attempted to raise an issue of fact by asserting that capacity is "a well understood term in this industry" measured in MW.[54] Specifically, STOP B2H pointed out that certain industry standards describe capacity in terms of MW.[55] Given this fact, STOP B2H therefore argued that, the Council should not, under its own rules, accept the OPUC's acknowledgment of a transmission line in terms of kV as satisfaction of the Least-Cost Plan Rule.[56] However, even accepting STOP B2H's contention that some industry standards "normally" measure capacity in terms of MW, that fact does not suggest that transmission line capacity must be defined in MW for the purposes of the Least Cost Plan Rule. On the contrary, defining capacity by reference to kV for the purposes of the Least-Cost Plan rule remains the only reasonable and practical approach. This is true because ***transmission lines under development are rated in kV and not MW***.[57] The higher the kV rating, the more capacity that transmission line is capable of carrying.[58] That means that when a transmission provider acquires a new transmission line, it will select a transmission line of a particular kV to match its capacity needs.[59] Therefore, to the extent the Action Plan of an IRP includes the acquisition of a transmission line, it makes sense that the line would be defined in terms of kV and not MW.

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[54] STOP B2H's Memorandum in Opposition to Idaho Power MSD on Issues N-1, N-2, and N-3 [hereinafter "STOP B2H's Response to N-1, N-2, and N-3"]; ODOE MSD on Issue N-2 at 9 (June 25, 2021) ("In reality, 'capacity' as used in the Need Standard is a well understood term in this industry. *It means MW*.") (emphasis in original).

[55] STOP B2H's Response to N-1, N-2, and N-3 at 10 ("Federal Energy Regulatory Commission [] and the Western Electricity Coordinating Council [] provide extensive, mandatory reliability standards for establishing the capacity of a transmission line (or collection of lines operated as a path). All such standards require that capacity be expressed in MW.").

[56] STOP B2H's Response to N-1, N-2, and N-3 at 9.

[57] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Affidavit of Jared Ellsworth / Exhibit B page 1 of 2; *see also* Idaho Power 2017 IRP at 61 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 1256 of 2046) (describing the Project as a new, single-circuit *500 kV* transmission line).

[58] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Affidavit of Jared Ellsworth / Exhibit B page 2 of 2.

[59] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Affidavit of Jared Ellsworth / Exhibit B page 1 of 2.



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Furthermore, it is reasonable to conclude that to the extent the OPUC acknowledges a 500 kV transmission line (or a transmission line of any size),[60] such an acknowledgment should be understood to include the entire capacity of the transmission line.[61]

STOP B2H also asserted that the type of information required to satisfy the System Reliability Rule is also "normally" provided in MW.[62] In support of this claim, STOP B2H referenced the fact that Idaho Power described its capacity needs in terms of MW in the information it provided to demonstrate compliance with the System Reliability Rule.[63] This fact, however, is irrelevant because the System Reliability Rule poses an entirely different question than the question raised by the Least-Cost Plan Rule. That is, the System Reliability Rule asks the Council to determine whether a facility is necessary to fill a reliability need,[64] while the Least-

[60] ASC Exhibit N, Attachment N-10, OPUC Order No. 18-176 at 9 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2025 of 2046) ("We acknowledge B2H Action Item 5 to conduct ongoing permitting, planning studies, and regulatory filings for the B2H transmission line, as well as Action Item 6 to conduct preliminary construction activities, acquire long-lead materials, and construct the B2H project."); *See also* Exhibit A, Order No. 21-184 at 14 ("We acknowledge action items nos. 3 and 4, regarding the Boardman to Hemingway (B2H) project. . . . We affirm here that we acknowledge the B2H project action items in this IRP, which are applicable to the proposed project as it is presented in the company's Second Amended 2019 IRP, which includes a 500 kV transmission line with the partnership arrangement as described by Idaho Power. ").

[61] STOP B2H also made the point that the OPUC's acknowledgment of B2H is insufficient because Idaho Power did not undertake to analyze and present its partners' need for capacity. STOP B2H's Response to N-1, N-2, and N-3 at 11. STOP B2H argued that because the Least Cost Plan rule refers to a "plan" or "combination of plans" the Council must have contemplated that the analysis in the IRP would have had to account for 100 percent of the capacity of the transmission line. STOP B2H's Response to N-1, N-2, and N-3 at 11. There is no basis to this argument, which would dictate to the OPUC what they should require to issue an acknowledgement. The Least-Cost Plan Rule defers to the OPUC's acknowledgment of need. OAR 345-023-0020(2). Given that the OPUC has confirmed that they have acknowledged a 500 kV line, and not some portion of it, that acknowledgment must be accepted as satisfaction of the Least Cost Plan Rule, and demonstration of compliance with the Need Standard. Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Exhibit A, Order No. 21-184 at 14.

[62] STOP B2H's Response to N-1, N-2, and N-3 at 9.

[63] STOP B2H's Response to N-1, N-2, and N-3 at 9.

[64] OAR 345-023-0030(1) ("The Council shall find that the applicant has demonstrated need for an electric transmission line that is an energy facility under the definition in ORS 469.300 if the Council finds that . . . [t]he facility is needed to enable the transmission system of which it is to be a part to meet firm capacity demands for electricity or firm annual electricity sales that are reasonably expected to occur within five years of the facility's proposed in-service date based on weather conditions that have at least a 5 percent chance of occurrence in any year in the area to be served by the facility.").



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Cost Plan Rule asks, in Idaho Power's case, whether the OPUC has acknowledged the "acquisition" of the capacity of the facility.[65] Accordingly, it would make sense to examine system reliability needs in terms of MW; and conversely, it makes sense that the transmission line to be acquired would be determined in terms of kV, which is how transmission lines under development are rated.[66] Therefore, the fact that Idaho Power presented information regarding the System Reliability Rule in terms of MW provided no support for STOP B2H's contention that the OPUC's acknowledgment of B2H would need to be issued in terms of MW in order to satisfy the Least-Cost Plan Rule.

**3. Hearing Officer's Ruling on Idaho Power's MSD of N-1**

In the *Ruling and Order on Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3* ("Ruling on Issues N-1, N-2 and N-3"), issued July 29, 2021, and incorporated herein by this reference, the Hearing Officer granted Idaho Power's motion and dismissed Issue N-1 from the contested case. The Hearing Officer explained the factual basis for her ruling as follows:

> Transmission lines under development are rated by kilovolts (kV). A transmission line's megawatt (MW) rating is determined in later-stage development of the project. When a transmission line provider seeks to construct a transmission line, the provider determines the size of the line by virtue of the kV rating. High voltage transmission lines are generally sized at 230 kV, 345 kV or 500 kV. The higher the kV rating, the more capacity the transmission line is capable of providing. (Idaho Power Reply; Exhibit B, Ellsworth Aff.)[67]

Thus, while the Hearing Officer did acknowledge STOP B2H's facts demonstrating that the

[65] OAR 345-023-0020(1), (2).
[66] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Affidavit of Jared Ellsworth / Exhibit B page 1 of 2.
[67] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 9.


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capacity of a transmission line *can* be expressed in terms of MW, she found that—as a matter of law—for the purpose of the Least Cost Plan Rule, the OPUC's description of B2H in terms of kV was adequate to demonstrate compliance.[68]

**4. STOP B2H Exceptions to Summary Determination of N-1**

In its pleading, STOP B2H raises two exceptions to the Hearing Officer's decision to grant summary determination in Idaho Power's favor on Issue N-1. The Council should reject STOP B2H's exceptions and find that Idaho Power has satisfied the Council's Need Standard and adopt the Hearing Officer's Proposed Contested Case Order without modification.

*a. Exception 1 – Challenge to Factual Determinations*

In its Exception 1, STOP B2H points out that the record reflects that capacity can be described in *either* kV or MW and therefore contends that this fact is evidence of a factual dispute.[69] From there, STOP B2H reasons that the factual dispute should have been resolved in its favor, which would preclude summary determination.[70] In making this argument, STOP B2H is manufacturing a factual dispute where one does not exist and is further confusing a factual determination with a conclusion of law.

First, while STOP B2H provided evidence that capacity is *in some contexts* described in MW, it provided no evidence to suggest that capacity can *only* be described in MW.[71] Therefore, STOP B2H's evidence was not in conflict with Idaho Power's evidence explaining that the capacity of a transmission line can also be expressed in terms of kV; as such, no factual dispute

[68] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 9.
[69] STOP B2H Exceptions at 7.
[70] STOP B2H Exceptions at 7.
[71] STOP B2H's Response to N-1, N-2, and N-3 at 9-10.



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existed.[72] Therefore, even accepting STOP B2H's evidence as true, the record nevertheless establishes that B2H's capacity could appropriately be described by either measure—which is precisely what the Hearing Officer found.[73]

Second, the Hearing Officer's conclusion with which STOP B2H disagrees—that the OPUC's acknowledgement of B2H's capacity in kV satisfied the Least Cost Plan Rule—was a pure conclusion of law, and contrary to STOP B2H's argument, there is no law to support the proposition that the *non-moving party's interpretation of the law* is accorded deference.[74] Thus, the Hearing Officer, construing the facts in a light most favorable to STOP B2H—i.e., accepting STOP B2H's statements that capacity of a transmission line could be expressed in MW—found that as a matter of law, the acknowledgment of a transmission line described in reference to kV could satisfy the Least Cost Plan Rule. Therefore, STOP B2H's exception is without merit.

*b. Exception 2 – Inaccurate Statements Regarding 2021 IRP*

STOP B2H also takes issue with the Hearing Officer's factual finding that "[h]igh voltage transmission lines are generally sized at 230 kV, 345 kV, or 500 kv"[75]—a fact that was established in Idaho Power's pleadings and which was not previously disputed by STOP B2H. STOP B2H now suggests that this finding was contradicted because "Idaho Power and partners were, and still

[72] Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 at 9-10.
[73] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 16 ("Idaho Power explains that while it is appropriate to evaluate system reliability needs in terms of MW, it is also appropriate to evaluate the acquisition of capacity in terms of kV, which is how transmission lines under development are rated. . . . Having considered the above arguments, the ALJ finds that Idaho Power is entitled to a favorable ruling as a matter of law on Issue N-1. The ALJ agrees that, with regard to this issue, there are no relevant facts in dispute.").
[74] It appears that STOP B2H is confusing the standards for MSD in contested cases. OAR 137-003-0580(7) states that "[t]he administrative law judge shall consider all *evidence* in a manner most favorable to the *non-moving party* or non-moving agency."
[75] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 9.


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are discussing, whether the line will be a 350, 400, 450, 500, or 550 MW capacity line."[76] It is not clear what point STOP B2H is attempting to make, but regardless, the allegation is unsupported by any evidence. STOP B2H refers generally to Idaho Power's 2021 IRP for this proposition, but that document is not in the record and STOP B2H makes no specific reference to a statement or page within that document. Moreover, even if the Council wished to take administrative notice of Idaho Power's 2021 IRP, it would find no support in that document for STOP B2H's erroneous claim. In fact, B2H has always been proposed by the Company as a 500 kV transmission line and it has always been acknowledged as such by the OPUC.[77]

For these reasons, the Council should reject STOP B2H's untimely challenge to the Hearing Officer's conclusions in the summary determination of N-1 and adopt the Proposed Contested Case Order without modification.

## C. Issue N-3

### 1. Issue N-3 - Whether Applicant Demonstrated Need for the Proposed Facility When Applicant Has Only Shown that its Needs Represent 21 Percent of the Total Capacity.

The Hearing Officer granted limited party status to STOP B2H to raise Issue N-3, which asks:

> *Whether Applicant demonstrated need for the proposed facility when Applicant has only shown that its needs represent 21 percent of the total capacity.*[78]

In its DPO Comments and Petition for Party Status, STOP B2H claimed that Idaho Power's demonstration of need under the Least Cost Plan Rule (and the System Reliability Rule) is

[76] STOP B2H Exceptions at 8.
[77] *See* Idaho Power / Rebuttal Testimony of Jared Ellsworth (Nov. 12, 2021) / Issues RFA-1 and RFA-2 / Exhibit G, *In the Matter of Idaho Power Company, 2019 Integrated Resource Plan*, OPUC Docket LC 74, Order No. 21-184, p. 11 of 76 (June 4, 2021).
[78] First Order on Case Management at 5.


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inadequate because the Company has not demonstrated a need for 100 percent of the capacity of B2H, and for the entirety of the line's 2,050 MW transmission capacity in particular.[79] On this point, STOP B2H pointed out that BPA and PacifiCorp would each be using a portion of B2H's capacity. Thus, STOP B2H interpreted the OPUC's acknowledgment of B2H as limited by Idaho Power's share of the line's capacity, and thus that the OPUC's acknowledgment order demonstrated the need for "a much smaller transmission line[.]"[80]

*a. Briefing on Motion for Summary Determination for N-3*

In its Motion for Summary Determination on N-3, Idaho Power demonstrated that STOP B2H was incorrect for two reasons. First, as explained above, STOP B2H misconstrues the OPUC's order, which clearly acknowledged Idaho Power's need for B2H as a single 500 kV transmission line, not in terms of a certain quantity of MW.[81] Specifically, the OPUC acknowledged Idaho Power's 2017 IRP Action Plan item to construct a "new single-circuit 500 kV transmission line approximately 300 miles long between the proposed Longhorn Station near Boardman, Oregon, and the existing Hemingway Substation in southwest Idaho."[82] Furthermore, the OPUC's Order No. 18-176 acknowledged Idaho Power's plan to conduct ongoing permitting, planning studies, and regulatory filings for the B2H transmission line, and to commence preliminary construction activities, acquire long-lead materials, ***and construct the B2H Project*** as a unitary transmission line—not as a subset of the line's capacity.[83]

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[79] Stop B2H Petition for Party Status at 4.
[80] Stop B2H Draft Proposed Order ("DPO") Comments at 5 (Aug, 22, 2019) (ODOE – B2HAPPDoc5-1 All DPO Comments Combined-Rec'd 2019-05-22 to 08-22. Page 5572 of 6396).
[81] Order No. 18-176 at 5 (ODOE – B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2021 of 2046).
[82] Order No. 18-176 at 5 (ODOE – B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2021 of 2046).
[83] Order No. 18-176 at 9 (ODOE – B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2025 of 2046).



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Indeed, in Idaho Power's 2019 IRP, the OPUC recently reaffirmed the need for B2H as a whole. In that proceeding, STOP B2H continued to argue that Idaho Power had not demonstrated a need for the full capacity of the 500 kV line, and specifically asked the OPUC to clarify their acknowledgement of B2H as a need for just a portion, as opposed to the entire line.[84] At the OPUC's April 15, 2021 Public Meeting in which the OPUC acknowledged the 2019 IRP B2H Action Items, Commissioner Tawney specifically addressed STOP B2H's arguments stating:

> A lot of the comments that get brought to us . . . are around, 'Shouldn't it be a different line? Shouldn't we be evaluating something different?' And I think the challenge we have is what's been brought to us is the 500 kV project, with the transfers at peak times for Idaho Power and the capacity used by others in other times when they need it. ***A different sized project would have really different throughput, it would have really different operational characteristics and it would have a different cost per unit.*** And we see this often in infrastructure in energy: there is an economy of scale with size. That means it's the best price, it's the least cost option—and that means we bring on partners. That's how the coal fleet was built and it is likely how we will build some of the clean energy resources that will come to the table in the coming decade.[85]

Chair Decker joined Commissioner Tawney's conclusion that "the line" as a whole—not a subset of the line's capacity—was being considered for acknowledgment.[86] Indeed, Chair Decker directly addressed the fact that other entities would have a need for the additional capacity not used by Idaho Power, pointing to "the needs generally for transmission and for distribution of

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[84] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Affidavit of Lisa Rackner, Exhibit B, Attachment 2, Stop B2H Final Comments in LC 74 p. 16 of 50.

[85] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, OPUC Special Public Meeting, Docket LC 74 Idaho Power IRP Deliberation and Discussion, Recording at 2:27:59 (Apr. 15, 2021) (available at https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=733) (last accessed July 15, 2022) (emphasis added).

[86] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, OPUC Special Public Meeting, Docket LC 74 Idaho Power IRP Deliberation and Discussion, Recording at 2:40:05 (Apr. 15, 2021) (available at https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=733) (last accessed July 15, 2022)



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resources across the region[.]"[87] Thus, the Commission has clearly and consistently acknowledged the construction of B2H as a whole, and not "a much smaller transmission line" as STOP B2H contended in its DPO comments.[88]

Moreover, the Least-Cost Plan Rule does not require the Council to consider the specific amount of capacity that the identified resource will fill for the applicant as indicated in the IRP, but rather looks at the facility itself (including the total capacity) that is identified for acquisition in the Action Plan of the least cost plan.[89] Here, the resource that was identified for acquisition in the IRP is the same 300-mile long, 500 kV transmission line for which Idaho Power now seeks a site certificate.[90] In this case, Idaho Power has demonstrated to the satisfaction of the OPUC that a 500 kV line, built and operated in conjunction with partners, is the least cost approach to filling Idaho Power's need.[91]

In its Response to Idaho Power's MSD on N-3, STOP B2H argued that the OPUC could not possibly have acknowledged the entire capacity of the transmission line because Idaho Power's own analysis justified the need for only 21 percent of the line.[92] However, as Idaho Power explained in its briefing, the OPUC's responses to a question posed by STOP B2H in the 2019 IRP proceedings illuminates STOP B2H's error.[93] Specifically, in comments filed before the final

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[87] Idaho Power / Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, OPUC Special Public Meeting, Docket LC 74 Idaho Power IRP Deliberation and Discussion, Recording at 2:41:00 (Apr. 15, 2021) available at https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=735

[88] Stop B2H DPO Comments at 5 (ODOE – B2HAPPDoc5-1 All DPO Comments Combined-Rec'd 2019-05-22 to 08-22. Page 5572 of 6396).

[89] OAR 345-023-0020.

[90] 2017 IRP at 8 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 1203 of 2046).

[91] Idaho Power Company's Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 11.

[92] STOP B2H's Response to N-1, N-2, and N-3 at 7.

[93] Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 at 5 (July 9, 2021).



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Public Meeting, STOP B2H asked the OPUC "to clarify what capacity measure they acknowledged for the B2H in Idaho Power's 2017 IRP."[94] After asking this question, STOP B2H went on to suggest the answer it was expecting to hear as follows: "We believe it was for Idaho Power's 21% of a 2050 MW bi-directional transmission line as described in table 6.2?"[95] However, as noted in Idaho Power's MSD, at the Public Meeting in which the OPUC issued its oral acknowledgment of B2H, Chair Decker and Commissioner Tawney attempted to disabuse STOP B2H of its misunderstanding; both Chair Decker and Commissioner Tawney confirmed that their 2017 acknowledgment approved Idaho Power's acquisition of the transmission line as a whole—all 500 kV of the line—and not a smaller line or some portion of B2H's capacity.[96] This conclusion is consistent with the OPUC's statement in its written order acknowledging B2H in the 2019 IRP, as follows:

> In response to comments for clarification from Stop B2H, we will allow the 2017 IRP Order speak for itself. We affirm here that we acknowledge the B2H project action items in this IRP, which are applicable to the proposed project as it is presented in the Company's Second Amended 2019 IRP, which includes a 500 kV transmission line with the partnership arrangement as described by Idaho Power.[97]

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[94] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, *In Re Idaho Power Company 2019 Integrated Resource Plan*, Docket LC 74, STOP B2H Coalition's Final Comments at 16 (Jan. 8, 2021) (available at https://edocs.puc.state.or.us/efdocs/HAC/lc74hac18632.pdf) (last visited July 7, 2021).

[95] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, *In Re Idaho Power Company 2019 Integrated Resource Plan*, Docket LC 74, STOP B2H Coalition's Final Comments at 16 (Jan. 8, 2021) (available at https://edocs.puc.state.or.us/efdocs/HAC/lc74hac18632.pdf).

[96] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, OPUC Special Public Meeting, Docket LC 74 Idaho Power IRP Deliberation and Discussion, Recording at 2:27:59 (Apr. 15, 2021) (available at https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=733)(last accessed July 15, 2022); *id*. at 2:40:04.

[97] Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, OPUC Docket LC 74, Order No. 21-184, Exhibit A page 14 of 76 (June 4, 2021).



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Given that the description of B2H as a 500 kV project in the 2017 IRP is identical to the description in the 2019 IRP, Chair Decker's statement can be taken as a confirmation that the OPUC's acknowledgement of B2H in the 2017 IRP is of a 500 kV transmission line with a partnership arrangement as well.

STOP B2H also argued that the OPUC's acknowledgment of B2H cannot be accepted as satisfaction of the Least-Cost Plan Rule because Idaho Power's 2017 IRP did not attempt to prove PacifiCorp's or BPA's need for the transmission line.[98] STOP B2H claimed that the Least-Cost Plan Rule's reference to a "combination of plans" suggests that if an applicant has demonstrated a need for only some of the capacity of a transmission line, then the applicant would need to offer a combination of plans to prove the need for the full capacity.[99] This argument should be rejected for two reasons. First, as noted above, the OPUC has acknowledged Idaho Power's acquisition of the entire line and not just a portion of the capacity of the line.[100] And second, the reference to a "combination of plans" more likely refers to the Commission's policy of continuing to analyze and acknowledge a resource over a series of iterative IRPs—until that resource is finally under construction.[101] Indeed, it was for this very reason that Idaho Power included evidence of acknowledgment of B2H in all of its IRPs beginning in 2009.[102]

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[98] STOP B2H's Response to N-1, N-2, and N-3 at 7.
[99] STOP B2H's Response to N-1, N-2, and N-3 at 11.
[100] Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 at 6.
[101] *See* Idaho Power / Idaho Power Company's Reply to STOP B2H's Response to Idaho Power Company's MSD of Issues N-1, N-2, and N-3 (May 28, 2021) / Issues N-1, N-2, N-3, Exhibit A, Order No. 21-184 at 15 ("As described by Idaho Power in its Second Amended 2019 IRP, the activities and actions that move the B2H project forward will continue to require ongoing analysis in future IRPs and other proceedings. Those future proceedings can and will involve continued review and analysis of the B2H project, and will continue to test the assumptions and projections that justify the proposed actions."); *see also* ASC Exhibit N, Attachment N-10, OPUC Order No. 18-176 at 2 (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28. Page 2018 of 2046 ) ("The IRP process is intended to be iterative.").
[102] ASC Exhibit N, Attachment N-1 at 83 (ODOE - B2HAPPDoc3-22 ASC 14a_Exhibit N_Need_ASC_Part 1 2018-09-28. Page 130 of 1076).


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*b. Hearing Officer's Ruling on Idaho Power's MSD of N-3*

The Hearing Officer found in Idaho Power's favor on Issue N-3, stating:

> The ALJ finds that Idaho Power is entitled to a favorable ruling as a matter of law on Issue N-3. There is no dispute that the OPUC acknowledged the B2H Project action items in Idaho Power's 2017 IRP and affirmed its acknowledgment of the B2H Project action items in Idaho Power's 2019 IRP. The OPUC acknowledged a "500 kV transmission line with the partnership arrangement as described by Idaho Power" as opposed to "only Idaho Power's 21 percent of a 2,050 MW bi-directional transmission line." See OPUC Order 21-184 at 13-15, Idaho Power Reply, Exhibit A. Because the OPUC has acknowledged the B2H Project as a whole, Idaho Power has demonstrated need for the proposed facility under OAR 345-023-0005(1) and OAR 345-023-0020(2). The bottom line is that the B2H Project satisfies the Need Standard for nongenerating facilities under the Least-Cost Plan Rule, regardless of the percentage of megawatt transmission capacity needed for Idaho Power's customers.[103]

While the Hearing Officer did acknowledge STOP B2H's facts demonstrating that the capacity of a transmission line can also be expressed in terms of MW, she found that—as a matter of law—for the purpose of the Least Cost Plan Rule, the OPUC's description of B2H in terms of kV was adequate to demonstrate compliance.[104]

*c. STOP B2H Exceptions to Summary Determination of N-3*

STOP B2H takes exception to the Hearings Officer's conclusion, arguing that a dispute existed with respect to the facts.[105] Specifically, STOP B2H states that "IPC posits that its 2019 IRP (which did not exist at the time of the application) was the relevant IRP. STOP noted that it was actually the 2017 IRP that should be considered."[106] STOP B2H's argument is without substance.

[103] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 9.
[104] Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 at 9.
[105] STOP B2H Exceptions at 9.
[106] STOP B2H Exceptions at 9.



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At the time that Idaho Power filed its ASC, the 2017 IRP was its most recent acknowledged plan. For that reason, Idaho Power relied on the 2017 IRP's acknowledgment of B2H to demonstrate need in this case. That said, given that B2H was subsequently approved again in the 2019 IRP, Idaho Power noted that fact in testimony and briefing, and the Hearing Officer subsequently noted that fact as well.[107] Importantly, STOP B2H does not deny that the OPUC acknowledged B2H in the Company's 2019 IRP, as well as the 2017 IRP, and points to no prejudice to STOP B2H flowing from the Hearing Officer's recognition of this fact. Contrary to STOP B2H's claim, there is no factual dispute regarding the 2019 IRP, and the Hearing Officer's recognition of its existence is not material to resolution of this issue.

For these reasons, the Council should reject STOP B2H's untimely challenge to the Hearing Officer's conclusions in the summary determination of N-3 and adopt the Proposed Contested Case Order without modification.

## IV. CONCLUSION

In adopting the Least-Cost Plan Rule, the Council clearly intended to defer to the OPUC's expertise to determine the need for a transmission line. As Idaho Power has shown, the OPUC has not only acknowledged Idaho Power's acquisition of B2H, but has also confirmed that that acknowledgment includes the acquisition of the entirety of the 500 kV transmission line—which must be understood to necessarily encompass the full capacity of the line. Because STOP B2H has not raised any genuine issues of fact on this issue, the Hearing Officer properly concluded that Idaho Power is entitled to a determination that it has satisfied the Council's Need Standard.

[107] *See* Idaho Power / Rebuttal Testimony of Jared Ellsworth / Issues RFA-1 and RFA-2, p. 5-8, 35-37 of 40; Idaho Power's Closing Arguments for Contested Case Issues RFA-1 and RFA-2 at 17 (Feb. 28, 2022).



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For the reasons discussed above, Idaho Power respectfully requests that the Council reject the limited party's exceptions to the Proposed Contested Case Order regarding the Need Standard.

DATED: July 15, 2022

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 15, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES N-1 AND N-3** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge
Hearings Officer
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I further certify that on July 15, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES N-1 AND N-3** was served by First Class Mail or electronic mail as indicated below:

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